CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY RUIZ,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

819 Fed.Appx. 238
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

Wesley Lynn RUIZ, Petitioner–Appellant,
v.
Lorie DAVIS, Director, Texas Department
of Criminal Justice, Correctional
Institutions Division, Respondent–Appellee.

No. 19-70003
|
FILED July 7, 2020
|
REVISED July 8, 2020

Synopsis

Background: Defendant petitioned for a writ of habeas corpus, after his state murder conviction and death sentence were affirmed on appeal, 2011 WL 1168414, and after his state habeas petition and supplement were denied and dismissed. After defendant was granted a stay to exhaust his claims in a state court, the Texas Court of Criminal Appeals dismissed defendant's second state habeas petition. The United States District Court for the Northern District of Texas, David C. Godbey, J., denied relief and declined to issue a certificate of appealability. Defendant appealed, seeking a certificate of appealability.

Holdings: The Court of Appeals held that:

[1] the District Court could not review claim that constitutional rights were violated by trial court allowing inaccurate testimony;

[2] prosecution did not commit *Brady* violation after murder trial;

[3] right to due process was not violated by presentation of inaccurate of testimony;

[4] trial counsel did not provide ineffective assistance;

[5] there was no clearly established law on whether right to fair trial was violated by presence of numerous police officers during sentencing; and

[6] the District Court did not make unreasonable determination of the facts regarding presence of officers.

Motion denied.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (6)

[1] **Habeas Corpus** State court decision on procedural grounds, and adequacy of such independent state grounds

Federal district court could not review habeas petitioner's claim that constitutional rights were violated by trial court allowing inaccurate testimony that petitioner could have been promoted to less restrictive classification after ten years, if sentenced to life without parole instead of death for murder, where Texas Court of Criminal Appeals dismissed habeas application as an abuse-of-the-writ without addressing merits, which was independent of constitutional claim, and none of the exceptions applied to allow Texas Court to consider application. Tex. Crim. Proc. Code Ann. art. 11.071 § 5(a).

[2] **Criminal Law** Time and manner of required disclosure

Criminal Law Duty to correct false or perjured testimony

Texas prosecutor did not commit *Brady* violation by failing to disclose, after murder trial, inaccuracy of testimony that defendant could have been promoted to less restrictive classification after ten years, if sentenced to life without parole instead of death; *Brady* did not require prosecutor to disclose inaccurate

testimony months after trial when subsequent case publicly established that similar testimony was inaccurate, there was no evidence that prosecutor knew testimony was inaccurate when defendant was tried, and defendant's failure to discover and timely raise claim in first habeas petition could not ground a *Brady* violation.

[3] **Constitutional Law** Use of Perjured or Falsified Evidence

Criminal Law Use of False or Perjured Testimony

Defendant's constitutional right to due process was not violated by Texas prosecutor's presentation of inaccurate of testimony that defendant could have been promoted to less restrictive classification after ten years, if sentenced to life without parole instead of death for murder, where there was no evidence that prosecutor actually knew testimony was false. U.S. Const. Amend. 5.

[4] **Criminal Law** Experts; opinion testimony

Trial counsel did not provide deficient performance in Texas capital murder trial by failing to impeach inaccurate testimony that defendant could have been promoted to less restrictive classification after ten years, if sentenced to life without parole instead of death, and thus, counsel did not provide ineffective assistance; counsel hired expert on Texas's complex prison-classification system to combat State's expert, expert failed to flag erroneous testimony for counsel, and counsel had no reason to doubt his expert's conclusion. U.S. Const. Amend. 6.

[5] **Habeas Corpus** Conduct of trial, in general

There was no clearly established law on whether defendant's right to fair and impartial trial was violated by presence of between ten and 50 uniformed off-duty police officers in courtroom gallery during punishment phase of capital trial for murder of police officer, and thus district court could not grant habeas relief, following Texas court's decision to deny relief on such grounds; Supreme Court precedent dealt with police officers in gallery as part of their government duties, and conduct of officers in defendant's case was neither clearly private nor clearly state action. 28 U.S.C.A. § 2254(d).

[6] **Habeas Corpus** Conduct of trial, in general

Federal district court did not make unreasonable determination of the facts regarding presence of between ten and 50 uniformed off-duty police officers in courtroom gallery during punishment phase of capital trial for murder of police officer, and thus defendant was not entitled to federal habeas relief, following Texas court's denial of relief on claim that right to fair and impartial trial was violated; argument that district court should have pinpointed how many officers were in gallery during sentencing was a claim that district court did not find enough facts, not that factual determinations were unreasonable. 28 U.S.C.A. § 2254(d).

***239** Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:12-CV-5112

Attorneys and Law Firms

Wesley Lynn Ruiz, Pro Se

Tomee Morgan Heining, Assistant Attorney General, Office of the Attorney General, Postconviction Litigation Division, Austin, TX, for Respondent-Appellee

Before OWEN, Chief Judge, and WILLETT and OLDHAM, Circuit Judges.

Opinion

PER CURIAM: *

***240** Wesley Lynn Ruiz, a prisoner sentenced to death, seeks a certificate of appealability (COA) for his habeas

petition. To succeed, Ruiz must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Having carefully reviewed the record and arguments of counsel, we conclude that Ruiz's arguments fail on procedural and substantive grounds. We thus deny his COA motion.

I

In 2008, a jury convicted Ruiz of murdering a police officer and sentenced Ruiz to death. At his Texas state court sentencing hearing, the prosecution called A. P. Merillat, a criminal investigator for the Huntsville Special Prosecution Unit, as an expert on prisoner classification. On direct examination, Merillat testified that Ruiz would receive a moderately restrictive classification if sentenced to life without parole, but that after ten years he could be promoted to a less restrictive classification "depending on his behavior." This testimony was indisputably incorrect; the Texas Department of Criminal Justice (TDCJ) had changed its policy in 2005, disallowing this exact reclassification. *See* *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (taking judicial notice of the TDCJ's policy change). And despite Ruiz's counsel's retention of an independent Texas prisoner-classification expert who testified at Ruiz's trial, neither counsel nor his expert identified Merillat's statement as erroneous for the jury.

Ruiz appealed to the Texas Court of Criminal Appeals (TCCA), which affirmed his conviction and sentence. [1] Then he filed a timely state habeas petition, quickly followed by a supplement to that petition. The former was denied on the merits, and the latter was dismissed as a subsequent habeas application without an exception to the successive-petition bar. *Ex parte Ruiz*, No. WR-78,129-01, WR-78,129-02, 2012 WL 4450820 (Tex. Crim. App. Sept. 26, 2012) (finding the supplement an "abuse of the writ" (citing TEX. CODE CRIM. PROC. art. 11.071 § 5(a))). [2]

So Ruiz filed a habeas petition in federal court, where for the first time he raised claims related to Merillat's testimony. Realizing his procedural hurdles, Ruiz immediately filed a motion to stay the federal proceedings so that he could exhaust his Merillat-related claims in state court with another habeas petition. The federal district court granted the stay. The TCCA dismissed Ruiz's second petition as abuse-of-the-writ; again, Ruiz ran afoul of the successive-petition bar without qualifying for an exception. *Ex parte Ruiz*, No. WR-78,129-03, 2014 WL 6462553 (Tex. Crim. App. Nov. 19, 2014) (citing TEX. CODE CRIM. PROC. art. 11.071 § 5(a)). So Ruiz resumed his federal habeas proceedings, urging relief on the merits and, in the alternative, a COA if his habeas claims were denied. The district court denied relief and didn't issue a COA. On appeal, Ruiz requests a COA from us, urging that his petition states valid habeas claims for relief including:

(1) knowing failure to correct false testimony;

***241** (2) ineffective assistance of trial, initial habeas, and appellate counsel;

(3) unconstitutional police presence at trial;

(4) Texas's death penalty procedure is unconstitutional; and

(5) cumulative error.

II

Before a petitioner may appeal the dismissal of his federal habeas petition, he must "seek and obtain" a COA—there's no automatic right to appeal under our statutory habeas scheme. § 2253(c)(1); *see also Cardenas v. Thaler,* 651 F.3d 442, 443–44 (5th Cir. 2011) (expounding that we only have jurisdiction to consider whether a COA should issue when a district court first "rule[s] upon whether a COA is warranted"). A COA should only issue when the petitioner has substantially shown denial of a constitutional right. § 2253(c). How this requirement may be satisfied depends on whether the district court rejected the petitioner's habeas claim on substantive or procedural grounds. *See* *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). If the former, "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." *Id.* If the latter, the petitioner must show that jurists of reason would find it debatable whether (1) "the petition states a valid claim of the denial of a constitutional right" *and* whether (2) "the district court was correct in its procedural ruling." *Id.*

A

[1] Ruiz first asserts that the state's failure to correct Merillat's testimony violated his constitutional rights. The

district court dismissed all claims connected to Merillat's testimony on procedural grounds, so Ruiz must satisfy *Slack*'s two-pronged showing. 529 U.S. at 484, 120 S.Ct. 1595. And because jurists of reason cannot debate whether the district court properly ruled that Ruiz's claim was procedurally barred—*Slack* prong two—our inquiry ends there. *See, e.g., Giesberg v. Cockrell*, 288 F.3d 268 (5th Cir. 2002) (denying a COA because the district court properly applied a procedural bar).

In 2005, the TDCJ promulgated a new policy ensuring that a prisoner sentenced for capital murder would never receive a prisoner classification below a certain level. In Ruiz's 2008 trial, Merillat incorrectly testified that capital murderers *could* be classified below that level after ten years in prison. In 2010, Ruiz filed his direct appeal with the TCCA. Before ruling on Ruiz's appeal, the TCCA decided *Estrada*, a case where Merillat had delivered the same incorrect testimony on prisoner classification that he had in Ruiz's trial. 313 S.W.3d at 274. The *Estrada* court took judicial notice that the TDCJ's prisoner-classification policy had changed, held that Merillat had testified inaccurately in Estrada's trial, and remanded for a new punishment hearing. *Id.* at 287.

Ruiz wants a similar outcome despite being a dissimilar appellant. Ruiz did not raise any Merillat-related claims on direct appeal or in his first state habeas petition; the *Estrada* petitioner raised this issue from the get-go. *Id.* In fact, Ruiz didn't raise these claims until his federal habeas petition nearly three years after trial. Ruiz realized his error and returned to state court, attempting to exhaust his Merillat-related claims so he could proceed with them in his federal habeas proceeding. But the TCCA dismissed his petition, finding it barred by the no-successive-petition rule without exception. ***242** *Ex parte Ruiz,* No. WR-78,129-03 (citing TEX. CODE CRIM. PROC. art. 11.071 § 5(a)). Based on this holding, the district court concluded Ruiz's Merillat-related federal habeas claims were procedurally barred. This holding is not debatable by reasonable jurists.

We have been clear: Federal courts may not review constitutional questions when: (1) the last state court considering the claim expressly relies on state procedural grounds to dismiss; (2) the grounds are independent of the federal claim's merits; and (3) the grounds are an adequate basis for the federal court's decision. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001). Because all three conditions are met here, rendering the district court's procedural ruling beyond debate, we deny Ruiz's COA.

As the first two prongs are clearly met,[3] we focus on whether the state court's holding is an adequate basis for the district court's procedural bar finding. We have consistently recognized Texas's abuse-of-the-writ doctrine as sufficient for this purpose. *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) (holding this doctrine is "an independent and adequate state ground for ... imposing a procedural bar"). Here, the TCCA explicitly dismissed Ruiz's habeas application as an abuse-of-the-writ—without addressing the merits—because his Merillat-related allegations failed to satisfy the requirements of Texas Code of Criminal Procedure Article 11.071 § 5(a). Because the Texas court properly applied the abuse-of-the-writ doctrine, the state court's statutory-bar holding was an adequate basis for the district court's procedural bar ruling.

Ruiz counters that the TCCA's decision was erroneous, and not an adequate basis for the district court's holding, because his claim qualified for a statutory exception to the abuse-of-the-writ doctrine. To be sure, Texas courts may consider the merits of any subsequent habeas petition filed after an initial application if the application specifically establishes that:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (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; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial....

TEX. CODE CRIM. PROC. art. 11.071 § 5(a).

[2] **[3]** But none of these provisions fit Ruiz. He could have raised the Merillat-based claims in his earlier state habeas application, so the first statutory exception doesn't apply. Neither do the second or third because Ruiz's requisite "constitutional violation" falters at the outset. Ruiz argues that the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to disclose, post *Estrada*, that Merillat's statement regarding prisoner classification was inaccurate. But he simply invokes *Brady* without specifying how the state's actions violated it. In any event, his *Brady* claim falls ***243** short.[4] There is no constitutional violation, a prerequisite to the second and third statutory exceptions.[5] Because none of § 5(a)'s statutory exceptions apply to Ruiz's claim, the Texas court properly barred it. Therefore, reasonable jurists cannot debate whether an adequate and independent state-law procedural ruling bars Ruiz's Merillat-based claims. They are barred. We deny a COA on these grounds.

B

Ruiz next argues that his trial, initial habeas, and appellate counsel all provided ineffective assistance—the first for failing to object to Merillat's incorrect testimony and the second and third for failing to raise his trial counsel's ineffectiveness. But, again, no reasonable jurist could debate that the district court properly found these claims procedurally barred—*Slack* prong two—and we decline to issue a COA. 529 U.S. at 484, 120 S.Ct. 1595.

The district court ruled that Ruiz's ineffective assistance of trial counsel claim was procedurally defaulted because he failed to raise it in his direct appeal or initial state habeas proceeding. Ruiz argues that, though he did fail to raise this claim below, his procedural default should be excused because his initial habeas counsel was itself ineffective by failing to raise an ineffective assistance claim against his trial counsel. *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may [excuse] a prisoner's procedural default of a claim of ineffective assistance at trial."). For the reasons discussed below, Ruiz's initial-review counsel wasn't ineffective. In turn, the district court's procedural bar holding is not debatable.

[4] Whether Ruiz's initial-review counsel was ineffective depends on whether his trial counsel was ineffective; if his trial counsel was not, then his initial-review counsel cannot be faulted for failing to raise a non-existent ineffective assistance of trial counsel claim. We look to the well-known twoprong *Strickland* standard to determine whether trial counsel's assistance was ineffective. *Martinez*, 566 U.S. at 14, 132 S.Ct. 1309. The petitioner must show a deficiency in the performance of his counsel—that is, his counsel's aid "fell below an objective standard of reasonableness ... under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688–89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (reinforcing that the petitioner must overcome the presumption that counsel's actions (or lack thereof) were within the wide range of professional norms). The petitioner must also show ***244** prejudice: But for counsel's error, the outcome of his trial would have been different. *Id.* at 694, 104 S.Ct. 2052.

Ruiz argues that his trial counsel was ineffective for his "failure to object" to Merillat's incorrect testimony. But the alleged ineffective assistance is best framed as trial counsel's failure to *impeach* Merillat—either on cross examination or through Ruiz's own expert—for Merillat's misstatement. Reviewing this argument, we resolve Ruiz's claim on *Strickland* prong one, his counsel was not deficient, and therefore don't address prong two.

The Texas prison-classification system is complex. When relevant, attorneys often call expert witnesses to explain the schema's nooks and crannies. *See, e.g.*, *Garcia v. Stephens*, 757 F.3d 220, 222, 226–29 (5th Cir. 2014). Following suit, Ruiz's trial counsel hired an expert on this system to combat the State's expert, Merillat. Because trial counsel hired an expert to address this complex subject matter, and counsel was entitled to rely on this expert, counsel's failure to impeach Merillat's incorrect testimony relating to the expert's topic was not unreasonable. Though the expert failed to flag Merillat's erroneous testimony for trial counsel, this was the expert's failure, not counsel's, and therefore counsel's assistance was nonetheless adequate.

Our conclusion is largely predicated on counsel's right to rely on his expert witnesses when developing labyrinthine subject matter such as the voluminous and convoluted Texas prisoner-classification system. *See Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel should be able

to rely on [an expert] to alert counsel to additional needed information ..."); *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002), *overruled on other grounds by* *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) ("Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment ... and rule that his performance was substandard for doing so."). In fact, holding otherwise would apply an improper "subject-matter-expert" standard to counsel. *See Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (refusing to find counsel ineffective for relying on "reasonable expert evaluations" of evidence). Counsel's expert reviewed Merillat's testimony and testified at trial that he did not disagree with anything in it. **ROA.5093.** And Ruiz offers no evidence that trial counsel had any reason to doubt his expert's conclusion. *See Murphy*, 901 F.3d at 592 ("Without a red flag ... it is too much to insist that counsel second-guess [his expert]."). As such, Ruiz cannot "overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 ("Judicial scrutiny of counsel's performance must be highly deferential.... There are countless ways to provide effective assistance in any given case."). [6]

Reasonable jurists cannot debate that the district court correctly found Ruiz's ineffective assistance of trial, initial habeas, and appellate counsel claims procedurally barred. And *Martinez* doesn't excuse Ruiz's procedural default. So we decline to issue a COA on this ground as well.

***245** C

Ruiz next claims he was denied the right to a fair and impartial trial because there were at least ten, and possibly up to fifty, uniformed off-duty police officers in the courtroom gallery during Ruiz's trial's punishment phase. The district court denied relief on the merits, finding that because the Supreme Court hasn't established firm standards for gallery spectator conduct, the TCCA's decision to deny habeas relief on these grounds was not unreasonable under 28 U.S.C. § 2254(d). Section 2254(d) only allows a district court to grant habeas for a claim adjudicated on the merits in state court if the decision was (1) "contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States; or ... [(2)] was based on an unreasonable determination of the facts...." § 2254(d) (emphasis added). When the district court denies habeas on the merits, as here, and the petitioner moves for a COA from us, as here, he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" for the COA to issue. *Slack*, 529 U.S. at 484, 120 S.Ct. 1595.

1

[5] Ruiz doesn't demonstrate that it's debatable whether the district court properly applied "clearly established Federal law." § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 380–82, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (stating that the Supreme Court has only clearly established precedent if it has "broken sufficient legal ground to establish an asked-for constitutional principle"). It is undisputed that the police officers in the gallery did not attend Ruiz's trial as part of their government duties, unlike in *Holbrook v. Flynn*, 475 U.S. 560, 569, 572, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (considering when the "courtroom security force" may generate impermissible inherent prejudice). Instead the officers' conduct here was "neither clearly private nor clearly state action." *Jones v. Davis*, 890 F.3d 559, 569 (5th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 795, 202 L.Ed.2d 587 (2019). Because the Supreme Court has "not affirmatively resolve[d]" whether "*Flynn* might ... apply to claims involving purely spectator conduct," the law Ruiz seeks to invoke isn't clearly established. *Id.*; *see also* *Carey v. Musladin*, 549 U.S. 70, 76, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) ("In contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of [private spectator conduct] is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial."). The district court got it right; no reasonable jurists would debate the district court's refusal to grant habeas on this ground.

2

[6] And Ruiz doesn't show that the district court made an unreasonable determination of the facts. § 2254(d). To start, Ruiz never argues that the district court's factual determinations were unreasonable. He merely notes that the district court didn't pinpoint how many officers were in the gallery during sentencing and opines that, if the court had made this factual finding, it could have had an impact. But this amounts to a conclusory allegation that the district court didn't find *enough* facts, not that its factual determinations were *unreasonable*. And, because our review is "limited to the record that was before the state court that adjudicated the claim on the merits," this line of argument falls short. ***246** *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). [7] Because reasonable jurists could not debate the district court's conclusions on Ruiz's fair-trial claim, we decline to issue a COA.

D

Ruiz next claims that Texas's death penalty procedure violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. "Under Texas law, the jury must consider two special issues before the death penalty is imposed on a capital defendant"; an "aggravating" special issue and a "mitigation" special issue. *Druery v. Thaler*, 647 F.3d 535, 542 (5th Cir. 2011) (citing TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1)). And pursuant to Texas's "12/10 Rule," "the trial court was [ ] required to instruct the jury that it must have at least 10 'no' votes to answer 'no' on the aggravating special issue, and at least 10 'yes' votes to answer 'yes' on the mitigation special issue—either of which answers would result in a life sentence, not death." *Id.* (citing TEX. CODE CRIM. PROC. § 37.071(2)(g)). Ruiz's trial court adhered to this procedure, and Ruiz was sentenced to death. The TCCA rejected Ruiz's contentions that this procedure violated the Constitution, and the district court agreed on the merits. [8] Because our precedent forecloses Ruiz's contentions, and therefore reasonable jurists could not debate the district court's substantive determination, we deny a COA here as well. [9] *Druery*, 647 F.3d at 543 (declining to issue a COA on this exact claim because "no clearly established federal law called into doubt the Texas death penalty statute" (cleaned up)).

E

Finally, Ruiz contends that the cumulative effect of the alleged constitutional violations he's suffered should be enough to warrant relief. However, "[m]eritless claims ... cannot be cumulated, regardless ***247** of the total number raised." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996).

* * *

Having carefully reviewed the record and arguments of counsel, we hold that Ruiz's motion for a COA is DENIED. Ruiz's counsel (J. Steven Bush) has filed a motion to withdraw, and that motion is GRANTED. [10] The motion for appointment of counsel is carried with the case.

All Citations

819 Fed.Appx. 238

Footnotes

* 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.

1 The Supreme Court denied certiorari review. *Ruiz v. Texas*, 565 U.S. 946, 132 S.Ct. 402, 181 L.Ed.2d 263 (2011).

2 The TCCA adopted the trial court's factual findings and legal conclusions, which the trial court developed after an evidentiary hearing. And, again, the Supreme Court denied certiorari review. *Ruiz v. Texas*, 569 U.S. 906, 133 S.Ct. 1725, 185 L.Ed.2d 789 (2013).

3 The TCCA's holding, based entirely on Article 11.071 § 5(a), is clearly independent from the federal claim's merits and relied on state procedural grounds.

4 We have never held that *Brady* requires the state to disclose inaccurate testimony months after trial when a subsequent case publicly establishes that similar testimony is inaccurate. And there is no evidence the state knew Merillat's testimony was inaccurate when Ruiz was tried. Regardless, *Estrada* was published six months before Ruiz's first habeas petition; he could have found this decision with reasonable diligence. When evidence is equally available to both the prosecution and defense, the defendant bears the responsibility of any failure to diligently investigate it. *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). Ruiz's own failure to discover and timely raise his Merillat-related claims in his first habeas petition cannot ground a *Brady* violation.

5 Alternatively, Ruiz alleges his constitutional right to due process was violated by the state's presentation of Merillat's false testimony. *See* *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). But Ruiz doesn't present any evidence that the prosecution actually knew Merillat's testimony was false, a *Napue* prerequisite, so his *Napue* claim is a non-starter. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *see also* *Kutzner*, 303 F.3d at 337 (requiring proof of actual knowledge).

6 Ruiz argues his appellate counsel was ineffective for failing to raise the ineffectiveness of his trial counsel on direct appeal. But even assuming this assertion is properly before us, see *Davila v. Davis*, —— U.S. ——, 137 S. Ct. 2058, 2065, 198 L.Ed.2d 603 (2017), this contention similarly falters because trial counsel was not ineffective.

7 Moreover, Ruiz specifies no "meaningful facts or evidence" that would make the district court's characterization of the facts unreasonable. *Sparks v. Davis*, 756 Fed. App'x 397, 403 (5th Cir. 2018) (unpublished). Most notably, he points to no evidence that the jurors were influenced by the presence of officers in the gallery during the trial's punishment phase. *Jones*, 890 F.3d at 571 (finding the mere presence of uniformed officers insufficient to support an inherent prejudice claim where "the record before [it did] not suggest the police presence intimidated the jury or disrupted the fact-finding process in any way"). And, in the alternative, he fingers no evidence showing that "bedlam reigned at the courthouse" or that the police officers created a "carnival atmosphere." *Cf.* *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (granting habeas when the "trial judge did not fulfill his duty to protect [petitioner] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom").

8 The district court found a number of Ruiz's underlying contentions procedurally barred but addressed their merits in the alternative. We review the court's resolution on the merits.

9 The Supreme Court recently held "the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." *Ramos v. Louisiana*, —— U.S. ——, 140 S. Ct. 1390, 1397, 206 L.Ed.2d 583 (2020). But "the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a *conviction*," not a sentence. *Id.* (emphasis added). In other words, a jury must be unanimous on the *factfinding* underlying a sentence, but not on the sentence actually imposed. *See* *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (finding a jury vote required for the "factfinding necessary" for a sentence but not the sentence itself). Here, Ruiz's jury was unanimous on the factfinding underlying his conviction and sentence, including the special fact issues at the sentencing phase. Because Ruiz's conviction meets the Sixth Amendment's unanimity requirement, *Ramos* is of no moment.

10 Ruiz's counsel filed this motion during the pendency of this COA decision. We grant it here, as opposed to in a separate order, out of fairness and efficiency concerns.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 19-70003

WESLEY LYNN RUIZ,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:12-CV-5112

Before OWEN, *Chief Judge*, and WILLETT and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Wesley Lynn Ruiz seeks panel rehearing of our decision denying a certificate of appealability (COA) on his claims that (1) the state's presentation of false expert testimony in the penalty phase violated his due

* Pursuant to 5TH CIRCUIT RULE 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 CIRCUIT RULE 47.5.4.

process and Eighth Amendment rights, and (2) that his trial, appellate, and initial habeas counsel were ineffective. Ruiz's petition for rehearing is denied.

Ruiz first argues that we failed to analyze whether he showed cause and prejudice to excuse the procedural default of his claims based on the false expert testimony. Ruiz did not argue cause and prejudice in his motion for a COA. Indeed, he did not address the procedural default at all. Instead, he argued the merits that the state's failure to correct the expert's false testimony violated *Brady v. Maryland*. Ruiz, through new counsel, contends that he sufficiently raised cause and prejudice because a *Brady* violation can establish cause for a procedural default. But as we explained, Ruiz's "*Brady* claim falls short."[1] It therefore does not serve as cause to excuse the procedural default.

Ruiz next argues that we contravened precedent in concluding that the Texas Court of Criminal Appeals's (TCCA's) dismissal of his application for relief was clearly independent from the federal claim's merits. The TCCA dismissed his application under Article 11.071 § 5(a) of the Texas Code of Criminal Procedure, which provides:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> >
> > (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could

[1] *Ruiz v. Davis*, 819 F. App'x 238, 242–43 (5th Cir. 2020).

> have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

We concluded that none of the subsections applied, explaining that "[t]he TCCA's holding, based entirely on Article 11.071 § 5(a), is clearly independent from the federal claim's merits and relied on state procedural grounds."[2] Ruiz argues that under our precedent, dismissals under Article 11.071 § 5(a) implicate the merits of the federal claim, and therefore are not based on independent state procedural grounds.

Here, the TCCA dismissed the application "without considering the merits of the claims."[3] That alone establishes that the TCCA's ruling was procedural, meaning we did not need to inquire further into whether any of § 5(a)'s subsections applied. In any event, the TCCA's opinion suggests it dismissed Ruiz's application on the ground that Ruiz could have brought his claims earlier.[4] Ruiz's petition, which focuses only on § 5(a)(1) and does not mention the other subsections, concedes as much. This is an independent state procedural bar.[5]

Ruiz also argues that we wrongly assessed the merits of his expert testimony claims. But we did so in the context of analyzing whether § 5(a)(2) or (a)(3) applied to Ruiz's application. Because the TCCA dismissed the

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[2] *Id.* at 242–43, 242 n.3.

[3] *Ex parte Ruiz*, No. Wr-78, 129-03, 2014 WL 6462553, at *1 (Tex. Crim. App. Nov. 19, 2014).

[4] *Id.*

[5] *See Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) ("If the CCA's decision rests on availability, the procedural bar is intact.").

application based on availability, we did not need to reach these questions. But the unnecessary analysis does not warrant rehearing.

Finally, Ruiz argues that we exceeded the scope of the COA inquiry by analyzing the merits of his ineffective assistance claims, as the Supreme Court cautioned against in *Buck v. Davis*.[6] The district court determined that Ruiz's ineffective assistance claims were procedurally barred and analyzed the merits in the context of determining whether Ruiz could show cause and prejudice to excuse the default.[7] We did the same.[8] Though we could have been more careful to explain the contours of our inquiry into counsel's performance, our imprecision does not warrant rehearing.

IT IS ORDERED that Ruiz's Petition for Panel Rehearing is DENIED.

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[6] 137 S. Ct. 759, 773 (2017) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003)).

[7] *Ruiz v. Davis*, No. 3:12-CV-5112, 2018 WL 6591687, at *7–10 (N.D. Tex. Dec. 14, 2018).

[8] *Ruiz*, 819 F. App'x at 243–44.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WESLEY LYNN RUIZ,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 3:12-CV-5112-N
	§	(Death Penalty Case)
LORIE DAVIS, DIRECTOR	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER DENYING RELIEF

Wesley Lynn Ruiz petitions the Court for a writ of habeas corpus, contending that his conviction and death sentence are unconstitutional due to trial errors, prosecutorial misconduct, and ineffective assistance of counsel. Because Ruiz has not shown that he is entitled to relief, the Court denies the requested relief.

I. PROCEDURAL BACKGROUND

Ruiz was convicted and sentenced to death for the capital murder of Dallas police officer Corporal Mark Nix. *See State v. Ruiz,* No. F07-50318-M (194th Judicial District Court, Dallas County, Tex. July 11, 2008). The Texas Court of Criminal Appeals ("CCA") affirmed the conviction and death sentence. *See Ruiz v. State,* No. AP-75,968, 2011 WL 1168414 (Tex. Crim. App. Mar. 2, 2011), *cert. denied,* 565 U.S. 946 (Oct. 11, 2011). During the pendency of his direct appeal, Ruiz filed his first postconviction application for a writ of habeas corpus in the state trial court in writ number W07-50318-M(A) on August 25, 2010.

See State Habeas Clerk's Record ("SHCR") at 2-58 [ECF 31[33] at 5]. The trial court held an evidentiary hearing and entered findings of fact and conclusions of law recommending that the relief sought be denied[1] (the "State Court Findings"), which were adopted by the CCA, which also dismissed the supplemental application as a subsequent writ that did not meet any of the exceptions provided for in Article 11.071, § 5. *See Ex Parte Ruiz,* No. WR-78,129-01, 2012 WL 4450820, at *1 (Tex. Crim. App. Sept. 26, 2012).

Ruiz filed his original petition for a writ of habeas corpus in this Court on September 23, 2013, which was accompanied by an unopposed motion to stay these proceedings to exhaust his claim concerning the allegedly false prisoner classification testimony of A.P. Merillat and a related claim of ineffective assistance of trial counsel. *See* Pet. [ECF 14]; Mot. [ECF 15]. The Court found that the unopposed motion to stay complied with *Rhines v. Weber,* 544 U.S. 269 (2005), and stayed these proceedings to allow Ruiz to exhaust these claims. *See* Order (Oct. 1, 2013) [ECF 16]. Ruiz filed a subsequent state habeas application, which the CCA dismissed as an abuse of the writ without considering the merits of the claims. *See Ex parte Ruiz,* No. WR-78,129-03, 2014 WL 6462553, at *1 (Tex. Crim. App. Nov. 19, 2014).

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[1]Curiously, the state trial court made two findings of fact and conclusions of law. The first is at 2 SHCR 365-405 [ECF 31[35] at 81-121], dated March 20, 2012. The second is at 2 SHCR 406-46 [ECF 31[35] at 122 through ECF 31[36] at 12], dated May 21, 2012. While the Court has not undertaken a line-by-line comparison, the two documents appear substantially identical except for the date. It is unclear why there are two documents. The Court will refer to the later order on the theory that, if there are any differences, the later order supercedes the earlier.

Following exhaustion, Ruiz returned to this Court, which reopened these proceedings. *See* Order (Nov. 20, 2014) [ECF 20]. Ruiz filed his amended petition on January 17, 2015, *see* Amd. Pet. [ECF 23], Respondent Davis filed her answer on April 16, *see* Ans. [ECF 28], and Ruiz filed his reply on May 5, *see* Reply [ECF 32].

II. FACTUAL BACKGROUND

The state court described the facts of the offense as follows:

> On March 21, 2007, the homicide division of the Dallas Police Department issued a bulletin to its officers to be on the lookout for a 1996 four-door Chevy Caprice with dark tinted windows and chrome wheels, red and gray in color, that was suspected to have some involvement in a capital murder. Two days later, on March 23rd, two plainclothes officers in an unmarked police vehicle spotted a car matching this description on Stemmons Freeway. They summoned marked patrol cars to stop the suspect vehicle and followed it as it exited the freeway at Mockingbird Lane and drove into West Dallas. Corporal Mark Nix arrived, positioning his patrol car directly behind the Caprice and activating his overhead lights and video camera. The Caprice momentarily braked as if to pull over, but then suddenly raced off at high speed down the winding road, followed by Nix and at least one other patrol car in hot pursuit. The ensuing events were recorded by Nix's video camera and that of the patrol car directly behind him, both of which recordings are in evidence.
>
> Apparently taking a curve too fast, the Caprice hit the left-hand curb and spun out of control. It barreled backwards down a slight incline on the right side of the street and came to rest facing the roadway, its back-end apparently blocked by a fence. Nix followed the Caprice down the incline and pulled to a stop, directly hood to hood. The patrol car behind Nix also pulled off the road and came to a halt on the passenger side of the Caprice, a short way off but close enough to effectively hem it in. Corporal Nix jumped out of his patrol car and rushed to the front passenger side of the Caprice. There he began to swing his baton with his left hand, smashing it against the tinted front passenger window. He paused momentarily to place his pistol on the ground so that he could use both hands to wield the baton and continued striking the window, punching a small hole through it. A second later, a single gun shot shattered the rear passenger window, the bullet striking Nix's badge and

> splintering. A fragment entered Nix's chest at the level of his clavicle, severing his left common carotid artery. The other officers responded with a hail of gunfire, then dragged Nix to cover and summoned the SWAT team. The appellant was eventually pulled from behind the wheel of the Caprice, wounded and unconscious, the pistol with which Nix had been shot found in his lap. Nobody else was in the car. Nix was pronounced dead at the hospital, but the appellant was able to survive his multiple wounds.

Ruiz v. State, 2011 WL 1168414, at *1 (footnotes omitted). These findings are entitled to deference. *See* 28 U.S.C. § 2254(e)(1).

III. CLAIMS

Ruiz presents six claims for relief in the following enumerated categories:

1. The knowing failure of the State of Texas to correct the presentation of false testimony by A.P. Merillat[2] given at Mr. Ruiz's trial, violated his constitutional rights, *see* Amd. Pet. at 12;

2. Mr. Ruiz's trial counsel was ineffective for failing to object to the false testimony of Mr. Merillat at the petitioner's sentencing, *see* Amd. Pet. at 26;

3. Mr. Ruiz's appellate counsel was ineffective for failing to raise the issue of the false testimony of Mr. Merillat by reply brief or at the oral argument of his appeal, *see* Amd. Pet. at 27;

4. Mr. Ruiz was denied his Sixth Amendment right to a fair and impartial trial because of the overwhelming presence of law enforcement in the courtroom during the punishment phase of the trial, *see* Amd. Pet. at 29;

5. The Texas court refused to allow the sentencing jury to fully consider and give effect to the mitigating evidence by prohibiting the attorneys

[2] The petition refers to this person as "A.P. Merrilat," "Merrilat," and "Merillat." *See* Am. Pet. at 12, 26. Respondent refers to the same person as "A.P. Merillat" and "Merillat." *See* Ans. at 10, 22. The state court record refers to him as "A.P. Merrilott" and "Merrilott." *See* 51 RR at 135-36. This order will refer to him as "A.P. Merillat" and "Merillat."

representing the State, the defendant, and the defendant's counsel from informing the jurors or the prospective jurors of the effect of the failure of a jury to agree on the issues submitted in violation of the Sixth, Eighth, and Fourteenth Amendments, *see* Amd. Pet. at 36; and

6. Mr. Ruiz's constitutional rights were violated by the punishment charge which required at least ten "no" votes for the jury to return a negative answer to the first special issue and at least ten "yes" votes for the jury to return an affirmative answer to the mitigation special issue, *see* Amd. Pet. at 38.

In his fifth and sixth claims, Ruiz also included cumulative error arguments. *See* Amd. Pet. at 38, 44. Ruiz also requests an evidentiary hearing, specifically on his first claim. *See* Amd. Pet. at 13. Respondent asserts that all of Ruiz's claims are procedurally barred and, in the alternative, lack merit. *See* Ans. at 22-95.

IV. STANDARD OF REVIEW

Federal habeas review of these claims is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA sets forth the preliminary requirements that must be satisfied before reaching the merits of a claim made in a federal habeas proceeding.

A. Exhaustion

Under AEDPA, a federal court may not grant habeas relief on any claim that the state prisoner has not first exhausted in the state courts. *See* 28 U.S.C. § 2254(b)(1)(A); *Harrington v. Richter*, 562 U.S. 86, 103 (2011). However, a federal court may deny relief on the merits notwithstanding any failure to exhaust. *See* 28 U.S.C. § 2254(b)(2); *Miller v. Dretke*, 431 F.3d 241, 245 (5th Cir. 2005).

B. State-Court Procedural Determinations

If the state court denies a claim on state procedural grounds, a federal court will not reach the merits of the claim if it determines that the state-law grounds are independent of the federal claim and adequate to bar federal review. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If the state procedural determination is based on state grounds that were inadequate to bar federal habeas review, or if the habeas petitioner shows that an exception to the bar applies, the federal court must normally resolve the claim without the deference that 28 U.S.C. § 2254(d) otherwise requires. *See Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir. 2000); *but see Busby v. Dretke,* 359 F.3d 708, 721 n.14 (5th Cir. 2004) (affording deference to merits finding when state court "invoked a procedural bar as an alternative basis to deny relief"); *Rolan v. Coleman,* 680 F.3d 311, 319 (3rd Cir. 2012) (holding that "AEDPA deference [under section 2254(d)] applies when a state court decides a claim on procedural grounds and, alternatively, on the merits").

C. State-Court Merits Determinations

If the state court denies a claim on the merits, a federal court may not grant relief unless it first determines that the claim was unreasonably decided by the state court, as defined in section 2254(d):

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. In the context of a section 2254(d) analysis, "adjudicated on the merits" is a term of art referring to a state court's disposition of a case on substantive rather than procedural grounds. *See Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). This provision does not authorize habeas relief but restricts this Court's power to grant relief to state prisoners by barring claims in federal court that were not first unreasonably denied by the state courts. AEDPA limits rather than expands the availability of habeas relief. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Richter*, 562 U.S. at 98. "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court rulings be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations omitted) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)).

Under the "contrary to" clause, a federal court is not prohibited from granting federal habeas relief if the state court either arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *See Williams*,

529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). Under the "unreasonable application" clause, a federal court may also reach the merits of a claim on federal habeas review"if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case." *White v. Woodall,* 572 U.S. 415, 425 (2014) (quoting *Williams*, 529 U.S. at 407-408). "'[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions.'" *Id.* at 419 (quoting *Howes v. Fields,* 565 U.S. 499, 505 (2012)). The standard for determining whether a state court's application was unreasonable is an objective one and applies to federal habeas corpus petitions that, like the instant case, were filed after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court unless the record before that state court first satisfies section 2254(d). "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 563 U.S. at 185. The evidence required under section 2254(d)(2) must show that the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

V. MERILLAT'S INACCURATE TESTIMONY

In his first three claims, Ruiz complains about the testimony of A.P. Merillat, the prosecution expert, regarding the classification of inmates in the Texas prison system. Ruiz first argues that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated because the State of Texas knowingly violated its duty to correct false testimony given by Merillat, which directly reflected upon and addressed the First Special Issue, i.e., whether Ruiz presented a future danger in prison society. *See* Amd. Pet. at 12-25. Ruiz first argues that the State's failure to disclose the nature of the false information violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the State's presentation and failure to correct the false testimony violated *Napue v. Illinois,* 360 U.S. 264, 269 (1959), and the State's use of materially inaccurate evidence in punishment violated *Johnson v. Mississippi,* 486 U.S. 578 (1988). *See* Amd. Pet. at 22-25. In his second claim, Ruiz argues that his trial counsel provided ineffective assistance in failing to object to the false testimony. *See id.* at 26-27. And in his third claim, Ruiz argues that his counsel on direct appeal provided ineffective assistance in failing to raise the issue of Merillat's false testimony on appeal. *See id.* at 27-29.

Respondent asserts that these claims are procedurally barred by the state court's determination that it was barred in a successive habeas petition. *See* Ans. at 22, 27-40. In the alternative, Respondent asserts that the claim lacks merit. *See id.* at 22, 40-57. Because the Court agrees that the claims are procedurally barred, it does not reach the merits.

Ruiz argues that the delay in filing these claims was due to the negligence of his appellate attorney and his state habeas counsel. *See* Amd. Pet. at 12. Ruiz also asserts that he has established cause and prejudice to excuse the procedural default in that the prosecution team either knowingly or unwittingly allowed Merillat to provide inaccurate testimony on the issue of classification and then failed to correct the testimony either in its direct or rebuttal punishment case. *See* Amd. Pet. Br. at 2-5 [ECF 23[2]]. Ruiz also argues that his alternate claim of ineffective assistance of trial counsel comes within the exception to procedural bar created in *Martinez v. Ryan,* 566 U.S. 1 (2012), and applied to Texas cases in *Trevino v. Thaler,* 569 U.S. 413 (2013). *See* Amd. Pet. Br. at 5-8.

A. Factual Background

During the punishment stage, the prosecution called A.P. Merillat, a "criminal investigator with the special prosecution unit out of Huntsville, Texas" to inform the jury based on his "experience as to the opportunities to commit violent crimes and how inmates are classified and what that is going to mean" depending on how the jury answered the two special issues in the punishment phase of this trial. 51 RR at 149, 155 [ECF 30 at 41, 42]. On direct examination, Merillat testified that Ruiz would enter the state prison system, the Institutional Division of the Texas Department of Criminal Justice (TDCJ), at a G-3 classification level if he was sentenced to life in prison and that this classification could be changed to a lower, less restrictive level after ten years. *See* Amd. Pet. at 14 (citing 51 RR at 160). Merillat also explained that persons entering at this level would be "able to work in a craft shop and make wallets or paint or do things like that" or work as "orderlies that . . .

sweep the floor, mop the floor, empty trash, such as that" as opposed to working "out in those fields hoeing weeds" as an incentive for good behavior and that "there is no restriction from it in the classification plan." *Id.* at 15 (citing 51 RR at 187-89).

Significantly, Ruiz also retained an expert, Fitzgerald, who agreed with Merillat's classification testimony.

On June 16, 2010, the Texas Court of Criminal Appeals issued its opinion in *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010). In *Estrada*, the state confessed error on the same point raised here: Merillat's classification testimony was incorrect. Interestingly, in *Estrada*, the two side's experts were Merillat and Fitzgerald, just as here. Just as here, both testified that a life without parole inmate started at G-3, but after ten years could be reclassified to a less restrictive classification. *Id.* at 286. The problem was that, in July 2005, the Texas Department of Criminal Justice adopted a new regulation: "Effective 9/1/05, offenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G-3 throughout their incarceration." *Id.* at 287. Both sides requested the Court of Criminal Appeals to take judicial notice of the regulation, which it did. *Id.*[3] The Court thus remanded for a new punishment proceeding.

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[3]Oddly enough, neither side has requested this Court to take judicial notice of the regulation. It also does not appear that the regulation is in the voluminous record, or at least neither side points the Court to it. Notwithstanding some effort, the Court has not located the regulation in the usual online legal resources. What may be a copy of the regulation appears at https://www.aclu.org/pdfs/capital/tdcj_unit_classification.pdf (last visited 12/10/18). The Court will assume, as do the parties, that the Court of Criminal Appeals got the facts right.

B. Procedural Bar

These claims were not raised in the direct appeal or initial state habeas proceeding. Instead, this Court granted an unopposed stay of these proceedings to allow them to be presented to the state court in a subsequent state habeas application. *See* Order (Oct. 1, 2013) [ECF 16]. During the abeyance, the state court dismissed the subsequent state application "as an abuse of the writ without considering the merits of the claims." *Ex parte Ruiz,* No. WR-78,129-03, 2014 WL 6462553, at *1 (Tex. Crim. App. Nov. 19, 2014).

This Court will not reach the merits of a claim that the state court denied on independent and adequate state procedural grounds, unless the habeas petitioner shows that an exception to the procedural bar applies. *See Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017); *Sawyer*, 505 U.S. at 338; *Coleman*, 501 U.S. at 729. The United States Court of Appeals for the Fifth Circuit has repeatedly "held that 'the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.'" *Canales v. Stephens,* 765 F.3d 551, 566 (5th Cir. 2014) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008)).

C. Ruiz's First Claim Is Procedurally Defaulted

Ruiz asserts that cause and prejudice is shown to excuse the procedural default of the first claim because of prosecutorial misconduct in withholding exculpatory evidence under *Brady v. Maryland,* 373 U.S. 83 (1963), in that the State failed to disclose and correct the false testimony of its witness A.P. Merrilat. *See* Am. Pet. at 22-25. Ruiz also asserts cause

and prejudice in that the prosecutors intentionally presented false testimony in violation of *Napue v. Illinois*.[4]

The principal problem for Ruiz's argument is *Estrada v. State*. The opinion is dated June 16, 2010. Ruiz did not file his state habeas petition until December 6, 2010. "Cause" in this context means "cause for the default." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Assuming for the sake of argument that the State's failure to disclose or correct Merillat's incorrect testimony was a cause in fact of Ruiz's failure to raise the issue before June 16, 2010, it factually could not be a cause after June 16, 2010 – *Estrada* is a published opinion of the Texas Court of Criminal Appeals on precisely the same point, even with the same two witnesses. Ruiz cannot plausibly claim that the State's failure to disclose or correct Merillat's testimony caused him to omit this claim from his original state habeas petition

[4]Ruiz also argues that the presentation of inaccurate information in the punishment stage violated *Johnson v. Mississippi*, 486 U.S. 578 (1988). This appears to be a substantive argument on the merits of the first claim, rather than an argument that *Johnson* supports cause and prejudice excusing the procedural default.

after publication of *Estrada*.[5] Thus, Ruiz fails to show cause and prejudice, and his first claim is procedurally defaulted.[6]

D. Ruiz's Ineffective Assistance of Trial Counsel Claim Is Procedurally Defaulted

Ruiz argues that his ineffective assistance of trial counsel claim is saved by *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). In order to establish cause to excuse the procedural default, Ruiz must show "(1) that his claim of ineffective assistance of counsel at trial is substantial – i.e., has some merit – and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Segundo v. Davis*, 831 F.3d 345, 350 (5th Cir. 2016) (quoting *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013)).

Ruiz's underlying ineffective assistance of trial counsel claim is governed by the familiar *Strickland* standard:

> To establish that he was denied constitutionally effective assistance of counsel, [Petitioner] must demonstrate that (1) counsel rendered deficient performance, and (2) counsel's actions resulted in prejudice. *Strickland v.*

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[5]*See McCoy v. United States*, 815 F3d 292, 296 (7th Cir. 2016) (procedural default not excused when new ground for relief was based on published Seventh Circuit decision issued two weeks before hearing in district court on section 2255 motion); *cf. Moore v. Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) (per curiam) (petitioner had cause for procedural default because at time of filing petition there was no published decision of Court of Criminal Appeals explaining factual criteria that must be pled in *Atkins* petition); *Baldwin v. Blackburn*, 653 F.2d 942, 951 (5th Cir. 1981) (cause existed for procedural default where new ground for relief was based on Louisiana Supreme Court case decided before petitioner's trial but not published until after trial) (pre-AEDPA).

[6]Ruiz requests an evidentiary hearing on this claim. Because the Court is able to dispose of the claim without reliance on any disputed facts, the Court denies that request.

> *Washington*, 466 U.S. 668, 687–88, 690 (1984). Both of these prongs must be proven, and the failure to prove one of them will defeat the claim, making it unnecessary to examine the other prong. *Id.* at 687. The deficient performance prong requires proof that, in light of all the circumstances, counsel's performance fell below an objective standard of reasonableness. *Id.* at 687–88. In determining whether counsel's performance was deficient, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). The Supreme Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," and avoid "the distorting effect of hindsight." *Id.* at 689–90. To demonstrate prejudice, the second prong, [Petitioner] must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Supreme Court has further held that the likelihood of a different outcome must be "substantial, not just conceivable." *Harrington* [*v. Richter*], 131 S. Ct. [770,] 792 [(2011)].

Williams v. Stephens, 761 F.3d 561, 566-67 (5th Cir. 2014).

Ruiz's claim fails at the first step: he cannot make a substantial showing of ineffective assistance of trial counsel.[7]

Ruiz argues that his trial counsel was ineffective for failing to object to Merillat's incorrect classification testimony. *See* Amd. Pet. at 26. This of necessity implies that Ruiz's trial counsel should have not only retained a classification expert (which he did), but also should have independently researched the classification regulations and determined that both Merillat and Ruiz's expert were wrong. The law is clear, however, that trial counsel was entitled to rely on his expert.

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[7]It is something of a metaphysical question whether Ruiz fails to establish cause under *Martinez* and *Trevino*, or simply fails on the merits of his ineffective assistance of trial counsel claim.

Segundo v. Davis is extremely close to the facts of this case. Segundo was found guilty of capital murder and sentenced to death. At the punishment phase, Segundo's trial counsel retained a clinical neuropsychologist who testified that Segundo had significant brain dysfunction but that he was not intellectually disabled. *See* 831 F.3d at 348. In his petition for writ of habeas corpus in the federal district court, Segundo for the first time argued that this trial counsel was ineffective for failing fully to investigate his intellectual disability, supported by a declaration of a new expert who criticized Segundo's earlier expert.

The Court of Appeals denied a certificate of appealability on the district court's rejection of that claim, holding that Segundo failed to make a substantial claim of ineffective assistance of counsel:

> The record makes clear that Segundo's trial counsel obtained the services of a mitigation specialist, fact investigator, and two mental-health experts. These experts and specialists conducted multiple interviews with Segundo and his family, performed psychological evaluations, and reviewed medical records. Segundo claims that trial counsel failed to provide necessary social history, which would have changed the experts' conclusions that he is not intellectually disabled. But none of the experts retained by trial counsel indicated that they were missing information needed to form an accurate conclusion that Segundo is not intellectually disabled. "Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004); *see Turner v. Epps*, 412 Fed. Appx. 696, 704 (5th Cir. 2011) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information . . . .").

> Given trial counsel's investigation and reliance on reasonable expert evaluations, Segundo cannot overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance. Thus, we hold that Segundo fails to present a substantial IATC claim, resulting in the inapplicability of *Martinez*. And we conclude that there is no debatability of the underlying constitutional claim. Because reasonable jurists could not debate that Segundo's petition fails to state a valid claim, we deny a COA.

Id. at 352 (footnote omitted); *see also Hummel v. Davis*, 908 F.3d 987, 992 n.15 (5th Cir. 2018) ("Similarly, trial counsel was entitled to rely on another expert's opinion that Hummel did not exhibit post-traumatic stress disorder prior to committing the murders." (citing *Segundo*)); *King v. Davis*, 703 F. App'x 320, 334 (5th Cir. 2017) (unpub.) (same).

The problem for Ruiz is compounded by the fact that the experts for both sides agreed – albeit wrongly – on the classification issue. If the experts had disagreed, that might have been a "red flag" that would call for further investigation by Ruiz's trial counsel. As it was, their agreement reinforces the reasonableness of Ruiz's trial counsel's relying on the opinion of his own retained expert. *See Murphy v. Davis*, 737 F. App'x 693, 708 (5th Cir. 2018) (unpub.) ("Without a red flag that [defendant's mitigation expert's] evaluation was defective or an indication from [the expert] that he needed more information to properly evaluate [defendant], it is too much to insist that counsel second-guess her experts' conclusions.").

Finally, Ruiz makes no showing of what his lawyer might have found had he undertaken independently to research the Texas prison classification rules. Neither party here provides a citation to the 2005 regulation. The Texas Court of Criminal Appeals quotes the regulation without citation in *Estrada*. *See* 313 S.W.3d at 287. Other than a few citations

in post-*Estrada* cases to the text of *Estrada*, the regulation appears to be somewhat obscure.[8] Ruiz fails to explain how a diligent search by Ruiz's trial counsel at the time of trial would have discovered the regulation.

This is similar to the facts of *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015) (per curiam). That case involved a forensic technique called Comparative Bullet Lead Analysis ("CBLA"). *See id.* at *3. An FBI expert testified for the government that a bullet fragment associated with the defendant matched the composition of a bullet fragment from the brain of the decedent. *See id.* Eleven years later, CBLA had fallen out of favor. The Maryland Court of Appeals granted habeas relief on the basis that the defendant's trial counsel was ineffective for having failed to find a report by the testifying FBI expert from four years before the trial that arguably called CBLA into question.[9] *See id.* The report apparently was obscure. *See id.* at *4 ("there is no reason to believe that a diligent search would even have discovered the supposedly crucial report"). The Supreme Court reversed:

> Given the uncontroversial nature of CBLA at the time of Kulbicki's trial, the effect of the judgment below is to demand that lawyers go "looking for a needle in a haystack," even when they have "reason to doubt there is any needle there." *Rompilla v. Beard*, 545 U.S. 374, 389 (2005). The Court of Appeals demanded something close to "perfect advocacy" — far more than the "reasonable competence" the right to counsel guarantees. *Yarborough v. Gentry*, 540 U.S. 1, 8(2003) (per curiam).

Id. at *4-5.

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[8] *See supra* note 3.

[9] Though the report's ultimate conclusion was that CBLA was a valid investigative technique. *See id.*

The same is true here. Given the agreement of the two experts, the absence of any red flag to suggest further research was necessary, and the obscurity of the regulation, it is unreasonable to expect Ruiz's trial counsel to have gone looking for a needle in a haystack when he had reason to doubt any needle was there. Ruiz fails to make a substantial showing of ineffective assistance of trial counsel. This claim is thus procedurally barred under *Martinez* and *Trevino*.

E. Ruiz's Ineffective Assistance of Appellate Counsel is Procedurally Defaulted

Ruiz also argues that his state appellate counsel was ineffective for having failed to raise *Estrada* in his reply brief on direct appeal. This claim is also not exhausted. As with his claim for ineffective assistance of trial counsel, Ruiz argues that his procedural default is excused by *Martinez* and *Trevino*. After Ruiz filed his briefing in this case, however, the Supreme Court decided *Davila v. Davis*, 137 S. Ct. 2058 (2017). In *Davila*, the Supreme Court declined to extend *Martinez* and *Trevino* to an underlying claim of ineffective assistance of appellate counsel. *See id.* at 2064-70. Ruiz makes no other argument to excuse his procedural default. Ruiz's claim for ineffective assistance of appellate counsel is thus barred as procedurally defaulted.

VI. LAW ENFORCEMENT SPECTATORS

In his fourth claim, Ruiz contends that he was denied his Sixth Amendment right to a fair and impartial trial because of the "overwhelming presence of law enforcement" in the courtroom during the punishment phase of his trial. Amd. Pet. at 29-36. Respondent argues that the state court reasonably denied this claim and that it lacks merit. *See* Ans. at 63-81.

While Ruiz raised a variety of related claims in his state habeas application,[10] before this Court he argues only that the presence of a large number of off-duty police officers in the gallery deprived him of a fair and impartial trial.

The state habeas court first held that this claim was procedurally barred. *See* State Court Findings ¶¶ 73, 76. It then found the claim lacked merit. *See id.* ¶¶ 80-86. It found, first, that the presence of spectator police officers was not barred by the Supreme Court jurisprudence on state-sponsored courtroom practices. *See id.* ¶¶ 82-83. Alternatively, it found that the officer-spectators were neither inherently nor actually prejudicial. *See id.* ¶¶ 84-86. The Court will proceed to the merits without addressing the exhaustion argument. *See* 28 U.S.C. § 2254(b)(2).

This Court has recently rejected a similar argument in *Sparks v. Davis*, 2018 WL 1509205 (N.D. Tex. Mar. 27, 2018), *aff'd*, — F. App'x —, 2018 WL 6418108 (5th Cir. Dec. 4, 2018) (COA denied):

> Sparks relies upon *Holbrook v. Flynn*, 475 U.S. 560 (1986), in which the Supreme Court held that a prisoner was not denied his constitutional right to a fair trial when, at his trial with five codefendants, customary courtroom security force was supplemented by four uniformed state troopers sitting in first row of spectator section. Sparks also relies upon *Carey v. Musladin*, 549 U.S. 70, 75-77 (2006), in which the Supreme Court reversed a grant of relief by the Ninth Circuit Court of Appeals and held that state appellate court

[10]Before the state court, Ruiz also complained of: (1) a larger number than usual of sheriff's deputies (bailiffs) present in the courtroom for security, (2) the presence of a metal detector at the entrance to the courtroom, and (3) the exclusion of his family from the first row of seating immediately behind the bar behind defense counsel table. Although the State responds to those other claims, it does not appear to the Court that Ruiz raises them before this Court.

determination that habeas petitioner was not inherently prejudiced when spectators wore buttons depicting murder victim was not contrary to or unreasonable application of clearly established law.

In *Musladin*, the Supreme Court distinguished between the "government-sponsored practices" governed by the standard set out in *Flynn* and in *Estelle v. Williams,* 425 U.S. 501 (1976), and "spectator conduct" that does not yet have an established governing standard.

> In contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial. And although the Court articulated the test for inherent prejudice that applies to state conduct in *Williams* and *Flynn*, we have never applied that test to spectators' conduct. Indeed, part of the legal test of *Williams* and *Flynn*–asking whether the practices furthered an essential state interest–suggests that those cases apply only to state-sponsored practices.

Musladin, 549 U.S. at 76 (footnote omitted). The Supreme Court then concluded that the state court could not have unreasonably applied clearly established federal law as determined by the Supreme Court because the Supreme Court had not established a standard for spectator's conduct. "No holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law." *Id.* at 77.

b. Analysis

Sparks relies upon *Musladin*, in which the Supreme Court held that it never applied the standard set forth in *Williams* and *Flynn* to the conduct of bystanders rather than government actors. The very case he relies upon reveals the lack of clearly established federal law to support relief under section 2254(d). Sparks has not shown that the state court decision was an unreasonable adjudication of his claim under section 2254(d). Therefore, the third claim is DENIED for lack of merit.

Id. at *9.

Likewise, here, because the Supreme Court has not established standards for spectator conduct, the Court of Criminal Appeals' decision was not an unreasonable adjudication under section 2254(d). The Court therefore denies relief on Ruiz's fourth claim.

VII. INFORMING JURORS OF EFFECT OF FAILURE TO REACH VERDICT

In his fifth claim, Ruiz complains that the Texas death penalty procedures violate the Sixth, Eighth, and Fourteenth Amendments by not informing the jurors that the failure to come to a unanimous verdict will result in a life sentence. *See* Amd. Pet. at 36-38. Respondent argues that this claim is both unexhausted and fails on the merits. The Court agrees.

Ruiz did not raise this argument in his direct appeal, *see* Brief of Appellant [ECF 30] or in his timely state habeas petition. *See* Application for Post Conviction Writ of Habeas Corpus under TEX. CODE CRIM. PROC. § 11.071 [ECF 31[43] at 5]. This claims is thus unexhausted and barred unless Ruiz can show cause and prejudice.

Ruiz makes a perfunctory contention of ineffective assistance of counsel: "In addition, all prior counsel provided ineffective assistance of counsel for failure to raise the bases for relief alleged in these claims. *Strickland*, 466 U.S. 668." Amd. Pet. at 38. Ruiz does not otherwise cite any legal authority or anything in the record to support this contention. In particular, Ruiz fails to identify any specific counsel who was ineffective, fails to identify any applicable standard of care, and fails to identify what action (or inaction) of counsel fell below that standard of care. "Where a habeas petitioner fails to brief an argument

adequately, we consider it waived." *Lookingbill v. Cockrell*, 293 F.3d 256, 263 (2002) (citing *Lockett v. Anderson*, 230 F.3d 695, 711 n. 27 (5th Cir. 2000); *Trevino v. Johnson*, 168 F.3d 173, 181 n.3 (5th Cir. 1999); *East v. Scott*, 55 F.3d 996, 1007 n.8 (5th Cir. 1995)); *accord Devoe v. Davis*, 717 F. App'x 419, 429 (5th Cir. 2018). Ruiz has inadequately briefed his claim of ineffective assistance on this point, and it is therefore waived. The Court holds that Ruiz's fifth claim is unexhausted and barred.

In the alternative, Ruiz's fifth claim lacks merit. Federal law does not require that a death penalty jury be informed that a single holdout juror in the penalty phase will result in a life sentence.

In *Allen v. Stephens,* 805 F.3d 617, 631-32 (5th Cir. 2015), *abrogated in part on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018), the petitioner argued that his "sentencing process was confusing and violated *Mills v. Maryland,* 486 U.S. 367 (1988), because it gave the jurors the misimpression that they did not have an individual ability to prevent a death sentence based upon their personal view of the mitigating evidence." The Court of Appeals rejected that argument, holding that the Supreme Court has declined to give *Mills* such a "broad construction." *Id.* at 632 (citing *Smith v. Spisak,* 558 U.S. 139, 148-49 (2010)).

> *Mills* error occurs only where jurors are led to believe that they are "precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence ***of a particular such circumstance***." *Id.* (quoting *Mills,* 486 U.S. at 384, 108 S.Ct. 1860) (emphasis added).
>
> Allen points to no instruction in his case that would have led jurors to believe that they were required to agree on the existence of any particular mitigating

> circumstance. Indeed, the instructions in Allen's case specifically provided that jurors "need not agree on what particular evidence supports an affirmative finding on" the mitigation special issue.

Id. *See also Jones v. United States*, 527 U.S. 373, 381 (1999) (Eighth Amendment does not require death penalty jury to be instructed on consequence of deadlock); *Young v. Davis*, 835 F.3d 520, 528 (5th Cir. 2016) (same, citing *Jones*); *Reed v. Stephens*, 739 F.3d 753, 779 (5th Cir. 2014) (same, construing instruction on lack of unanimity as challenge to "12-10 Rule"); *Turner v. Quarterman*, 481 F.3d 292, 300 (5th Cir. 2007) (Fifth Circuit precedent forecloses argument that Eighth Amendment and due process require death penalty jury be informed of consequence of deadlock) (citing *Alexander v. Johnson*, 211 F.3d 895, 897 n.5 (5th Cir. 2000) (per curiam)).

Accordingly, the Court holds, in the alternative, that Ruiz's fifth claim fails on the merits.

VIII. TEXAS'S "10-12" RULE IS CONSTITUTIONAL

In his sixth claim, Ruiz complains that the Texas death penalty procedures violate the Fifth, Sixth, Eighth, and Fourteenth Amendments because the punishment charge, required at least ten "no" votes for the jury to return a negative answer to the first special issue and at least ten "yes" votes for the jury to return an affirmative answer to the mitigation special issue. *See* Am. Pet. at 39-44; TEX. CODE CRIM. PROC. art. 37.071 §§ 2(d)(2), 2(f)(2).

In support of this claim, Ruiz invokes the Fifth, Sixth, Eighth, and Fourteenth Amendment to the Constitution. *See* Amd. Pet. at 39. Ruiz did not make any Fifth or Sixth Amendment arguments in support of this claim in the state habeas proceeding, so those

arguments are unexhausted. Ruiz makes the same perfunctory argument regarding ineffective assistance of counsel as with his fifth claim, which is waived for the same reason. Thus, any Fifth or Sixth Amendment arguments relating to this claim are procedurally barred.[11]

Ruiz raised this issue on his direct appeal, and the Court of Criminal Appeals rejected it on the merits: "We have rejected this challenge to the so-called '10-12 rule' on many prior occasions, and we reject it today as well." *Ruiz v. State*, 2011 WL 1168414, at *8 (Tex. Crim. App. 2011) (citing *Russeau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005)). This ruling is entitled to AEDPA deference. *See* 28 U.S.C. § 2254(d).

The Court of Criminal Appeals' disposition of this issue is consistent with the Fifth Circuit's jurisprudence.[12] *See Blue v. Thaler*, 665 F.3d 647, 669-70 (5th Cir. 2011) ("*Jones* [*v. United States*] insulates the 10-12 Rule from constitutional attack."); *Druery v. Thaler*, 647 F.3d 535, 542-43 (5th Cir. 2011) (upholding Texas's 10-12 rule; holding *Teague v. Lane*, 489 U.S. 288 (1989), barred extending *Mills v. Maryland*, 486 U.S. 367 (1988), to Texas's 10-12 rule); *Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005) (same). This Court cannot

[11]Ruiz fails to brief any Fifth or Sixth Amendment claims on the merits (other than the perfunctory reference to ineffective assistance of counsel), so any claims under those amendments are likewise waived on the merits for failure to brief.

[12]The actual question, of course, is whether the Court of Criminal Appeals' disposition was contrary to or an unreasonable application of Supreme Court precedent. The Fifth Circuit's cases are, at the least, informative to this Court of the Supreme Court's precedent.

say that the Court of Criminal Appeals' disposition was contrary to or an unreasonable application of Supreme Court precedent, so the Court denies Ruiz's sixth claim on the merits.

IX. CUMULATIVE ERROR

Ruiz also argues cumulative error in connection with his fifth and sixth claims. Because the Court has found no error, there likewise is no cumulative error. *See Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) ("Twenty times zero equals zero.").

CONCLUSION

The Court denies Ruiz's amended petition for a writ of habeas corpus.

In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court denies Ruiz a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell,* 537 U.S. 322, 338 (2003); *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000); 28 U.S.C. § 2253(c)(2). If Ruiz files a notice of appeal, he may proceed in forma pauperis on appeal.

Signed December 14, 2018.

David C. Godbey
United States District Judge