Appendix A

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

CHARLES D. RABY,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-02-0349
	§	
JANIE COCKRELL, Director, Texas Department of Criminal Justice-Institutional Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT AND DENYING WRIT OF HABEAS CORPUS

Charles D. Raby has petitioned for a writ of habeas corpus, and Janie Cockrell has moved for summary judgment. The court is of the opinion that on Cockrell's motion for summary judgment Raby's petition for a writ of habeas corpus should be DENIED.

Background

Petitioner Charles D. Raby, currently in the custody of the Texas Department of Criminal Justice, filed this federal habeas corpus application. Because this is Raby's first application for federal relief, a brief history of the case is included.[1]

Raby was convicted of capital murder in June 1994, in the 248th District Court of Harris County, Texas, for the murder of Edna Franklin in October 1992. The indictment alleged that Raby

[1] For convenience, the facts are adapted largely from the opinion of the Texas Court of Criminal Appeals affirming Raby's conviction and sentence. *See Raby v. State*, 970 S.W.2d 1 (Tex.Crim.App.1998) (en banc). Citations to the trial record will appear where this opinion elaborates on the Court of Criminal Appeals' recitation of the relevant facts.

20

murdered Franklin during the course of a robbery, sexual assault or burglary in her home. 27 Tr. at 8.[2]

Edna Mae Franklin, the 72 year old victim, lived with her two adult grandsons, who were Raby's friends. Although Franklin barred Raby from her home, her grandsons often snuck him through a window and allowed him to spend the night. On the night of Franklin's murder, the two grandsons left their grandmother at home and went out. On their return, one of them discovered Franklin dead on the living room floor. She had been severely beaten and repeatedly stabbed, and her throat was cut. She was undressed below the waist. The contents of her purse were emptied on her bedroom floor. Police concluded that the murderer's point of entry was the same window through which the grandsons had allowed Raby to enter the house. After further investigation, police arrested Raby for the offense, and he confessed to killing Franklin.

Before trial, Raby moved to suppress his confession. The police officers who questioned him testified to the informed and voluntary nature of the confession. Raby also testified at the suppression hearing. His version of events did not differ markedly from the police officers'. Raby testified that he saw the officers putting his then-girlfriend, Mary Gomez, and her baby into a car. He asked where the police were taking them and was told they were going home. *Id.* at 69.

He also testified that while driving to the police station, the police told him they could "get" Gomez for aiding Raby in the murder based on her failure to contact the police when she knew Raby's whereabouts after the murder. *Id.* at 70. Both the officer who drove Raby to the police station and the officer who interrogated him denied this. 26 Tr. at 91-92, 94-95. Raby said that he

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[2] "Tr." refers to the transcript of Raby's trial, including pretrial proceedings. The number appearing before "Tr." is to the volume number of the transcript. For example, "27 Tr. at 8" refers to volume 27 of the trial transcript at page 8.

believed the police took Gomez and the baby home. After arriving at the police station, however, he heard the baby crying and Gomez trying to soothe the baby. When he asked about her, the police told him she would be held for a little while in case they wanted to talk to her. He asked to talk to her, but testified that he was not permitted to at that time. He testified that the police did allow him to talk to Gomez after he gave his statement. 25 Tr. at 71-77. One of the officers testified that he did not even begin the interrogation until after Raby spoke to Gomez. 26 Tr. at 95-96. The police said nothing else to Raby about Gomez or the baby. 25 Tr. at 76-77.

On cross examination, Raby conceded that the police read him his warnings three times, that he understood the warnings, and that he knowingly and intelligently waived his rights. While Raby stated that he was concerned that Gomez might face charges, he admitted that the police never threatened that she would be charged if he did not sign the confession. He expressly said that he signed the confession voluntarily and because it was true. *Id.* at 74-83. The trial court denied Raby's motion to suppress his confession. 26 Tr. at 103.

At trial, Raby pleaded not guilty to the charge of capital murder. The testimony of several witnesses placed him near Franklin's house on the day of the murder, and one witness saw him with a knife. *See, e.g.*, 28 Tr. at 289-319. Sergeant Bill Stephens, one of the arresting officers, told the jury that he tried to serve the arrest warrant on Raby in at least three locations, including Gomez' home. When he arrived there, he learned that Raby fled moments earlier. 29 Tr. at 371. Gomez testified that Raby was at her home when he received a phone call from his mother informing him that the police were looking for him. He fled a few minutes before the police arrived. 28 Tr. at 325-26. The jury found Raby guilty of capital murder.

At the punishment phase, the state introduced evidence of a number of prior offenses and bad

acts. Witnesses testified to a series of assaults committed by Raby, with the victims including Raby's girlfriend, his stepfather, a ten year old boy, a two year old girl, a friend's mother, and others. Among the many assaults on his girlfriend, one occurred while she was pregnant with his child, and one occurred while she was holding the infant. While incarcerated, Raby reportedly attacked jailers and sheriff's deputies, fought with other inmates, and was found with weapons. Witnesses also testified about Raby's involvement in several convenience store robberies. Raby offered testimony at punishment related to his troubled childhood, including his mother's mental problems, his commitment to foster care and institutions, and episodes of physical and verbal abuse. Other witnesses testified that Raby had a peaceful disposition and that his problems during incarceration were provoked by jailers. The jury found that Raby presented a future danger and that the mitigating evidence did not justify a sentence of life imprisonment rather than death. As required by Texas statute, the trial court then sentenced Raby to death.

The Texas Court of Criminal Appeals affirmed Raby's conviction and sentence, *Raby v. State*, 970 S.W.2d 1 (Tex.Crim.App. 1998), and the United States Supreme Court denied certiorari, *Raby v. Texas*, 525 U.S. 1003 (1998). Raby then filed a state application for post conviction relief: it was denied by the Texas Court of Criminal Appeals on January 31, 2001. Raby filed this federal habeas corpus petition on January 30, 2002, and amended it on May 8, 2002.

Discussion

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which became effective April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

The "unreasonable application" standard permits federal habeas relief only if a state court decision identifies the correct rule from Supreme Court case law but unreasonably applies the rule to the facts before it or "if the state court either 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." *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000).[3] In applying this standard, this court must determine (1) what was the decision of the state courts and (2) whether there is any established federal law with which the state court decision conflicts. *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence."

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[3] On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this court will include the full name of the petitioner when citing these two cases.

28 U.S.C. § 2254(e)(1).

B. Procedural Default

When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal relief is generally barred on that claim. *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001).

> In all cases in which a state prisoner had 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).

C. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Insofar as they are consistent with established habeas practice and procedure, the Federal Rules of Civil Procedure apply to habeas cases. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Where a state prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts and where the prisoner's evidence fails to demonstrate clearly and convincingly that the statutory presumption

of correctness has been rebutted, the facts of a case may not be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *May v. Collins*, 955 F.2d 299, 310 (5th Cir. 1991), *cert. denied*, 504 U.S. 901 (1992); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). Consequently, where facts have been determined by the Texas state courts, this court is bound by those findings.

1. Ineffective Assistance of Counsel

Raby challenges his conviction and sentence on 13 separate grounds. First, he argues that he received ineffective assistance of counsel at trial and on appeal (Claims For Relief I, II, and III).

a. Ineffective assistance of counsel at the suppression hearing

Raby claims that his counsel failed to develop and present a compelling case for suppression of his confession because: (1) counsel never learned that Raby was intoxicated and had no memory of entering the Franklin home or committing the crime; and (2) the statement consisted of Raby's answers to yes or no questions posed by the police. Raby also implies something sinister in the absence of audio or video tape of the statement, viewing this as evidence that the police have "something to hide." He also contends that his statement to the police was false, and that an investigation of his personality and psychological makeup would have revealed to counsel his susceptibility to making a false confession. Finally, Raby contends that he was coerced to confess by an implied threat to prosecute his girlfriend, Mary Gomez, for aiding and abetting the murder. Unfortunately for Raby, the obdurate reality and the facts do not coincide with his theories.

1. Exhaustion of State remedies.

Raby failed to raise this claim either in his direct appeal or in his state habeas corpus petition. AEDPA requires that a prisoner exhaust his state remedies before raising a claim in federal court. A federal court cannot grant an application for a writ of habeas corpus on behalf of a person in state custody unless the applicant has exhausted the remedies available in the state courts, there is an absence of state corrective process, or circumstances exist that render such process ineffective to protect his rights. 28 U.S.C. § 2254(b)(1). The standard requires that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. This rule extends to the evidence establishing the factual allegations themselves.

Ordinarily, a federal petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state court to present these claims. *Rose v. Lundy*, 455 U.S. 509 (1982). That result in this case, however, would be futile because the unexhausted claims would be procedurally barred as an abuse of the writ under Texas law.

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. Tex.CodeCrim.Proc.Ann. art. 11.071 § 5(a) (Vernon Supp. 2002). The Texas Court of Criminal Appeals will not consider the merits or grant relief on a later application unless it contains specific facts establishing: (1) the current claims have not been and could not have been presented earlier in an original application because the factual or legal basis for the claim was unavailable on the date of the previous application; or (2) by a preponderance of the evidence, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. *Id.* The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.) (per curiam),

cert. denied, 515 U.S. 1153 (1995).

Raby does not say that he could not have presented this claim in his direct appeal or his state petition because the factual basis for the claim did not exist. While his claim about the falsity of the confession may imply that he is actually innocent, that claim cannot stand in the face of his own testimony that his confession was both voluntary and true. Raby's unexhausted claim does not fit within the exceptions to the successive writ statute and would be procedurally defaulted in the Texas courts.

On review, a federal court may not consider a claim if the state court where he must present his claim to exhaust it would now find the unexhausted claims procedurally barred. That bar precludes this court from reviewing the claim unless he has shown (a) cause for the default and (b) actual prejudice attributable to the default; or alternatively, he has shown that this court's refusal to review the claim will result in a fundamental miscarriage of justice. A "miscarriage of justice" means either factual innocence of the crime for which he was convicted, or legal ineligibility for the death penalty. *Whitley v. Sawyer*, 505 U.S. 333, 335 (1992); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). To show actual innocence, Raby must show a fair probability that, in light of all the evidence, the jury would have entertained a reasonable doubt of his guilt. *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986).

Raby claims that the ineffective assistance of appellate and postconviction counsel constitute cause for his default. Those claims of ineffective assistance of counsel are discussed later.

2. Voluntariness of the Confession.

Raby's claim that his confession was false raises a claim of actual innocence. He contends

that his confession was coerced, involuntary and false, based on his claims that he was intoxicated when he confessed, and he confessed only because he feared that his girlfriend, Mary Gomez, would be charged with aiding and abetting his crime (Claim For Relief XII). At the suppression hearing, however, Raby testified that the police told him that Gomez was being kept at the police station "in case we need to talk to her for a little while," and that they said nothing else about her. 25 Tr. at 72. There was a dispute about whether Raby had an opportunity to talk to Gomez before he gave his statement, but Raby admitted that the police said only that they wanted to talk to Gomez, and made no threats about her, *id.* at 72-73. He also admitted on cross-examination that the police read him his *Miranda* rights several times, that he understood those rights, and that he voluntarily and intelligently waived them. *Id.* at 74. He also admitted that the police never threatened to mistreat Gomez in any way, and that the sergeant conducting the interrogation never threatened to file charges against Gomez. *Id.* at 78-79. Most significant, Raby specifically testified that nobody ever told him that Gomez would be charged unless Raby confessed, and that he confessed, in part, because the confession was true:

> Q. Sergeant Allen certainly didn't say, "You better sign this confession or I'll put her and the baby in jail"? I mean, he never did that?
>
> A. No.
>
> Q. So that's my point. In terms of you giving that confession, you were giving the confession because you wanted to come straight with Sergeant Allen?
>
> A. Yeah. And I wanted her to go home. The quicker I got that over with, the quicker she could get out of there, because I knew it was already going to tear her all up, and why get her even more mad at me?
>
> * * *
>
> Q. And you're not telling the Judge that the only reason you signed the

confession was because you wanted to ger her out of there? You signed it because you did it voluntarily and because it's true, right?

A. Because it's true and, you know - - well, he didn't force me to do it, but I wanted her to go home.

Id. at 81-83. While Raby expressed concern for Gomez, he testified in no uncertain terms that his confession was knowing and voluntary, and that it was true. His current claim that the confession was coerced and false cannot stand up in the face of his prior testimony. *See, e.g., Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 482 (5th Cir. 2002) (affidavit contradicting prior testimony could not create fact issue to defeat summary judgment absent a compelling explanation of the contradiction); *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 386 (5th Cir. 2000) (same), *cert. denied*, 531 U.S. 1073 (2001); *see also United States v. Coleman*, Nos. 89-10574, 89-10598, and 89-10599, 1990 WL 177243 at *3-*4 (9th Cir. Nov. 13, 1990) (rejecting argument that guilty plea was not knowing and voluntary where testimony that defendant was intoxicated contradicted defendant's earlier testimony), *cert. denied*, 499 U.S. 930 (1991); *Richardson v. Johnson*, 864 F.2d 1536, 1538-39 (11th Cir. 1989) (petitioner's testimony in habeas corpus proceeding that contradicts his trial testimony does not support relief), *cert. denied*, 490 U.S. 1114 (1989). Accordingly, there is no support for a contention that Raby is actually innocent of the murder of Edna Franklin. Raby's claim that he received ineffective assistance of counsel at the suppression hearing is, therefore, defaulted.

b. Ineffective Assistance of Counsel at the Guilt-Innocence Phase

Raby contends that he received ineffective assistance of counsel at the guilt-innocence phase of his trial. This claim is also procedurally defaulted. Because Raby also asserts the alleged ineffectiveness of his trial counsel as cause for other procedural defaults, this claim will be reviewed on the merits.

First, Raby claims that his counsel "abandoned their advocacy role at the guilt-innocence phase of trial." He bases this assertion on counsel's decision not to make an opening statement, not to present any evidence, including rebuttal experts, and not to attempt to show that Raby's confession was involuntary and incredible. Additionally, he claims his counsel could have more effectively examined witnesses, presented evidence of alternative suspects, pointed out mischaracterizations of testimony by the prosecutor, presented a more effective closing argument, and objected more. Finally, he claims that counsel focused on irrelevant issues, particularly on whether Raby entered the house through the door or a window. Raby speculates that this focus was in pursuit of the legally-mistaken theory that entry through the door would preclude a finding of burglary because there would have been no breaking, only entry, into the house. If Raby's theory holds true, then his claim of ineffective assistance of counsel would fall within the scope of *United States v. Cronic*, 466 U.S. 648 (1984), and would excuse him from having to satisfy the prejudice test.

The voluntariness and credibility of Raby's confession have been discussed. Raby admitted under oath that his confession was knowing, voluntary, and true. Counsel were not deficient for choosing not to falsely argue that the confession was involuntary or untrue. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 187 (1986) (Blackmun, J., concurring) (petitioner "had no legitimate interest that conflicted with [his counsel]'s obligations not to suborn perjury"). In the same vein, counsel were not deficient for failing to present theories concerning alternative suspects when Raby admitted that he committed the crime.

The decision not to present any evidence, including experts to rebut the state's experts, was also a valid strategic decision. Counsel were faced with a defendant who confessed to murder. There was little they could do to convince the jury that Raby did not murder Franklin in the face of his own

confession and prosecution testimony placing him near Franklin's home with a knife at the approximate time of Franklin's death. Instead, counsel focused on challenging the evidence supporting the burglary that elevated Raby's intentional killing to capital murder. Counsel vigorously challenged, through cross-examination, the evidence of robbery and sexual assault, obtaining admissions that there was no physical evidence of sexual assault on Franklin's body, and that her room was frequently as messy as it was after she was murdered, thus challenging both the State's sexual assault and robbery theories. *See, e.g.*, 27 Tr. at 57-59, 137-38, 167-68. Counsel also attempted to establish that Raby had the consent of Franklin's grandsons to enter the house, *id.* at 129-32, and attacked the credibility of prosecution witnesses, *id.* at 169-71.

> [W]hen counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision. [*Bell v. Cone*, ___ U.S. ___, 122 S.Ct. 1843,] 1851-52 [(2002)]. By making such choices, defense counsel has not abandoned his or her client by entirely failing to challenge the prosecution's case. Such strategic decisions do not result in an abandonment of counsel . . . .

Haynes v. Cain, 298 F.3d 375, 381 (5th Cir. 2002) (en banc). Thus, counsel's decision, in the face of Raby's confession, to focus on the elements separating non-capital from capital murder did not constitute abandonment of their role and the *Strickland* test which was applied by the Texas Court of Criminal Appeals, *see* SHTr. at 229-31, not the *Cronic* test urged by Raby, governs this claim.

Having established that the state court applied the correct standard, the sole remaining question under AEDPA is whether it did so reasonably. Assuming that counsel rendered deficient performance, Raby still cannot demonstrate prejudice. He confessed to killing Franklin, thus establishing both his entry into the house and that he killed the victim. There was also substantial evidence supporting a jury finding of both robbery and sexual assault. While Raby, with the benefit of hindsight, offers a list

of things he believes counsel could have done differently or more effectively, an objective review of counsel's performance reveals that counsel provided reasonably effective assistance given the hand they were dealt. "Judicial scrutiny of a counsel's performance must be highly deferential [and] every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S., at 689. Thus, Raby cannot "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Id.* at 694, and the state court's analysis was reasonable.

c. Ineffective Assistance of Counsel at Punishment Phase

Raby also contends that he received ineffective assistance of counsel at the punishment phase of his trial because: (1) counsel failed to present an adequate case against future dangerousness and presented an expert witness who harmed Raby's case; (2) counsel failed to present adequate mitigating evidence; (3) counsel failed to impeach one of the state's witnesses; (4) counsel's closing argument was weak; and (5) counsel's overall performance was inadequate. None of these claims was presented to the Texas courts. Accordingly, they are unexhausted and procedurally defaulted. Unlike Raby's ineffective assistance of counsel claims about the suppression hearing and the guilt-innocence phase of his trial, the assistance of counsel at the punishment phase is not used as the predicate for other procedural defaults, nor does it raise an issue of actual innocence. The state procedural default bars this court from addressing the merits of Raby's claim.

d. Ineffective Assistance of Appellate Counsel

Raby contends that his appellate counsel was ineffective because he had a conflict of interest and failed to raise five specifically identified claims of trial error and "any other claim that this court

concludes was procedurally defaulted." In a related claim, Raby argues that the Texas post-conviction process is actually an additional layer of direct appeal, that the process is inadequate to protect his rights, and that he was forced to use incompetent postconviction counsel.

1. Direct Appeal

A defendant is constitutionally entitled to effective assistance of counsel in his first appeal as of right under state law. *Evitts v. Lucy*, 469 U.S. 387, 394-95 (1985). Generally, to prevail on a claim for ineffective counsel, a petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also Smith v. Robbins*, 528 U.S. 259 (2000) (this standard applies to claims about appellate counsel). First, Raby must demonstrate that counsel's representation fell below an objective standard of reasonableness. Reasonableness is measured against prevailing professional norms, and it must be viewed under the circumstances. Review of counsel's performance is deferential. *Id.* at 687-89.

With the exception of Raby's claim that the prosecutor commented on his silence, all of the specific claims Raby alleges should have been raised on direct appeal were raised in his state post-conviction proceeding. While the State habeas court denied some of these on procedural grounds, it also addressed all of them on the merits, and found all of them lacking in merit. SHTr. at 221-31. These findings and conclusions were adopted by the Texas Court of Criminal Appeals. *Ex Parte Raby*, No. 48,131-01 (Tex.Crim.App. Jan. 31, 2001).

The issue of the prosecutor's comment is without merit. Because the Court of Criminal Appeals, *i.e.*, the same court that heard Raby's direct appeal, found most of these claims meritless, and this court finds the remaining claim meritless, it necessarily follows both that counsel was not deficient for failing to raise meritless claims and that Raby suffered no prejudice as a result of a failure to raise these meritless claims.

To the extent that Raby bases this claim on appellate counsel's failure to raise other claims that are now procedurally defaulted, it is equally unavailing. Appellate counsel is not required to raise every possible non-frivolous claim on appeal. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). Appellate counsel raised 16 points of error in the direct appeal -- nine of these are raised again in this petition. Of the other specific claims identified by Raby, all but one were later raised and rejected in his state habeas corpus petition. Raby had a right to competent, not perfect, counsel on appeal. His appellate counsel raised numerous nonfrivolous issues, and nothing in the record suggests that his failure to raise other issues was based on anything other than a professional judgment to focus on what counsel believed were the strongest issues available to him. Raby received effective assistance of appellate counsel.

2. Conflict of Interest

The conflict of interest arises from the fact that Raby's appellate counsel was Michael Fosher who served as second chair counsel at Raby's trial. Raby claims that Fosher had a conflict of interest because he would be disinclined to argue that he, himself, rendered ineffective assistance at trial.

Raby misconstrues "conflict of interest." A conflict of interest arises in situations in which the

attorney has a specific interest contrary to that of his client. For example, an attorney would have a conflict of interest where he represents a party suing a company in which the attorney owns a financial interest. The type of "conflict" identified by Raby is not a conflict of interest at all, but is the kind of situation attorneys routinely litigate. For example, attorneys often draft contracts and subsequently argue that those same contracts should not be enforced due to some defect in the contract.

Even assuming that Raby has identified an actual conflict of interest, he is not entitled to relief. The issue of "an attorney's conflict of interest that springs . . . from a conflict between the attorney's personal interest and that of his client" is governed by the *Strickland* standard. *Beets v. Scott*, 65 F.3d 1258, 1260 (5th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1157 (1996). The ineffective assistance of trial counsel claim was eventually raised in Raby's state habeas corpus petition, where it was rejected by the Texas Court of Criminal Appeals. Raby therefore suffered no prejudice from appellate counsel's failure to raise the issue on direct appeal.

3. Raby's State Post-Conviction Proceeding

Raby also claims, under numerous theories, that the Texas post-conviction procedure is inadequate to address defects in his trial and sentencing proceeding. Specifically, he contends that: (1) he was required to present many of his claims in his post-conviction proceeding; (2) he was forced to accept representation by an attorney who was incompetent and failed to present and preserve numerous issues for review; (3) the state postconviction process was so inadequate as to deny him his rights under the due process clause; (4) the Texas Court of Criminal Appeals failed to follow Texas state law, thus denying Raby a State-created liberty interest without due process of law; and (5) the process was so ineffective as to deny him access to the courts. He also argues that the State post-conviction proceeding is, in fact, simply another layer of direct criminal appeal and not a civil post-

conviction proceeding. He bases this last point on nothing more than the facts that jurisdiction over state post-conviction proceedings rests in the Texas Court of Criminal Appeals, and the rules governing such proceedings are part of the Texas code of criminal procedure.

None of the authority cited by Raby supports the proposition that he was required to raise his claims in his State habeas corpus petition rather than on direct appeal. To the contrary, clearly-established Texas law holds that the habeas corpus proceeding is more limited in scope than the direct appeal. *See Ex Parte Graves*, 70 S.W.3d 103, 109 (Tex.Crim.App. 2002) (post-conviction proceedings limited to review of jurisdictional defects or denials of fundamental or constitutional rights). As a practical matter, the only claim Raby could have raised in his State habeas petition that he could not have raised on direct appeal was his claim, rejected above, that he received ineffective assistance of counsel on appeal.

Second, habeas corpus proceedings are civil in nature, not another layer of direct criminal appeal. "Postconviction relief is . . . not part of the criminal proceeding itself, and it is in fact considered to be civil in nature." *Finley v. Pennsylvania*, 481 U.S. 551, 556-57 (1987) (citing *Fay v. Noia*, 372 U.S. 391, 423-24 (1963)).[4] It is well-established that there is no constitutional right to counsel in a post-conviction proceeding. "States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." *Id.* at 557 (citation omitted). For this reason, Raby has no right to effective assistance of postconviction counsel, *id.* at 557-58, and ineffective assistance of

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[4] Even if Raby's theory that the Texas postconviction process was another layer of direct appeal was correct, it would provide no basis for relief. *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985) held that there is a constitutional right to effective assistance of counsel on a *first* appeal as of right. Raby's first appeal was his direct appeal to the Texas Court of Criminal Appeals.

postconviction counsel cannot constitute cause for a procedural default.

> There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings . . . [Petitioner] must bear the risk of attorney error that results in a procedural default.

Coleman v. Thompson, 501 U.S. 722, 752-53 (1991) (citations and internal quotation marks omitted); *see also Martinez v. Johnson*, 255 F.3d 229, 241 (5th Cir. 2001) ("ineffective assistance of habeas counsel cannot provide cause for a procedural default"), *cert. denied sub nom. Martinez v. Cockrell*, 534 U.S. 1163 (2002).

Finally, substantially all of Raby's various theories concerning the State postconviction proceeding are foreclosed by *Ogan v. Cockrell*, 297 F.3d 349 (5th Cir. 2002). Ogan, like Raby, argued that the Texas habeas court's appointment of purportedly incompetent habeas counsel violated Texas statutory law, deprived him of meaningful access to the courts, and violated his rights to equal protection and due process of law. Noting that "[t]his Court has repeatedly held . . . that there is no constitutional right to competent habeas counsel,"*id.* at 357, *Ogan* rejected all of these theories. Moreover, failure to provide competent habeas counsel "does not fall under the general catch-all exception provided in 28 U.S.C. § 2254(b)(1)(B)(ii)." *Martinez*, 255 F.3d at 238 n.10. "28 U.S.C. § 2254(i) bars a federal habeas claim solely grounded in 'the ineffectiveness or incompetence of counsel during . . . State collateral post-conviction proceedings.'" *Martinez*, 255 F.3d at 245 (quoting 28 U.S.C. § 2254 (i)). Accordingly, Raby's various claims arising out of the purportedly deficient performance of his state habeas counsel provide neither independent grounds for relief, nor cause for any procedural default.

2. Sufficiency of the Evidence.

Raby contends that the evidence was insufficient to support the jury's finding of the predicate felonies of robbery and sexual assault used to elevate the murder to capital murder. (Claim For Relief VI). The state court found this claim procedurally barred. Because the insufficiency of the evidence could give rise to a claim that Raby is legally ineligible for the death penalty, this claim will be reviewed on the merits.

In addressing the sufficiency of the evidence, the "question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis original). This court must determine whether a rational person would conclude from the data in evidence – beyond a reasonable doubt – that Raby killed Franklin in the course of committing or attempting to commit burglary, aggravated sexual assault, or robbery.

The state court found that:

> At the guilt-innocence phase, the state elicited evidence that [Raby] confessed to committing the instant offense; that [Edna Franklin] had barred [Raby] from her home; that [Franklin's] grandson was away from [Franklin's] house from 4:00 p.m. until 10:00 p.m.; that [Franklin] always locked the doors in her home when she was alone; that, when [Franklin's] grandson discovered [her], the front and back doors of [Franklin's] home were open; that [Franklin] was discovered dead on her living room floor; that [Franklin] had sustained bruises to her scalp, ear, and sternum caused by blunt force, two large cutting wounds to her neck, five stab wounds to the chest, and 11 fractured ribs; that the stab wounds were consistent with the blade of a pocketknife; that Franklin was nude below the waist; that the condition of [Franklin's] body was consistent with a person who had been sexually assaulted; that [Franklin's] blue jeans were turned inside out and off her body; that [Franklin's] panties were ripped and discarded; that [Franklin's] purse was on her bedroom floor with credit cards, bills, and her checkbook strewn about; that the attacker entered the house through a window; that [Raby] was seen earlier on the day of the instant offense cleaning his nails with a pocketknife; and, that a white man with a build and height consistent with that of [Raby] was seen in the vicinity of [Franklin's] house at approximately 8:00 p.m. on the

evening of the instant offense.

SHTr. at 222-23 (citations omitted). Based on this evidence, the state court found that the evidence supported the jury's findings. Federal relief is available under only if the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

This evidence, viewed independently by a federal court in the light favorable to the prosecution, was nearly compelling in showing that Franklin was killed during the commission or attempted commission of a robbery or sexual assault. While there was no direct evidence of a sexual assault, there was substantial circumstantial evidence including her state of undress, the condition of her clothing, and the position of her body. While Raby postulates that the evidence was equally consistent with Franklin undressing for bed as it is with sexual assault, this theory ignores that she: (1) was not fully undressed, but was undressed only below the waist; (2) was not in her bedroom (where one would expect to find her if she was in the process of undressing for bed), but in the living room; and (3) her pants and her underwear were found near her body (in the living room) with the pants turned inside out and the underwear torn. Circumstantial evidence supported robbery, including the state of the contents of Franklin's purse. Franklin may have been messy, but she was not shown to have ordinarily done any of the things used to support rape and robbery.

Raby also contends that there was insufficient evidence that he even entered the premises or did so unlawfully. He argues that the only evidence that he even entered the premises was his confession, but naturally that does establish his entry into the house.

He also argues that there was no proof that he entered the house illegally because Franklin's grandsons had admitted him to the house on earlier occasions. It is undisputed, however, that the

grandsons were not present at the time of the murder, and had not admitted Raby to the house on that day. Raby's implicit proposition that a person who is lawfully admitted onto private property on one or many occasions has permission to enter of his own accord on any occasion is unsupported. In sum, the state habeas court's finding that there was sufficient evidence to support a finding of every element of robbery, aggravated sexual assault, or attempted robbery or sexual assault was reasonable.

3. Intoxication Defense

Raby next contends that his conviction was obtained in violation of the Constitution because he was not permitted to inform the jury that extreme intoxication could negate the specific intent necessary to a finding of capital murder (Claim For Relief IV). Statutes barring the defense of voluntary intoxication do not violate the Constitution. *Montana v. Egelhoff*, 518 U.S. 37 (1996). Raby challenges the logic of *Egelhoff* because it was not a capital case. That distinction has, however, already been rejected. *Goodwin v. Johnson*, 132 F.3d 162, 190-91 (5th Cir. 1998) (holding that Texas statute barring defense of voluntary intoxication to negate specific intent element of capital murder does not violate due process clause). Accordingly, Raby's claim is without merit.

4. Argument About Mitigating Evidence.

Raby claims that the trial court barred him from arguing to the jury during the punishment phase that it should consider evidence of his intoxication as mitigating evidence (Claim For Relief V).

In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality of the Supreme Court held "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . as a basis for a sentence less than death." 438 U.S. at 604 (emphasis in original). This holding is based on the plurality's conclusion that death "is so profoundly different from all other penalties" as to render "an individualized decision

. . . essential in capital cases." *Id.* at 605.

Raby moved seeking two separate rulings before the jury charge at the punishment phase: First, Raby asked the trial court to instruct the jury that it must consider evidence of his intoxication as mitigating; and second, he asked to argue to the jury that evidence of intoxication was mitigating. There is some ambiguity whether he wanted to argue that the jury *must* consider such evidence mitigating or merely that it *could* so consider the evidence. It is clear, however, that the trial court barred him only from arguing that the jury *must* so consider the evidence.

> Mr. Fosher [defense counsel]: My understanding is that we're allowed to argue something about intoxication, but there is no type of instruction in the charge regarding- -
>
> The Court: Well, I just told you that you can't tell them that they have to. They're not instructed. It's not in the instructions. If it's raised by the evidence, I suppose anything in the record you can argue, and I gave you guidelines as set out by the Court of Criminal Appeals. So I don't know what you're going to say. I'm probably going to have to rule on it if there's an objection.

37 Tr. at 988.

In Raby's direct appeal, the Texas Court of Criminal Appeals held that there is no constitutional requirement that a capital sentencing jury give particular weight to any mitigating evidence, but only that they have an opportunity to consider and give effect to mitigating evidence. *Raby v. State*, 970 S.W.2d 1, 6 (Tex.Crim.App. 1998). Accordingly, that court found that the trial court's ruling was correct. Raby now claims that the Court of Criminal Appeals misunderstood his claim of error, and ruled instead on the trial court's denial of his requested instruction that the jury *must* give weight to his mitigating evidence.

Assuming that Raby is correct and the Court of Criminal Appeals did misunderstand his argument, he still is not entitled to relief. As the portion of the record quoted above demonstrates, the

trial court did not prevent Raby from arguing from the record that he was intoxicated and that the jury could consider this in mitigation of punishment. The trial court ruled instead that Raby could argue from the record but could not argue that the jury *must* give mitigating weight to this evidence. "If it's raised by the evidence, I suppose anything in the record you can argue . . . ."

5. Constitutionality of Capital Murder

Raby next contends that his conviction for capital murder is unconstitutional because the jury was permitted to base the conviction on a finding of burglary in which the murder served as the predicate felony (Claim For Relief VII). The Texas capital murder statute defines capital murder as a murder committed "in the course of committing or attempting to commit . . . burglary." Tex. Penal Code § 19.03(a)(2). Raby claims that the statute does not give fair notice that the murder itself may serve as the predicate felony for burglary because the murder does not occur until after the burglary, *i.e.*, the unauthorized entry onto the premises with the intent to commit a felony, is complete. Raby claims that this "burglary by murder" statute is unconstitutional because it turns into capital murder any murder committed inside a building or habitation in which the murderer was not authorized to enter, and therefore fails to meaningfully narrow the class of death-eligible defendants. He also claims that the statute fails to give fair notice that the murder itself can serve as the predicate felony for burglary.

a. Fair Notice.

Due process requires that the law give fair notice of what conduct is prohibited. "[T]he Due Process clause prohibits 'an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.'" *Beets v. Johnson*, 180 F.3d 190, 193 (5th Cir. 1999) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964)), *cert. denied*, 528 U.S. 1121 (2000). Raby complains both that the language of the capital murder statute is ambiguous, and that no Texas case law held that language to encompass "burglary by murder" until after Raby murdered Franklin.

Contrary to Raby's argument, the Texas Court of Criminal Appeals held at least three times before his crime that murder itself can serve as the predicate felony for a burglary used to elevate murder to capital murder. "[A]n unlawful entry into a habitation with the intent to commit murder will satisfy the burglary element of a capital murder charge." *Boyd v. State*, 811 S.W.2d 105, 114 (Tex.Crim.App), *cert. denied*, 502 U.S. 971 (1991); *see also Beathard v. State,* 767 S.W.2d 423, 427 (Tex.Crim.App. 1989) (holding that unauthorized entry onto premises with intent to commit murder establishes burglary element of capital murder); *Fearance v. State*, 771 S.W.2d 486, 402-94 (Tex.Crim.App. 1988) (rejecting argument that "the jury did not have to find an underlying felony to aggravate the intentional murder to capital murder"), *cert. denied*, 492 U.S. 927 (1989). Thus, the Texas Court of Criminal Appeals provided unequivocal notice that "burglary by murder" could elevate an intentional killing to capital murder years before Raby murdered Franklin. Raby had fair notice.

b. Failure to Narrow the Class of Defendants.

A capital sentencing scheme must meaningfully narrow the class of death-eligible defendants. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Raby, theorizing that "burglary by murder" turns any murder committed in a building or habitation that the killer was not authorized to enter into

capital murder, argues that the Texas capital murder statute fails to so narrow the class of defendants.

While it does not appear that this specific claim has been addressed by federal courts, courts have repeatedly upheld the facial constitutionality of the Texas capital sentencing scheme against charges that it fails to meaningfully narrow the class of death-eligible defendants. *See, e.g., Jurek v. Texas*, 428 U.S. 262, 268-71 (1976); *West v. Johnson*, 92 F.3d 1385, 1406 (5th Cir. 1996). Moreover, Raby's conclusion simply does not follow from his premise. Supreme Court precedent requires that a capital sentencing scheme narrow the class of death-eligible defendants. In other words, a state may not simply declare a mandatory death sentence for all murderers, *see, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) but must instead draw some rational distinction between those convicted murderers who are sentenced to death and those who are not. The "felony by murder" statute satisfies that requirement. By recognizing the sanctity of private premises, and acting to protect individuals from harm by unwelcome intruders when they are on such premises, the Texas legislature has identified a separate category of murder which it deems distinct, and more deserving of death, than other categories of murder. Not all murders are committed during the course of a burglary by murder, and Raby presents no evidence that a substantial percentage of capital murder charges in Texas are based on this theory.

In any event, even if Raby's theory concerning this underlying felony were correct, it would provide no basis for relief in this case. There was ample evidence to support a jury finding of two other felonies supporting the burglary charge; aggravated sexual assault, and robbery. Thus, regardless of whether the "burglary by murder" provision of the Texas capital sentencing scheme narrows the class of death eligible defendants, there was sufficient evidence to support a finding of burglary based

on two other underlying felonies.

6. Jury Unanimity.

Raby next contends that his conviction for capital murder was unconstitutional because the jury was not required to unanimously agree on the felony underlying the burglary (Claim For Relief VIII). Raby raised this claim in his state habeas corpus petition. The Texas habeas court rejected the claim as procedurally barred because Raby did not object to the jury charge at trial, and as meritless. SHTr. at 223-24, 227-28. As discussed above, Raby did not receive ineffective assistance of counsel at trial, and has neither demonstrated cause for his defaults nor actual innocence. Accordingly, this claim is defaulted.

7. Prosecutorial Comment on Raby's Silence.

In his closing argument, the prosecutor commented on Raby's pre and post-arrest silence, stating: "[I]s it any wonder that when he runs, that he is silent after he runs? . . . Is it any wonder that that type of coward would not fess up to all the details of his statement to the police? Of course not." 30 Tr. at 462-63. Raby claims that this violated his Fifth Amendment right against compelled self-incrimination (Claim For Relief IX). Raby, however, never presented this claim to the Texas state courts.

Raby has not demonstrated cause for his failure to present the claim to the Texas courts or actual innocence. This court may not address the claim on the merits.

8. Informing the Jury About Parole Eligibility.

Raby was sentenced to death based in part on a finding that he presented a future danger to society. He asserts that his sentence is unconstitutional because he was not permitted to question the jury during voir dire or otherwise inform the jury that, if sentenced to life imprisonment, he would be

ineligible for parole for at least 35 years (Claim For Relief X). This claim is clearly foreclosed.

Raby primarily relies on *Simmons v. South Carolina*, 512 U.S. 154 (1994). At the time of Simmons' conviction, South Carolina allowed for a sentence of life in prison without the possibility of parole upon conviction of a capital offense. In *Simmons*, the defense sought an instruction informing the jury that life imprisonment would carry no possibility of parole, but the trial court refused. The Supreme Court held that when "the alternative sentence to death is life without parole . . . due process plainly requires that [the defendant] be allowed to bring [parole ineligibility] to the jury's attention by way of argument by defense counsel or an instruction from the court." *Simmons*, 512 U.S. at 169 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

The *Simmons* court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a danger to society, the fact that the defendant may receive life without possibility of parole "will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Simmons*, 512 U.S. at 169. To hold otherwise would create a "false dilemma by advancing generalized argument regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Id.* at 171.

Simmons addresses very specific circumstances: (1) When the state seeks the death penalty on the grounds that the defendant will be a future danger to society; and (2) when the alternative to a death sentence is a life sentence without the possibility of parole.

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at 168-69 (internal quotation marks and citation omitted). In this case, the jury's alternative to a death sentence was a parole-eligible life sentence.

Raby's claim has repeatedly been rejected.

> [T]he Supreme Court took great pains in its opinion in *Simmons* to distinguish states such as Texas, which does not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole eligibility . . . [T]he Fifth Circuit has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole.

Green v. Johnson, 160 F.3d 1029, 1045 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also*, *Wheat*, 238 F.3d at 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001)(finding *Simmons* inapplicable to the Texas sentencing scheme); *Soria v. Johnson*, 207 F.3d 232 (5th Cir.), *cert. denied*, 530 U.S. 1286 (2000)(finding that "reliance on *Simmons* to demonstrate that the Texas capital sentencing scheme denied [petitioner] a fair trial is unavailing"); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.) ("because Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* unavailing")(internal quotation marks and citation omitted), *cert. denied*, 531 U.S. 849 (2000); *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir.)(stating that a claim based on *Simmons* "has no merit under the law in our circuit"), *cert. denied*, 523 U.S. 1113 (1998); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995) (holding that *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole"), *cert. denied sub nom. Montoya v. Johnson*, 517 U.S. 1133 (1996); *Allridge v. Scott*, 41 F.3d 213, 222(5th Cir. 1994)(stating that "*Simmons* is inapplicable to this case"), *cert. denied*, 514 U.S. 1108 (1995); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.) (refusing to "extend *Simmons* beyond cases in which

the sentencing alternative to death is life without parole"), *cert. denied*, 513 U.S. 1054 (1994).

If these decisions left any doubt that *Simmons* provides no basis for the relief Raby seeks, the Supreme Court removed all such doubt in *Ramdass v. Angelone*, 530 U.S. 156 (2000). "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 169.

In this case, life without parole was not a possibility. Raby faced one of two sentences: Death, or life imprisonment with the possibility of parole at a future date. Therefore, as *Ramdass* and Fifth Circuit precedent make unmistakably clear, his case does not fall within the scope of *Simmons*.

If Raby seeks an extension of *Simmons* to the Texas scheme, this court is barred from granting relief on that basis by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Wheat*, 238 F.3d at 361 (finding any extension of *Simmons* to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000)(same), *cert. denied*, 531 U.S. 1167 (2001); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir.) ("Relief based on *Simmons* is foreclosed by *Teague*."), *cert. denied*, 527 U.S. 1055 (1999). In *Teague*, the Supreme Court held that a federal court may not create new constitutional rules of criminal procedure on habeas review. *Id.* at 301. If controlling precedent did not expressly hold that the *Simmons* rule does not cover Raby's case, relief would be barred by *Teague*.

Raby also asserts that a Texas rule giving trial judges discretion to inform the jury about parole eligibility violates the equal protection clause by putting those defendants who's judges do not so inform the jury in a less favorable position that those defendants who's judges do so inform the jury. Raby did not raise this claim in the Texas courts. It is therefore unexhausted and procedurally barred. Even if it were not so barred, Raby cites no authority in support of his proposed rule barring such discretion, and it appears that there is no such authority. *Teague* prohibits this court from announcing

the rule Raby requests.

9. Jury Voir Dire.

Raby next claims that he was not permitted to conduct jury voir dire to determine whether any jurors would not consider his mitigating evidence (Claim For Relief XI). Before trial, Raby moved for permission to ask prospective jurors whether they would consider as mitigating evidence: (1) his relative youth at the time of the crime; (2) that he was intoxicated; (3) that he suffers from a medically diagnosed mental or emotional illness; (4) that he was abused or neglected as a child; (5) that he has exhibited positive character traits such as having engaged in acts of kindness toward family members; and (6) any other relevant mitigating factor. *Raby v. State*, 970 S.W.2d 1, 3 (Tex.Crim.App. 1998). The trial court granted the motion, but stopped defense counsel's questioning during voir dire when counsel tried to commit the prospective jurors to finding specific evidence mitigating. The Texas Court of Criminal Appeals rejected this claim on direct appeal:

> [T]he law does not require a juror to consider any particular piece of evidence as mitigating: all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating.

Raby, 970 S.W.2d at 3.

Raby relies primarily on *Morgan v. Illinois*, 504 U.S. 719 (1992). *Morgan* does not address this issue. It addresses the issue of "whether, during *voir dire* for a capital offense, a state trial court may . . . refuse inquiry into whether a potential juror would *automatically impose the death penalty* upon conviction of the defendant." *Id.* at 721 (second italics added). The trial court did not prevent Raby from inquiring whether any particular juror would automatically impose a sentence of death, but argues that the *Morgan* principle that a capital defendant is entitled to a fair and impartial jury

necessarily extends to a right to question about specific mitigating evidence. The Fifth Circuit This extension of *Morgan* has been expressly rejected. "*Morgan* only 'involves the narrow question of whether, in a capital case, jurors must be asked whether they would automatically impose the death penalty upon conviction of the defendant.'" *Trevino v. Johnson*, 168 F.3d 173, 183 (5th Cir. 1999) (quoting *United States v. Greer*, 968 F.2d 433, 437 n.7 (5th Cir. 1992)), *cert. denied*, 527 U.S. 1056 (1999). In *Trevino*, the petitioner raised a substantially identical claim to Raby's claim: Whether his Fourteenth Amendment rights were violated when he was not permitted "to inquire whether each venireperson . . . would consider youth as a mitigating factor." *Id.* The Fifth Circuit found that the Texas Court of Criminal Appeals' rejection of Trevino's claim was not an unreasonable application of *Morgan*, and that AEDPA therefore required denial of the petition. *Trevino* clearly mandates the same result in this case.

10. Cumulative Error.

Finally, Raby argues that the cumulative effect of all of his claimed errors deprived him of a fair trial. (Claim For Relief XIII). Raby never raised this claim in the state courts. Accordingly, the claim is unexhausted and procedurally barred, and this court may not address it.

Evidentiary Hearing

An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (it was "Congress' intent to avoid unneeded hearings in federal habeas corpus"). "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rules Governing Section 2254 Cases R. 8. Each of Raby's claims can be resolved by reference to the state court record, the submissions of the parties, and relevant legal

authority. There is no basis on which to hold an evidentiary hearing.

Certificate Of Appealability.

Raby has not requested a certificate of appealability (COA), but this court may determine whether he is entitled to this relief. *See Alexander v. Johnson*, 211 F.3d 895, 898(5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). COAs are granted on an issue-by-issue basis, limiting appellate review to those issues. *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner "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." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: 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.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This court has carefully and exhaustively considered each of Raby's claims. While the issues Raby raises are clearly important and deserving of the closest scrutiny, this court finds that each of the claims is foreclosed by clear, binding precedent. Under such precedents, Raby has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). On those claims dismissed on procedural grounds, jurists of reason would not find it debatable whether the petition states valid grounds for relief and would not find it debatable whether this court is correct in its procedural determinations. Raby is not entitled to a certificate of appealability on his claims.

LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

Appendix B

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

CHARLES D. RABY,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-02-0349
	§	
JANIE COCKRELL, Director, Texas Department of Criminal Justice-Institutional Division,	§	
	§	
Respondent.	§	

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

On November 27, 2002, this Court granted Respondent's motion for summary judgment and dismissed Raby's petition for a writ of habeas corpus. On December 12, Raby filed a motion for reconsideration of that order.

"A motion to reconsider an order. . . is appropriate when the court is presented with newly-discovered evidence, when the court committed clear error, when there is an intervening change in controlling law, or when other highly unusual circumstances exist." *Becerra v. Asher*, 921 F.Supp. 1538, 1548 (S.D. Tex. 1996), *aff'd*, 105 F.3d 1042 (5th Cir.), *cert. denied sub nom. Becerra v. Houston independent School District*, 522 U.S. 824 (1997).

Raby states five grounds for relief. Points two through five in Raby's motion essentially rehash arguments that this court rejected on November 27. Accordingly, they provide no basis for reconsideration of the November 27 order.

Point one of Raby's motion states that he filed a motion for postconviction DNA testing in the Texas State courts on November 19, 2002. Though Raby filed his state court motion eight days before this court issued its decision, Raby never sought a stay of his federal habeas corpus

23

proceedings.

Raby concedes that there was no physical evidence linking him to the murder, but urges reconsideration based on his stated belief that the DNA testing will identify the "real" murderer. His state court motion is partially based on the premise that his confession was false and involuntary. This court rejected that underlying premise based on Raby's explicit testimony that the confession was true and voluntary. There is no reason to believe that Raby's state court DNA motion will accomplish anything but delay. Accordingly,

IT IS ORDERED THAT Raby's Motion for Reconsideration (Document 22) is **Denied.**

SO ORDERED

Lynn N. Hughes
United States District Judge

Houston, Texas
December 30, 2002

Appendix C

In the United States Court of Appeals for the Fifth Circuit

№ 03-20129

CHARLES D. RABY,

Petitioner-Appellant,

VERSUS

DOUG DRETKE,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas
№ H-02-0349

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Charles Raby applies for a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2254. We deny the request.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

(continued...)

*(...continued)

29

I.

In June 1994, a jury convicted Raby of the capital murder[1] of seventy-two-year-old Edna Franklin, who "had been severely beaten[,] repeatedly stabbed[,] and undressed . . . below the waist." *Raby v. Stone*, 970 S.W.2d 1 (Tex. Crim. App. 1998). Although Raby pleaded not guilty, the state introduced a signed statement in which he admitted to attacking Franklin and to the general circumstances surrounding the crime.[2] During the punishment phase, prosecution and defense witnesses testified to aggravating and mitigating factors, respectively. The jury answered that Raby posed a future danger and that sufficient mitigating evidence was not presented. Raby was sentenced to death.

II.

Although Raby originally cited thirteen grounds for habeas corpus relief, he now seeks a COA based on the following: (1) ineffective assistance of counsel at the punishment phase; (2) improper prosecutorial comments regarding Raby's silence surrounding his arrest; (3) ineffective assistance of trial counsel during the guilt phase of the trial; (4) insufficient evidence; (5) the alleged unconstitutionality of Texas law in not allowing an intoxication defense; and (6) not being able to inform the jury about his future parole eligibility in a life sentence. The district court dismissed all of Raby's claims on a motion for summary judgment.

The first two grounds were dismissed because Raby had failed to exhaust his options in state proceedings. The third ground was dismissed based on procedural defaults and an application of *Strickland v. Washington*, 466 U.S. 668 (1984). The district court dismissed the fourth ground after determining that the evidence "was nearly compelling in showing that Franklin was killed during the commission or attempted commission of a robbery or sexual assault." The district court cited valid Supreme Court and Fifth Circuit precedent[3] stating the precise opposite of what Raby claimed in his fifth ground. Finally, the court cited *Green v. Johnson*, 160 F.3d 1029, 1045 (5th Cir. 1998), to dispel Raby's argument that he had the constitutional right to inform the jury as to his parole eligibility under a life sentence.[4]

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[1] TEX. PENAL CODE ANN. § 19.03(a)(2) ("A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and . . . (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation.").

[2] The statement read, in part:

> I went to a little store and bought some wine . . . . I drank the wine . . . . I knocked on the door. I did not hear anyone answer. I just went inside . . . . I walked into the kitchen and grabbed Edna. Edna's back was to me and I just grabbed her. I remember struggling with her and I was on top of her. I know I had my knife but I do not remember taking it out. We were in the living room when we went to the floor. I saw Edna covered in blood and underneath her. I went to the back of the house and went out the back door . . . .

[3] *Montana v. Egelhoff*, 518 U.S. 37 (1996); *Goodwin v. Johnson*, 132 F.3d 162, 190-91 (5th Cir. 1998) (applying *Egelhoff* to a capital case in which the defendant unsuccessfully claimed that a Texas statute foreclosing voluntary intoxication violated due process).

[4] The district court, and this court, in *Green*, distinguished a Texas life sentence from a South Carolina life sentence, as referenced in *Simmons*

(continued...)

The statement similarly blocks Raby's second ground, whereby he claims that the prosecution improperly commented on his silence surrounding his arrest. The prosecutor stated:

> [Is] it any wonder that a person who would attack a helpless, fragile, arthritic little old lady and stab her as many times as he did, brutalize her, slit her throat, ripped her clothes off, ripped her panties, anyone who would do something so cowardly, is it any wonder that when he runs, that he is silent after he runs? He doesn't go to the police. He isn't filled with remorse. When he gets the call that the police are coming, when he gets that call from his mother, he flees, indicating guilty knowledge. Is it any wonder that that type of coward would not fess up to all the details of his confession to the police? Of course not.

Even if one ignores the procedural bar[6] invoked by the district court, disregards the fact that Raby's counsel apparently did not object to the prosecutor's comment, and assumes that the prosecution improperly commented on Raby's silence, any possible error was harmless.[7]

In *Cotton*, we granted a COA on the prosecution's referring to the defendant as an expert who could have refuted a co-conspirator's testimony, but we promptly dispatched of the point on grounds of harmless error. In Raby's situation, the prosecution's comment did not paint the defendant in a more negative light than in *Cotton*, and the harmlessness is similarly obvious.

Consequently, given the manner in which *Cotton* disposed of a similar prosecutorial comment, reasonable jurists could not debate the outcome of this issue. Finally, even assuming that the procedural default could be excused, we should not grant a COA based on the substance of the first claim, as discussed in part IV, *infra*.

IV.

Given the weight of his signed confession, Raby's strongest argument focuses on the punishment phase of his trial. The district court barred this ground based on Raby's failure to exhaust his state remedies, as required by 28 U.S.C. § 2254(b)(1)(B)(i). Raby attempts to excuse his procedural default by invoking § 2254(b)(1)(B)(ii), which provides an exception to the regular exhaustion requirement where "circumstances exist that render [state] process ineffective to protect the rights of the applicant." Raby claims that his state-appointed state habeas counsel, James Keegan, actively interfered with his attempts to pursue his habeas claims.[8] Raby lists eleven ways in which Keegan allegedly "thwarted" his attempts to present habeas claims in state court.[9]

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[6] The procedural bar discussion appears in part IV, *infra*.

[7] *See Cotton v. Cockrell*, 343 F.3d 746, 752 (5th Cir. 2003) ("Given the overwhelming evidence of guilt and the court's cautionary instruction to the jury, we conclude that the prosecution's statement had no substantial and injurious effect or influence in the determination of [defendant's] guilt.").

[8] Raby claims that "the CCA blocked his access to the courts by appointing a lawyer who refused to investigate and raise meritorious claims in the state habeas proceedings and precluding him from otherwise asserting those claims."

[9] These problems include failing to investigate extra-record claims, to hire an investigator, to request a separate evidentiary hearing, to forward

(continued...)

An unresponsive, insensitive lawyer does not excuse a procedural default under § 2254 (b)(1)(B)(ii).[10] The facts in *Martinez* are similar to those presented here, in regard to Raby's claims regarding Keegan.[11] Thus, *Martinez* forecloses debate on the use of alleged ineffectiveness of state habeas counsel to circumvent the state exhaustion requirement.

V.

Raby claims that his drug-addicted counsel failed to provide him with effective assistance. Specifically, Raby asserts that his attorney failed to investigate his case adequately and points to eighteen mitigating factors that such an investigation would have uncovered. He also asserts that his lawyer egregiously erred by calling "notorious state expert Walter Quijano, who . . . prejudicially labeled Raby a 'psychopath.'"

Counsel's performance does not satisfy *Washington*'s requirements for ineffective assistance. Raby's trial counsel called witnesses to testify "to his troubled upbringing, including his mother's mental problems, his commitment to foster care and institutions, and episodes of physical abuse." *Raby v. Stone*, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998). Additional witnesses testified "that [defendant] had a peaceful disposition and that his problems during incarceration had been provoked by jailers." *Id.* Thus, counsel did not underperform in attempting to mitigate Raby's sentence.

Although the decision to call Quijano did not help Raby, "judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Hopkins*, 325 F.3d at 586. Additionally, "informed strategic decisions are given a heavy measure of deference." *Boyle v. Johnson*, 93 F.3d 180, 187 (5th Cir. 1996) (citing *Mann v. Scott*, 41 F.3d 968, 984 (5th Cir. 1994)). Raby's counsel met with Quijano before the punishment phase and apparently (though wrongly) thought that his testimony would help establish that the Texas prison system would contain any future dangerousness on Raby's part. No COA is justified on this issue.

The application for COA is DENIED.

A true copy
Test
Clerk, U. S. Court of Appeals, Fifth Circuit
By Joseph Amat
Deputy
New Orleans, Louisiana

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[9](...continued)
court documents to Raby, and to accept Raby's mail.

[10] *See Martinez v. Johnson*, 255 F.3d 229, 239 n.10 (5th Cir. 1991) ("[U]nder these facts, failure to provide 'competent' counsel for a state habeas petition does not fall under the general catch-all exception provided in 28 U.S.C. § 2254(b)(1)(B)-(ii).").

[11] *Id.* at 238 n.9 ("(1) Rhodes did not respond to any of Martinez's letters, nor did he accept or return any of Martinez's phone calls; (2) Rhodes did not hire an investigator or an expert to develop extra-record evidence; (3) Rhodes did not send Martinez any of the copies of documents he filed on his client's behalf.").

Appendix D

C

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 14, 2004

Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street, Room 100
New Orleans, LA 70130

Re: Charles D. Raby
v. Doug Dretke, Director, Texas Department of Criminal Justice,
Correctional Institutions Division
No. 03-9274
(Your No. 03-20129)
H-02-CV-349

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K Suter

William K. Suter, Clerk

Houston

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Appendix E

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

CHARLES D. RABY,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action H-02-349
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

Charles D. Raby, a Texas death row inmate, moved for relief from the judgment of this Court entered on November 27, 2002, denying his petition for a writ of habeas corpus. Among the claims denied were Raby's claims that he received ineffective assistance of counsel when his counsel called as an expert witness Dr. Walter Quijano who, Raby contends, gave testimony that was harmful to Raby. Raby further contends that counsel was ineffective for failing to investigate and present mitigating evidence. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Raby's application for a certificate of appealability. *See Raby v. Dretke*, 78 Fed. App'x 324 (5th Cir. 2003).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 569 U.S. 413 (2013), the Supreme Court held that *Martinez* is applicable to the Texas

capital postconviction process. On August 4, 2017, Raby, relying on *Martinez* and *Trevino*, moved for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Background

Raby was convicted of capital murder and sentenced to death in June 1994, in the 248th District Court of Harris County, Texas, for the murder of Edna Franklin in October 1992. The indictment alleged that Raby murdered Franklin during the course of a robbery, sexual assault or burglary in her home.

The Texas Court of Criminal Appeals affirmed Raby's conviction and sentence, *Raby v. State*, 970 S.W.2d 1 (Tex.Crim.App. 1998), and the United States Supreme Court denied certiorari, *Raby v. Texas*, 525 U.S. 1003 (1998). Raby then filed a state application for post conviction relief: it was denied by the Texas Court of Criminal Appeals on January 31, 2001. Raby filed his federal habeas corpus petition on January 30, 2002, and amended it on May 8, 2002. This Court denied the petition on November 27, 2002, the Fifth Circuit denied Raby's application for a certificate of appealability on October 15, 2003, and the Supreme Court denied Raby's petition for a writ of *certiorari* on June 14, 2004, *Raby v. Dretke*, 542 U.S. 905 (2004).

While Raby's federal petition was pending, he moved in state court for DNA testing. His motion was granted, *Raby v. State*, No. AP-74,930 (Tex. Crim. App. June 29, 2005). The state DNA proceeding ended in 2015. *See Raby v. State*, No. AP-76,970, 2015 WL 1874540 (Tex. Crim. App. Apr. 22, 2015).

In 2016, Raby filed a successive state habeas corpus application raising the issues presented in this motion. That application was denied as an abuse of the writ. *Ex Parte Raby*, No. WR-

48,131-02, 2017 WL 2131819 (Tex. Crim. App. May 17, 2017). On August 4, 2017, Raby filed this motion under Rule 60(b)(6).

Discussion

In this motion, Raby argues that his trial counsel rendered ineffective assistance by calling Dr. Walter Quijano to testify, and by failing to prepare and present mitigating evidence. This Court found that these claims were procedurally defaulted when raised in Raby's habeas petition. He now argues that *Martinez*, *Trevino,* and the Supreme Court's recent decision in *Buck v. Davis,* 137 S.Ct. 759 (2017), constitute extraordinary circumstances allowing this Court to address the merits of his claims under Rule 60(b)(6).

A. Rule 60(b)

Rule 60(b)(6) provides for relief from a judgment for "any . . . reason that justifies relief." This Court can consider the motion if it "attacks, not the substance of the federal court's resolution [of Raby's habeas corpus petition] on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Relief under Rule 60(b) is available only if the case presents "extraordinary circumstances." *Id.* at 536.

Generally speaking, a "change in decisional law after entry of judgment does not constitute extraordinary circumstances" and is not alone a ground for relief from a final judgment under Rule 60(b)(6). *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (internal quotation marks and citation omitted). *Adams* specifically rejected the argument that *Martinez*, standing alone, constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6). *Id.* at 320. Raby argues that his case presents extraordinary circumstances because *Buck*, in his reading, allows relief in any instance where there is "risk of injustice to the parties", or "risk of undermining the public's

confidence in the judicial process." Motion at 16. Raby's reading of *Buck* is so broad that any case in which any petitioner could plausibly argue that he has a colorable claim that is procedurally barred would merit review under Rule 60(b)(6) because failure to address such a claim carries a "risk of injustice to the parties," or a "risk of undermining the public's confidence in the judicial process." This broad reading would eviscerate the procedural default doctrine.

The only significant similarity between Raby's case and *Buck* is that the alleged ineffective assistance of counsel in the two cases involves calling the same expert witness, Dr. Walter Quijano. The critical, and dispositive, difference, however, is that Dr. Quijano gave Buck's jury the impression that Buck was more likely to commit additional crimes in the future because he is African-American. *See Buck*, 137 S.Ct. at 767. Raby is white, and Dr. Quijano's testimony at Raby's trial did not in any way inject a racial component into the sentencing decision.

While Raby now argues that *Buck* allows relief under Rule 60(b) in a broad range of cases, the *Buck* Court was very clear that the extraordinary circumstance in that case was the insertion of race as a factor in the sentencing decision.

> The District Court's conclusion that Buck "ha[d] failed to demonstrate that this case presents extraordinary circumstances" rested in large measure on its determination that "the introduction of any mention of race—though "ill[ ]advised at best and repugnant at worst played only a "de minimis " role in the proceeding. 2014 WL 11310152, at *5. The Fifth Circuit, for its part, failed even to mention the racial evidence in concluding that Buck's claim was "at least unremarkable as far as [ineffective assistance] claims go. 623 Fed.Appx., at 673. But our holding on prejudice makes clear that Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. As petitioner correctly puts it, "[i]t stretches credulity to

> characterize Mr. Buck's [ineffective assistance of counsel] claim as run-of-the-mill." Brief for Petitioner 57.
>
> This departure from basic principle was exacerbated because it concerned race. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 576 U.S. ——, ——, 135 S.Ct. 2187, 2208, 192 L.Ed.2d 323 (2015). It thus injures not just the defendant, but "the law as an institution, ... the community at large, and ... the democratic ideal reflected in the processes of our courts."

Buck v. Davis, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017).

In contrast to the injection of race in *Buck*, Raby raises the kind of ineffective assistance of counsel claim that is raised in many capital cases – that his trial counsel failed to investigate and develop mitigating evidence, and called a mental health expert who said something harmful to the defense. This type of claim is common, not extraordinary. As the Fifth Circuit has made clear, the change in decisional law signified by *Martinez* and *Trevino* does not, without more, constitute extraordinary circumstances. Therefore, Raby is not entitled to relief under Rule 60(b)(6).

B. Certificate of Appealability

Raby has not requested a certificate of appealability ("COA"), but the Court may nevertheless determine whether he is entitled to this relief in light of the foregoing ruling. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied

such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997). A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "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." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: 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.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

This Court concludes that jurists of reason would not find it debatable whether this court is correct in its determination that Raby fails to demonstrate extraordinary circumstances. Therefore, Raby is not entitled to a COA.

Order

For the foregoing reasons, IT IS ORDERED THAT Raby's Motion For Relief From Judgment is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED.

SIGNED at Houston, Texas, on April 5, 2018.

LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-70018

CHARLES D. RABY,

Petitioner–Appellant,

versus

LORIE DAVIS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, CLEMENT, and DUNCAN, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Charles Raby, a death row inmate, seeks a certificate of appealability ("COA") to challenge the denial of his Federal Rule of Civil Procedure 60(b)(6) motion. Finding no extraordinary circumstances warranting Rule 60(b)(6) relief, we decline the request.

I.

In 1994, Raby was convicted and sentenced to death for capital murder. The Texas Court of Criminal Appeals upheld his conviction on direct appeal and denied his application for state habeas corpus relief. Raby filed a federal habeas petition, claiming, *inter alia*, that his attorney rendered ineffective assistance of counsel ("IAC") at the punishment phase by failing to present mitigating evidence and by calling the notorious state expert Walter Quijano, who prejudicially labeled Raby "a psychopath." The district court denied the petition, given Raby's failure to exhaust state remedies. This court rejected Raby's request for a COA because his claims were both procedurally foreclosed and without merit. *Raby v. Dretke*, 78 F. App'x 324, 328 (5th Cir. 2003).

After exhausting further attempts at state habeas review, Raby filed a Rule 60(b)(6) motion for relief from judgment. The district court denied the motion, holding that there were no extraordinary circumstances justifying relief. Raby now seeks a COA to challenge that ruling.[1]

II.

"Before an appeal may be entertained," a habeas petitioner "must first seek and obtain a COA" as a "jurisdictional prerequisite." *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). To receive a COA, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He satisfies that standard by "demonstrat[ing] 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." *Hernandez v. Johnson*, 213 F.3d 243, 248

[1] The state counters that the Rule 60(b)(6) motion is untimely under Rule 60(c) and that his habeas petition is time-barred under 28 U.S.C. § 2244(d)(1)(A). We do not address those arguments because we rely on other grounds.

(5th Cir. 2000) (citation omitted). The court limits its examination at the COA stage "to a threshold inquiry into the underlying merit of [the] claims."[2]

Raby contends that the district court erroneously denied his Rule 60(b)(6) motion to reopen its judgment as to whether his IAC claims had been procedurally foreclosed. We have jurisdiction to consider that ruling because the motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings."[3] Because we review a Rule 60(b)(6) ruling for abuse of discretion, "the COA question is . . . whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck*, 137 S. Ct. at 777. Though a court may reopen judgment for "any other reason that justifies relief," FED. R. CIV. P. 60(b)(6), it will do so only on a showing of "extraordinary circumstances," which "rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535. Raby claims his circumstances are extraordinary for two reasons—neither of which is convincing.

A.

Raby asserts that he is entitled to Rule 60(b)(6) relief as a result of an intervening change in decisional law since the district court's previous ruling. In 2002, the district court determined that Raby's IAC claims were procedurally foreclosed under *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991), because he had failed to raise them in the state habeas proceedings. But the Court has since recognized a "narrow exception" to *Coleman*. *Diaz v. Stephens*, 731 F.3d 370, 375 (5th Cir. 2013) (citation omitted). As established in *Martinez*

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[2] *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (citing *Buck v. Davis*, 137 S. Ct. 759, 773 (2017)).

[3] *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). *See also Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (finding jurisdiction to consider a Rule 60(b) motion that "attacks a procedural ruling which precluded a merits determination").

v. Ryan, 566 U.S. 1, 14 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 428 (2013), "a claim of ineffective assistance of trial counsel defaulted in a Texas post-conviction proceeding may be reviewed in federal court if state habeas counsel was constitutionally ineffective in failing to raise it, and the claim has 'some merit.'" *Buck*, 137 S. Ct. at 779–80 (citations omitted). Raby maintains that the exception applies here and that such a "significant change" in decisional law constitutes an "extraordinary circumstance" under Rule 60(b)(6).

Even if Raby's claims were not procedurally defaulted under *Martinez* and *Trevino*, he is ineligible for Rule 60(b)(6) relief. A "change in decisional law after entry of judgment does not constitute [extraordinary] circumstances and is not alone grounds for relief from a final judgment."[4] Hence, the district court correctly determined that the change in decisional law effected by *Martinez* and *Trevino*, without more, did not amount to an extraordinary circumstance.

B.

Raby posits that the facts of his IAC claims are extraordinary. Not only did his trial attorney allegedly fail to present mitigating evidence, but he also called Quijano, who described Raby as "a psychopath" prone to future violence. Raby invokes *Buck* as an analogous case. There, the Court considered an IAC claim involving defense counsel's decision to present Quijano, who testified that the defendant's race contributed to his future dangerousness. *Id.* at 769. Noting that the "law punishes people for what they do, not who they are," the Court held that such prejudicial testimony was an extraordinary circumstance in that it discriminated against the defendant's race—an "immutable

[4] *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (citation omitted) (quoting *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990)). *See also Haynes v. Davis*, 733 F. App'x 766, 768 (5th Cir. 2018); *Diaz*, 731 F.3d at 375–76.

characteristic." *Id.* at 778. Raby avers that, much like race, a personality disorder is an "immutable characteristic." He thus maintains that Quijano's statements calling him a "psychopath" constitute an extraordinary circumstance.

Buck is inapplicable. Unlike the instant case, the claim in *Buck* entailed racial discrimination, "odious in all aspects" and "especially pernicious in the administration of justice." *Buck*, 137 S. Ct. at 778 (citation omitted). Such discrimination "injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Id.* (citation omitted). Additionally, the Texas Attorney General in *Buck* took the "remarkable step[]" of admitting error in similar cases, but not in Buck's. *Id.* at 778–79. No such extraordinary circumstances exist here. Raby neither alleges racial discrimination nor demonstrates how his claims "give rise to the sort of pernicious injury that affects communities at large."[5]

Raby yet maintains that the district court erred in failing to consider the equitable factors relevant to a Rule 60(b) analysis:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular case, the interest

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[5] *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1172 (11th Cir.), *cert. denied*, 138 S. Ct. 217 (2017). *See also Miller v. Mays*, 879 F.3d 691, 702 (6th Cir. 2018) (noting that *Buck* "focused on the injection of race into the sentencing determination"), *petition for cert. filed* (Aug. 13, 2018) (No. 18-5597); *Davis v. Kelley*, 855 F.3d 833, 836 (8th Cir. 2017) (per curiam) (same).

> in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981) (citation omitted). This court has never explicitly held that the *Seven Elves* factors bear on the "extraordinary circumstances" inquiry under Rule 60(b)(6). *Haynes*, 733 F. App'x at 769. Where we have consulted those factors, however, we have cautioned that "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting." *Id.* (quoting *Diaz*, 731 F.3d at 376 n.1).

Raby insists that equity weighs in his favor because no court has considered the merits of his defaulted IAC claims. Not so: This court found his claims to lack merit when it rejected his request for a COA in 2003.[6] Finally, Raby posits that his diligence in attempting to raise those claims constitutes an extraordinary circumstance. But persistence alone does not warrant relief from judgment.[7]

Because there are no extraordinary circumstances meriting Rule 60(b)(6) relief, Raby's application for a COA is DENIED.

Certified as a true copy and issued as the mandate on Oct 31, 2018

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

[6] *See Raby*, 78 F. App'x at 327–29 ("[E]ven assuming that the procedural default could be excused, we should not grant a COA based on the substance of the [IAC] claim . . . .").

[7] *See Diaz*, 731 F.3d at 377 (denying Rule 60(b)(6) motion despite diligence in presenting IAC claims).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

October 31, 2018

Mr. David J. Bradley
Southern District of Texas, Houston
United States District Court
515 Rusk Street
Room 5300
Houston, TX 77002

No. 18-70018 Charles Raby v. Lorie Davis, Director
USDC No. 4:02-CV-349

Dear Mr. Bradley,

Enclosed is a certified copy of an opinion-order entered on October 31, 2018. We have closed the case in this court.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Enclosure(s)

cc:
Mr. Jefferson David Clendenin
Ms. Sarah Mary Frazier
Mr. Kevin Dane Mohr
Ms. Tracey Maria Robertson
Ms. Fredericka Searle Sargent

Appendix G

Chronological list of Rule 60(b) cases in which petitioners invoked *Martinez v. Ryan*, 566 U.S. 1 (2012)

2012

Cook v. Ryan, 688 F.3d 598 (9th Cir. 2012);

Lopez v. Ryan, No. CV-98-72-PHX- SMM, 2012 WL 1520172 (D. Ariz. Apr. 30, 2012);

Leavitt v. Arave, No. 1:93- CV-0024-BLW, 2012 WL 1995091 (D. Idaho June 1, 2012);

Hines v. Hobbs, No. 5:12CV00321 JLH/HDY, 2012 WL 5416920 (E.D. Ark. Oct. 24, 2012);

Post v. Bradshaw, No. 1:97 CV 1640, 2012 WL 5830468 (N.D. Ohio Nov. 15, 2012).

2013

Diaz v. Stephens, 731 F.3d 370 (5th Cir. 2013);

Williams v. Thaler, 524 F. App'x. 960 (5th Cir. 2013);

Jones v. Ryan, 733 F.3d 825 (9th Cir. 2013);

Foley v. White, No. CIV.A. 6:00-552-DCR, 2013 WL 375185 (E.D. Ky. Jan. 30, 2013);

Howell v. Crews, No. 4:04-CV-299/MCR, 2013 WL 672583 (N.D. Fla. Feb. 23, 2013);

McGuire v. Warden, Mansfield Corr. Inst., No. 3:99-CV-140, 2013 WL 1131423 (S.D. Ohio Mar. 18, 2013);

Henness v. Bagley, No. 2:01-CV-043, 2013 WL 4017643 (S.D. Ohio Aug. 6, 2013);

Dubose v. Hetzel, No. 2:09-CV-1392- KOB-JEO, 2013 WL 4482413 (N.D. Ala. Aug. 20, 2013);

Schad v. Ryan, No. CV-97- 02577-PHX-ROS, 2013 WL 5276407 (D. Ariz. Sept. 19, 2013);

West v. Carpenter, No. 3:01-CV-91, 2013 WL 5350627 (E.D. Tenn. Sept. 23, 2013), *aff'd*, 790 F.3d 693 (6th Cir. 2015).

2014

In re Paredes, 587 F. App'x. 805 (5th Cir. 2014);

Strouth v. Carpenter, No. 3:00-CV-00836, 2014 WL 1394458 (M.D. Tenn. Apr. 9, 2014);

Wood v. Ryan, No. CV-98- 0053-TUC-JGZ, 2014 WL 3573622 (D. Ariz. July 20, 2014);

Moreland v. Robinson, No. 3:05- CV-334, 2014 WL 4351522 (S.D. Ohio Sept. 2, 2014);

Ringo v. Roper, No.4:03-CV-08002-BCW, 2014 WL 4377962 (W.D. Mo. Sept. 3, 2014);

Taylor v. Wetzel, No. 4:CV-04-553, 2014 WL 5242076 (M.D. Pa. Oct. 15, 2014).

2015

Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261 (11th Cir. 2015);

Sheppard v. Robinson, 807 F.3d 815 (6th Cir. 2015);

Styers v. Ryan, 632 F. App'x. 329 (9th Cir. 2015);

Wright v. Warden, Riverbend Maximum Sec. Inst., 793 F.3d 670 (6th Cir. 2015);

Pruett v. Stephens, 608 F. App'x. 182 (5th Cir. 2015);

Abdur'Rahman v. Carpenter, 805 F.3d 710 (6th Cir. 2015);

Jones v. Bradshaw, No. 1:03 CV 1192, 2015 WL 10733080 (N.D. Ohio 2015);

Jones v. Kelly, No. 4:99-CV-4134, 2015 WL 5299450 (W.D. Ark. 2015);

Montiel v. Chappell, No. 1:96-CV-05412 LJO, 2015 WL 4730127 (E.D. Cali. 2015);

Davis v. Bobby, No. 3:14-CR-250, 2015 WL 5734485 (S.D. Ohio 2015);

Henderson v. Collins, No. 1:94-CV-106, 2015 WL 519247 (S.D. Ohio Feb. 9, 2015);

Gates v. Stephens, No. CV 09-2702, 2015 WL 12928671 (S.D. Tex. July 16, 2015), *aff'd sub nom.*, *Gates v. Davis*, 660 F. App'x 270 (5th Cir. 2016);

Barnett v. Roper, No. 4:03CV00614 ERW, 2015 WL 13662176 (E.D. Mo. Aug. 18, 2015), *aff'd*, 904 F.3d 623 (8th Cir. 2018);

Gribble v. Folino, No. CV 09-2091, 2015 WL 13568112 (E.D. Pa. Oct. 2, 2015), *objections sustained in part and overruled in part*, No. CV 09-2091, 2017 WL 3727107 (E.D. Pa. Aug. 30, 2017).

2016

Franklin v. Jenkins, 839 F.3d 465 (6th Cir. 2016);

Landrum v. Anderson, 813 F.3d 330 (6th Cir. 2016);

Moses v. Joyner, 815 F.3d 16 (4th Cir. 2016);

Hutton v. Mitchell, No. 1:05 CV 2391, 2016 WL 3445397 (N.D. Ohio 2016);

Martinez v. Ryan, No. CV-05-01561-PHX-ROS, 2016 WL 1268344 (D. Ariz. Mar. 31, 2016);

Teleguz v. Zook, No. 7:10CV00254, 2016 WL 4540884 (W.D. Va. Aug. 31, 2016);

2017

Buck v. Davis, 137 S.Ct. 759 (2017);

Williams v. Kelley, 854 F.3d 1002 (8th Cir. 2017);

Preyor v. Davis, 704 F. App'x 331 (5th Cir. 2017);

Moore v. Mitchell, 848 F.3d 774 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 650, 199 L. Ed. 2d 546 (2018);

Clark v. Davis, 850 F.3d 770 (5th Cir.), *cert. denied*, 138 S. Ct. 358, 199 L. Ed. 2d 266 (2017);

Davis v. Kelley, 855 F.3d 833 (8th Cir. 2017);

In re Edwards, 865 F.3d 197 (5th Cir.), *cert. denied sub nom.*, *Edwards v. Davis*, 137 S. Ct. 909, 197 L. Ed. 2d 83 (2017);

Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158 (11th Cir.), *cert. denied sub nom.*, *Lambrix v. Jones*, 138 S. Ct. 217, 199 L. Ed. 2d 142 (2017);

Lopez v. Davis, No. 1:15-CV-144, 2017 WL 6761816 (S.D. Tex. 2017);

Balentine v. Davis, No. 2:03-CV-39-J-BB, 2017 WL 9470540 (N.D. Tex. Sept. 29, 2017), *report and recommendation adopted*, No. 2:03-CV-039-D, 2018 WL 2298987 (N.D. Tex. May 21, 2018).

2018

Beatty v. Davis, No. 17-70024, 2018 WL 5920498 (5th Cir. Nov. 12, 2018);

Haynes v. Davis, 733 F. App'x 766 (5th Cir. 2018), *cert. denied*, No. 18-6471, 2019 WL 177624 (U.S. Jan. 14, 2019);

Miller v. Mays, 879 F.3d 691 (6th Cir.), *cert. denied*, 139 S. Ct. 567, 202 L. Ed. 2d 406 (2018);

Raby v. Davis, 907 F.3d 880 (5th Cir. 2018);

Runnels v. Davis, 746 F. App'x. 308 (5th Cir. 2018);

Zack v. Sec'y, Fla. Dep't of Corr., 721 F. App'x 918 (11th Cir.), *cert. denied sub nom.*, *Zack v. Jones*, 139 S. Ct. 322, 202 L. Ed. 2d 220 (2018);

Weaver v. Bowersox, No. 4:96-CV-2220 CAS, 2018 WL 1083576 (E.D. Mo. 2018);

Rayford v. Davis, No. 3:06-CV-978-B, 2018 WL 620451 (N.D. Tex. Jan. 29, 2018);

Crutsinger v. Davis, No. 4:07-CV-00703-Y, 2018 WL 3743881 (N.D. Tex. Aug. 7, 2018);

Cox v. Horn, No. CV 00-5188, 2018 WL 4094963 (E.D. Pa. Aug. 28, 2018);

Zagorski v. Mays, No. 3:99-CV-01193, 2018 WL 4352705 (M.D. Tenn. Sept. 12, 2018), *aff'd*, 907 F.3d 901 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 450, 202 L. Ed. 2d 343 (2018);

Segundo v. Davis, No. 4:10-CV-970-Y, 2018 WL 4623106 (N.D. Tex. Sept. 26, 2018), *aff'd sub nom.*, *In re Segundo*, No. 18-11265, 2018 WL 6595159 (5th Cir. Dec. 13, 2018).

2019

Jennings v. Davis, No. 19-70005, 2019 WL 384943 (5th Cir. 2019);

Menzies v. Crowther, No. 03-CV-0902-CVE-FHM, 2019 WL 181359 (D. Utah Jan. 11, 2019).

Appendix H

CERTIFICATES OF APPEALABILITY IN THE FOURTH, FIFTH, AND ELEVENTH CIRCUITS

Undersigned counsel updated the research undertaken by counsel for petitioner Duane Buck (Petition for Writ of Certiorari, *Buck v. Stephens*, No. 15-8049, 2016 WL 3162257, at *21 (Feb. 4, 2016)), who reviewed electronically available opinions and orders from the United States Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits, published and unpublished, dated after January 1, 2011, in which a petitioner sought relief from his or her death sentence under 28 U.S.C. § 2254 and a motion for a Certificate of Appealability ("COA") was decided within the circuit. Using the above criteria, the tables below collect electronically available opinions and orders from the Fourth, Fifth, and Eleventh Circuits through February 2019.

Similar to counsel in *Buck*, undersigned counsel used the Westlaw database, an online legal research service, to input search terms and retrieve the relevant cases. The first set of search terms were as follows: (1) (capital /s habeas) & 2254 & "certificate #of appealability"; (2) capital /25 2254 & "certificate #of appealability"; (3) (death /2 penalty) & 2254 & "certificate #of appealability"; (4) (capital / s habeas) & 2254 /50 "COA"; (5) (capital /25 2254) /50 "COA"; and (6) (death /2 penalty) & 2254 /50 "COA." These searches were narrowed to the Fourth, Fifth, and Eleventh Circuits during the relevant time period.

Undersigned counsel also ran a search within a collection of cases tagged by Westlaw as concerning Certificates of Appealability (Westlaw assigns these cases with an internal number - 197k818). Within this section, undersigned counsel ran a broad search for the terms "capital & 2254" and "death & 2254" in the Fourth, Fifth, and Eleventh Circuit Courts during the relevant time period.

Undersigned counsel reviewed the cases to ensure they fit the criteria identified above (*i.e.*, a capital case under 28 U.S.C. § 2254 in which the petitioner was under a death sentence and a motion for a COA was decided) and excluded false hits from consideration.

In the below tables, any case in which either the district court or the court of appeals granted a COA on any claim is listed as "Granted." If no court granted a COA on any claim, the case is listed as "Denied." Where possible, undersigned counsel have attempted to provide detail regarding which court within the circuit (circuit or district) granted a COA. When a petitioner sought a COA on more than one occasion and two separate opinions were issued by the court of appeals during the relevant time period, those cases are listed separately.

The review of undersigned counsel was limited to the electronically available opinions issued by the court of appeals since September 2015; the district court rulings were determined based on the procedural history in the court of appeals' opinions.

Based on this review, a COA was denied on all claims in 60.2% (124 out of 206) of the cases arising out of the Fifth Circuit, while a COA was only denied in 9.5% (14 out of 147) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively.

Fourth Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Atkins, Randy	4th	*Atkins v. Lassiter*, 502 F. App'x. 244 (4th Cir. 2012)	Granted, Circuit
Barnes, William	4th	*Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014)	Granted, District
Elmore, Edward	4th	*Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011), as amended (Dec. 12, 2012)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Fowler, Elrico	4th	*Fowler v. Joyner*, 753 F.3d 446 (4th Cir. 2014)	Granted, Circuit
Gray, Ricky	4th	*Gray v. Zook*, 806 F.3d 783 (4th Cir. 2015)	Granted, District
Gray, Ricky	4th	*Gray v. Pearson*, 526 F. App'x 331 (4th Cir. 2013)	Granted, District
Hurst, Jason	4th	*Hurst v. Joyner*, 757 F.3d 389 (4th Cir. 2014)	Granted, District
Johnson, Shermaine	4th	*Johnson v. Ponton*, 780 F.3d 219 (4th Cir. 2015)	Granted, District
Porter, Thomas	4th	*Porter v. Zook*, 803 F.3d 694 (4th Cir. 2015)	Granted, District
Prieto, Alfredo	4th	*Prieto v. Zook*, 791 F.3d 465 (4th Cir. 2015	Granted, Circuit
Richardson, Timothy	4th	*Richardson v. Branker*, 668 F.3d 128 (4th Cir. 2012)	Granted, District
Teleguz, Ivan	4th	*Teleguz v. Pearson*, 689 F.3d 322 (4th Cir. 2012)	Granted, Circuit
Warren, Lesley Eugene	4th	*Warren v. Thomas*, 894 F.3d 609 (4th Cir. 2018)	Granted
MacDonald, Jeffrey R.	4th	*United States v. MacDonald*, 911 F.3d 723 (4th Cir. 2018)	Granted
Moses, Errol Duke	4th	*Moses v. Joyner*, 815 F.3d 163 (4th Cir. 2016)	Granted, Circuit
Porter, Thomas Alexander	4th	*Porter v. Zook*, 803 F.3d 694 (4th Cir. 2015)	Granted, District
Juniper, Anthony Bernard	4th	*Juniper v. Zook*, 876 F.3d 551 (4th Cir. 2017)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Porter, Thomas Alexander	4th	*Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018)	Granted, Circuit
Lawlor, Mark Eric	4th	*Lawlor v. Zook*, 909 F.3d 614 (4th Cir. 2018)	Granted
		Total Granted:	**19 (100%)**
		Total Denied:	**0 (0%)**

Fifth Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adams, Beunka	5th	*Adams v. Thaler*, 421 F. App'x 322 (5th Cir. 2011)	Granted, District
Allen, Guy Len	5th	*Allen v. Stephens*, 619 F. App'x 280 (5th Cir. 2015)	Denied
Allen, Kerry Dimart	5th	*Allen v. Stephens*, 805 F.3d 617 (5th Cir. 2015)	Denied
Ayestas, Carlos Manuel	5th	*Ayestas v. Thaler*, 462 F. App'x 474 (5th Cir. 2012)	Denied
Basso, Suzanne Margaret	5th	*Basso v. Stephens*, 555 F. App'x 335 (5th Cir. 2014)	Denied
Battaglia, John David	5th	*Battaglia v. Stephens*, 621 F. App'x 781 (5th Cir. 2015)	Denied
Beatty, Tracy Lane	5th	*Beatty v. Stephens*, 759 F.3d 455 (5th Cir. 2014)	Denied
Bigby, James Eugene	5th	*Bigby v. Stephens*, 595 F. App'x 350 (5th Cir. 2014)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Blue, Carl Henry	5th	*Blue v. Thaler*, 665 F.3d 647, 670 (5th Cir. 2011)	Denied
Bower, Lester Leroy	5th	*In re Bower*, 612 F. App'x 748 (5th Cir. 2015)	Denied
Brawner, Jan Michael	5th	*Brawner v. Epps*, 439 F. App'x 396 (5th Cir. 2011)	Denied
Brown, Arthur	5th	*Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012)	Denied
Burton, Arthur Lee	5th	*Burton v. Stephens*, 543 F. App'x 451 (5th Cir. 2013)	Denied
Butler, Steven Anthony	5th	*Butler v. Stephens*, No. 09-70003, 2015 WL 5235206, at *4 (5th Cir. Sept. 9, 2015)	Granted, Circuit
Byrom, Michelle	5th	*Byrom v. Epps*, 518 F. App'x 243 (5th Cir. 2013)	Granted, District
Canales, Anibal	5th	*Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014)	Granted, District
Cantu, Ivan Abner	5th	*Cantu v. Thaler*, 632 F.3d 157 (5th Cir. 2011)	Granted, District
Carter, Tilon Lashon	5th	*Carter v. Stephens*, 805 F.3d 552 (5th Cir. 2015)	Denied
Charles, Derrick Dewayne	5th	*Charles v. Stephens*, 736 F.3d 380, 383 (5th Cir. 2013)	Granted, District
Chester, Elroy	5th	*Chester v. Thaler*, 666 F.3d 340 (5th Cir. 2011)	Granted, District
Clark, Troy	5th	*Clark v. Thaler*, 673 F.3d 410 (5th Cir. 2012)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Cobb, Richard Aaron	5th	*Cobb v. Thaler*, 682 F.3d 364 (5th Cir. 2012)	Granted, District
Coleman, Lisa Ann	5th	*In re Coleman*, 768 F.3d 367 (5th Cir. 2014)	Denied
Coleman, Lisa Ann	5th	*Coleman v. Thaler*, 716 F.3d 895 (5th Cir. 2013)	Denied
Craig, Dale Dwayne	5th	*Craig v. Cain*, No. 12-30035, 2013 WL 69128, at *1 (5th Cir. Jan. 4, 2013)	Denied
Crawford, Charles Ray	5th	*Crawford v. Epps*, 531 F. App'x 511 (5th Cir. 2013)	Granted, District
Crutsinger, Billy Jack	5th	*Crutsinger v. Stephens*, 576 F. App'x 422 (5th Cir. 2014)	Denied
Doyle, Anthony Dewayne	5th	*Doyle v. Stephens*, 535 F. App'x 391 (5th Cir. 2013)	Denied
Druery, Marcus Ray Tyrone	5th	*Druery v. Thaler*, 647 F.3d 535 (5th Cir. 2011)	Denied
Eldridge, Gerald Cornelius	5th	*Eldridge v. Stephens*, 608 F. App'x 289 (5th Cir. 2015)	Granted, Circuit
Escamilla, Licho	5th	*Escamilla v. Stephens*, 749 F.3d 380 (5th Cir. 2014)	Granted, Circuit
Feldman, Douglas Alan	5th	*Feldman v. Thaler*, 695 F.3d 372 (5th Cir. 2012)	Denied
Freeman, James Garrett	5th	*Freeman v. Stephens*, 614 F. App'x 180 (5th Cir. 2015)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Garcia, Humberto Leal	5th	*Garcia v. Thaler*, 440 F. App'x 232 (5th Cir. 2011)	Denied
Garcia, Gustavo Julian	5th	*Garcia v. Stephens*, 793 F.3d 513 (5th Cir. 2015)	Denied
Garcia, Juan Martin	5th	*Garcia v. Stephens*, 757 F.3d 220 (5th Cir. 2014)	Denied
Garza, Joe Franco	5th	*Garza v. Stephens*, 575 F. App'x 404 (5th Cir. 2014)	Denied
Garza, Manuel	5th	*Garza v. Stephens*, 738 F.3d 669 (5th Cir. 2013)	Denied
Garza, Robert Gene	5th	*Garza v. Thaler*, 487 F. App'x 907 (5th Cir. 2012)	Denied
Gates, Bill Douglas	5th	*Gates v. Thaler*, 476 F. App'x 336 (5th Cir. 2012)	Denied
Gonzales, Ramiro	5th	*Gonzales v. Stephens*, 606 F. App'x 767 (5th Cir. 2015)	Denied
Guevara, Gilmar Alexander	5th	*Guevara v. Stephens*, 577 F. App'x 364 (5th Cir. 2014)	Denied
Gutierrez, Ruben	5th	*Gutierrez v. Stephens*, 590 F. App'x 371 (5th Cir. 2014)	Denied
Hall, Justen	5th	*Hall v. Thaler*, 504 F. App'x 269 (5th Cir. 2012)	Denied
Harris, Robert Wayne	5th	*Harris v. Thaler*, 464 F. App'x 301 (5th Cir. 2012)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Haynes, Anthony Cardell	5th	*Haynes v. Thaler*, 438 F. App'x 324 (5th Cir. 2011)	Granted, Circuit
Hearn, Yokamon Laneal	5th	*Hearn v. Thaler*, 669 F.3d 265 (5th Cir. 2012)	Denied
Henderson, James Lee	5th	*Henderson v. Stephens*, 791 F.3d 567 (5th Cir. 2015)	Granted, District
Hernandez, Ramiro	5th	*Hernandez v. Stephens*, 537 F. App'x 531 (5th Cir. 2013)	Granted, District
Hines, Bobby Lee	5th	*Hines v. Thaler*, 456 F. App'x 357 (5th Cir. 2011)	Denied
Hoffman, Jessie	5th	*Hoffman v. Cain*, 752 F.3d 430 (5th Cir. 2014)	Granted, District
Holiday, Raphael Deon	5th	*Holiday v. Stephens*, 587 F. App'x 767 (5th Cir. 2014)	Denied
Ibarra, Ramiro Rubi	5th	*Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. 2012)	Denied
Ibarra, Ramiro Rubi	5th	*Ibarra v. Stephens*, 723 F.3d 599 (5th Cir. 2013)	Granted, Circuit
Jackson, Henry Curtis	5th	*Jackson v. Epps*, 447 F. App'x 535 (5th Cir. 2011)	Granted, District
Jasper, Ray	5th	*In re Jasper*, 559 F. App'x 366 (5th Cir. 2014)	Granted, Circuit
Jasper, Ray	5th	*Jasper v. Thaler*, 466 F. App'x 429 (5th Cir. 2012)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Jennings, Robert Mitchell	5th	*Jennings v. Stephens*, 537 F. App'x 326 (5th Cir. 2013)	Denied
Johnson, Dexter	5th	*Johnson v. Stephens*, 617 F. App'x 293 (5th Cir. 2015)	Granted, District
Jones, Shelton Denoria	5th	*Jones v. Stephens*, 612 F. App'x 723 (5th Cir. 2015)	Granted, District
Jones, Shelton Denoria	5th	*Jones v. Stephens*, 541 F. App'x 399 (5th Cir. 2013)	Denied
Jordan, Richard	5th	*Jordan v. Epps*, 756 F.3d 395 (5th Cir. 2014)	Denied
Ladd, Robert Charles	5th	*Ladd v. Stephens*, 748 F.3d 637 (5th Cir. 2014)	Granted, District
Lewis, Rickey Lynn	5th	*Lewis v. Thaler*, 701 F.3d 783 (5th Cir. 2012)	Granted, District
Loden, Thomas Edwin	5th	*Loden v. McCarty*, 778 F.3d 484 (5th Cir. 2015)	Granted, District
Manning, Willie Jerome	5th	*Manning v. Epps*, 688 F.3d 177 (5th Cir. 2012)	Granted, District
Masterson, Richard Allen	5th	*Masterson v. Stephens*, 596 F. App'x 282= (5th Cir. 2015)	Denied
Matamoros, John Reyes	5th	*Matamoros v. Stephens*, 539 F. App'x 487 (5th Cir. 2013)	Granted, Circuit
Mays, Randall Wayne	5th	*Mays v. Stephens*, 757 F.3d 211 (5th Cir. 2014)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
McCarthy, Kimberly Lagayle	5th	*McCarthy v. Thaler*, 482 F. App'x 898 (5th Cir. 2012)	Denied
McCoskey, Jamie Bruce	5th	*McCoskey v. Thaler*, 478 F. App'x 143 (5th Cir. 2012)	Granted, District
McGowan, Roger Wayne	5th	*McGowen v. Thaler*, 675 F.3d 482 (5th Cir. 2012)	Denied
Mendoza, Moises Sandoval	5th	*Mendoza v. Stephens*, 783 F.3d 203 (5th Cir. 2015)	Granted, District
Mitchell, William Gerald	5th	*Mitchell v. Epps*, 641 F.3d 134 (5th Cir. 2011)	Denied
Newbury, Donald Keith	5th	*Newbury v. Stephens*, 756 F.3d 850 (5th Cir. 2014)	Denied
Newbury, Donald Keith	5th	*Newbury v. Thaler*, 437 F. App'x 290 (5th Cir. 2011)	Denied
Osborne, Emerson	5th	*Osborne v. King*, 617 F. App'x 308 (5th Cir.)	Granted, District
Parr, Carroll	5th	*Parr v. Thaler*, 481 F. App'x 872 (5th Cir. 2012)	Denied
Panetti, Scott Louis	5th	*Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013)	Granted, District
Paredes, Miguel	5th	*In re Paredes*, 587 F. App'x 805 (5th Cir. 2014)	Denied
Perez, Louis Castro	5th	*Perez v. Stephens*, 745 F.3d 174 (5th Cir. 2014)	Denied
Pruett, Robert Lynn	5th	*Pruett v. Thaler*, 455 F. App'x 478 (5th Cir. 2011)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Puckett, Larry Matthew	5th	*Puckett v. Epps*, 641 F.3d 657 (5th Cir. 2011)	Granted, Circuit
Quintanilla, John Manuel	5th	*Quintanilla v. Thaler*, 443 F. App'x 919 (5th Cir. 2011)	Denied
Rayford, William Earl	5th	*Rayford v. Stephens*, 622 F. App'x 315 (5th Cir. 2015)	Denied
Reed, Rodney	5th	*Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014)	Denied
Ripkowski, Britt Allen	5th	*Ripkowski v. Thaler*, 438 F. App'x 296 (5th Cir. 2011)	Granted, District
Rivas, George	5th	*Rivas v. Thaler*, 432 F. App'x 395 (5th Cir. 2011)	Denied
Roberson, Robert Leslie	5th	*Roberson v. Stephens*, 614 F. App'x 124 (5th Cir. 2015)	Granted, Circuit
Roberts, Donnie Lee	5th	*Roberts v. Thaler*, 681 F.3d 597 (5th Cir. 2012)	Granted, District
Ross, Vaughn	5th	*Ross v. Thaler*, 511 F. App'x 293 (5th Cir. 2013)	Denied
Ruiz, Rolando	5th	*Ruiz v. Stephens*, 728 F.3d 416 (5th Cir. 2013)	Denied
Russeau, Gregory	5th	*Russeau v. Stephens*, 559 F. App'x 342 (5th Cir. 2014)	Granted, District
Sells, Tommy Lynn	5th	*Sells v. Stephens*, 536 F. App'x 483 (5th Cir. 2013)	Denied
Simmons, Donald Ray	5th	*Simmons v. Thaler*, 440 F. App'x 237 (5th Cir. 2011)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Simmons, Gary Carl	5th	*Simmons v. Epps*, 654 F.3d 526 (5th Cir. 2011)	Granted, Circuit
Simon, Robert	5th	*Simon v. Epps*, 463 F. App'x 339 (5th Cir. 2012)	Granted, District
Sprouse, Kent William	5th	*Sprouse v. Stephens*, 748 F.3d 609 (5th Cir. 2014)	Granted, District
Storey, William	5th	*Storey v. Stephens*, 606 F. App'x 192 (5th Cir. 2015)	Denied
Swain, Mario	5th	*Swain v. Thaler*, 466 F. App'x 393 (5th Cir. 2012)	Granted, District
Tabler, Richard Lee	5th	*Tabler v. Stephens*, 588 F. App'x 297 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	*Tamayo v. Stephens*, 740 F.3d 991 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	*Tamayo v. Stephens*, 740 F.3d 986 (5th Cir. 2014)	Granted, District
Tercero, Bernardo Aban	5th	*Tercero v. Stephens*, 738 F.3d 141 (5th Cir. 2013)	Denied
Threadgill, Ronnie Paul	5th	*In re Threadgill*, 522 F. App'x 236 (5th Cir. 2013)	Denied
Threadgill, Ronnie Paul	5th	*Threadgill v. Thaler*, 425 F. App'x 298 (5th Cir. 2011)	Granted, District
Trevino, Carlos	5th	*Trevino v. Thaler*, 449 F. App'x 415 (5th Cir. 2011)	Granted, District
Trottie, Willie Tyrone	5th	*Trottie v. Stephens*, 720 F.3d 231 (5th Cir. 2013)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Trottie, Willie Tyrone	5th	*Trottie v. Stephens*, 581 F. App'x 436 (5th Cir. 2014)	Denied
Turner, Edwin Hart	5th	*Turner v. Epps*, 12 F. App'x 696 (5th Cir. 2011)	Denied
Vasquez, Manuel	5th	*Vasquez v. Thaler*, 505 F. App'x 319 (5th Cir. 2013)	Denied
Villanueva, Jorge	5th	*Villanueva v. Stephens*, 555 F. App'x 300 (5th Cir. 2014)	Granted, Circuit
Ward, Adam Kelly	5th	*Ward v. Stephens*, 777 F.3d 250 (5th Cir. 2015)	Denied
Washington, Willie Terion	5th	*Washington v. Stephens*, 551 F. App'x 122 (5th Cir. 2014)	Granted, Circuit
White, Garcia Glenn	5th	*White v. Thaler*, 522 F. App'x 236 (5th Cir. 2013)	Denied
Wilkins, Christopher Chubasco	5th	*Wilkins v. Stephens*, 560 F. App'x 299 (5th Cir. 2014)	Denied
Williams, Clifton Lamar	5th	*Williams v. Stephens*, 761 F.3d 561 (5th Cir. 2014)	Denied
Williams, Perry Eugene	5th	*Williams v. Stephens*, 575 F. App'x 380 (5th Cir. 2014)	Granted, District
Wilson, Marvin Lee	5th	*Wilson v. Thaler*, 450 F. App'x 369 (5th Cir. 2011)	Granted, District
Wood, Jeffrey Lee	5th	*Wood v. Stephens*, 619 F. App'x 304 (5th Cir. 2015)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Woodard, Robert Lee	5th	*Woodard v. Thaler*, 414 F. App'x 675 (5th Cir. 2011)	Denied
Young, Clinton Lee	5th	*Young v. Stephens*, 795 F.3d 484 (5th Cir. 2015), as revised (July 30, 2015)	Denied
Yowell, Michael John	5th	*Yowell v. Thaler*, 545 F. App'x 311 (5th Cir. 2013)	Denied
Halprin, Randy Ethan	5th	*Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018)	Denied
Norris, Michael Wayne	5th	*Norris v. Davis*, 826 F.3d 821 (5th Cir. 2016)	Denied
Trevino, Carlos	5th	*Trevino v. Davis*, 829 F.3d 328 (5th Cir. 2016)	Granted, Circuit
Runnels, Travis Trevino	5th	*Runnels v. Davis*, 664 F. App'x 371 (5th Cir. 2016)	Denied
Freeney, Ray McArthur	5th	*Freeney v. Davis*, 737 F. App'x 198 (5th Cir. 2018)	Denied
Norman, LeJames	5th	*Norman v. Stephens*, 817 F.3d 226 (5th Cir. 2016)	Denied
Ramirez, John H.	5th	*Ramirez v. Stephens*, 641 F. App'x 312 (5th Cir. 2016)	Denied
Batiste, Teddrick	5th	*Batiste v. Davis*, 747 F. App'x 189 (5th Cir. 2018)	Denied
Jones, Shelton Denoria	5th	*Jones v. Davis*, 890 F.3d 559 (5th Cir. 2018)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Barbee, Stephen Dale	5th	*Barbee v. Davis*, 660 F. App'x 293 (5th Cir. 2016)	Granted, Circuit
Long, Steven Lynn	5th	*Long v. Davis*, 663 F. App'x 361 (5th Cir. 2016)	Denied
Austin, Perry Allen	5th	*Austin v. Davis*, 876 F.3d 757 (5th Cir. 2017)	Granted, Circuit
Ochoa, Abel Revill	5th	*Ochoa v. Davis*, No. 17-70016, 2018 WL 5099615 (5th Cir. Oct. 18, 2018)	Denied
Chanthako-ummane, Kosoul	5th	*Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016)	Denied
Buck, Duane Edward	5th	*Buck v. Stephens*, 623 F. App'x 668 (5th Cir. 2015)	Denied
Runnels, Travis Trevino	5th	*Runnels v. Davis*, 746 F. App'x 308 (5th Cir. 2018)	Denied
Whitaker, Thomas Bartlett	5th	*Whitaker v. Davis*, 853 F.3d 253 (5th Cir. 2017)	Granted, District
Matthews, Damon Roshun	5th	*Matthews v. Davis*, 665 F. App'x 315 (5th Cir. 2016)	Denied
Weathers, Obie D.	5th	*Weathers v. Davis*, 659 F. App'x 778 (5th Cir. 2016)	Denied
Milam, Blaine Keith	5th	*Milam v. Davis*, 733 F. App'x 781 (5th Cir. 2018)	Denied
Jones, Quintin Phillippe	5th	*Jones v. Davis*, 673 F. App'x 369 (5th Cir. 2016)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Bernard, Brandon and Vialva, Christopher Andre	5th	*United States v. Vialva*, 904 F.3d 356 (5th Cir. 2018)	Denied
Bible, Danny Paul	5th	*Bible v. Stephens*, 640 F. App'x 350 (5th Cir. 2016)	Denied
Murphy, Patrick Henry	5th	*Murphy v. Davis*, 737 F. App'x 693 (5th Cir. 2018)	Denied
Ruiz, Rolando	5th	*Ruiz v. Davis*, 850 F.3d 225 (5th Cir. 2017)	Denied
Preyor, Tai Chin	5th	*Preyor v. Davis*, 704 F. App'x 331 (5th Cir. 2017)	Denied
Wardlow, Billy Joe	5th	*Wardlow v. Davis*, 2018 WL 5276281, No. 17-70029 (5th Cir. 2018)	Denied
Jennings, Robert Mitchell	5th	*Jennings v. Davis*, 2019 WL 384943, No. 19-70005 (5th Cir. 2019)	Granted, District
Coble, Billie Wayne	5th	*Coble v. Davis*, 682 F. App'x 261 (5th Cir. 2017)	Granted, Circuit
Braziel, Alvin Avon	5th	*Braziel v. Stephens*, 631 F. App'x 225 (5th Cir. 2015)	Denied
Castillo, Juan	5th	*Castillo v. Stephens,* 640 F. App'x 283 (5th Cir. 2016)	Denied
Cathey, Eric Dewayne	5th	*In Re Eric Dewayne Cathey v. Davis*, 174 F. App'x 841 (5th Cir. 2006)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Clark, Troy	5th	*Clark v. Stephens*, 627 F. App'x 305 (5th Cir. 2015)	Granted, Circuit
Busby, Edward Lee	5th	*Busby v. Davis,* 677 F. App'x 884 (5th Cir. 2017)	Granted, Circuit
Slater, Paul Wayne	5th	*Slater v. Davis*, 717 F. App'x 432 (5th Cir. 2018)	Denied
Hartfield, Jerry	5th	*Hartfield v. Osborne*, 808 F.3d 1066 (5th Cir. 2015)	Granted, District
Cortez, Raul	5th	*Cortez v. Davis*, 665 F. App'x 330 (5th Cir. 2016)	Granted, Circuit
Williams, Marlon Dantruce	5th	*Williams v. Stephens*, 620 F. App'x 348 (5th Cir. 2015)	Granted, Circuit
Rodriguez, Humberto	5th	*Rodriguez v. Davis*, No. 16–41176, 2017 WL 8944047 (5th Cir. Dec. 20, 2017)	Denied
Humphrey, Omar Khayyam	5th	*Humphrey v. Banks*, No. 16–60228, 2017 WL 3725603 (5th Cir. Mar. 30, 2017)	Denied
Thomas, Andre Lee	5th	*Thomas v. Davis*, 726 F. App'x 243 (5th Cir. 2018)	Granted, Circuit
Canales, Anibal	5th	*Canales v. Davis*, 740 F. App'x 432 (5th Cir. 2018)	Granted, Circuit
Hernandez, Fabian	5th	2018 WL 5603606 (5th Cir. 2018)	Denied
Saldano, Victor Hugo	5th	2018 WL 151320 (5th Cir. 2019)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Jackson, Christopher Devon	5th	2018 WL 6505437 (5th Cir. 2018)	Denied
Wood, David Leonard	5th	648 F. App'x 388 (5th Cir. 2016)	Denied
Mamou, Jr., Charles	5th	742 F. App'x 820 (5th Cir. 2018)	Granted, Circuit
Robertson, Mark	5th	715 F. App'x 387 (5th Cir. 2017)	Denied
Johnson, Dexter	5th	746 F. App'x 375 (5th Cir. 2018)	Denied
Wessinger, Todd	5th	704 F. App'x 309 (5th Cir. 2017)	Denied
Allen, Kerry Dimart	5th	*Allen v. Stephens*, 805 F.3d 617 (5th Cir. 2015)	Denied
Austin, Perry Allen	5th	*Austin v. Davis*, 647 F. App'x 477 (5th Cir. 2016)	Granted, Circuit
Cardenas, Ruben Ramirez	5th	*Cardenas v. Stephens*, 820 F.3d 197 (5th Cir. 2016)	Denied
Saldano, Victor Hugo	5th	*Saldano v. Davis*, 701 F. App'x 302 (5th Cir. 2017)	Granted, Circuit
Shore, Anthony	5th	*Shore v. Davis*, 845 F.3d 627 (5th Cir. 2017)	Denied
Garcia, Joseph	5th	*Garcia v. Davis*, 704 F. App'x 316 (5th Cir. 2017)	Denied
Ibarra, Ramiro Rubi	5th	*Ibarra v. Davis*, 738 F. App'x 814 (5th 2018)	Granted, Circuit
Sorto, Walter Alexander	5th	*Sorto v. Davis*, 672 F. App'x 342 (5th 2016)	Denied
Hummel, John	5th	*Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Martinez, Raymond Deleon	5th	*Martinez v. Davis*, 653 F. App'x 308 (5th Cir. 2016)	Granted, Circuit
Devoe, Paul G.	5th	*Devoe v. Davis*, 717 F. App'x 419 (5th Cir. 2018)	Denied
Murphy, Jedidiah Isaac	5th	*Murphy v. Davis*, 732 F. App'x 249 (5th Cir. 2018)	Granted, Circuit
Prystash, Joseph	5th	*Prystash v. Davis*, 854 F.3d 830 (5th Cir. 2017)	Denied
Young, Christopher	5th	*Young v. Davis*, 835 F.3d 520 (5th Cir. 2016)	Granted, Circuit
Ramos, Robert Moreno	5th	*Ramos v. Davis*, 653 F. App'x 359 (5th Cir. 2016)	Denied
Rhoades, Rick Allen	5th	*Rhoades v. Davis*, 852 F.3d 422 (5th Cir. 2017)	Granted, Circuit
Fratta, Robert Alan	5th	*Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018)	Denied
Soliz, Mark Anthony	5th	*Soliz v. Davis*, No. 17-70019, 2018 WL 4501154 (5th Cir. Sept. 18, 2018)	Granted, District
Ayestas, Carlos Manuel	5th	*Ayestas v. Stephens*, 817 F.3d 888 (5th Cir. 2016)	Denied
Williams, Arthur	5th	*Williams v. Davis*, 674 F. App'x 359 (5th Cir. 2017)	Denied
Allen, Willard	5th	*Allen v. Vannoy*, 659 F. App'x 792 (5th Cir. 2016)	Granted, Circuit
Davila, Erick Daniel	5th	*Davila v. Davis*, 650 F. App'x 860 (5th Cir. 2016)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
King, John William	5th	*King v. Davis*, 703 F. App'x 320 (5th Cir. 2017)	Granted, Circuit
Washington, Willie Terion	5th	*Washington v. Davis,* 715 F. App'x 380 (5th Cir. 2017)	Granted, Circuit
Guevara, Gilmar Alexander	5th	*Guevara v. Davis,* 679 F. App'x 332 (5th Cir. 2017)	Denied
Simon, Robert	5th	*Simon v. Fisher,* 641 F. App'x386 (5th Cir. 2016)	Granted, District
Sparks, Robert	5th	*Sparks v. Davis,* No.18-70013, 2018 WL 6418108 (5th Cir. 2018)	Denied
Rockwell. Kwame A.	5th	*Rockwell v Davis,* 853 F.3d 758 (5th Cir. 2017)	Denied
Rodriguez, Rosendo, III	5th	*Rodriguez v. Davis,* 693 F. App'x 276 (5th Cir. 2017)	Denied
Lucio, Melissa Elizabeth	5th	*Lucio v. Davis,* No.16-70027, 2018 WL 5095807 (5th Cir. 2018)	Granted, Circuit
Garcia, Joseph	5th	*In re Garcia*, No.18-11546, 2018 WL 6338484 (5th Cir. 2018)	Denied
Weathers, Obie D.	5th	*Weathers v. Davis*, No.15-70030, 2019 WL 643215 (5th Cir. 2019)	Granted, Circuit
Thompson, Charles Victor	5th	*Thompson v. Davis,* No.17-70008, 2019 WL 654298 (5th Cir. 2019)	Granted, Circuit
		Total Granted:	**82 (39.8%)**
		Total Denied:	**124 (60.2%)**

Eleventh Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adkins, Ricky D.	11th	*Adkins v. Warden,* Holman CF, 710 F.3d 1241 (11th Cir. 2013)	Granted, Circuit
Anderson, Fred	11th	*Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881 (11th Cir. 2014)	Granted, Circuit
Arthur, Thomas D.	11th	*Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014)	Granted, Circuit
Banks, Chadwick	11th	*Banks v. Sec'y, Fla. Dep't of Corr.*, 491 F. App'x 966 (11th Cir. 2012)	Granted, District
Barwick, Darryl Brian	11th	*Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239 (11th Cir. 2015)	Granted, Circuit
Bates, Kayle Barrington	11th	*Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278 (11th Cir. 2014)	Granted, Circuit
Belcher, James	11th	*Belcher v. Sec'y, Dep't of Corr.*, 427 F. App'x 692 (11th Cir. 2011)	Granted, Circuit
Bell, Michael	11th	*Bell v. Fla. Atty. Gen.*, 461 F. App'x 843 (11th Cir. 2012)	Granted, District
Bishop, Joshua Daniel	11th	*Bishop v. Warden, GDCP*, 726 F.3d 1243 (11th Cir. 2013)	Granted, Circuit
Blanco, Omar	11th	*Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211 (11th Cir. 2012)	Granted, District
Bolin, Oscar Ray	11th	*In re Bolin*, No. 15-15710-P, 2016 WL 51227, at *7 fn. 4 (11th Cir. Jan. 4, 2016)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Booker, Stephen	11th	*Booker v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1121 (11th Cir. 2012)	Granted, Circuit
Borden, Jeffrey Lynn	11th	*Borden v. Allen*, 646 F.3d 785 (11th Cir. 2011)	Granted, District
Boyd, Anthony	11th	*Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320 (11th Cir. 2012)	Granted, Circuit
Brannan, Andrew H.	11th	*Brannan v. GDCP Warden*, 541 F. App'x 901 (11th Cir. 2013)	Granted, Circuit
Brooks, Christopher Eugene	11th	*Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292 (11th Cir. 2013)	Granted, Circuit
Burgess, Raymond	11th	*Burgess v. Terry*, 478 F. App'x 597 (11th Cir. 2012)	Granted, Circuit
Burns, Daniel	11th	*Burns v. Sec'y, Fla. Dep't of Corr.*, 720 F.3d 1296 (11th Cir. 2013)	Granted, Circuit
Carrillo, Raul	11th	*Carrillo v. Sec'y, Fla. Dep't of Corr.*, 477 F. App'x 546 (11th Cir. 2012)	Granted, District
Chavez, Juan Carlos	11th	*Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057 (11th Cir. 2011)	Granted, District
Conner, John Wayne	11th	*Conner v. GDCP Warden*, 784 F.3d 752 (11th Cir. 2015)	Granted, Circuit
Conner, John Wayne	11th	*Conner v. Hall*, 645 F.3d 1277 (11th Cir. 2011)	Granted, Circuit
Connor, Seburt Nelson	11th	*Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 609 (11th Cir. 2013)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Consalvo, Robert	11th	*Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842 (11th Cir. 2011)	Granted, District
Cook, Andrew Allen	11th	*Cook v. Warden, Ga. Diagnostic Prison*, 677 F.3d 1133 (11th Cir. 2012)	Granted, District
Cooper, Richard	11th	*Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328 (11th Cir. 2011)	Granted, District
Cox, Allen W.	11th	*Cox v. McNeil*, 638 F.3d 1356 (11th Cir. 2011)	Granted, Circuit
Damren, Floyd	11th	*Damren v. Florida*, 776 F.3d 816 (11th Cir. 2015)	Granted, District
Downs, Ernest Charles	11th	*Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240 (11th Cir. 2013)	Granted, Circuit
Evans, Paul H.	11th	*Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249 (11th Cir. 2012)	Granted, Circuit
Evans, Wydell	11th	*Evans v. Sec'y, Fla. Dep't of Corr.*, 681 F.3d 1241 (11th Cir. 2012)	Granted, District
Everett, Paul Glen	11th	*Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212 (11th Cir. 2015)	Granted, Circuit
Farina, Anthony Joseph	11th	*Farina v. Sec'y, Fla. Dep't of Corr.*, 536 F. App'x 966 (11th Cir. 2013)	Granted, Circuit
Ferguson, John	11th	*Ferguson v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 1315 (11th Cir. 2013)	Granted, District
Ferrell, Eric Lynn	11th	*Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Floyd, Maurice Lamar	11th	*Floyd v. Sec'y, Fla. Dep't of Corr.*, No. 13-13566, 2016 WL 231484, at *1 (11th Cir. Jan. 20, 2016)	Granted, Circuit
Fults, Kenneth Earl	11th	*Fults v. GDCP Warden*, 764 F.3d 1311 (11th Cir. 2014)	Granted, Circuit
Gissendaner, Kelly Renee	11th	*Gissendaner v. Seaboldt*, 735 F.3d 1311 (11th Cir. 2013)	Granted, District
Gore, Marshall Lee	11th	*Gore v. Crews*, 720 F.3d 811 (11th Cir. 2013)	Granted, District
Gonzalez, Ricardo	11th	*Gonzalez v. Sec'y, Fla. Dep't of Corr.*, 629 F.3d 1219 (11th Cir. 2011)	Granted, District
Greene, Daniel	11th	*Greene v. Upton*, 644 F.3d 1145 (11th Cir. 2011)	Granted, Circuit
Griffin, Michael Allen	11th	*Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086 (11th Cir. 2015)	Denied
Grim, Norman Mearle	11th	*Grim v. Sec'y, Fla. Dep't of Corr.*, 705 F.3d 1284 (11th Cir. 2013)	Denied
Gudinas, Thomas Lee	11th	*Gudinas v. Sec'y, Dep't of Corr.*, 436 F. App'x 895 (11th Cir. 2011)	Granted, Circuit
Hardy, John Milton	11th	*Hardy v. Comm'r, Ala. Dep't of Corr.*, 684 F.3d 1066 (11th Cir. 2012)	Granted, District
Harvey, Harold Lee	11th	*Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228 (11th Cir. 2011)	Granted, District
Heath, Ronald Palmer	11th	*Heath v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 1202 (11th Cir. 2013)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Henry, George Russell	11th	*Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226 (11th Cir. 2014)	Granted, District
Hitchcock, James	11th	*Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014)	Granted, Circuit
Hittson, Travis Clinton	11th	*Hittson v. GDCP Warden*, 759 F.3d 1210 (11th Cir. 2014)	Granted, Circuit
Holland, Albert Jr.	11th	*Holland v. Florida*, 775 F.3d 1294 (11th Cir. 2014)	Granted, Circuit
Holsey, Robert Wayne	11th	*Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230 (11th Cir. 2012)	Granted, District
Howell, Paul A.	11th	*Howell v. Sec'y, Fla. Dep't of Corr.*, 730 F.3d 1257 (11th Cir. 2013)	Granted, District
Hunt, Gregory	11th	*Hunt v. Comm'r, Ala. Dep't of Corr.*, 666 F.3d 708 (11th Cir. 2012)	Granted, District
Israel, Connie Ray	11th	*Israel v. Sec'y, Fla. Dep't of Corr.*, 517 F. App'x 694 (11th Cir. 2013)	Granted, District
Johnson, Marcus Ray	11th	*Johnson v. Warden, Ga. Diagnostic & Classification Prison*, 805 F.3d 1317 (11th Cir. 2015)	Denied
Johnson, Terrell M.	11th	*Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907 (11th Cir. 2011)	Granted, Circuit
Jones, Brandon Astor	11th	*Jones v. GDCP Warden*, 753 F.3d 1171 (11th Cir. 2014)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Jones, Randall Scott	11th	*Jones v. Sec'y, Dep't of Corr.*, 644 F.3d 1206 (11th Cir. 2011)	Granted, Circuit
Kilgore, Dean	11th	*Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301 (11th Cir. 2015)	Granted, Circuit
Kuenzel, William Earnest	11th	*Kuenzel v. Comm'r, Ala. Dep't of Corr.*, 690 F.3d 1311 (11th Cir. 2012)	Granted, District
Lambrix, Cary Michael	11th	*Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246 (11th Cir.)	Denied
Lawrence, Jonathan Huey	11th	*Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464 (11th Cir. 2012)	Granted, Circuit
Lee, Jeffrey	11th	*Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172 (11th Cir. 2013)	Granted, District
Lucas, Harold Gene	11th	*Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342 (11th Cir. 2012)	Granted, District
Lucas, Daniel Anthony	11th	*Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785 (11th Cir. 2014)	Granted, Circuit
Lugo, Daniel	11th	*Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198 (11th Cir. 2014)	Granted, Circuit
Lynch, Richard E.	11th	*Lynch v. Sec'y, Fla. Dep't of Corr.*, 776 F.3d 1209 (11th Cir. 2015)	Granted, Circuit
Madison, Vernon	11th	*Madison v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1333 (11th Cir. 2012)	Granted, Circuit
Madison, Vernon	11th	*Madison v. Comm'r, Ala. Dep't of Corr.*, 761 F.3d 1240 (11th Cir. 2014)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
McNabb, Torrey Twane	11th	*McNabb v. Comm'r, Ala. Dep't of Corr.*, 727 F.3d 1334 (11th Cir. 2013)	Granted, District
Melton, Antonio Lebaron	11th	*Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234 (11th Cir.)	Denied
Mendoza, Marbel	11th	*Mendoza v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1213 (11th Cir. 2014)	Granted, Circuit
Morris, Robert	11th	*Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117 (11th Cir. 2012)	Granted, Circuit
Morton, Alvin Leroy	11th	*Morton v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1157 (11th Cir. 2012)	Granted, Circuit
Myers, Robin D.	11th	*Myers v. Allen*, 420 F. App'x 924 (11th Cir. 2011)	Granted, District
Owen, Donald Eugene	11th	*Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181 (11th Cir. 2012)	Granted, District
Pietri, Norberto	11th	*Pietri v. Fla. Dep't of Corr.*, 641 F.3d 1276 (11th Cir. 2011)	Granted, District
Ponticelli, Anthony John	11th	*Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271 (11th Cir. 2012)	Granted, District
Pooler, Leroy	11th	*Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252 (11th Cir. 2012)	Granted, District
Preston, Robert Anthony	11th	*Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449 (11th Cir. 2015)	Granted, Circuit
Price, Christopher Lee	11th	*Price v. Allen*, 679 F.3d 1315 (11th Cir. 2012)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Puiatti, Carl	11th	*Puiatti v. Sec'y, Fla. Dep't of Corr.*, 732 F.3d 1255 (11th Cir. 2013)	Granted, Circuit
Reese, John Loveman	11th	*Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277 (11th Cir. 2012)	Granted, District
Roberts, David Lee	11th	*Roberts v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1086 (11th Cir. 2012)	Granted, Circuit
Rodriguez, Manuel Antonio	11th	*Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277(11th Cir. 2014)	Granted, District
Rose, Milo A.	11th	*Rose v. McNeil*, 634 F.3d 1224 (11th Cir. 2011)	Granted, Circuit
Rozzelle, Roger Allen	11th	*Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000 (11th Cir. 2012)	Granted, District
San Martin, Pablo	11th	*San Martin v. McNeil*, 633 F.3d 1257 (11th Cir. 2011)	Granted, District
Smith, Joseph Clifton	11th	*Smith v. Campbell*, 620 F. App'x 734 (11th Cir. 2015)	Granted, Circuit
Smith, Ronald Bert	11th	*Smith v. Comm'r, Ala. Dep't of Corr.*, 703 F.3d 1266 (11th Cir. 2012)	Granted, Circuit
Smithers, Samuel	11th	*Smithers v. Sec'y, Fla. Dep't of Corr.*, 501 F. App'x 906 (11th Cir. 2012)	Granted, Circuit
Tanzi, Michael Anthony	11th	*Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644 (11th Cir. 2014)	Granted, Circuit
Taylor, Michael Shannon	11th	*Taylor v. Culliver*, No. 13-11179, 2015 WL 4645228, at *1 (11th Cir. Aug. 6, 2015)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Taylor, Perry Alexander	11th	*Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284 (11th Cir. 2014)	Granted, Circuit
Terrell, Brian Keith	11th	*Terrell v. GDCP Warden*, 744 F.3d 1255 (11th Cir.)	Granted, Circuit
Trepal, George James	11th	*Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088 (11th Cir. 2012)	Granted, District
Troy, John	11th	*Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305 (11th Cir. 2014)	Granted, Circuit
Waldrip, Tommy Lee	11th	*Waldrip v. Humphrey*, 532 F. App'x 878 (11th Cir. 2013)	Granted, Circuit
Walls, Frank A.	11th	*Walls v. Buss*, 658 F.3d 1274 (11th Cir. 2011)	Granted, District
Wellons, Marcus A.	11th	*Wellons v. Warden, Ga. Diagnostic & Classification Prison*, 695 F.3d 1202 (11th Cir. 2012)	Granted, Circuit
White, Leroy	11th	*White v. Jones*, 408 F. App'x 292 (11th Cir. 2011)	Denied
Williamson, Dana	11th	*Williamson v. Fla. Dep't of Corr.*, 805 F.3d 1009 (11th Cir. 2015)	Granted, District
Wilson, Marion Jr.	11th	*Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671 (11th Cir. 2014)	Granted, District
Wright, Joel Dale	11th	*Wright v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256 (11th Cir. 2014)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Zack, Michael Duane	11th	*Zack v. Tucker*, 666 F.3d 1265 (11th Cir. 2012)	Granted, District
Meders, Jimmy Fletcher	11th	*Meders v. Warden, Georgia Diagnostic Prison*, 911 F.3d 1335 (2019)	Granted, District
Moody, Walter Leroy	11th	*Moody v. Commissioner,* 682 F. App'x. 802 (11th Cir. 2017)	Granted
Mashburn, Ellis Louis	11th	*Mashburn v. Commissioner, Alabama Department of Corrections*, 713 F. App'x. 832 (11th Cir. 2017)	Granted
Samra, Michael Brandon	11th	*Samra v. Warden, Donaldson Correctional Facility*, 626 F. App'x. 227 (11th Cir. 2015)	Granted, Circuit
Pittman, David Joseph	11th	*Pittman v. Secretary, Florida Department of Corrections*, 871 F.3d 1231 (11th Cir. 2017)	Granted
Hammonds, Artez	11th	*Hammonds v. Commissioner, Alabama Department of Corrections*, 712 F. App'x. 841 (11th Cir. 2017)	Granted, Circuit
Wilson, Marion	11th	*Wilson v. Warden, Georgia Diagnostic Prison*, 834 F.3d 1227 (11th Cir. 2016)	Granted, District
Butts, Robert Earl	11th	*Butts v. GDCP Warden*, 850 F.3d 1201 (11th Cir. 2017)	Granted, District

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Willacy, Chadwick	11th	*Willacy v. Secretary, Florida Department of Corrections*, 703 F. App'x. 744 (11th Cir. 2017)	Granted, Circuit
Floyd, Maurice Lamar	11th	*Lamar v. Secretary, Florida Department of Corrections*, 638 F. App'x. 909 (11th Cir. 2016)	Granted
Arbelaez, Guillermo O.	11th	*Arbelaez v. Florida, Department of Corrections*, 662 F. App'x. 713 (11th Cir. 2016)	Granted, Circuit
Krawczuk, Anton J.	11th	*Krawczuk v. Secretary, Florida Department of Corrections*, 873 F.3d 1273 (11th Cir. 2017)	Denied
Daniel, Renard Marcel	11th	*Daniel v. Comm'r, Ala. Dep't of Corrections*, 822 F.3d 1248 (11th Cir. 2016)	Granted, District
Ray, Domineque	11th	*Ray v. Ala. Dep't of Corrections*, 809 F.3d 1202 (11th Cir. 2016)	Granted, Circuit
Clark, Ronald	11th	*Clark v. Attorney Gen., Fla.*, 821 F.3d 1270 (11th Cir. 2016)	Granted, Circuit
Eggers, Michael Wayne	11th	*Eggers v. Alabama*, 876 F.3d 1086 (11th Cir. 2017)	Denied
McWilliams, James	11th	*McWilliams v. Comm'r, Ala. Dep't of Corrections*, 634 F. App'x 698 (11th Cir. 2015)	Granted, Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Waldrop, Bobby Wayne	11th	*Waldrop v. Comm'r, Ala. Dep't of Corrections*, 711 F. App'x 900 (11th Cir. 2017)	Granted, Circuit
Tharpe, Keith	11th	*Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016)	Granted, Circuit
Brown, Paul Anthony	11th	*Brown v. Sec'y, Dep't of Corrections*, No. 17-10027, 2018 WL 4932715 (11th Cir. Oct. 11, 2018)	Granted, Circuit
Jones, Harry	11th	*Jones v. Sec'y, Fla. Dep't of Corrections*, 834 F.3d 1299 (11th Cir. 2016)	Granted, District
Ledford, J.W.	11th	*Ledford v. Warden, Georgia Diagnostic and Classification Prison*, 818 F.3d 600 (11th Cir. 2016)	Granted, District
Wilson, Marion	11th	*Wilson v. Warden, Ga. Diagnostic Prison*, 898 F.3d 1314 (11th Cir. 2018)	Denied
Stewart, Kenneth	11th	*Stewart v. Sec'y, Fla. Dep't of Corrections*, 635 F. App'x 711 (11th Cir. 2015)	Granted, Circuit
Barnes, James	11th	*Barnes v. Sec'y, Dep't of Corrections*, 888 F.3d 1148 (11th Cir. 2018)	Granted, District
Maples, Cory	11th	*Maples v. Comm'r, Ala. Dep't of Corrections*, 729 F. App'x 817 (11th Cir. 2018)	Granted
Lambrix, Cary Michael	11th	*Lambrix v. Sec'y, Fla. Dep't of Corrections*, 851 F.3d 1158 (11th Cir. 2017)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Raleigh, Bobby	11th	*Raleigh v. Sec'y, Fla. Dep't of Corrections*, 827 F.3d 938 (11th Cir. 2016)	Granted, Circuit
Gill, Vanessa	11th	*Gill v. Barrett*, 723 F. App'x 934 (11th Cir. 2018)	Granted, District
Lambrix, Cary Michael	11th	*Lambrix v. Sec'y, DOC*, 872 F.3d 1170 (11th Cir. 2017)	Granted, District
Johnson, Marcus Ray	11th	*Johnson v. Warden, Georgia Diagnostic & Classification Prison*, 805 F.3d 1317 (11th Cir. 2015)	Granted, Circuit
Tirado, Jose	11th	*Tirado v. Sec'y, Dep't of Corrections*, No. 17-14791-D, 2018 WL 5778983 (11th Cir. Apr. 2, 2018)	Denied
Conaway, Ronald	11th	*Conaway v. Sec'y, Dep't of Corrections*, No. 17–11726–D, 2017 WL 4708145 (11th Cir. Aug. 18, 2017)	Denied
Hannon, Patrick	11th	*Hannon v. Sec'y, Fla. Dep't of Corrections*, 716 F. App'x 843 (11th Cir. 2017)	Denied
Zack, Michael Duane	11th	*Zack v. Sec'y, Fla. Dep't of Corrections*, 721 F. App'x 918 (11th Cir. 2018)	Granted, Circuit
Tharpe, Keith	11th	*Tharpe v. Warden*, 2017 WL 4250413 (11th Cir. 2017)	Denied

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Rimmer, Robert	11th	*Rimmer v. Secretary, Florida Department of Corrections*, 876 F.3d 1039 (11th Cir. 2017)	Granted
Hernandez-Alberto, Pedro	11th	*Hernandez-Alberto v. Secretary, Florida Department of Corrections*, 840 F.3d 1360 (11th Cir. 2016)	Granted, Circuit
Morrow, Scotty Garnell	11th	*Morrow v. Warden*, 886 F.3d 1138 (11th Cir. 2018)	Granted
Arthur, Thomas D	11th	*Arthur v. Commissioner, Alabama Department of Corrections*, 840 F.3d 1268 (11th Cir. 2016)	Granted, District
Lance, Donnie Cleveland	11th	*Lance v. Warden, Georgia Diagnostic Prison*, 706 F. App'x. 565 (11th Cir. 2017)	Granted, Circuit
		Total Granted:	**133 (90.5%)**
		Total Denied:	**14 (9.5%)**