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IN THE
SUPREME COURT OF THE UNITED STATES

TARUS VANDELL SALES,
Petitioner

v.

**ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,**
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION APPENDIX

Respectfully submitted,

/s/ Ken McGuire

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APPENDIX A

Memorandum Opinion and Order of United States District Court, Southern
District of Texas (Sept. 4, 2024) (denying Petitioner's § 2254 federal writ of
habeas corpus)

ENTERED

October 09, 2025

Nathan Ochsner, Clerk

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

TARUS VANDELL SALES,

Petitioner,

v.

ERIC GUERRERO, Director, Texas
Department of Criminal Justice, Correctional
Institutions Division,*Respondent.*¹§
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CIVIL ACTION NO. 4:15-cv-256

MEMORANDUM AND ORDER

In 2003, the State of Texas convicted Tarus Vandell Sales for the capital murder of Tyrone Butler. Sales received a death sentence. After Texas appellate and habeas challenges were unsuccessful, Sales filed a federal petition for a writ of habeas corpus. The respondent, Eric Guerrero, has answered and opposes any relief.

Having reviewed the pleadings, the record, and the applicable law, the court denies Sales's habeas petition. The court will not certify any issue for appellate review. The reasons are set out below.

BACKGROUND**I. The Crime and Police Investigation**

Around midnight on July 21, 2000, security guard Tyrone Butler headed home from his job at the Sharpstown Mall. A car pulled up behind him at a red light. A man got out, approached Butler's truck and fired two shots. Butler slumped over as his truck rolled through the intersection,

¹ Bobby Lumpkin was the previously named respondent in this action. Eric Guerrero succeeded Lumpkin as Director of the Texas Department of Criminal Justice, Correctional Institutions Division on December 19, 2024. Under Rule 25(d) of the Federal Rules of Civil Procedure, Guerrero is automatically substituted as a party.

crashing into a telephone pole. The other car sped away. Butler died from gunshot wounds to his neck and arm.

No eyewitness identified the killer. No physical evidence pointed to a suspect. Nothing at the crime scene explained why the shooter had targeted Butler. Houston Police Department Officer Eric Mehl spearheaded an investigation, which soon focused on a threatening anonymous phone call Butler had recently received at work. The police believed that the call related to Butler's upcoming testimony in a criminal trial.

Butler was the primary witness to a February 8, 2000, incident at the Sharpstown Mall. As he sat in his work vehicle, Butler saw a man—later identified as Sales—firing gunshots at a car and then driving away. Butler followed and radioed for help. Marked police vehicles joined the chase. Police eventually arrested the occupants of the fleeing car: Tarus “Bread” Sales, his girlfriend, Cheryl “Jasmine” Kissentaner, and a passenger, Herschel “Little One” Ostine.

The State charged Sales with deadly conduct, a third-degree felony. The State also charged Ostine with carrying a weapon and Kissentaner with evading arrest in a vehicle. Sales was released on bond with an August 14, 2000, trial date. Butler was to testify in that trial.

The police searched for a connection between Butler's anticipated testimony and his death. Police officers interviewed several individuals, whose information pointed toward the conclusion that Sales had solicited help to silence Butler's testimony. The police arrested Sales, Kissentaner, and Ostine for different roles in Butler's murder.

The State believed that Ostine was the shooter, that Kissentaner was in the car, and that Sales had orchestrated the plot. On July 8, 2001, the State filed capital murder charges against Ostine and retaliation charges against Kissentaner. (Docket Entry No. 52-41 at 37, 38).²

² Kissentaner surrendered to police officers on July 26, 2001. Kissentaner pleaded guilty to retaliation on August 22, 2003. *The State of Texas v. Kissentaner*, No. 88, 1568 (179th Dist. Ct.). Despite searching for in both

The State delayed filing charges against Sales. In late 2001, Officer Mehl prepared an affidavit describing the investigative steps leading to Sales's capital-murder charge. (Docket Entry No. 45-28 at 7-9). Officer Mehl's investigation relied heavily on information from Sales's friends and associates. Officer Mehl had interviewed three men—Daniel "D'Low" Fleary, Kevin Howell and Leon Leshall Hatfield—who each described how Sales had orchestrated Butler's murder. (Docket Entry No. 45-28 at 8-9).³ On November 7, 2001, the State charged Sales with capital murder "while in the course of committing and attempting to commit the retaliation of Tyron Butler" (Docket Entry No. 53-43 at 6); *see* Tex. Penal Code Ann. § 19.03(a)(2).⁴ A grand jury returned a felony indictment against Sales on January 7, 2002. (Docket Entry No. 45-28 at 11).

II. The Trial

Sales stood trial in the 179th District Court of Harris County Texas.⁵ Sales's trial began on February 17, 2003. The State did not argue that Sales was the shooter; instead, prosecutors argued that Sales had encouraged Ostine to kill Butler. The State based its prosecution on the Texas law of parties, which shares accountability for a crime among all participants.

Houston and Tennessee, the police did not arrest Ostine until a few months after Sales' trial. (Docket Entry No. 52-41 at 39). Ostine confessed that he and Kissentaner's friend, Deannadra Darfour, had followed Butler and that he had shot Butler. Ostine eventually pleaded guilty to capital murder and received a life sentence. *State v. Ostine*, No. 88,1567 (179th Dist. Ct.).

³ Even though Fleary was on probation in Fort Bend County, Officer Mehl had difficulty contacting him. Fleary was hiding because he feared Sales would kill him. (Docket No. 45-15 at 26). After police arrested Fleary for a probation violation, Officer Mehl interviewed him about the Butler murder. Fleary subsequently disappeared and did not testify at trial.

⁴ The jury instructions defined the offense of retaliation as follows: "A person commits the offense of retaliation if he intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service or status of another as a witness or prospective witness; or a person who has reported, or who the actor knows intends to report the occurrence of a crime." (Docket Entry No. 53-43 at 135); *see also* Tex. Pen. Code Ann. § 36.06(a).

⁵ Wayne Hill and Jerome Godinich represented Sales at trial. The court will refer to Sales's trial attorneys collectively as "trial counsel."

Under Texas Penal Code §§ 7.01 and 7.02, a law-of-parties instruction provides two pathways to conviction—“aider and abettor liability and conspiracy liability.” *Murphy v. Davis*, 737 F. App’x 693, 700 (5th Cir. 2018). A jury may convict a person under “aider and abettor liability” when, “if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense” Tex. Penal Code § 7.02(a)(2); (Docket Entry No. 53-43 at 137). A jury may convict a person under “conspiracy liability” if:

. . . . in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, [and thus] all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Texas Penal Code § 7.02(b); (Docket Entry No. 53-43 at 137). The State’s case allowed the jury to convict Sales under either theory.

A. The Guilt/Innocence Testimony

The State’s case against Sales was not airtight.⁶ Sales never admitted any involvement in the crime. No forensic evidence or eyewitness account pointed to Sales’s participation. The State’s case primarily depended on what Sales had said before and after the murder.

⁶ The prosecutor’s opening statement cautioned jurors:

The evidence in this case is not ever going to be overwhelming evidence. It’s a retaliation of a dead witness. The witnesses will be obviously reluctant to you when you get to judge them and see how they testify. And if you come into this courtroom thinking when you leave you’re going to know all the answers and the puzzle is going to fit perfectly together, you need to go back and finish the John Grisham book you’re reading because it doesn’t work like that way in the real world. But you will believe with all your heart when they’re done testifying and you put it all together, that all those deals that were made and all the dragging out of the witnesses and all the pushing and prodding and all the work by [Houston Police Department Officer] Eric Mehl amounts to one thing. It was all worth it to get to the man that was capable of having a witness executed to save his own life.

(Docket Entry No. 52-40 at 10-11).

The State presented its strongest testimony through four witnesses: Officer Mehl, Leon Leshall Hatfield, Kevin Howell, and Martinez Hardnett. Officer Mehl's testimony set the factual background, explaining how the police investigation connected the Sharpstown Mall shooting to Butler's death. Officer Mehl told jurors what information led him to contact Sales's friends, including Leon Hatfield and Kevin Howell.

Hatfield provided strong testimony about Sales's involvement in orchestrating the murder. Hatfield testified that Sales bought a .357 pistol after his arrest for the Sharpstown Mall shooting. (Docket Entry No. 52-42 at 37). Sales told Hatfield that he would "have to deal with" and "take care of" the Mall security guard because "he didn't want a felony gun charge on him" or "to go to prison behind this n*****." (Docket Entry 52-42 at 35-37). Hatfield testified that Sales "wanted [Butler] to be killed." (Docket Entry 52-42 at 36). Sales offered to pay several individuals, including Hatfield, \$5,000 for the murder. (Docket Entry No. 52-42 at 36). Sales told Hatfield said that "he should hire a dopehead" or "get one of his homies" from Tennessee to do it. (Docket Entry 52-42 at 36).

Hatfield testified that Sales worked on finding out "what time [Butler] got off . . . and checking his schedule a lot, like casing the joint." (Docket Entry No. 52-42 at 36). Sales later told Hatfield that "they k[new] what [Butler's] schedule [was]" and "they [were] going to handle what they [were] going to handle." (Docket Entry 52-42 at 38). Hatfield knew that Sales "was serious" about having Butler killed. (Docket Entry No. 52-42 at 38).

Howell's testimony provided additional incriminating information about the shooting. Howell testified that he met Sales and Ostine through his friend, Fleary. The men would travel back and forth to Nashville for drug transactions. (Docket Entry No. 52-42 at 18). In early summer 2000, Sales wanted Fleary and Howell to obtain information about Butler's work schedule.

(Docket Entry 52-42 at 4). Fleary and Howell visited the Sharpstown Mall and learned when Butler would get off work. (Docket Entry No. 52-42 at 4-5).

In July 2000, however, Fleary disappeared after taking a large amount of money from Sales and Ostine.⁷ Sales had anticipated that Fleary would kill Butler in return for the money. (Docket Entry No. 52-42 at 7). Sales was angry when he realized that Fleary had left without killing. (Docket Entry 52-42 at 7-8).

Howell testified that Ostine, Kissentaner, and Darfour left together on the night of Butler's murder. (Docket Entry 52-42 at 8).⁸ When the three returned, Sales asked, "Did you take care of it?" Ostine answered, "Yes." (Docket Entry 52-42 at 9).

The morning after Butler's murder, Howell left for the airport with Sales and Ostine. (Docket Entry 52-42 at 9). On the way, they stopped in a wooded area where Ostine discarded a small black revolver. (Docket Entry 52-42 at 10). At the airport, Sales used Howell's identification to buy plane tickets to Nashville for himself and Ostine. (Docket Entry 52-42 at 11).

The State also presented testimony from Harris County jail inmate Martinez Hardnett that Sales talked about the murder after his arrest.⁹ Hardnett met Sales while in a holding cell together. (Docket Entry No. 52-43 at 7). Sales "at times" talked about "the case he's on trial for." (Docket Entry No. 52-43 at 7). Hardnett did not press Sales for details. (Docket Entry No. 52-43 at 12). Sales described the murder to Hardnett, but he only "vaguely" said why "the security guard was killed." (Docket Entry No. 52-43 at 8, 10). Sales said that the shooter was in Nashville. (Docket

⁷ Hatfield testified that Sales said that Fleary stole \$50,000. (Docket Entry No. 52-42 at 37).

⁸ The record contains contradictory information about whether Kissentaner, Darfour, or both traveled with Ostine to where he shot Butler.

⁹ Hardnett had previously provided information to both the DEA and Houston Police Department. (Docket Entry No. 52-43 at 5-6). The District Attorney's Office promised to dismiss pending charges against Hardnett in return for his testimony. (Docket Entry No. 52-43 at 12).

Entry No. 52-43 at 8). Sales told Hardnett that “there was a person who was supposed to testify that he tried to hire him to kill the security guard.” (Docket Entry No. 52-43 at 11). Hardnett testified that Sales feared that “his shooter had got caught. So he wanted to get out so that he could get money to hire the lawyer for the shooter,” hoping that he would not “[t]ell the cops what actually happened.” (Docket Entry No. 52-43 at 8).

The defense did not call any witnesses in the guilt/innocence phase. The jury found Sales guilty of capital murder. (Docket Entry No. 53-43 at 154). The jury returned a general verdict, meaning that it did not specify whether it found Sales guilty under the “aider and abettor” or conspiracy theories.

B. The Penalty Phase

A Texas jury finding a defendant guilty of capital murder must then answer special-issue questions. In this case, the instructions asked the jury to answer the following questions: (1) would Sales “commit criminal acts of violence that would constitute a continuing threat to society”; (2) did Sales “intend[] to kill Tyron Butler . . . or . . . [did] he anticipate[] that a human life would be taken”; and (3) did jurors find “a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed”? (Docket Entry No. 53-43 at 169-71).

The State argued that Sales’s violent and lawless life warranted a death sentence. Police officers had arrested Sales nineteen times as a juvenile. (Docket Entry No. 52-49 at 13). Sales was threatening and violent during those arrests. As an adult, Sales was incarcerated for a drug-related crime. He had acted out violently during his arrest. The State emphasized Sales’s involvement in a separate murder in Tennessee. (Docket Entry No. 52-49 at 13).

The defense called seven penalty phase witnesses whose testimony followed two general themes. First, defense witnesses downplayed Sales's role in the Tennessee murder. Second, the defense witnesses described mitigating factors in Sales's life. The state habeas court summarized the mitigation evidence as follows:

The Court finds that during [Sales's] trial, trial counsel presented extensive evidence of [his] troubled background, the violent atmosphere of the housing projects, the effect of the housing projects on [his] choices in life, [his] lack of a father, the poor nurturing of [his] mother, the role of [his] grandmother in [his] life, and the effect of his grandmother's death, [his] mother's gambling addiction and abusive relationships, [his] frequent school changes, [his] reading disability, and [his] positive behavior in structured facilities.

(Docket Entry No. 53-5 at 104).

The jury authorized a death sentence. The trial judge imposed a sentence of death by lethal injection.

III. Appellate and Post-Conviction Review

Through appointed counsel,¹⁰ Sales's direct appeal to the Texas Court of Criminal Appeals raised eleven claims. (Docket Entry No. 52-3 at 12-14). On January 26, 2005, the Court of Criminal Appeals affirmed Sales's conviction in an unpublished opinion. *Sales v. State*, No. AP-74594, 2005 WL 8153975 (Tex. Crim. App. Jan. 26, 2005) (not designated for publication).

Sales filed a state habeas corpus application while his direct appeal was pending. Sales's ninety-six-page habeas application raised thirteen grounds for relief. (Docket Entry No. 53-1 at 8-103). The State filed an answer, but the case then lay dormant for several years. In August 2012, the Court of Criminal Appeals ordered the trial court to resolve any factual issues. (Docket Entry No. 52-10). After receiving proposed findings of fact and conclusions of law, the state habeas

¹⁰ Charles Hinton represented Sales on direct appeal and Patrick F. McCann represented Sales on state habeas review.

court entered a detailed recommendation on May 1, 2013. (Docket Entry No. 53-5 at 87-132). On January 14, 2015, the Court of Criminal Appeals issued a brief order denying relief. (Docket Entry No. 53-8 at 1-2).

IV. The Initial Stages of Federal Review

On February 5, 2015, this court appointed counsel for Sales. (Docket Entry No. 4). On January 14, 2016, Sales filed a federal petition for a writ of habeas corpus. Sales's initial federal petition raised the following twenty-eight grounds for relief:

1. The petitioner is actually innocent of the capital murder of which he stands presently convicted.
2. Sales is actually innocent of the capital murder and sentence of death for which he stands convicted.
3. Sales was denied his Sixth Amendment right to effective assistance of counsel.
4. Sales was denied his Sixth Amendment right to effective assistance of counsel.
5. The State violated Sales's rights guaranteed by the Sixth Amendment and *Massiah v. United States*, 377 U.S. 201, 206 (1964) and its progeny.
6. In violation of due process guaranteed under *Brady v. Maryland* and its progeny, the State suppressed material exculpatory and impeaching evidence.
7. The cumulative effect of the ineffective assistance of counsel, the failure to obtain *Apprendi/Ring* and *Tison/Enmund* findings by the jury beyond a reasonable doubt, and the State's *Brady* violations undermined all confidence in the verdict at Mr. Sales's trial.
8. Sales's sentence of death violates the Eighth and Fourteenth Amendments, because Sales's sentencing jury failed to make the required *Tison/Enmund* findings, and Sales is thus ineligible for the death penalty as a nonshooter.
9. Sales's sentence of death violates the Eighth and Fourteenth Amendments, because the state courts failed to make the required *Tison/Enmund* findings, and Sales is thus ineligible for the death penalty as a non-shooter.
10. The petitioner has new factual evidence that if presented to the jury would have resulted in a "no" answer to the future dangerousness question.
11. The petitioner has new factual evidence that if offered to a jury at punishment would have resulted in a "yes" answer to the mitigation question.

12. The petitioner is entitled to a new trial as the prosecution withheld valuable mitigating information from the defense in violation of *Brady v. Maryland*.
13. A new trial as to punishment should be granted because the statutory future dangerousness instruction violates the principles of *Tenard v. Dretke*, *Ring v. Arizona*, and *Apprendi v. New Jersey*. New trial as to punishment should be granted because the statutory mitigation instruction violates the principles of *Tenard v. Dretke*, *Ring v. Arizona*, and *Apprendi v. New Jersey*.
14. A new trial as to guilt, as well as punishment, should be granted because the statutory mitigation instruction is inadequate under the “mixed signals” analysis of *Penry v. Johnson*.
15. The petitioner was denied the equal protection of the law guaranteed by the Fourteenth Amendment and Eighth Amendments under *Bush v. Gore* because of disparate treatment due to his race.
16. The petitioner was denied the equal protection of the law guaranteed by the Fourteenth and Eighth Amendments due to disparate treatment of citizens facing the death penalty in the State of Texas under *Bush v. Gore*, 531 U.S. 98 (2000).
17. Lethal injection as it is currently carried out in Texas will produce unnecessary pain, torture, and lingering death.
18. A new trial as to punishment should be granted because improper evidence of future dangerousness was introduced by the State during the punishment phase resulting in irreparable harm to the applicant in violation of his 6th, 8th and 14th amendment rights.
19. Counsel failed to investigate, develop and present a proper punishment case in violation of *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).
20. A new trial as to punishment should be granted because the punishment charge on parties violates *Apprendi v. New Jersey* and *Ring v. Arizona*.
21. The trial court erred in ruling that petitioner’s witness Jessica Harris could not give her expert opinion as to whether or not there was mitigation in petitioner’s case in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978)
22. The trial court erred in denying petitioner’s challenge for cause to venireperson number 5, Ms. Theresa Beck Simms, on the grounds that Ms. Simms would not consider mitigation evidence on the punishment phase of a capital murder trial in answering special issue number three.
23. The trial court erred in denying petitioner’s challenge for cause to venireperson # 92, Mr. Donald E. Noble, on the grounds that he could not afford petitioner the presumption of innocence.

24. The trial court erred in overruling petitioner's hearsay objection to Sergeant Mehl's testimony regarding the deceased having received a warning phone call.
25. The trial court erred by overruling petitioner's hearsay objection to Sergeant Mehl's testimony concerning information that was generated from records stored in a computer.
26. The trial court erred in overruling petitioner's hearsay objection to witness Diane Seaton's testimony concerning the phone call for Tyrone Butler.
27. The trial court erred in denying petitioner's motion to disallow the introduction of evidence of an unadjudicated murder at the punishment phase of petitioner's trial based on petitioner's objections to the murder as an extraneous offense.
28. The trial court erred by denying petitioner's motion to hold Tex. Code Crim. Proc. Art. 37.071, sec. 2(e) and (f) unconstitutional as a violation of the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution.

(Docket Entry No. 8 at 1-6).¹¹

Sales raised some of these claims for the first time in federal court. Under federal law, an inmate must exhaust all habeas claims in state court. *See* 28 U.S.C. § 2254(b)(1). After the respondent filed an answer, Sales sought permission to litigate his unexhausted claims in Texas courts. On February 13, 2017, the court stayed federal proceedings to permit Sales to exhaust those claims. (Docket Entry No. 26). Sales returned to state court.

V. The Successive State Habeas Review

On July 10, 2017, Sales filed a state habeas application raising eight grounds for relief.¹²

¹¹ The court's citations to the parties' pleadings uses the pagination in the court docketing system.

¹² Sales exhausted the following claims: (1) actual innocence of his capital conviction; (2) actual innocence of the death penalty; (3) ineffective assistance of counsel regarding guilt/innocence instructions; (4) ineffective assistance of counsel for not interviewing eyewitnesses; (5) the State suppressed evidence relating to Darfour and Hatfield; (6) cumulative error; (7) the jury failed to make the adequate findings to allow a death sentence; and (8) the state courts failed to make the proper findings to allow for his conviction as the non-shooter. Subsequent Application for Writ of Habeas Corpus Filed Pursuant to Article 11.071, Section 5, *Ex Parte Sales*, No. 893161-B (179 Dist. Court, Harris County, Texas) (filed July 10, 2017). Sales's federal counsel, Mr. McGuire, filed the initial successive state habeas application. After the Court of Criminal Appeals authorized successive review of one claim, Sales moved for the

Texas strictly bars successive habeas proceedings, with limited exceptions. *See* Tex. Code of Crim. Pro. art. 11.071, § 5(a). A successive application may proceed when the inmate could not have raised claims earlier “because the factual or legal basis for the claim was unavailable on the date [he] filed the previous application” Tex. Code Crim. Pro. art. 11.071 § 5(a)(1). On February 14, 2018, the Court of Criminal Appeals found that only Sales’s actual-innocence claim deserved review. *Ex parte Sales*, 2018 WL 852323, at *2 (Tex. Crim. App. 2018); (Docket Entry No. 54-27). After holding an evidentiary hearing with Ostine as the only witness, the state habeas court issued detailed findings of fact and conclusions of law, concluding that Sales “fail[ed] to prove his innocence.” (Docket Entry No. 54-21 at 486). On January 25, 2023, the Court of Criminal Appeals “adopt[ed]” the lower court findings “as being supported by the record.” *Ex parte Sales*, 2023 WL 382321, at *3 (Tex. Crim. App. 2023). Based on “the trial court’s findings and conclusions and [its] own independent review of the record,” the Court of Criminal Appeals “conclude[d] that [Sales] ha[d] not established an entitlement to habeas relief” *Id.*

VI. The Renewed Federal Proceedings

Sales returned to federal court and filed a First Amended Death Penalty Case Application for Post-Conviction Writ of Habeas Corpus. (Docket Entry No. 44).¹³ Sales’s amended petition raises the same twenty-eight claims as his initial federal petition. In the body of his first amended petition, however, Sales abandoned several claims.

The respondent filed a renewed answer, arguing that most of Sales’s claims are procedurally barred. (Docket Entry No. 51). Because Sales never exhausted several claims and

appointment of counsel in state court. Andrew LeGrand, Haley Alexandra Former, and Christopher M. Wilson represented Sales in the successive state habeas proceedings.

¹³ In his amended petition, Sales stated that he “presents a fact-based Petition that does not discuss all of the applicable law. Accordingly, counsel will shortly file a motion asking the court to permit the filing of a brief in support of the Petition.” (Docket Entry No. 44 at 7). Sales never filed such a motion or brief.

defaulted others, the respondent contends that only claims one, two, twelve, seventeen, and nineteen are fully available for federal review. Alternatively, the respondent argues that all Sales's claims are without merit. Sales filed a reply that addresses only claims four, eight, and nine. (Docket Entry No. 59).

Taken together, Sales's claims fall into three categories:

- (1) The claims Sales has abandoned (claims thirteen through sixteen, twenty through twenty-three, twenty-seven, and twenty-eight);
- (2) The claims Sales exhausted in state court that are procedurally available for review (claims one, two, twelve, seventeen, nineteen, and twenty-four through twenty-six); and
- (3) The claims Sales presents in a procedurally improper manner (claims three through eleven and eighteen).

The court need not discuss Sales's abandoned claims. The court discusses together the claims that rely on a common factual or legal foundation.

VII. The Applicable Legal Standards on Federal Habeas Review

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and traditional habeas practice, how a federal court considers an inmate's claims depends on how he has previously litigated them. If an inmate raises his claims in state court, and the state court adjudicates them, federal review is narrow and deferential. The Fifth Circuit organizes already-adjudicated claims "into three different categories: (1) those presenting questions of law, (2) those presenting questions of fact, and (3) those presenting mixed questions of law and fact." *Neal v. Vannoy*, 78 F.4th 775, 783 (5th Cir. 2023). Courts review legal questions under § 2254(d)(1), to determine whether they are either "contrary to" clearly established Supreme Court precedent or an "unreasonable application" egregious beyond fair-minded disagreement. *Langley v. Prince*, 926 F.3d 145, 155-56 (5th Cir. 2019). Federal courts presume that factual findings are correct and

approve them unless unreasonable. *See Rice v. Collins*, 546 U.S. 333, 338-39 (2006); 28 U.S.C. § 2254(d)(2), (e)(1). Courts review mixed questions in two parts: legal conclusions under § 2254(d)(1), and factual findings under §§ 2254(d)(2) and (e)(1). *See Austin v. Davis*, 876 F.3d 757, 782-84 (5th Cir. 2017).

“If [the AEDPA] standard is difficult to meet, that is because it was meant to be.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). But even meeting AEDPA’s narrow exceptions does not guarantee habeas relief; an inmate still must show, on *de novo* review, that federal law and justice demand relief. *See Brown v. Davenport*, 596 U.S. 118, 134 (2022); 28 U.S.C. § 2243. Even if the inmate shows constitutional error, a court may not provide relief if the error was harmless. *See Davenport*, 596 U.S. at 122 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

Inmates often raise claims that the state courts have rejected on procedural grounds. The respondent argues that claims three through eleven and eighteen are unavailable for federal consideration because the state court (1) dismissed them without considering their merits (claims three through nine) or (2) dismissed them as not cognizable (claims ten, eleven, and eighteen). Both categories of dismissals bar federal review. *See Guidry v. Lumpkin*, 2 F.4th 472, 486 (5th Cir. 2021); *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997); *see also Davila v. Davis*, 582 U.S. 521, 527 (2017). The court may reach the merits of these claims only merits if Sales shows some exception to the procedural bar.

A petitioner may overcome a procedural bar by showing: (1) cause and actual prejudice or (2) that “a constitutional violation has probably resulted in the conviction of one who is actually

innocent.”” *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (cleaned up). Sales makes the following arguments to overcome the procedural bar of his defaulted claims:¹⁴

1. His innocence overcomes the procedural bar of all defective claims. Sales specifically discusses actual innocence with claims three, six, seven, and eight. (Docket Entry No. 44 at 55, 131, 215, 216).
2. Ineffective representation of habeas counsel overcomes the procedural bar to claims three, four, eight, and nine. (Docket Entry No. 44 at 112, 144, 147-49, 174-75, 187-94, 215, 218, 232).
3. The suppression of evidence overcomes the procedural bar to claim six. (Docket Entry No. 44 at 205-12, 231-32).
4. Ineffective representation by state appellate counsel overcomes the procedural bar to claims five, eight, and ten. (Docket Entry No. 187-94, 217, 232).

With that background, the court turns to Sales’s grounds for relief.

ANALYSIS

I. Actual Innocence (Claims One and Two)

Sales’s first two claims are based on actual innocence. A defendant may raise federal an actual-innocence claim in two different contexts: (1) as a stand-alone constitutional claim; or (2) as a gateway to federal review of procedurally barred claims. Sales raises both. Neither claim warrants federal habeas relief.

A. Stand-Alone Constitutional Claim (Claim Two)

In claim two, Sales argues that his actual innocence is an independent constitutional ground for relief. Courts “do[] not recognize freestanding claims of actual innocence on federal habeas review.” *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009); *see also Herrera v. Collins*, 506 U.S. 390, 400 (1993); *Schlup v. Delo*, 513 U.S. 298, 326 (1995); *In re Palacios*, 58 F.4th 189, 190

¹⁴ Sales does not make any specific argument to overcome the procedural bar of claims eleven or eighteen.

(5th Cir. 2023); *In re Raby*, 925 F.3d 749, 755 (5th Cir. 2019). The court denies claim two as not cognizable.

B. Actual Innocence as Procedural Gateway to Review (Claim One)

Claim one does not provide a ground for habeas relief. In claim one, Sales argues that he “is actually innocent of the capital murder” under *Schlup v. Delo*, 513 U.S. 298 (1995), and that the court “may reach each of [his] constitutional claims through [the] innocence ‘gateway.’” (Docket Entry No. 44 at 13). Sales argues that claim one provides a vehicle for the review of other claims. The court summarily denies claim one as a ground for habeas relief. For the reasons described at length below, Sales’s arguments also do not provide for federal review of the barred claim.

In *Schlup*, the Supreme Court held that innocence may allow a limited federal review of procedurally barred claims. A convicted defendant invoking federal habeas jurisdiction “comes before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt.” *Schlup*, 513 U.S. at 326. As a result, “tenable actual-innocence gateway pleas are rare.” *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). An inmate proves actual innocence only when “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt” in light of “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.” *Schlup*, 513 U.S. at 324, 327.

Sales argues that “[n]o reasonable juror would have convicted [him] if they learned of the evidence contained in the [post-trial] statements of . . . shooter Herschel Ostine, Deannandra Darfour, . . . and Cheryl Kissentaner” (Docket Entry No. 44 at 19). Sales’s federal argument covers the same ground as the actual-innocence claim he raised on successive state habeas review. This

court must defer to the state-court findings involving Sales's claim of innocence. *See Reed v. Stephens*, 739 F.3d 753, 773 n.8 (5th Cir. 2014); *In re Wright*, 298 F. App'x 342, 344 (5th Cir. 2008). The court, therefore, will comprehensively discuss the state adjudication before turning to Sales's federal actual-innocence arguments.

1. State Habeas Review

Sales's successive state habeas application advanced his alleged innocence both as a substantive claim and as a gateway to review. (Docket Entry No. 53-13 at 11-21). The Court of Criminal Appeals considered Sales to have raised the claims from his successive habeas application under Tex. Code Crim. Pro. art. 11.071 § 5(a)(1), which allows for review only when the claims "were unavailable on the date [the inmate] filed the previous application." (Docket Entry No. 54-27 at 3). Sales's state actual-innocence argument relied on three sources: (1) an affidavit that the shooter, Herschel Ostine, signed in 2015, (Docket Entry No. 53-54); (2) the undated transcript of what purports to be a phone call between Sales's habeas attorney and his girlfriend, Cheryl Kissentaner, (Docket Entry No. 53-63); and (3) a partial transcript of a 2015 interview with the getaway driver, Deandra Darfour, (Docket Entry No. 53-62). The Court of Criminal Appeals rejected any consideration of the Kissentaner and Darfour documents because: (1) "what [Sales] refers to as 'statements' are only unsworn transcripts of their recorded interviews with habeas counsel"; (2) the documents did not make "a *prima facie* showing that [Sales] is actually innocent"; and (3) the record contradicted Sales's argument that "Kissentaner was unavailable when [Sales] filed his initial habeas application." (Docket Entry No. 54-27 at 4).¹⁵

¹⁵ Sales argues that the Court of Criminal Appeals decision "was contrary to, or an unreasonable application of, clearly established Supreme Court precedent . . . [b]ecause they incorrectly concluded they could not consider these unsworn statements" on state habeas review. (Docket Entry No. 44 at 38). No federal constitutional law governs a state habeas court's consideration of evidence.

The Court of Criminal Appeals tentatively allowed successive review to proceed on the Ostine affidavit. (Docket Entry No. 54-27 at 4). The Court of Criminal Appeals remanded for additional factual development. The parties developed evidence relating to Ostine's crime, his arrest, and his guilty plea. This evidence provided context to his 2015 affidavit.

Ostine disappeared after the Butler murder and was still at large during Sales's trial. On September 20, 2003, Nashville police officers arrested Ostine. Ostine provided a custodial statement at that time, confessing to his role as the shooter and implicating Sales in Butler's murder. (Docket Entry No. 54-20 at 287-315). According to Ostine's 2003 police statement, Sales had talked openly about having Butler killed about a week before the murder. (Docket Entry No. 54-20 at 300). Ostine said that Sales ordered him to kill Butler. (Docket Entry No. 54-20 at 300). Ostine said that, after the murder, Sales asked: "How many times did you shoot?" and "Did you do this?" (Docket Entry No. 54-20 at 308). Sales even checked Ostine's weapon to confirm that he had fired shots. (Docket Entry No. 54-20 at 308). In short, Ostine's 2003 police statement both "implicate[d] Sales as either a party or co-conspirator to [Butler's] murder" and "corroborated much of the trial testimony and accompanying physical evidence from [Sales's] trial." (Docket Entry No. 54-21 at 467). On May 2, 2005, Ostine pleaded guilty to capital murder and received a life sentence. *State v. Ostine*, No. 881567 (179th Dist. Court, Harris County, Texas).

In 2015, however, Ostine provided an affidavit saying:

I made the decision on my own to shoot Tyrone Butler. Tarus Sales did not ask me to kill Tyrone Butler, or direct me in any way to shoot Butler. I shot and killed Butler on my own, and Tarus had nothing to do with the decision to do that.

(Docket Entry No. 45-55 at 1). Ostine described how he shot Butler to curry Sales's favor:

Shooting Butler was my idea alone. I thought it might make Sales protect me, since Butler was a witness against Sales on another case. The other case was not serious, though. Sales did not hire me to murder Butler, or ask me to murder Butler, or assist or counsel me to murder Butler. There was no hiring or no paying of me or

no asking me to do the Butler murder by Tarus Sales. I just decided on my own that killing Butler was a way for me to get Tarus to maybe vouch for me with [Tennessee police officer Ernest] Cecil back in Nashville so Cecil wouldn't kill me for losing his money. Tarus Sales did not put me up to shooting Butler or ask me to do it.

(Docket Entry No. 45-55 at 1). Ostine stated that Sales was angry when he found out about the shooting.

On remand, the State stipulated that Ostine's affidavit was unavailable when Sales filed his initial habeas application. (Docket Entry No. 54-2 at 5). On June 2, 2022, the trial court held an evidentiary hearing. Ostine was the only witness. (Docket Entry No. 54-1 at 1-169). Ostine testified that Sales did not ask, direct, hire, or help him to kill Butler. (Docket Entry No. 54-1 at 18). Ostine reiterated that it was his plan alone to kill Butler. (Docket Entry No. 54-1 at 18). Ostine again linked the Butler murder to criminal acts he and Sales had committed in Tennessee. The State cross-examined Sales using his 2003 police interview and with telephone calls he had made while incarcerated in Tennessee before his extradition.¹⁶

On August 22, 2022, the trial court entered proposed findings and conclusions recommending that the Court of Criminal Appeals deny relief. (Docket Entry No. 54-21 at 455-88). The trial court provided significant and detailed reasons for disbelieving Ostine's 2015 affidavit and state evidentiary hearing testimony. The trial court found that Ostine's "testimony seemed 'rehearsed' and unbelievable," leading to the conclusion that he was not a "sincere" witness. (Docket Entry No. 54-21 at 468). The trial court found Ostine's hearing testimony to be "vague and uncertain as to the key relevant facts surrounding the . . . murder" (Docket Entry No. 54-21 at 468). Ostine did "not give any details regarding the plan and preparation of the

¹⁶ In one phone call, Ostine said that the police "know everything" and "ain't nothing they don't know," suggesting that the version of events he gave in his 2003 interview accurately described the events surrounding the crime. (Docket Entry No. 54-21 at 478).

murder” and “his testimony and affidavit [were] silent as to any information on how his idea and plan to kill the complainant came about or any other surrounding meaningful details regarding the incident.” (Docket Entry No. 54-21 at 468-69). In contrast, the State presented credible testimony that “this murder was not . . . a result of sudden passion or [a] heat-of-the-moment type of crime,” but the result of a calculated “series of events.” (Docket Entry No. 54-21 at 468).

The trial court also found that Ostine “had sufficient knowledge and motive to murder [Butler] on behalf of [Sales],” and that Ostine was a person Sales “could trust to carry out [Butler’s] murder.” (Docket Entry No. 54-21 at 473). The court found that Ostine’s “lifelong friendship with [Sales] and history of dealing drugs with [him] demonstrates bias” that “reduce[d] the persuasiveness of his 2015 writ affidavit when weighed against the existing trial testimony and evidence.” (Docket Entry No. 54-21 at 473-74).

The state habeas trial court also chronicled numerous “inconsistencies” between Ostine’s 2003 custodial interview, his 2015 affidavit, and his writ-hearing testimony. (Docket Entry No. 54-21 at 474-78). The state habeas court found that Ostine “failed to provide adequate or persuasive reasons for the inconsistencies between” his various accounts, making his most recent statements “unpersuasive.” (Docket Entry No. 54-21 at 477-78). The state habeas trial court also found that Ostine’s “post-arrest [telephone] conversation[s] . . . detracted from the persuasiveness of his 2015 writ affidavit and habeas testimony.” (Docket Entry No. 54-21 at 479).

In the end, the state habeas trial court believed Ostine’s 2003 custodial statement and disbelieved his post-conviction accounts. The state habeas trial court specifically found “Ostine’s testimony that he decided on his own to kill the complainant, Tyrone Butler, to not be credible and to not be persuasive.” (Docket Entry No. 54-21 at 471). Having discounted Sales’s underlying habeas evidence, the habeas trial court easily rejected Sales’s actual innocence claim. The habeas

trial court found that Sales “relie[d] on the inconsistent and biased statements of [his] lifelong friend and co-defendant” which did not prove his innocence. (Docket Entry No. 54-21 at 483). The habeas trial court concluded that Ostine’s affidavit “only muddies the water regarding [Sales’s] guilt” but “does not unquestionably establish [his] innocence.” (Docket Entry No. 54-21 at 486). The habeas trial court ultimately concluded that “Ostine’s 2015 affidavit and corresponding 2022 post-conviction evidentiary hearing testimony fail[ed] to overcome the weight of the trial testimony and accompanying physical evidence establishing [Sales’s] guilt. Therefore, [he] fails to prove his innocence by clear and convincing evidence.” (Docket Entry No. 54-21 at 487).

The habeas trial court forwarded the case to the Court of Criminal Appeals. Sales submitted objections to the lower court’s findings and conclusions. (Docket Entry No. 54-22). On January 25, 2023, the Court of Criminal Appeals entered an order denying relief based on “the trial court’s findings and conclusions and [its] independent review of the record.” (Docket Entry No. 54-24 at 7). The Court of Criminal Appeals specifically “adopt[ed]” the lower court’s findings “as being supported by the record.” (Docket Entry No. 54-24 at 7). On that basis, the Court of Criminal Appeals “den[ied] habeas relief” on Sales’s actual-innocence claim. (Docket Entry No. 54-24 at 7).

Sales renews his actual-innocence arguments in this federal court. Sales relies on documents purporting to be interviews with Darfour and Kissentaner, as well Ostine’s 2015 affidavit. As discussed below, the Darfour and Kissentaner statements are not new and reliable evidence for federal consideration. The state courts’ findings foreclose Sales’s claim of innocence.

2. Unsworn Statements

The Supreme Court has “stressed the need to *prove* a gateway claim of actual innocence through *new and reliable* evidence.” *Merryman v. Davis*, 781 F. App’x 325, 330 (5th Cir. 2019) (emphasis in original); *see also Perkins*, 569 U.S. at 386-87. The documents allegedly transcribing interviews with Darfour and Kissentaner are neither new nor reliable. First, the documents are not sworn statements. *See Teahan v. Almager*, 383 F. App’x 615, 615 (9th Cir. 2010) (holding that unsworn statements of purported alibi witnesses were insufficient to establish actual innocence); *Kincy v. Dretke*, 92 F. App’x 87, 93 n.8 (5th Cir. 2004) (rejecting an actual-innocence claim when the only evidence consisted of “highly debatable, unsworn statements”). Second, the interviews do not meet the requirements of an unsworn declaration. *See* 28 U.S.C. § 1746.¹⁷ Kissentaner and Darfour would not provide affidavits. Their unwillingness to verify their statements under penalty of perjury sharply undercuts the reliability of the unsworn statements. *See Cosey v. Lilley*, 62 F.4th 74, 84 (2d Cir. 2023) (finding an unsworn statement unreliable when the witness would not sign an affidavit).

Darfour’s statement is particularly unreliable because it contradicts statements she had made to police officers. In a 2004 police interview, Darfour acknowledged that Sales was willing

¹⁷ Considering unsworn statements in this case would be a double-edged sword for Sales. The Darfour and Kissentaner statements are not the only unsworn statements in the record. Sales does not mention it in his actual-innocence argument, for obvious reasons, but the exhibits to his amended federal petition include what he calls a “recorded statement” from trial witness Hatfield. (Docket Entry No. 44 at 200). Similar to the Kissentaner and Darfour statements, Hatfield’s recorded statement appears to be a transcription of an interview or conversation between an investigator and Hatfield in 2015. (Docket Entry No. 53-76). In Hatfield’s recorded statement, he says that Sales was at the scene of the murder. (Docket Entry No. 53-76 at 34). Hatfield states that, after the murder, Sales said “We killed him.” (Docket Entry No. 53-76 at 26). Hatfield also states that Sales later “kidnapped” Kevin Howell and “had him tied up” after the murder because Howell “kn[e]w they killed the security guard.” (Docket Entry No. 53-76 at 30-31). Hatfield describes a call from Sales in which he said, “You gonna tell on me, this and that. I’m gonna kill—I’m gonna kill you and your family.” (Docket Entry No. 53-76 at 29). Hatfield states that Sales began “staking out [Hatfield’s] mom[’s] house,” (Docket Entry No. 53-76 at 31). The kidnapping and threats after the murder prompted Hatfield to call the police and “t[ell] them everything that [he] knew” about Sales’s involvement. (Docket Entry No. 53-76 at 31).

to pay to have Butler killed. Darfour said that Sales had offered Fleary \$5,000 to kill Butler. (Docket Entry No. 45-72 at 17-18). Sales “asked about a gun for [Fleary].” (Docket Entry No. 45-72 at 27). Darfour said that Kissentaner had told her that Sales “was thinking about” having Butler killed “because [Fleary] was supposed to [have] done [it] and he didn’t do it . . .” (Docket Entry No. 45-72 at 16).

The Kissentaner and Darfour documents are also not “new” evidence. “Evidence does not qualify as ‘new’ . . . if ‘it was always within the reach of [an inmate’s] personal knowledge or reasonable investigation.’” *Hancock v. Davis*, 906 F.3d 387, 389 (5th Cir. 2018). The record does not explain why Darfour did not testify at trial. She did not face criminal charges at that time. In fact, Sales says that “Darfour clearly was available to testify at trial.” (Docket Entry No. 59 at 34). Darfour’s account was available to Sales at the time of his trial and cannot qualify as “new” under federal actual-innocence jurisprudence. *See Moore v. Quartermann*, 534 F.3d 454, 465 (5th Cir. 2008) (finding that evidence was not new “given that it was always within the reach of [the inmate’s] personal knowledge or reasonable investigation”).

The state habeas court specifically found that “the record contradicts [Sales’s] claim that Kissentaner was unavailable when [he] filed his initial habeas application.” (Docket Entry No. 54-27 at 5). Kissentaner’s unsworn statement may be newly presented, but Kissentaner’s testimony was available to Sales for more than a decade before he filed his initial federal petition. The Kissentaner and Darfour documents are not a new or reliable basis for an actual-innocence claim.

3. Federal Review

Sales’s actual-innocence argument stands or falls on Ostine’s account. The state habeas trial judge who viewed Ostine’s evidentiary hearing testimony found that he was not credible. This

was not a capricious decision; the habeas trial court based its credibility finding on Ostine's demeanor, his testimony, and a comparison of that testimony with the record evidence. The state habeas trial court provided detailed and extensive reasons for rejecting Ostine's account. These credibility findings are "entitled to a strong presumption of correctness and [is] 'virtually unreviewable' by the federal courts." *Pippin v. Dretke*, 434 F.3d 782, 792 (5th Cir. 2005); *see also* 28 U.S.C. § 2254(e)(1). Sales disputes the state-court determination but does not present clear and convincing evidence to contradict the findings. Sales's 2015 affidavit and subsequent habeas testimony are not a reliable basis to show his innocence.

In the end, a habeas court's actual-innocence review encompasses a broad assessment of all available evidence. *See House*, 547 U.S. at 537-38. Trial testimony showed that Sales had solicited Butler's murder and later told a jail inmate about it. After their arrest, both Ostine and Darfour gave police statements describing how Sales had ordered Butler's murder in retaliation for his upcoming testimony. Ostine has since provided a different version of events. As the state habeas trial court observed, Sales's new evidence at best "muddies the waters," but it is still not "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial" *Schlup*, 513 U.S. at 316.

Sales has not "demonstrate[d] that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006) (citing *Schlup*, 513 U.S., at 327). Sales's actual-innocence arguments do not overcome the procedural bar of his defaulted claims.

II. Sales Was Not the Triggerman (Claims Three, Eight, and Nine)

Sales did not shoot Tyrone Butler and was not present when he was murdered. But the Constitution does not prohibit a death sentence against “the class of murderers who did not themselves kill, attempt to kill, or intend to kill.” *Cabana v. Bullock*, 474 U.S. 376, 385 (1986). In *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court has set out the constitutional standards governing capital sentencing for that “class of murderers.” *Cabana*, 474 U.S. at 385.

Sales bases three claims on the intersection between the *Enmund/Tison* cases and other Supreme Court precedent. Because Sales raised all three claims in his successive state habeas application, he must overcome the resultant procedural bar. Before considering Sales’s procedural argument, the court reviews the Eighth Amendment law relating to a non-triggerman’s death sentence.

A. Background

The “deeply rooted” Eighth Amendment guarantee that “a punishment should be proportionate to the crime,” *Solem v. Helm*, 463 U.S. 277, 284 (1983), limits death sentences for “defendants who do not kill, intend to kill, or foresee that life will be taken” *Graham v. Florida*, 560 U.S. 48, 69 (2010). Because “the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual’s participation in the crime,” the Supreme Court has set out minimum standards for a death sentence through its *Enmund/Tison* jurisprudence. *Sumner v. Shuman*, 483 U.S. 66, 79 (1987). In *Enmund*, the Supreme Court examined the Eighth Amendment implications of sentencing a non-triggerman to death. Relying on the Eighth Amendment’s proportionality principle, the *Enmund* court held that a non-triggerman’s sentence must be “tailored to [a defendant’s] personal responsibility and moral

guilt.” *Id.* at 797.¹ *Enmund* established that a defendant’s own culpability, not that of his co-participants, should determine his sentence. *See id.* at 798.

Revisiting *Enmund* in *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court specified that the Constitution does not prohibit the execution of a non-triggerman when the jury finds that: (1) the defendant was a major participant in the felony committed; and (2) the defendant demonstrated “reckless indifference to human life.” 481 U.S. at 157. The *Tison* factors have become the focus of the Eighth Amendment’s proportionality review in cases involving the death sentence of a non-triggerman.

In *Cabana v. Bullock*, 474 U.S. 376 (1986), the Supreme Court held that “[t]he decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that [it has] ever required to be made by a jury.” The *Cabana* court emphasized that the *Enmund/Tison* cases “impose[] a categorical rule” without “impos[ing] any particular form of procedure upon the States.” *Id.* at 386. The decision is “one that a trial judge or an appellate court is fully competent to make.” *Id.* at 386; *see also Hopkins v. Reeves*, 524 U.S. 88, 100 (1998) (“*Tison* and *Enmund* do not affect the showing that a State must make at a defendant’s trial for felony murder, so long as their requirement is satisfied at some point thereafter.”). The *Cabana* court held that “[a]t what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution.” *Cabana*, 474 U.S. at 386.

Texas law has not codified the *Enmund/Tison* analysis. Sales has not pointed to any authority requiring a *sua sponte Enmund/Tison* analysis when a non-triggerman receives a death sentence. Because Sales did not raise any *Enmund/Tison* issue until his procedurally defective successive habeas application, no state court directly conducted that analysis. The Texas jury and

courts did, however, make decisions that functionally correspond to the *Enmund/Tison* analysis. The record contains findings corresponding to *Tison*'s major-participation requirement. The jury instructions allowed for Sales's conviction as either a party or a coconspirator to the murder. While a conviction as a coconspirator may not sufficiently establish a defendant's role as a major participant, a conviction as a party does. *See Clark v. Johnson*, 227 F.3d 273, 280 (5th Cir. 2000). Even though the jury issued a general verdict, the successive state habeas court found that "[t]he trial evidence established [Sales] as *both* a party to capital murder, *and* as a coconspirator to capital murder for conspiring to retaliate against [Butler]." (Docket Entry No. 54-21 at 486) (emphasis added). The state court found that the evidence supported Sales's conviction as a party, which satisfies a condition set in the *Enmund/Tison* cases.

As to the reckless-indifference requirement, the jury in the penalty phase answered the special-issue question asking whether Sales "actually caused the death," "intended to kill," or "anticipated that a human life would be taken," Tex. Code Crim. Pro. art. 37.071 § 2(b)(2). Federal and state courts have held that this Texas special-issue question complies with the *Enmund/Tison* requirement of displaying reckless indifference to human life. *See Halprin v. Davis*, 911 F.3d 247, 259 (5th Cir. 2018); *Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006); *Alvarez v. Davis*, 2017 WL 4844570, at *23 (S.D. Tex. 2017); *Walker v. Scott*, 123 F. Supp. 2d 1034, 1043 (E.D. Tex. 2000); *see also Leza v. State*, 351 S.W.3d 344, 355 (Tex. Crim. App. 2011); *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999); *but see Gongora v. Quarterman*, 2008 WL 4656992, at *7 (5th Cir. 2008) (granting a certificate of appealability on a similar argument but ultimately deciding the case on other grounds). In answering the special-issue question, the jury made *Tison*'s reckless-indifference finding.

In short, the *Enmund/Tison* analysis was effectively done in this case. Notwithstanding, Sales's petition raises three claims based on *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), and subsequent cases. In *Apprendi*, the Supreme Court explained that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 469. Sales relies on *Apprendi* to argue that: (1) a jury must explicitly engage in the *Enmund/Tison* analysis (claim eight);¹⁸ (2) his death sentence is unconstitutional because the *Enmund/Tison* findings were not made beyond a reasonable doubt (claim nine); and (3) his prior attorneys should have objected because the indictment and jury instructions did not require the *Enmund/Tison* findings (claim three). Sales argues that this court must vacate his death sentence and remand for a hearing in which a jury explicitly considers the *Enmund/Tison* factors.

Like other constitutional errors, an inmate may default consideration of an alleged *Enmund/Tison* violation by failing to raise it in a proper manner. See *Halprin*, 911 F.3d at 259 (finding an *Enmund/Tison* claim to be procedurally barred); *Murphy v. Davis*, 737 F. App'x 693, 700 (5th Cir. 2018). This court cannot reach the merits unless Sales can overcome the procedural bar of claims three, eight, and nine. Sales argues that the alleged *Enmund/Tison* violation makes him actually innocent of capital murder and that his initial habeas counsel's failure to raise the barred claims was deficient performance under *Martinez v. Ryan*, 566 U.S. 1 (2012). As discussed below, neither argument provides a path to federal review.

¹⁸ Sales raised other *Apprendi* claims in his initial habeas application. It is not clear why he did not include this one. (Docket Entry No. 53-4 at 206-09).

B. Actual Innocence

Sales argues that he can overcome the procedural bar because he is actually innocent of his *death sentence* under *Sawyer v. Whitley*, 505 U.S. 333 (1992). Actual innocence of a death sentence is different from actual innocence of capital murder. “To show “actual innocence” of a death sentence, *Sawyer* requires inmates to “show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.” *Sawyer*, 505 U.S. at 336.

Sales bases his *Sawyer* argument on the Supreme Court’s *Apprendi* jurisprudence, which he asserts requires the jury to make “the required *Tison/Enmund* factual findings beyond a reasonable doubt” because they “allow the *increased* punishment of death.” (Docket Entry No. 44 at 216) (emphasis added). Sales interprets *Apprendi* as requiring states to alter their capital-murder statutes processes to include the *Enmund/Tison* factors in a capital indictment and in the jury’s verdict and to require those factors to be proven beyond a reasonable doubt.

For federal review to become available under a *Sawyer* analysis, Sales must show that, but for constitutional error (which in this case means that *Apprendi* required the jury to make the *Enmund/Tison* findings beyond a reasonable doubt), no reasonable juror would have sentenced him to death (presumably because of how jurors would decide the *Enmund/Tison* question). Sales, however, does not make a proper *Sawyer* argument and has not made a strong showing of constitutional error.

1. *Sawyer*

Sales’s arguments fall outside the traditional *Sawyer* miscarriage-of-justice exception, for several reasons. First, Sales’s arguments depend on showing that it was legal error under *Apprendi* to fail to explicitly include the *Enmund/Tison* factors in the jury’s verdict. *Sawyer*’s “miscarriage

of justice” exception, however, “is concerned with *actual* as compared to *legal* innocence.” *Sawyer*, 505 U.S. at 339 (emphasis added); *see also Duggar v. Adams*, 489 U.S. 401, 410 n.6 (1989) (“Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual is ‘actually innocent’ of the sentence he or she received.”). Merely alleging legal error or legal ineligibility is insufficient to meet the *Sawyer* exception; an inmate must show that he is factually innocent. *See Callins v. Johnson*, 89 F.3d 210, 215 (5th Cir. 1996) (“*Sawyer* does not hold that anyone who is legally ineligible for a particular punishment is ‘actually innocent.’”). Sales’s argument goes only to legal error. *See Widener v. Smith*, 156 F. App’x 509, 511 (3d Cir. 2005) (describing allegations of *Apprendi* error as “legal, not factual innocence”).

Second, Sales does not base his argument on new evidence. An inmate proves his factual innocence through newly discovered evidence, which “is an indispensable prerequisite to the assertion of every type of true actual innocence claim.” *Henderson v. Thaler*, 626 F.3d 773, 786 (5th Cir. 2010) (Weiner, J., dissenting). Using new evidence, an inmate must show that, but for any constitutional violation, no reasonable juror would have found him eligible for the death penalty. *See Sawyer*, 505 U.S. at 336. Sales does not base this argument on new evidence.

Third, Sales’s barred claims are based on arguing that the elements of the judicially created *Enmund/Tison* analysis are the same as the elements of capital murder. The *Sawyer* exception, however, focuses on the *statutory* elements that make a defendant eligible for a death sentence. *See Sawyer*, 505 U.S. at 348; *see also Tong v. Lumpkin*, 90 F.4th 857, 864 (5th Cir. 2024) (“*Sawyer* limited this exception to situations where alleged constitutional errors only affected the applicant’s eligibility for the death penalty under state statutory law”) (quotation omitted and cleaned up); *Callins v. Johnson*, 89 F.3d 210, 215 (5th Cir. 1996) (“*Sawyer* does not hold that anyone who is

legally ineligible for a particular punishment is ‘actually innocent.’ *Sawyer* merely likens sentencing criteria to the elements of a crime, focusing on the factual, not legal, basis for the verdict.”). In other words, innocence claims under *Sawyer* “are limited to arguments that ‘no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law,’ *i.e.*, the elements of the crime itself and the existence of aggravating circumstances.” *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 906 (10th Cir. 2019); *see also Gilbert v. United States*, 640 F.3d 1293, 1320 (11th Cir. 2011); *Sibley v. Culliver*, 377 F.3d 1196, 1205 (11th Cir. 2004). Texas law has not made the *Enmund/Tison* inquiry an element of the crime of capital murder.

Fourth, no court has yet extended *Apprendi* in the manner required by Sales’s arguments. As discussed further below, *Apprendi* does not apply in this circumstance because the *Enmund/Tison* analysis does not qualify a defendant for a death sentence; instead, the analysis may remove the defendant from the class of death-eligible defendants. Because Sales’s proposed extension of *Apprendi* was “not dictated by precedent” at the time of his trial, it qualifies as a “new rule” of constitutional law. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). In essence, Sales asks the court to create a new rule of constitutional law and then retroactively apply it to his sentence. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (finding that *Apprendi*’s application in *Ring* was a new rule under *Teague*); *see also Rowell v. Dretke*, 398 F.3d 370, 379 (5th Cir. 2005) (holding in another context that any extension of *Apprendi* to Texas’ capital sentencing scheme would violate *Teague*). Sales has not identified any case applying the *Sawyer* miscarriage-of-justice exception through the creation of new law.

Finally, Sales must show that, “but for” the alleged *Apprendi* error, no reasonable juror would have found him eligible for a death sentence. *Sawyer*, 505 U.S. at 336. The “but for”

language proposes a counterfactual scenario in which an alleged error did not take place and then determines how that alleged error influenced the actual outcome—in this case, a death sentence. Sales does not show how the jury in his case would have responded differently based on any *Enmund/Tison* violation. Sales asks for a remand to allow a jury to engage in the *Enmund/Tison* analysis, but he does not make the necessary showing to support that result.

In short, Sales has not made a proper actual-innocence argument.

2. *Apprendi*

Even if the court could reach the merits of Sales’s *Enmund/Tison* claims, he has not made a strong showing that *Apprendi* required jurors to engage in that analysis. All three of Sales’s barred claims depend on showing that *Apprendi* requires a beyond-a-reasonable-doubt verdict based on the *Enmund/Tison* factors. The Supreme Court based its *Apprendi* jurisprudence on the Sixth Amendment guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” In *Apprendi*, the Supreme Court held that any fact which “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict” is essentially an “element” that the trial court must submit to the jury. 530 U.S. at 494. The Supreme Court, however, clarified that “once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.” *Apprendi*, 530 U.S. 497.

Two years later, in *Ring v. Arizona*, 536 U.S. 584, 602 (2002), the Supreme Court applied *Apprendi* to Arizona’s statutory sentencing scheme. In *Ring*, a jury had convicted the defendant of felony murder, but he “could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made” on “at least one aggravating

circumstance.” *Hurst v. Florida*, 577 U.S. 92, 98 (2016) (quoting *Ring*, 536 U.S. at 592). After *Ring*, “[a] defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Ring*, 536 U.S. at 586. “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt” because the sentencing factors “operate as the functional equivalent of an element of a greater offense.” *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494, n. 19); *see also Blakely v. Washington*, 542 U.S. 296, 303 (2004) (finding that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant”).

Sales argues that *Apprendi* overruled the Supreme Court’s decision in *Cabana*, which held that a jury does not need to engage in the *Enmund/Tison* analysis. Sales argues that he is actually innocent because his jury did not engage in that analysis. Sales’s use of the *Apprendi* decision as an actual-innocence argument faces an uphill battle. In the quarter century since the Supreme Court decided *Apprendi*, no court has yet held that it overruled *Cabana*. While the Fifth Circuit has not yet directly confronted the question,¹⁹ the Tenth Circuit has held that “*Apprendi* does not render invalid the rule of *Cabana*.” *Gilson v. Sirmons*, 520 F.3d 1196, 1219 (10th Cir. 2008); *see also* 6 LaFave et al., *Criminal Procedure* (4th ed.), § 26.4(i), pp. 1018-1019 (“So far, lower courts have rejected arguments to equate the factors which as a matter of Eighth Amendment law are required for death eligibility with elements. The rule[] in *Tison* . . . ha[s] instead been treated as [a] defense[] to, not element[] of, capital murder.”).

¹⁹ Judges on the Fifth Circuit have questioned the viability of *Cabana* after the *Apprendi* decision in concurring and dissenting opinions. *See Gongora v. Thaler*, 710 F.3d 267, 290 (5th Cir. 2013) (Owen, J., dissenting); *Hall v. Quarterman*, 534 F.3d 365, 386 (5th Cir. 2008) (Higginbotham, J., concurring in part).

Sales's argument depends on establishing the *Enmund/Tison* analysis as an element of a capital offense in the sentencing phase. The structure of the Texas capital-sentencing system suggests that *Apprendi* would not apply in these circumstances.

The Supreme Court's "cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the *eligibility* decision and the *selection* decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994) (emphasis added). "In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant." *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).

The fact that Sales's jury made the factual determinations that he was eligible for a death sentence under Texas law distinguishes Sales's trial from the cases that have been found wanting under *Apprendi*.²⁰ In Texas, jurors make the eligibility decision in the guilt/innocence phase by finding that the defendant killed under one of several specifically defined circumstances. *See* Tex. Penal Code § 19.03; *Johnson v. Texas*, 509 U.S. 350, 362 (1993). The guilt-innocence phase is when "the state [is] required to prove beyond a reasonable doubt every finding prerequisite to exposing [the defendant] to the maximum penalty of death." *Granados v. Quarterman*, 455 F.3d 529, 536-37 (5th Cir. 2006); *see also Garcia v. Davis*, 704 F. App'x 316, 324 (5th Cir. 2017); *Allen v. Stephens*, 805 F.3d 617, 628 (5th Cir. 2015). After a guilty verdict, "the prescribed statutory maximum for capital murder is fixed at death" and "[n]othing the jury or judge decided

²⁰ Sales emphasizes that *Ring* relied on *Apprendi* to undercut *Walton v. Arizona*, 497 U.S. 639, 648-49 (1990). In *Walton*, the Supreme Court found "further support" in *Cabana* for its decision that the Arizona capital punishment's aggravating circumstances were not elements of the capital offense. *Walton*, 497 U.S. at 648. In finding that "*Walton* and *Apprendi* are irreconcilable," however, the *Ring* Court "overrule[d] *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609 (emphasis added). This distinction is critical. No court has held that the *Enmund/Tison* findings operate as an aggravating circumstance. Those findings limit or restrain, not but do not authorize, capital punishment.

during the punishment phase could have enhanced [the defendant's] sentence beyond the prescribed range.” *Allen*, 805 F.3d at 627 (quotation omitted). The jury’s guilty verdict made Sales eligible for the death penalty under the Supreme Court’s Eighth Amendment jurisprudence. *See Tuilaepa*, 512 U.S. at 971.

The *Enmund/Tison* cases deal with the selection phase of capital-case sentencing. *See Cabana*, 474 U.S. at 386 (stating that *Enmund* and *Tison* represent a “substantive limitation on sentencing”); *see also Clark*, 227 F.3d at 280 (“*Enmund* and *Tison* apply to the sentencing phase of the trial and not to the guilt/innocence phase.”). The Supreme Court explained in *Cabana* that the “ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury.” *See Cabana*, 474 U.S. at 385; *see also Reeves*, 524 U.S. at 100. “This bears repeating. The limitations that the *Enmund* decision found to be imposed by the Eighth Amendment do not add elements to a state’s statutory elements of a capital offense.” *Gongora v. Thaler*, 710 F.3d 267, 294 (5th Cir. 2013) (Owen, J., dissenting).

The Fifth Circuit has held that *Apprendi* “is inapposite to any discussion of the constitutional requirements of the selection phase.” *Turner v. Quarterman*, 481 F.3d 292, 299–300 (5th Cir. 2007). By the penalty phase, “the defendant has been judged death-eligible and the jury is being instructed how to decide whether selection of the death penalty is appropriate.” *Id.* at 300; *see also Brown v. Sanders*, 546 U.S. 212, 216 (2006) (“Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it.”). The jury’s decisions in the penalty phase determine whether a defendant should receive that sentence. The Fifth Circuit has repeatedly found that *Apprendi* does not apply to the Texas capital-sentencing process. *See, e.g., Sparks v.*

Davis, 756 F. App'x 397, 404 (5th Cir. 2018); *Powell v. Quarterman*, 536 F.3d 325, 334 (5th Cir. 2008). The *Enmund/ Tison* analysis does not qualify a defendant for a death sentence; instead, it removes defendants from the class of offenders who can be executed. Sales has not made a strong showing that *Apprendi* changed how Texas courts must sentence those convicted of capital murder, even those who did not themselves carry out the killing.

The Fifth Circuit's approach to other Eighth Amendment limits also undermines Sales's argument that *Apprendi* applies to invalidate his death sentence. The Fifth Circuit has held that "neither *Ring* and *Apprendi* . . . render[s] the absence of [intellectual disability in *Atkins*] the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt." *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003); *see also Woods v. Quarterman*, 498 F.3d 580, 585 n.3 (5th Cir. 2007); *United States v. Webster*, 421 F.3d 308, 312 (5th Cir. 2005). "When a defendant raises [intellectual disability] as an issue, its resolution can only *decrease* the sentence to which the defendant is exposed, and the *Apprendi* line of cases is therefore not applicable." *United States v. Umana*, 750 F.3d 320, 359 (4th Cir. 2014). The Fifth Circuit has held that *Apprendi* does not require jurors to decide whether *Atkins* precludes an inmate from execution. *See Webster*, 421 F.3d at 312; *In re Campbell*, 82 F. App'x 349, 351 (5th Cir. 2003); *Johnson*, 334 F.3d at 405. Sales has not explained why the Fifth Circuit's approach in cases based on the same constitutional provisions he invokes does not apply here.

In the end, the Eighth Amendment proportionality review operates to limit, not enhance, a sentence. Those limits do not create new elements of an offense that a jury must decide. Sales has not made a strong argument that *Apprendi* required the jury to determine whether the *Enmund/Tison* factors were proven beyond a reasonable doubt.

3. Conclusion

Sales has not shown a fundamental miscarriage of justice that would allow review of his *Enmund/Tison* related claims.

C. The Arguments that Prior Counsel Provided Constitutionally Deficient Representation

Sales argues that he can overcome the procedural bar of claims three, eight, and nine because his state appellate and habeas attorneys were deficient in failing to raise those claims earlier. An inmate may overcome a procedural bar by alleging ineffective representation by prior counsel. *See Luna v. Davis*, 793 F. App'x 229, 233 (5th Cir. 2019) (“Procedural defaults can be excused, and one way to excuse a default is to show it resulted from ineffective assistance.”). This argument does not allow federal review, for several reasons.

First, Sales did not properly exhaust his argument that his appellate counsel’s representation overcomes the procedural bar. “[A]n ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted” *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *see also Hatten v. Quarterman*, 570 F.3d 595, 605 (5th Cir. 2009). Sales raised the same allegations about appellate counsel’s representation in the successive habeas application that the Court of Criminal Appeals dismissed as an abuse of the writ. The allegations and arguments Sales raises here do not show cause to overcome the procedural bar.

Second, Sales argues that habeas counsel’s deficient representation overcomes the procedural bar to claims three, eight, and nine under *Martinez v. Ryan*, 566 U.S. 1 (2012). The Supreme Court, however, has limited the *Martinez* exception to “the default of a single claim”—an ineffective-assistance-of-trial-counsel claim. *Davila v. Davis*, 582 U.S. 521, 524 (2017). Any

error in habeas counsel's representation cannot overcome the procedural bar to claims eight and nine.

Third, Sales has not made a strong showing of deficient performance by his prior attorneys. As discussed at length above, no court has applied *Apprendi* in the context of the *Enmund/Tison* analysis. Courts are skeptical of arguments that an attorney provides deficient representation by not asking for an extension of current law. See *Floyd v. Filson*, 949 F.3d 1128, 1145 (9th Cir. 2020); *United States v. Morris*, 917 F.3d 818, 823 (4th Cir. 2019); *United States v. Challoner*, 583 F.3d 745, 750 (10th Cir. 2009); *Powell v. United States*, 430 F.3d 490, 491 (1st Cir. 2005). Sales has not shown that appellate or habeas counsel omitted a strong claim, such that their performance was deficient.

Fourth, a petitioner must show actual prejudice, which means that, but for the attorneys' errors "the result . . . would have been different." *Tong*, 90 F.4th at 868 (quoting *Strickland*, 466 U.S. at 694). In other words, Sales must show a reasonable probability that he would have prevailed on appeal or state habeas but for his counsel's deficient performance. See *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). Sales has not shown a reasonable probability that the state courts would have granted his *Enmund/Tison* related claims had prior counsel raised them in a proper manner. See *Leza v. State*, 351 S.W.3d 344, 355 (Tex. Crim. App. 2011) (denying a different argument based on *Apprendi*'s effect on the *Enmund/Tison* cases).

Finally, Sales argues in claim nine that his counsel were deficient in failing to argue that his death sentence violated the Eighth Amendment "because the state courts have failed to make the required *Tison/Enmund* findings beyond a reasonable doubt." (Docket Entry No. 44 at 218). It is unclear, however, what specific objection Sales expected his trial attorneys to make, given the

law that applied. Even if trial counsel should have made some objection, the state courts could have cured any error under *Cabana* by making the findings on subsequent review.

The court, therefore, finds that Sales has not shown that any alleged deficient representation should allow review of his barred claims.

D. Alternative Merits Review

Having reviewed the record, the pleadings, and the law, the court alternatively finds that Sales has not shown that these three claims he raises merit relief.

III. Ineffective Assistance of Counsel (Claim Four)

In claim four, Sales argues that his trial counsel “was ineffective for failing to interview and present eyewitnesses to the crime.” (Docket Entry No. 44 at 147). Sales’s brief asserts that “[t]rial and state habeas counsel never interviewed the most critical witnesses for the defense in the case, including Herschel Ostine, Deannadra Darfour, and Cheryl Kissentaner.” (Docket Entry No. 44 at 160). Sales’s federal petition raised this claim for the first time. The court stayed these proceedings so that Sales could exhaust this claim. The state habeas court dismissed this claim under the Texas abuse-of-the-writ doctrine. *See Sales*, 2018 WL 852323, at *2. The default of Sales’s federal *Strickland* claim results in a procedural bar.²¹

²¹ Relying on *Nelson v. Lumpkin*, 72 F.4th 649 (5th Cir. 2023), Respondent argues that, because Sales exhausted a completely different *Strickland* claim in his initial habeas action, the state courts actually adjudicated claim four. *Nelson*, however, involved a distinct scenario from the instant case. In *Nelson*, the inmate initially raised a claim that trial counsel ineffectively presented mitigating evidence and then, in a subsequent federal petition, “pointed out more instances of trial counsel’s alleged deficient performance at sentencing” which would have impacted the jury’s consideration of mitigating evidence. *Id.* at 659. Here, however, the claim Sales exhausted in his initial state habeas application differs fundamentally from the one he presented on federal review. Sales’ initial habeas application alleged that counsel “fail[ed] to properly investigate both a shooting which occurred in close proximity and within minutes of the shooting of the victim in [his] case” and a “possible claim of alibi.” (Docket Entry No. 53-1 at 42). Unlike *Nelson*, Sales does not seek to add new evidence to the earlier *Strickland* claim. The circumstances are distinguishable from *Nelson*.

Sales contends that habeas counsel was ineffective under *Martinez v. Ryan* for not raising the claim of failing to interview and call certain witnesses. Habeas counsel would be ineffective under *Martinez* only if he omitted a claim that “is substantial—*i.e.*, has some merit.” *Cantu v. Davis*, 665 F. App’x 384, 386 (5th Cir. 2016). To show that an attorney was deficient for not calling a witness, a petitioner “must name the witness, demonstrate that the witness would have testified, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable.” *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010). Sales has not raised a substantial *Strickland* claim as to Ostine, Darfour, and Kissentaner.

Sales’s allegations regarding Ostine fail because, as the successive state habeas court found, Ostine’s “testimony [was] unavailable at the time of [Sales’s] trial” (Docket Entry No. 54-21 at 464). Trial counsel cannot be ineffective for not interviewing an unavailable witness. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). Further, the statements Ostine gave closest in time to Sales’s trial were highly incriminating. The state habeas court found that his later statements were not credible or persuasive. (Docket Entry No. 54-21 at 471).

Sales’s allegations regarding Darfour and Kissentaner are not “substantial” because he has not shown what their testimony would have been. *See Moore*, 534 F.3d at 468 (rejecting a *Strickland* claim based on unsupported allegations). Sales has not provided an affidavit or trustworthy account of what Kissentaner or Darfour could or would have told counsel before trial. A claim of uncalled witnesses cannot be substantial if it rests on unverified information.

For those reasons, Sales has not shown that habeas counsel’s representation overcomes the procedural bar of his underlying ineffective-assistance-of-trial-counsel claim. Alternatively, and for the same reasons, Sales has not shown that claim four merits habeas relief. This claim is denied.

IV. *Massiah* Violation (Claim Five)

Sales's fifth claim contends that the State violated his Sixth Amendment rights under *Massiah v. United States*, 377 U.S. 201 (1964). Under *Massiah*, government agents cannot question a criminal defendant without counsel after the Sixth Amendment right attaches. *See Thompson v. Davis*, 916 F.3d 444, 454 (5th Cir. 2019). "A *Massiah* violation has three elements: (1) the Sixth Amendment right to counsel has attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel being present; and (3) that agent 'deliberately elicit[s]' incriminating statements from the defendant." *Henderson v. Quarterman*, 460 F.3d 654, 664 (5th Cir. 2006) (citing *Massiah*, 377 U.S. at 206). Sales alleges that Martinez Hardnett, an inmate who testified against him at trial, acted as a government agent. Sales's *Massiah* claim is both procedurally barred and, alternatively, without merit.

A. Procedural Bar

Sales did not raise a *Massiah* claim in state court. AEDPA precludes federal habeas relief on any unexhausted claim. *See* 28 U.S.C. § 2254(b)(1). The Texas strict abuse-of-the-writ doctrine (found in Tex. Code Crim. Pro. art. 11.071 § 5) prevents Sales from raising a *Massiah* claim in a successive state habeas corpus application, which in turn bars federal review. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Sales argues that ineffective assistance from his appellate and habeas counsel is cause to forgive the default of his *Massiah* claim. (Docket Entry No. 44 at 194). Neither argument opens the door to federal review. Sales did not exhaust an ineffective-assistance-of-appellate counsel argument, which he must do before using it as "cause." *See Carpenter*, 529 U.S. at 453; *Hatten*, 570 F.3d at 605. Deficient representation by habeas counsel can only forgive ineffective-

assistance-of-trial-counsel claims. *See Davila v. Davis*, 582 U.S. 521, 531 (2017). Sales has not overcome the procedural bar of his claims.

B. Alternative Merits Review

In the alternative, Sales's *Massiah* claim lacks merit. The State's witness, Martinez Hardnett, testified about incriminating statements Sales made while in the Harris County Jail. Hardnett's long history of selling drugs led to him working as a DEA informant in 2002. (Docket Entry No. 53-30 at 5-6). Hardnett provided the DEA with information three times. (Docket Entry No. 53-30 at 17, 22). The DEA paid Hardnett for that information, but he expected more money for past work. (Docket Entry No. 53-30 at 6). Hardnett had also received \$1,700 from the Houston Police Department for "go[ing] out and meet[ing] actual drug dealers and arrang[ing] to buy cocaine[.]" (Docket Entry No. 53-30 at 6). Nothing in Hardnett's testimony suggested that he received payments for any information he learned in the Harris County Jail.

Hardnett first met Sales in a Harris County Detention Center holding cell. (Docket Entry No. 53-30 at 7). The two men visited the law library together. As they talked, Sales told Hardnett things that incriminated him in the Butler murder. (Docket Entry No. 53-30 at 8-10). Hardnett contacted the police after he had received this information from Sales. (Docket Entry No. 53-30 at 11,21). Hardnett testified: "Well, actually, [the police officer with whom he spoke] told me that he couldn't give me any help with my case. . . . They made no promises." (Docket Entry No. 53-30 at 11).

Prosecutors learned after jury selection had started that Hardnett had information about Sales. (Docket Entry No. 53-30 at 3). Prosecutors promised to dismiss Hardnett's pending auto theft charge in return for his testimony. (Docket Entry No. 53-30 at 5). Nothing in the record suggests that Hardnett received any other benefit for his testimony.

Sales’s claim succeeds if Hardnett “(1) was promised, reasonably led to believe, or actually received a benefit in exchange for soliciting information from [Sales]; and (2) acted pursuant to instructions from the State, or otherwise submitted to the State’s control.” *Creel v. Johnson*, 162 F.3d 385, 393-94 (5th Cir. 1998). Nothing in the record suggests that the State directed Harnett to obtain information from Sales. *See Thompson*, 941 F.3d at 814 (“[A]n informant cannot be an agent of the State without the State’s knowledge or consent.”). Sales assumes that Hardnett must have been working for the State because he had done so before. But “a jailhouse informant is not a government agent simply because he has previously cooperated with the government and decides to capitalize on an opportunity to do so again by eliciting incriminating information from a cellmate.” *Id.* at 817.

Hardnett knew from experience that information was valuable. In finding occasions to hear Sales’s story, Hardnett “simply saw an opportunity and seized it.” *Id.* at 814. “Acting in the hopes of receiving a benefit is insufficient to establish a *Massiah* violation.” *United States v. Age*, 136 F.4th 193, 232 (5th Cir. 2025) (quotation omitted); *see also United States v. Fields*, 761 F.3d 443, 478 (5th Cir. 2014) (finding that no *Massiah* violation exists when an inmate who “had previously cooperated with the government . . . saw an opportunity to do so again”). The record does not show that Hardnett acted as a government agent.

Even though a procedural bar precludes federal review, the court alternatively denies Sales’s *Massiah* claim. *See* 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”).

V. *Brady* (Claim Six)

Sales alleges that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing both a post-trial Tennessee police interview with Deandra Darfour and a pretrial Houston police interaction with witness Leon Hatfield.²² “To establish a *Brady* violation, a defendant must show: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the prosecution; and (3) the evidence was material.” *United States v. Glenn*, 935 F.3d 313, 319 (5th Cir. 2019) (quotation omitted). The Texas state courts barred this claim when Sales raised it in his successive habeas application.

Citing *Banks v. Dretke*, 540 U.S. 668 (2004), Sales argues that the State’s suppression of evidence itself provides cause to overcome the resultant procedural bar. (Docket Entry No. 44 at 200). A *Brady* claim’s merits overlap with the showing required to overcome the procedural bar. *See id.* at 691; *Strickler v. Greene*, 527 U.S. 263, 282 (1999). As discussed below, Sales has not overcome the procedural bar.

A. Darfour’s 2004 Police Interview in Tennessee

In his first *Brady* claim, Sales argues that the State suppressed a police interview with Deandra Darfour that took place almost a year after trial. Early on, the police were aware that Darfour might have information about the crime. Darfour did not testify at Sales’s trial, which ended on March 1, 2003. Both Sales and the State believed that Darfour had been at the scene of the murder.²³ The record does not show why Darfour did not face criminal charges at that time.

²² Sales also raises *Brady* arguments relating to penalty-phase witness Caruthers in both claim six and claim twelve. (Docket Entry No. 44 at 202-05, 247-61). Sales does not describe what difference exists, if any, between the two claims. The court addresses any *Brady* arguments relating to Caruthers in claim twelve.

²³ In the State’s opening statement, the prosecutor identified the three individuals who “left together th[e] night [of the murder], Herschel Ostine, Cheryl Kissentaner and this other black female named D’Anndra Darfour.” (Docket Entry No. 53-27 at 10). The defense asked for Darfour’s name to be included “as one of the parties” because “[t]here’s

Sales does not allege that the State suppressed any information about Darfour before or during trial. The State followed an open-file policy and allowed Sales full access to its records. (Docket Entry No. 52-40 at 6). The *Brady* claim relates to a police statement Darfour gave in 2004. The State's renewed interest in Darfour followed Ostine's October 1, 2003, arrest. Ostine admitted to his role in the murder and described Darfour's involvement. (Docket Entry No. 53-72 at 264). The police arrested Darfour and interviewed her on January 15, 2004. (Docket Entry No. 45-72 at 1-51).²⁴ Sales alleges that, "[i]n violation of its obligation under *Brady*, the State never turned over to the defense a copy of Darfour's custodial video statement made in January 2004." (Docket Entry No. 44 at 195).

Sales's *Brady* claim fails because he does not show that: (1) the State had a continuing duty to turn over information after trial; (2) he could not have obtained the interview himself; and (3) any alleged suppression was material.

Brady applies to a criminal trial. See *United States v. Meza*, 843 F. App'x 592, 599 n.3 (5th Cir. 2021) ("*Brady* is a fair-trial right . . ."). Darfour gave her police statement before Sales's appellate or post-conviction review concluded. The Supreme Court has not held that the *Brady* right continues after trial proceedings have ended. See *Estrada v. Healey*, 647 F. App'x 335, 338 (5th Cir. 2016) (stating that the Supreme Court "explicitly declined to extend *Brady*'s pre-trial

testimony that she was the black female that accompanied Mr. Ostine and Ms. Kissentaner on the 21st of July, 2000, when Mr. Butler was killed." (Docket Entry No. 53-31 at 1).

²⁴ The police began the interview by having Darfour watch Ostine's confession, which implicated her in Butler's murder. (Docket Entry No. 45-72 at 3). Sales's federal petition summarizes Darfour's account of the events leading up to Butler's murder. (Docket Entry No. 44 at 80-82). Sales does not argue that the State suppressed Ostine's confession to the murder. The State indicted Darfour on March 11, 2004, for "unlawfully, intentionally, and knowingly caus[ing] the death of Tyrone Butler by shooting Tyrone Butler with a deadly weapon, namely, a firearm." *Id.* (citation omitted). *Darfour v. State*, 2006 WL 853154, at *1 (Tex. App. -Houston [1st Dist.], 2006). Darfour "pled guilty to the indictment on September 1, 2004, entering a written judicial confession without an agreed punishment recommendation." *Id.* "The trial court found [Darfour] guilty and . . . assessed her punishment at 30 years' confinement." *Id.*

protections to the post-conviction context”) (citing *The District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009)). Many courts have held that the *Brady* right does not extend “*post-verdict*” because “[t]o do otherwise would contradict Supreme Court cases applying *Brady* by analyzing how withheld evidence might have affected the jury . . .” *Browning v. Trammell*, 717 F.3d 1092, 1104 (10th Cir. 2013) (emphasis added); *see also In re Bolin*, 811 F.3d 403, 408 (11th Cir. 2016). Those cases find no right to the disclosure of information that the State developed after a trial. *See Estrada*, 647 F. App’x at 338; *Bell v. Bell*, 512 F.3d 223, 234 (6th Cir. 2008); *United States v. Maldonado-Rivera*, 489 F.3d 60, 67 (1st Cir. 2007). Some courts, however, have held that the *Brady* trial right extends to the conclusion of direct appeal. *See Runningle v. Ryan*, 686 F.3d 758, 772 n.6 (9th Cir. 2012); *Fields v. Wharrie*, 672 F.3d 505, 515 (7th Cir. 2012); *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997).

Without specifically deciding the issue, the Fifth Circuit itself has been skeptical of any argument that the State bears an affirmative burden under *Brady* to provide evidence after trial. *See Ruiz v. Davis*, 819 F. App’x 238, 243 n.4 (5th Cir. 2020). The Fifth Circuit has not held that “that a prosecutor has a duty to turn over subsequently discovered information . . . related to events that had *not yet occurred at the time of trial* but would nevertheless, if a time machine were available, be useful.” *In re Masterson*, 638 F. App’x 320, 327-28 (5th Cir. 2016) (emphasis added); *see also Osborne*, 557 U.S. at 69 (noting that the Supreme Court has never held that the *Brady* “disclosure obligation continue[s] after the defendant [is] convicted and the case [is] closed”). Sales has not shown that the State’s obligation to disclose information continued after trial.

Sales has also failed to show that he could not have obtained the Darfour interview himself. Sales's post-conviction attorneys knew about developments relating to Darfour. (Docket Entry No. 53-52 at 1). "*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002); *see also West v. Johnson*, 92 F.3d 1385, 1399 (5th Cir. 1996); *See also Bigby v. Dretke*, 402 F.3d 551, 574-75 (5th Cir. 2005); *Kutzner*, 303 F.3d at 336. Nothing suggests that appellate or state habeas counsel could not have discovered the Darfour statement themselves.

Finally, Sales has not shown actual prejudice, which in this circumstance is the same as *Brady* materiality. *See Banks*, 540 U.S. at 691. Darfour's 2004 police interview provided strong evidence that Sales wanted Butler killed. Darfour told the police that Sales had offered Fleary \$5,000 to kill Butler. (Docket Entry No. 45-72 at 17-18).²⁵ Darfour described Sales as being "mad" when he learned Fleary had taken the money and left town without killing Butler. (Docket Entry No. 45-72 at 18-19). Darfour's statement to the police would have hurt, not helped, Sales if presented at trial.

In conclusion, Sales has not shown that the alleged suppression of evidence overcomes the procedural bar to his *Brady* claim, or that his *Brady* claim merits relief.

²⁵ Sales argues that he "could have made use of the information and presented it in his initial state habeas application." (Docket Entry No. 44 at 196-97). Sales, however, does not base any viable federal claim on the 2004 Darfour interview. Instead, Sales argues that it would have provided "investigative leads" which would have led to the same information as found in the "Actual Innocence section" of his federal petition. (Docket Entry No. 44 at 199). Sales' arguments fail, however, because suppressed evidence must "lead directly" to the other evidence on which a habeas petitioner relies. *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450, 465 (6th Cir. 2015) (quotation omitted); *see also East v. Scott*, 55 F.3d 996, 1004 (5th Cir. 1995) (asking whether the *Brady* material "would have led to" the petitioner's other evidence). Sales has not shown that the 2004 Darfour interview was the springboard to any constitutional claim.

B. The Alleged Threats to Leon Hatfield

Sales alleges that the State suppressed evidence about Leon Hatfield, who testified in the guilt/innocence phase of Sales's trial. Hatfield's testimony helped establish that Sales had offered to pay for Butler's murder.²⁶ Sales alleges that the State failed to disclose that Hatfield had been subjected to hours of interrogation, which ended only after the prosecutor made threats, agreed not to arrest him, and promised to expunge his outstanding traffic tickets. (Docket Entry No. 44 at 200).²⁷ Multiple reasons prevent Sales from overcoming the procedural bar or obtaining relief.

First, the record does not contain any affidavit or other sworn account by Hatfield. Sales relies on what he calls a "recorded statement," (Docket Entry No. 44 at 200), which appears to be an unverified transcript of a conversation between an investigator and Hatfield in 2015. (Docket Entry No. 53-76). The investigator apparently arrived at Hatfield's apartment unannounced and asked Hatfield questions while he was cooking dinner. The transcript of this conversation is not competent evidence.

²⁶ Hatfield testified that Sales knew that Butler had picked him out of a lineup and that Sales "had to deal with [Butler]." (Docket Entry No. 54-42 at 36). Hatfield testified that Sales bought a new gun after bonding out of prison. Hatfield's testimony provided context to the crime, particularly that Sales and his associates learned Butler's schedule and took steps toward the murder. During cross-examination, Hatfield testified that he had pending warrants and was on probation when he first interacted with the police, but they did not arrest him. (Docket Entry No. 52-42 at 43). Neither party asked if he had received any benefit in exchange for his testimony.

²⁷ Hatfield testified that as the trial approached, the prosecutor "mailed many subpoenas," which he "didn't never [*sic*] answer." (Docket Entry No. 53-76 at 46). Hatfield testified that the prosecutors then "sen[t] their bounty hunters all to [his] job[]" and forced him to the prosecutor's office in a "little police car." (Docket Entry No. 53-76 at 19, 46). The prosecutor kept Hatfield "downtown for like 10 hours" and threatened to "lock [him] up because of [his] tickets." (Docket Entry No. 53-76 at 43).²⁷ Hatfield told the prosecutor: "The only way I'll show up [to testify] is if you guys get all of my tickets expunged off of me." (Docket Entry No. 53-76 at 47). Hatfield watched the prosecutor make phone calls and later tried to verify that his tickets were no longer pending. (Docket Entry No. 53-76 at 47-48). Police arrested Hatfield about three years after the crime for the tickets that he believed had been expunged. (Docket Entry No. 53-76 at 48). Hatfield also testified that prosecutors gave Kevin Howell money and a place to live in return for his testimony.

Second, Sales has not presented an affidavit from trial counsel stating that the defense did not know about Hatfield's statements to the prosecution. Sales merely assumes that his trial counsel did not have that information.

Third, Sales contends that trial counsel was ineffective for not interviewing Hatfield. (Docket Entry No. 44 at 154). This argument, however, is inconsistent with the allegation that the State suppressed information about Hatfield's information.

Fourth, some of the information that Hatfield allegedly told the prosecution is duplicative of trial testimony. For example, Officer Mehl testified that he used Hatfield's pending warrant to secure information from him and that he later wrote a letter for Hatfield that led to his probation being ended. (Docket Entry No. 53-28 at 31-32).

Finally, the information contained in the purported interview would have been extremely harmful to the defense. Assuming that the information in the transcript is true, it would come with a catastrophic cost. The transcript provides much stronger evidence that Sales orchestrated the murder than the State presented at trial. In fact, the transcript shows that Sales was at the scene of the murder. (Docket Entry No. 53-76 at 34). The transcript contains damning evidence of Sales's involvement in the murder, including that Sales told Hatfield, "we killed him." (Docket Entry No. 53-76 at 26).²⁸

For those reasons, Sales's *Brady* claim involving Hatfield is both procedurally barred and without merit.

²⁸ Hatfield also testified that Sales "kidnapped" Kevin Howell and "had him tied up" after the murder because Howell "kn[e]w they killed the security guard." (Docket Entry No. 53-76 at 30-31). Sales also called Hatfield and told him: "You gonna tell on me, this and that. I'm gonna kill—I'm gonna kill you and your family." (Docket Entry No. 53-76 at 29). Hatfield testified that Sales began "staging out [Hatfield's] mom[s] house." (Docket Entry No. 53-76 at 31). Sales's kidnapping and threats after the murder prompted Hatfield to call the police and "t[ell] them everything that [he] knew" (Docket Entry No. 53-76 at 31). Sales's post-crime kidnapping and threats prompted Hatfield to call the police and tell them about the crime. (Docket Entry No. 53-76 at 31).

VI. Cumulative Error (Claim Seven)

Sales bases claim seven on the cumulative effect of his federal habeas claims. An independent claim based on cumulative error may be viable only when: “(1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors ‘so infected the entire trial that the resulting conviction violates due process.’” *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). But “[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised.” *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996); *see also Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (“Twenty times zero equals zero.”). Sales has “presented nothing to cumulate.” *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993). The court denies Sales’s cumulative-error claim.

VII. New Evidence on Sentencing (Claims Ten and Eleven)

Sales bases claims ten and eleven on “new factual evidence” which, “if offered to a jury at punishment,” allegedly would have resulted in different answers to the future-dangerousness and mitigation special issues. (Docket Entry No. 44 at 219, 233). These claims are procedurally barred and legally unsound. Sales defaulted these claims by raising them for the first time in his successive state habeas application. Sales has not shown that he can overcome the resultant procedural bar. Even if he could do so, Sales’s novel arguments lack merit. He cites no case law allowing reappraisal of a jury’s verdict based on new evidence. *See Johnson v. Lumpkin*, 74 F.4th 334, 339 (5th Cir. 2023); *Bible v. Stephens*, 640 F. App’x 350, 355 (5th Cir. 2016). The court cannot create new constitutional law on habeas review. *See Teague*, 489 U.S. at 310. The court denies claims ten and eleven.

VIII. *Brady* (Claim Twelve)

Sales's twelfth claim argues that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), not turning over evidence held by Tennessee prosecutors about an extraneous offense. (Docket Entry No. 44 at 247). As previously discussed, a *Brady* violation has three parts: (1) the State suppressed evidence; (2) which was favorable to the accused; and was (3) material. *See Strickler*, 527 U.S. at 281-82. Fifth Circuit case law also requires a petitioner to show that, with diligence, he could not have discovered the evidence himself. *See United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003).

Sales's twelfth claim involves penalty-phase information about his various crimes and unadjudicated offenses. The State particularly highlighted Sales's role in the July 20, 1998, murder of eighteen-year-old Frank Mayprey in Nashville, Tennessee.²⁹ Sales did not shoot Mayprey, but the State argued that he played a major role in the crime. Sales alleges that the State suppressed evidence that contradicted the testimony of a witness, Shantel Caruthers, about that crime.

The state habeas court denied this claim on the merits. Sales must show that its adjudication was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

A. Background

The State presented information about the Mayprey murder primarily through Caruthers.³⁰ Caruthers testified that Mayprey was her boyfriend and that he “used to sell drugs. He was wild.

²⁹ The trial record spells his name “Mayprey.” The habeas record uses both “Mayprey” and “Maypray.” Sales uses the spelling “Maypray.”

³⁰ The State also presented evidence about the Mayprey murder through police officers. Officer William Cleek of the Nashville Police Department homicide unit testified that Caruthers positively identified Sales from a photo array the day after the murder. Officer Cleek secured a warrant for Sales's arrest for criminal homicide and aggravated kidnapping. Sales eventually turned himself in for the crime.

He carried a gun” (Docket Entry No. 52-47 at 19). Caruthers met Sales, who she knew as “Boo,” about a week before Mayprey was murdered during a failed transaction involving “some money or some dope.” (Docket Entry No. 52-47 at 19).

Caruthers testified that “Boo” and another man had met Mayprey at an apartment building driving a gold Impala vehicle. They drove Mayprey and Caruthers to a park. Sales got out of the car holding a shotgun, pulled Caruthers out of the car, pushed her toward a wooded area, and forced her to kneel. (Docket Entry No. 52-47 at 23). Still holding the shotgun, Sales promised that he would not hurt Caruthers. (Docket Entry No. 52-47 at 23-24). After several minutes, Caruthers heard gunshots. She saw Mayprey laying on the ground and heard the other man say, “come on, Boo.” (Docket Entry No. 52-47 at 24). The two men drove away in the gold Impala. (Docket Entry No. 52-47 at 25). Caruthers ran to a gas station to find help. Caruthers later described the shooter to the police. (Docket Entry No. 52-47 at 26).

Caruthers testified that she did not know the shooter’s identity that day. (Docket Entry No. 52-47 at 20). The jury learned the shooter’s identity during the defense questioning. The first mention of the shooter’s name came when the defense asked a police officer about “the person who later turns out to be the shooter, Mr. Avery.” (Docket Entry No. 52-47 at 44). Most of the trial testimony about the shooter’s identity came through two defense witnesses: Roger Moore, an Assistant District Attorney from Tennessee; and Caruthers (after the defense recalled her in its punishment case-in-chief). Moore testified that the State of Tennessee had indicted Avery for the first-degree murder. (Docket Entry No. 52-48 at 5). Testimony in response to questions from defense counsel showed that both Sales and Caruthers had identified Avery as the shooter. (Docket Entry No. 52-48 at 7, 11).

Sales's *Brady* claim alleges that the State suppressed evidence that Avery had not been the shooter. Sales argues that the State did not disclose that: (1) Caruthers failed a polygraph test in which she said that she did not know the shooter and that she did not set up the shooting; and (2) hours after the murder, Caruthers told other people that a man named Jay King shot Mayprey. Sales argues that “[t]he alternate versions of events given by Caruthers and in police possession, but suppressed from the defense, provided an alternate motive for Mayprey’s death that did not involve Sales at all.” (Docket Entry No. 44 at 253). Sales argues that disclosure of this information “would have painted Caruthers in a highly unflattering light.” (Docket Entry No. 44 at 253).

B. The Merits

Sales raised his *Brady* claim in his initial state habeas application.³¹ A federal court should “train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims.” *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). The state habeas court found that Sales’s *Brady* claim was “over-reaching and unpersuasive.” (Docket Entry No. 53-5 at 108). The state habeas court made two important findings which guided its decision. First,

³¹ In state court, Sales identified three groups of new evidence that he alleges had been “kept from the defense.” (Docket Entry No. 53-1 at 25):

1. Caruthers had “failed a lie detector test” she took on June 27, 1998. (Docket Entry No. 53-1 at 25). The report from the polygraph test included a “pre-test interview” in which Caruthers gave a different version of the murder. This version still placed Sales at the scene but blamed the shooting on a man name “Corey King.” (Docket Entry No. 53-1 at 182). Caruthers, however, was “not sure of the shooter is him or not.” (Docket Entry No. 53-1 at 182). The polygraph report indicated deception on three questions: (1) “Do you recognize the person that shot [Mayprey]? Answer: No!”; (2) Do you know for sure who shot [Mayprey]? Answer: No!”; and (3) “Did you set up this shooting? Answer: No!” (Docket Entry No. 53-1 at 182). The report ended: “During the post test interview Caruthers could not or would not supply adequate information to account for the above listed reactions. (Docket Entry No. 53-1 at 183).
2. Tennessee police reports stated that Caruthers had initially told friends that the shooter was a man named Jay King. (Docket Entry No. 53-1 at 26, 163, 227-29).
3. A July 17, 1998, police report indicated that “Caruthers told Detv. Cleek that Jay had held a gun to Mayprey’s head and threatened to shoot him in the head just prior to this murder.” (Docket Entry No. 53-1 at 27). It is unclear which police report this statement referenced.

the state habeas court found that “knowledge, if any, that Caruthers might have concerning the identity of the man who shot Mayprey . . . is not information imputed to the prosecution . . . under the precepts of *Brady*.” (Docket Entry No. 53-5 at 108, 123). Second, the state habeas court found that “information concerning Caruthers’s ability to identify the shooter in the unadjudicated extraneous offense in Tennessee is not material to [Sales’s] guilt in the instant offense under the precepts of *Brady*.” (Docket Entry No. 53-5 at 108).

Sales’s petition does not extensively address the suppression prong of the *Brady* analysis. Sales alleges that defense counsel did not have access to information that the Tennessee prosecutors had about Mayprey’s shooter, but Sales offers no support for that allegation. Trial counsel’s questioning suggests that the defense had information from the Tennessee Mayprey investigation, including Tennessee court transcripts and police reports. (Docket Entry No. 52-47 at 27, 30).³² Further, the identity of the Mayprey shooter was never a mystery to Sales, given the evidence that he was in the car with that shooter when they took Caruthers and Mayprey to the park. The gist of Sales’s *Brady* claim rests on information best known to him.

1. Imputed to the Prosecution

Sales blames the Texas prosecutors for not turning over evidence obtained from the Tennessee prosecution. The question of who “act[s] on the government’s behalf” as a member of the “prosecution team” is not always easily answered. *Kyles v. Whitley*, 514 U.S. 419, 437 (1996). The Supreme Court has not provided guidance on who or what entity is responsible for disclosure when the prosecutors in one state present evidence obtained from prosecutors in another state of a separate crime committed in that other state. In deciding whether material possessed by one

³² Sales, in fact, faults trial counsel for not adequately cross-examining witnesses “regarding Ms. Caruthers credibility and her past changing stories and failure of a lie detector test”—an argument which presupposes trial counsel had access to his *Brady* evidence. (Docket Entry No. 44 at 295-96).

government entity is attributable to another, the Fifth Circuit does not apply a “bright line rule” but instead requires “a case-by-case analysis.” *Avila v. Quarterman*, 560 F.3d 299, 308 (5th Cir. 2009). The Fifth Circuit imputes information from one governmental entity to another when there is “extensive cooperation between the agencies,” such that they both “acted as agents of the . . . government pursuant to the principles of agency law.” *Id.* But when an entity from one state “shared no resources or labor” with an entity in another state, “did not work together to investigate” a crime, and did not act “under the direction or supervision” of the other state’s officials, a court may not impute the possession of the material from one state to the other. *Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002); *see also United States v. Reyeros*, 537 F.3d 270, 283 (3rd Cir. 2008) (finding no constructive possession by one government when it did not “share[] any investigative resources whatsoever” with the other).

Without a bright-line rule or Supreme Court law directly on point, the state habeas court’s decision was not an unreasonable one. The Harris County District Attorney’s Office did not possess the allegedly suppressed information. (Docket Entry No. 53-5 at 123) (finding that Sales “acknowledge[d]” that the Tennessee prosecutorial material “was not provided to the state in [his] case.”). Nothing suggests that the Tennessee and Texas district attorneys collaborated in the Mayprey murder prosecution. Prosecutors in the two states may have cooperated in some manner in investigating the Butler murder or in prosecuting it, but nothing shows that they did so in the Mayprey murder. The record does not show that the Tennessee authorities were functionally members of the Texas prosecutorial team for the Butler murder. The state habeas court reasonably refused to impute the knowledge in the possession of the Tennessee authorities to Texas prosecutors. (Docket Entry No. 53-5 at 123)

2. Materiality

The state habeas court alternatively found that the allegedly suppressed evidence was not material. (Docket Entry No. 53-5 at 123). “Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury.” *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quotation omitted). A reviewing court evaluates “the cumulative effect of all such evidence” to decide if it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435.

Sales argues that the *Brady* material “would have called [Caruthers’s] entire testimony into doubt” and “devastated” her credibility. (Docket Entry No. 44 at 254). Sales also argues the material would have shown that he had no role in the Mayprey murder. The record undermines these arguments. The new evidence could show that Caruthers had given different versions of what happened, particularly about who shot Mayprey. But the question jurors faced was not who shot Mayprey, but what involvement Sales had in that crime. The *Brady* material confirms Sales’s involvement. In the police reports, Caruthers clearly identifies Sales, who she refers to as “Boo.” (Docket Entry No. 53-1 at 162, 183); *see also* Docket Entry No. 53-34 at 19 (testimony by Caruthers identifying Sales as “Boo”). The police report describes how Sales held Caruthers at gunpoint when Mayprey was shot and killed. (Docket Entry No. 44 at 252).

The alleged *Brady* material fits comfortably into the broader evidence of Sales’s involvement. No evidence disputes Sales’s role in the Mayprey murder. He gave deposition testimony that he was involved in the events leading up to the murder, was carrying a shotgun, and was present when it occurred. (Docket Entry No. 53-2 at 19-35). Sales identified the shooter as Avery. (Docket Entry No. 53-2 at 18). Evidence raising questions about Caruthers’s identification of the shooter does not “put the whole case in such a different light as to undermine confidence

in the verdict.” *Banks*, 527 U.S. at 698 (quoting *Kyles*, 514 U.S. at 435). The state habeas court, therefore, was not unreasonable in denying Sales’s *Brady* claim.

The court denies claim twelve.

IX. Lethal Injection (Claim Seventeen)

In claim seventeen, Sales alleges that “lethal injection *as it is currently carried out in Texas* will produce unnecessary pain, torture, and lingering death” (Docket Entry No. 44 at 263) (emphasis added). Sales alleges that “Texas intends to execute [him] by poisoning him with a lethal combination of *three chemical substances: Sodium Thiopental*, or Sodium Pentothal . . . ; *Pancuronium Bromide*, or Pavulon . . . and *potassium chloride*” which “in combination . . . cannot pass constitutional muster.” (Docket Entry No. 44 at 264) (emphasis added). The court denies this claim because habeas corpus is the wrong vehicle to raise it, and its claim is meritless.

The writ of habeas corpus exists to remedy constitutional deprivations in the fact or duration of an inmate’s imprisonment. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). The Supreme Court has made it clear that “a method-of-execution claim must be brought” under 42 U.S.C.] § 1983.” *Glossip v. Gross*, 576 U.S. 863, 879 (2015); *see also Hill v. McDonough*, 547 U.S. 573, 579-80 (2006). A habeas action is the wrong vehicle to raise a method-of-execution challenge. *See Rachal v. Quarterman*, 265 F. App’x 371, 377 (5th Cir. 2008) (“Claims challenging the method of execution cannot be raised in a habeas proceeding”).

Even if raised as a civil rights violation, the claim lacks merit. In 2012, Texas switched from the challenged three-drug lethal-injection protocol to the use of a single drug, pentobarbital. *See Trottie v. Livingston*, 766 F.3d 450, 453 (5th Cir. 2014). The state habeas court rejected this claim because of the change in Texas procedure. (Docket Entry No. 53-5 at 112-13). In his initial federal petition, Sales nonetheless sought relief on the basis that he would be subjected to the three-

drug protocol. (Docket Entry No. 8 at 122). Sales presented the same argument in his amended petition, even after the respondent had pointed out that Texas had abandoned that protocol. Sales does not explain why he repeated this claim even after learning that it lacked any foundation.

The court denies claim seventeen.

X. Improper Evidence (Claim Eighteen)

In his eighteenth claim, Sales complains that his constitutional rights were violated by “the admission of evidence used at sentencing about [his] expunged juvenile record.” (Docket Entry No. 44 at 275). The state habeas court concluded that Sales’s “lack of objection” prevented consideration of this claim under the Texas contemporaneous-objection rule. (Docket Entry No. 53-5 at 130). “Texas applies its contemporaneous objection rule strictly and regularly and it is an independent and adequate state-law procedural ground sufficient to bar federal court habeas review of federal claims.” *Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999) (cleaned up).

Sales disputes the default of this claim, arguing that he made a sufficient objection in the trial court. “[A] basic tenet of federal habeas review is that a federal court does not have license to question a state court’s finding of procedural default [that is] based upon an adequate and independent state ground.” *Smith v. Johnson*, 216 F.3d 521, 523 (5th Cir. 2000); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”). Other than his general arguments relating to actual innocence, Sales makes no effort to show cause or prejudice, as necessary for federal review of this claim. This claim is procedurally barred.

Alternatively, the court finds that this claim lacks merit. The State based its punishment case on Sales’s numerous prior crimes and bad acts, including his nineteen arrests as a juvenile. Sales’s eighteenth claim alleges that using three of those juvenile offenses violated his Sixth,

Eighth, and Fourteenth Amendment rights. Sales alleges that he was “found not guilty” of those three offenses and “the charges were ordered expunged.” (Docket Entry No. 44 at 275).³³ Sales argues that “[t]he introduction of acquitted offenses” and his “juvenile offenses expunged after being found not guilty” was contrary to “the Supreme Court’s well-established law concerning the Double Jeopardy clause and use of acquitted conduct to establish extraneous offenses.” (Docket Entry No. 44 at 280).

The respondent disputes the use of the terms “acquitted” and “expunged” to describe the dispositions of these offenses. The respondent contends that the record does not show any judicial determination that he had not committed the alleged offenses. The Tennessee juvenile court judge dismissed the charges against Sales because his conduct, in the judge’s opinion, [was] not disorderly in nature” should not have made an officer “feel threatened by a fifteen-year-old child.” (Docket Entry No. 52-46 at 36). The respondent argues that “[t]he simple fact that the juvenile referee did not feel that Sales’s conduct rose to certain elements of the charged offenses does not establish a conclusive finding that Sales did not engage in the conduct the jury was tasked with finding beyond a reasonable doubt.” (Docket Entry No. 51 at 191). The state habeas court agreed, holding that “the trial court properly admitted testimony concerning [Sales’s] juvenile misconduct

³³ Respondent described the circumstances surrounding the three crimes as follows:

the State presented evidence that, as a juvenile, Sales was cited in August 1994 for disorderly conduct, assault, and resisting arrest. The State also elicited testimony that Sales was found not guilty of those three charges. The State later presented the testimony of officer Brian Petty, the officer who charged Sales with those offenses. Petty pulled over a car in which Sales was a passenger because Petty recognized the driver as someone who “did not have a driver’s license.” Sales got out of the car and started yelling, “f*** you and suck my d***.” Officer Petty decided to arrest Sales. When Officer Petty tried to handcuff Sales, he “resisted” by “jerking his arms away.” Sales then threatened Officer Petty, who testified that Sales “told me that he would take care of me if he could ever find me alone.” On the drive to the juvenile detention center, Officer Petty’s partner noticed that Sales had slipped out of his handcuffs. Officer Petty testified that the juvenile-court judge dismissed the charges because the judge felt that Petty “should not feel threatened by a fifteen-year-old child” and because Sale’s conduct, in the judge’s opinion was “not disorderly in nature.”

(Docket Entry No. 51 at 185-86) (citations omitted).

and the events surrounding his arrest on the charges of disorderly conduct resisting arrest and verbal assault regardless of the juvenile judge's subsequent dismissal or finding of not guilty.” (Docket Entry No. 53-5 at 130).

The court, however, does not need to address whether the Constitution prohibited the introduction of the three offenses because any error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Brown v. Davenport*, 596 U.S. 118, 127 (2022) (“[W]here *Brecht* is implicated, a federal court must also ensure a habeas petitioner has carried his burden under its terms before granting relief.”). Sales has not shown any constitutional error that resulted in “actual prejudice” and “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht*. 507 U.S. at 637. The State presented the jury with evidence that Sales had committed numerous bad acts and crimes, both as a juvenile and as an adult. The jury had before it extensive evidence of Sales’s criminal history, including drug trafficking and violent acts. Even excluding the three challenged offenses, the evidence showed that Sales’s interactions with police officers were often belligerent, threatening, and violent. Sales sold drugs himself and organized others in drug transactions. Sales’s drug trafficking including violent acts. His capital murder conviction in this case began when Sales fired gunshots into a vehicle during a failed drug transaction and then fled. The jury had extensive evidence of Sales’s violent history and his future threat to society.

The record shows that brief testimony about Sales’s juvenile lawlessness was eclipsed by the evidence of his involvement in two separate murders. Even assuming constitutional error in the introduction of three, out of many, juvenile offenses, the overwhelming evidence of Sales’s lawless and violent behavior proves that the error did not have “a substantial and injurious effect

or influence in determining the jury's verdict." *Goodwin v. Johnson*, 132 F.3d 162, 181 (5th Cir. 1997) (citing *Brecht*, 507 U.S. at 638). Any error was harmless. The court denies claim eighteen.

XI. Failure To Present Mitigating Evidence (Claim Nineteen)

Sales's nineteenth claim faults trial counsel for "fail[ing] to investigate, develop, and present a proper punishment case." (Docket Entry No. 44 at 292). The defense presented its punishment case primarily through three witnesses: Sales's mother, Debra Sales; his uncle, Donnie Greene; and the mitigation specialist, Jessica Harris. Through those witnesses, trial counsel presented:

extensive evidence of [Sales's] troubled background, the violent atmosphere of the housing projects, the effect of the housing projects on [his] choices in life, [his] lack of a father, the poor nurturing of [his] mother, the role of [his] grandmother in [his] life, and the effect of his grandmother's death, [his] mother's gambling addiction and abusive relationships, [his] frequent school changes, [his] reading disability, and [his] positive behavior in structured facilities.

(Docket Entry No. 53-5 at 104). The defense relied heavily on the mitigation specialist, who tried "to uncover all of the information about Tarus Sales . . . by conducting interviews, meeting with various people, and collecting information from records." (Docket Entry No. 52-3 at 44); *see also* (Docket Entry No. 53-35 at 47-55; 53-36 at 1-18).

Sales argues that his trial counsel should have put forward a more-robust punishment-phase defense. Arguing that "the jury did not hear 90% of the crucial mitigating evidence at trial regarding [his] life and why it should be spared," Sales alleges that his trial counsel did not sufficiently investigate his turbulent home life, his upbringing in a violent community, and his positive qualities. (Docket Entry No. 44 at 294). Sales faults trial counsel's selection of witnesses and criticizes trial counsel's heavy reliance on testimony from the mitigation specialist.

Sales raised this claim in his initial state habeas application.³⁴ The state habeas court considered Sales's allegations, made explicit fact findings, and denied relief. Sales must show that the state-court decision was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). To meet this burden, Sales must make a "clear, independent argument that the state court's denial" requires relief under AEDPA. *Poree v. Collins*, 866 F.3d 235, 250 (5th Cir. 2017). Sales has not made the required showing.

In authorizing the filing of Sales's amended petition, this court ordered Sales to "provide relevant precedent showing how the state court's adjudication of any exhausted claim was contrary to, or an unreasonable application of, federal law" under 28 U.S.C. § 2254(d). (Docket Entry No. 36 at 3). Sales did not follow this order. Sales's briefing on this claim does not focus on the AEDPA standard. Instead, Sales's amended petition essentially replicates the claim from his state habeas application. *Compare* Docket Entry No. 44 at 292-96 *with* Docket Entry No. 53-1 at 90-95. Sales's amended petition carelessly preserves language clearly addressing only the state habeas process. (Docket Entry No. 44 at 296) ("As mandate has not issued in this cause, the case is available for review by this court since Applicant's conviction is not yet final.").

The only significant difference between his state habeas briefing and his federal habeas briefing is the following paragraph:

Relief under 28 U.S.C. § 2254 (d)(1) & (2) is available to Petitioner as the state court decisions and fact finding related to the grounds for relief discussed herein, were an unreasonable application of or were contrary to pre-existing decisions of the United States Supreme Court, and/or because the state court's resolution of his constitutional claims were premised on unreasonable fact finding. Relief is also available based upon de novo review of other grounds for relief, for which the state courts did not address the underlying federal constitutional claim.

³⁴ Sales raised two related claims in state habeas court: he had "new factual evidence that if offered to a jury at punishment would have resulted in a 'yes' answer to the mitigation question"; and his "counsel failed to properly develop investigate and present a punishment case in violation of *Wiggins v. Smith*, 123 S. Ct. 2527 (2003)." (Docket Entry No. 53-1 at 10-11). The state factual findings and legal conclusions are equally applicable to Sales' nineteenth ground for federal relief.

(Docket Entry No. 44 at 296). This paragraph does little more than rehearse the AEDPA standard. Sales does not identify the governing Supreme Court precedent or discuss how the state habeas decision erred or how that error was unreasonable. Sales’s reply brief in this court does not add analysis of this ineffective-assistance-at sentencing claim.

Copying the state-court pleadings and setting out the AEDPA standard does not meet a petitioner’s burden. *See Ramirez v. Stephens*, 641 F. App’x 312, 324 (5th Cir. 2016) (a “passing reference” without “sufficient[ly] argu[ing]” the AEDPA standard amounts to an abandonment of federal habeas claims). Sales’s federal court brief, which “consists of a verbatim replication” of his state-court briefing, “falls far short of the showing required for habeas relief under AEDPA.” *Badelle v. Correll*, 452 F.3d 648, 654 (7th Cir. 2006). The court denies this claim because Sales fails to meet his AEDPA burden. *See Poree*, 866 F.3d at 250; *Ramirez*, 641 F. App’x at 324.

The court alternatively denies this claim on the merits. The state habeas court identified the appropriate law and applied it to Sales’s claim. The state habeas court found that Sales had not shown either deficient performance or actual prejudice. The state habeas court extensively examined trial counsels’ investigative efforts, strategic choices, and presentation of evidence. (Docket Entry No. 53-5 at 98-106, 119-22). The state habeas court reviewed the evidence on which Sales based this claim and found it to be “essentially the same . . . evidence” that trial counsel had presented. Based on the “thorough and extensive evidence” presented at trial, the state habeas court found that Sales’s trial attorneys were not ineffective and that he had not shown *Strickland* prejudice. (Docket Entry No. 53 at 106). Jurors at trial balanced similar evidence against Sales’s violence and participation in two homicides. Even in the light of Sales’s new evidence, the state habeas court was not unreasonable in finding no *Strickland* prejudice. The court denies this claim.

XII. The Confrontation Clause Claims (Claims Twenty-Four through Twenty-Six)

Claims twenty-four through twenty-six argue that the trial court erred in overruling Sales's hearsay objections. Sales bases this claim on the Confrontation Clause and cases decided after *Crawford v. Washington*, 541 U.S. 36 (2004). The parties debate whether Sales has exhausted these claims. While it is a close call, the court finds that Sales sufficiently met the exhaustion requirement. Sales, however, does not merit relief under AEDPA.

A. Exhaustion

Federal law holds habeas petitioners to a strict exhaustion requirement. *See* 28 U.S.C. § 2254(b)(1). Federal relief is available only if the petitioner has first given the state courts an opportunity to consider all legal theories and factual claims. *See Brown v. Dretke*, 419 F.3d 365, 371 (5th Cir. 2005). Having raised “a somewhat similar state-law claim” is generally not enough. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). A petitioner “must have ‘fairly presented’ to the state courts the ‘substance’ of his federal habeas corpus claim.” *Id.* (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). The petitioner must “reasonably alert[] the state courts to the federal nature of the claim.” *Brown*, 419 F.3d at 371; *see also Baldwin v. Reese*, 541 U.S. 27, 27 (2004); *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

On direct appeal, Sales challenged three instances in which the trial court overruled his hearsay objections. (Docket Entry No. 52-3 at 78-97). Sales's appellate briefing quoted trial counsel's arguments had argued that admitting the alleged hearsay evidence would “violate the defendant's rights” under Texas law and under “the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments.” (Docket Entry No. 52-3 at 80, 93; Docket Entry No. 52-41 at 15, 20, 22). Sales's appellate brief, however, discussed error only under Texas state law. (Docket Entry No. 52-3 at

82, 85-86, 89-91, 96-97).³⁵ The respondent argues that because Sales did not explicitly ask the state courts to grant relief under the federal Constitution, he failed to exhaust this claim.

The respondent's argument that Sales "did not raise a federal constitutional claim [in state court] is a reasonable one." *Taylor v. Cain*, 545 F.3d 327, 333 (5th Cir. 2008). Sales's state briefing did not refer to the federal Constitution or discuss *Crawford* and subsequent federal case law. Sales argues that he "explicitly and implicitly" relied on federal law because: (1) he referred to trial counsel's objection, which mentioned the federal Constitution; and (2) he cited a state court case that "collect[ed] federal cases analyzing hearsay objections using Confrontation Clause analysis." (Docket Entry No. 44 at 304, 330). Sales's argument depends heavily on *Taylor*, which "exemplifie[s]" a line of cases "demand[ing] less of state habeas petitioners seeking to raise a federal claim." *Johnson v. Cain*, 712 F.3d 227, 233 n.4 (5th Cir. 2013).

In *Taylor*, the petitioner raised a federal Confrontation Clause claim even though his "filings in state court never explicitly mention[ed] the federal Constitution." *Taylor*, 545 F.3d at 332. The Fifth Circuit found that the petitioner had sufficiently exhausted his claim because (1) "his brief made the type of arguments that support a Confrontation Clause claim," and (2) he cited state precedent that "explicitly connected the error in allowing such hearsay to an accused's federal Constitutional Clause rights." *Id.* at 33-34.

As in *Taylor*, Sales's state court briefing referred to trial counsel's federal constitutional objection and cited state precedent, which in turn relied on federal law. Even though Sales did not make his reliance on federal law as clear as he has on federal review, under *Taylor*, his state court

³⁵ Sales filed his appellate brief on February 18, 2004. (Docket Entry No. 52-3). The Supreme Court decided *Crawford* on March 8, 2004. Because Sales' direct appeal was not final until January 6, 2005, *Crawford* applied to Sales' claims. See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").

briefing was sufficient to comply with the exhaustion requirement. In light of *Taylor*, the court finds that Sales exhausted claims twenty-four through twenty-six.

B. *Crawford*

Federal habeas relief is available only if Sales shows the state court adjudication was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). The Supreme Court has explained its *Crawford* Confrontation Clause jurisprudence under *Crawford v. Washington*, 541 U.S. 36 (2004), as follows:

The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In *Crawford*, . . . we held that this provision bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” A critical portion of this holding . . . is the phrase “testimonial statements.” Only statements of this sort cause the declarant to be a “witness” within the meaning of the Confrontation Clause. . . . It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Davis v. Washington, 547 U.S. 813, 821 (2006). To trigger a *Crawford* violation, a statement “must be both testimonial—i.e., statements an objectively reasonable declarant could have anticipated would be used at trial—and offered for their truth, thus constituting hearsay.” *United States v. Meises*, 645 F.3d 5, 20 (1st Cir. 2011). “[A] statement that is not testimonial cannot violate the Confrontation Clause.” *Brown v. Epps*, 686 F.3d 281, 286 (5th Cir. 2012) (quoting *United States v. Vasquez*, 234 F. App’x 310, 313 (5th Cir. 2007)). The issue is whether the three challenged statements violated the Confrontation Clause.

1. Sergeant Mehl’s Testimony (claims twenty-four and twenty-five)

Sales raises two claims based on the trial testimony of Eric Mehl, the Houston Police Department sergeant who investigated Butler’s murder. During that investigation, Sergeant Mehl received information that led to the investigation resulting in Sales’s arrest. In claim twenty-four,

Sales challenges Sergeant Mehl's testimony about a phone call that Butler received before his murder.³⁶ Claim twenty-five challenges Sergeant Mehl's testimony about his search of computer records.³⁷

The Court of Criminal Appeals affirmed the denial of trial counsel's hearsay objections for both statements. The Court of Criminal Appeals first discussed the phone call:

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tex. R. Evid. 801(d). A statement which is not offered for the truth of the matter asserted, but for some other reason, is not hearsay. *Guidry v. State*, 9 S.W.3d 133, 152 (Tex. Crim. App. 1999), *cert. denied*, 531 U.S. 837 (2000); *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App.), *cert. denied*, 516 U.S. 832 (1995) . . . Mehl's testimony about the phone call received by Butler was offered to explain why the police were prompted to run Butler's name through the computer system, an action that ultimately led to [Sales] as a suspect. The content of the telephone conversation was not revealed[.]

Sales, 2005 WL 8153975, at *5.

Sales has not shown that the testimony about the phone call violated the Confrontation Clause. The testimony did not discuss the content of the telephone call, but instead only mentioned that the call prompted the police officers to take the next steps in the investigation of Butler's murder. The prosecution, in fact, interrupted Sergeant Mehl as he began to discuss the content of the call. The testimony "provide[d] context for [the police] investigation" and "was not "offered for the truth of the matter asserted therein, but instead for another purpose, to explain the officer's

³⁶ When renewing his claim on federal habeas review, Sales describes Sergeant Mehl's testimony as involving a "warning phone call," but Sergeant Mehl's testimony did not describe the content of the conversation. (Docket Entry No. 44 at 305). Instead, Sergeant Mehl testified that Seaton had received a phone call which prompted him to run Butler's name through a computer database. The Court of Criminal Appeals explicitly observed that "the content of the telephone conversation was not revealed." *Sales*, 2005 WL 8153975, at *1.

³⁷ As described by the Court of Criminal Appeals, these claims involve "the admission of Mehl's testimony that the police received information that Butler had received a telephone call two days before his murder . . . This information had led Mehl to run the computer search on Butler's name . . . and pulled every case in which Butler had been a witness, a complainant, or a reportee. Based on the computer results, [Sales] became a suspect." *Sales*, 2005 WL 8153975, at *5 (footnote omitted).

actions.” *United States v. Kizzee*, 877 F.3d 650, 656 n.2 (5th Cir. 2017) (internal quotations and citations omitted). It was “not procured with a primary purpose of creating an out-of-court substitute for trial testimony.” *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). The state court was not unreasonable for rejecting this claim.

Sales bases claim twenty-five on his “hearsay objection to Sergeant Mehl’s testimony concerning information that was generated from records stored in a computer.” (Docket Entry No. 44 at 329). The Court of Criminal Appeals described this claim:

Mehl testified that seven offense reports came up when they ran a computer search using Butler’s name. Of those, they ultimately focused on one offense report. [Sales] objected to testimony about the report, based on hearsay. The objection was overruled. In narrowing the reports down to the one against [Sales], Mehl testified that he ran a search to determine which male suspects were in custody at the time of Butler’s death and which cases were still pending which would require testimony from a witness. The case against [Sales] was the only one still pending. The report reflected that [Sales] and two others were arrested for a deadly-conduct offense. The case against [Sales] was set for trial on August 14, 2000. Butler, a witness in the case, was killed on July 21, 2000.

Sales, 2005 WL 8153975, at *5-6. The Court of Criminal Appeals found no hearsay violation because “[t]he testimony regarding the report was not offered for its truth (that [Sales] committed the offense stated therein), but to explain how [he] came to be a suspect in the instant case, and to set out a motive [Sales] might have had for murdering Butler.” *Id.* at 6.

Sales argues that “[t]he offense report information was computer stored data, which is clearly hearsay.” (Docket Entry No. 44 at 333). The respondent argues that “courts have agreed that the Confrontation Clause does not apply to information generated by machines.” (Docket Entry No. 51 at 219) (quoting *United States v. Miller*, 982 F.3d 412, 437 (6th Cir. 2020)). Texas law draws a distinction between “computer stored data, which would be hearsay” and “self-generate[d] data,” which “is not a statement and cannot be hearsay.” *Stevenson v. State*, 920 S.W.2d 342, 343-44 (Tex. App.-Dallas, 1996). The Court of Criminal Appeals, however, did not

base its decision on a distinction between computer-stored or computer-generated data. The challenged testimony involves information gleaned by a computer from police reports, information that led to additional police investigation. The State offered the results of the computer search to show arrests in cases in which Butler had some involvement and might be a witness. The question is whether there is any showing that the information derived from the police reports—identifying the cases in which Butler might be a witness—was testimonial. Sales has not shown that it was. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) (stating that records “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial . . . are not testimonial”). Sales has not shown a *Crawford* violation.

2. Unknown Caller (claim twenty-six)

Sales’s twenty-sixth claim involves testimony about a phone call that Butler received shortly before his murder. Sales objects to testimony from Nikita Seaton, who worked as a concierge at the Sharpstown Mall. The Court of Criminal Appeals described Seaton’s testimony:

Seaton, an African-American female, testified that on July 18, 2000, while at work, she received a phone call from someone who sounded like a young black male. She testified that the caller asked to speak to “T–Bone,” which Seaton knew was a nickname for Butler, so she called Butler to the phone. The call lasted less than a minute, and when he hung up, Butler discussed the call with Seaton. After Butler’s murder, Seaton told the police about the call.

[Sales’s] hearsay objections were directed to two portions of Seaton’s testimony: (1) her description of the caller as a young, black male, and (2) her testimony that the caller asked to talk to Butler.

Sales, 2005 WL 8153975, at *6.

The Court of Criminal Appeals denied Sales’s claim because it found that Seaton’s testimony was not hearsay:

Seaton’s description of what the caller might have sounded like was not hearsay. Seaton did not refer to a statement made by someone else, but rather simply stated her own perceptions of the caller’s characteristics based upon the sound of his

voice. Thus, since Seaton was simply testifying as to her own auditory perceptions, there was no hearsay in that portion of her testimony. Her testimony about the caller's request to speak with Butler was not presented for the truth of the matter asserted, but to explain why she called Butler to the telephone, and is therefore not hearsay.

Id.

Sales has not shown that the state court decision was in error. As the Court of Criminal Appeals observed, Seaton's description of the speaker's characteristics did not communicate any statement but instead recounted Seaton's conclusions about the speaker based on hearing his voice. The speaker's request to speak with Butler was not presented for the truth of the matter asserted, but to explain why Seaton gave him the telephone. Sales has not shown that the Seaton's challenged statements were testimonial under *Crawford*.

3. Harmlessness

The respondent contends that any Confrontation Clause violation was harmless. Confrontation Clause violations are subject to a harmless-error analysis. *See United States v. Hall*, 500 F.3d 439, 443 (5th Cir. 2007) (stating that evidence improperly admitted under *Crawford* "is subject to the doctrine of harmless error"). The challenged testimony helped establish why police officers started down the investigative path that led them to arrest Sales. Much of the challenged testimony was cumulative of other sources showing that Butler was set to testify against Sales. Other elements—such as Seaton's conclusions about what Sales might look like based on hearing his voice—did not necessarily inculcate Sales or was cumulative of other testimony presented by the State. The record shows that the alleged *Crawford* violations did not have a substantial and injurious effect or influence in determining the jury's verdict or result in actual prejudice. The court finds that any *Crawford* error was harmless.

CERTIFICATE OF APPEALABILITY

Under AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a certificate of appealability. *See* 28 U.S.C. § 2253(c). Sales has not yet asked this court to grant him a certificate, but a court can consider the issue without a request. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).

“The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal.” *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). A court may issue a certificate of appealability only when “the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The Fifth Circuit holds that the severity of an inmate's punishment, even a sentence of death, “does not, in and of itself, require the issuance of a COA.” *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). The Fifth Circuit anticipates that a federal habeas court will resolve debatable questions about a certificate in the death-row petitioner's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

The Supreme Court has explained the standard for evaluating whether to grant a certificate on claims rejected on their merits. “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.” *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. A district court that has denied habeas relief on procedural grounds should issue a certificate of appealability only “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*, 529 U.S. at

484; *Miller-El*, 537 U.S. at 336-38. If the petitioner does not meet this standard, “no appeal would be warranted.” *Slack*, 529 U.S. at 484.

Sales has raised numerous issues which the court has carefully reviewed and analyzed based on the record, the AEDPA standards, and controlling precedent. The court will not issue a certificate of appealability on any of Sales’s claims.

CONCLUSION AND ORDER

The court dismisses Sales’s petition for a writ of habeas corpus, with prejudice. A certificate of appealability is not issued. The court denies all other requests for relief. Final judgment is separately entered.

The clerk will deliver a copy of this order to the parties.

SIGNED on October 9, 2025, at Houston, Texas.

A handwritten signature in black ink, reading "Lee H. Rosenthal", is positioned above a horizontal line. The signature is fluid and cursive.

Lee H. Rosenthal
Senior United States District Judge

ENTERED

October 09, 2025

Nathan Ochsner, Clerk

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

TARUS VANDELL SALES,

Petitioner,

v.

ERIC GUERRERO, Director, Texas
Department of Criminal Justice, Correctional
Institutions Division,

Respondent.

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CIVIL ACTION NO. 4:15-cv-256

FINAL JUDGMENT

The court denies Tarus Vandall Sales's petition for a writ of habeas corpus and dismisses this case with prejudice. No certificate of appealability will issue.

This is a final judgment.

SIGNED on October 9, 2025, at Houston, Texas.



Lee H. Rosenthal
Senior United States District Judge

APPENDIX B

Order of the Fifth Circuit Court of Appeals (May 14, 2026) (denying a certificate of appealability)

United States Court of Appeals
for the Fifth Circuit

No. 25-70018

United States Court of Appeals
Fifth Circuit

FILED

May 14, 2026

Lyle W. Cayce
Clerk

TARUS VANDELL SALES,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice,*
Correctional Institutions Division,

Respondent—Appellee.

Application for Certificate of Appealability
from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CV-256

UNPUBLISHED ORDER

Before SMITH, HAYNES, and OLDHAM, *Circuit Judges.*

PER CURIAM:

On March 1, 2003, Tarus Vandell Sales was sentenced to death in Texas state court for murdering Tyrone Butler. After extensive litigation on direct appeal and in state postconviction proceedings, Sales filed a 28-claim federal postconviction petition that spanned 353 pages (not including the 17 exhibits attached to that petition). ROA.5176–535. The district court denied relief and denied a certificate of appealability (“COA”). Sales now asks our

court for a COA on two claims.

A prisoner in custody pursuant to the judgment of a state court cannot appeal the denial of postconviction relief in federal court without first obtaining a COA. *See* 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Where the district court denies the prisoner’s claims on the merits, the prisoner must make “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), which requires that “reasonable jurists could debate whether (or, for that matter, agree that)” the court below should have resolved the claims in a different manner, or that the claims “deserve encouragement to proceed further,” *Miller-El*, 537 U.S. at 336 (quotations omitted). Where the district court denies relief on procedural grounds, the prisoner must show “that jurists of reason would find it debatable whether the petition states a valid claim of a 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).

Sales first moves for a COA on the ground that he is “actually innocent” of the death penalty. The district court rejected this contention on the ground that “[c]ourts ‘do[] not recognize freestanding claims of actual innocence on federal habeas review.’” ROA.16445 (citing *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009); *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). Jurists of reason could not debate the district court’s ruling, so a COA cannot issue on this ground.

Second, Sales moves for a COA under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). In *Enmund* and *Tison*, the Supreme Court addressed the culpability required for assessing the death penalty for a non-triggerman under the law of parties. The district court rejected this claim because, inter alia, it was procedurally defaulted.

ROA.16456. To obtain a COA for his *Enmund-Tison* claim, Sales must show that jurists of reason could debate the district court's procedural ruling *and* that jurists of reason could debate the underlying constitutional claim. *See Slack*, 529 U.S. at 484.

Sales cannot meet this standard. It appears undisputed that Sales defaulted his *Enmund-Tison* claim and thus no state court has passed on it. *See* ROA.16456. Sales's only contention is that he has cause to excuse that default because he's innocent of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1992). The state court made extensive factual findings on Sales's innocence claims. ROA.32048-81 (state court findings of fact and conclusions of law); ROA.16447-54 (district court's discussion of state court's findings and conclusions). And the Texas Court of Criminal Appeals adopted the lower court's findings "as being supported by the record," and denied habeas relief. *Ex parte Sales*, No. WR-78,131-02, 2023 WL 382321, at *3 (Tex. Crim. App. Jan. 25, 2023) (per curiam). The federal district court relied on these state court decisions to hold that Sales failed to show that he's innocent of the death penalty, and hence his innocence claim cannot be used to excuse the default of his *Enmund-Tison* claim. ROA.16452-54. Sales cannot show that jurists of reason would debate this procedural ruling. That alone justifies denial of a COA. *See Slack*, 529 U.S. at 484.

In any event, even if jurists of reason could debate the district court's procedural ruling, jurists of reason could not debate the district court's rejection of Sales's underlying *Enmund-Tison* claim. In Texas, a jury cannot recommend a death sentence without first answering the so-called "anti-parties" special issue. That special issue asks the jury to decide whether the "defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(2); *see also* TEX. PEN. CODE §§ 7.01, 7.02. The

jury answered this special issue “yes.” ROA.16682. And our precedent holds that answer to the anti-parties special issue meets the “reckless indifference” requirement imposed by *Tison*. See *Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006).^{*} Thus, jurists of reason could not debate the district court’s resolution of the underlying *Enmund-Tison* claim in any event.

Finally, a brief response to the partial dissent. Our colleague would grant a COA on Sales’s second claim because this is a death penalty case. But § 2253 does not provide special COA standards for capital cases. And the Supreme Court has rejected the idea that we should “resolv[e] all legal disputes in capital cases by adopting the outcome that makes the death penalty more difficult to impose.” *Kansas v. Marsh*, 548 U.S. 163, 181 (2006). At the end of the day, no one—including our dissenting colleague—can explain how jurists of reason could debate the district court’s procedural-default holding. And no one—including our dissenting colleague—can explain how jurists of reason could debate the underlying *Enmund-Tison* claim given the jury’s answer to the anti-parties special issue.

For the foregoing reasons, the application for a COA is DENIED.

^{*} Sales attempts to avoid this result by arguing that Texas Penal Code § 7.02(a) requires the defendant’s *physical presence* at the crime scene to support a party-liability conviction. Because Sales was not physically present, he reasons that he was not a “major participant” in the murder and hence cannot be sentenced to death under *Enmund* and *Tison*. See *Tison*, 481 U.S. at 158 (holding defendant must be a “major participant”). This contention rests on a misconstruction of state law. Section 7.02(a) does *not* require the defendant’s physical presence. See *Guevara v. State*, 152 S.W.3d 45, 51–52 (Tex. Crim. App. 2004) (“[T]he Penal Code does not require that the party actually participate in the commission of the offense to be criminally responsible,” and it “*also does not require that a party to the crime be physically present at the commission of the offense.*” (emphasis added)). The evidence in the state court record amply shows that Sales was a “major participant” in the murder, and hence jurists of reason could not debate the district court’s rejection of his claims under *Enmund* and *Tison* (even if that claim was not defaulted, which it was).

HAYNES, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority opinion on the application's first request, but I would grant a COA on Sales's second one. Under 28 U.S.C. § 2254, we shall entertain a state case on habeas "on the ground that [the applicant] is in custody in violation of the Constitution or laws or treaties of the United States." I tend to think that Sales has satisfied this standard at this round of allowing the COA. Given that, and because this is a death penalty case which implicates constitutional rights, I do not think we should ignore a habeas action if the death penalty was improperly granted. I therefore believe it is appropriate to at least consider this issue more fully. I am not yet deciding if we reverse the state court, only that it is appropriate for us to grant this COA and consider it in full.

APPENDIX C

Findings of Fact and Conclusions of Law, *Ex parte Tarus Vandell Sales*, Cause
No. 893161-B, 179th District Court, Harris County, Texas (Aug. 19, 2022)

P.34

NO. 893161-B

EX PARTE

2

IN THE 179th DISTRICT

TARUS VANDELL SALES,

§

COURT OF

2

HARRIS COUNTY, TEXAS

(THIS IS A CAPITAL CASE)

COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING

REMAND

This Court has considered the application for writ of habeas corpus in cause no. 0893161-B with all attachments; both parties' proposed findings of fact and conclusions of law with all attachments; the trial and appellate records; the reporter's record from the evidentiary hearing associated with this cause including all exhibits; the reporter's record from all transcribed post-conviction court settings in this cause; the Texas Court of Criminal Appeals Remand Order in WR-78,131-02, 2018 WL 852323 (Tex. Crim. App. Feb. 14, 2018); the argument of counsel; and all official court records and filings in cause number 0893161, 0893161-A, and 0893161-B. Having done so, this Court recommends that the requested habeas relief be DENIED. This Court's recommendation is based on the following findings of fact and conclusions of law:

FILED
Marilyn Burgess
District Clerk
AUG 22 2022
Time: _____
Harris County, Texas
By _____
Deputy

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. The applicant was indicted and convicted of capital murder in cause number 0893161 (“the primary case”). (C.R. at 6, 167).¹
2. The applicant was represented at trial by attorneys Wayne Hill and Jerome Godinich. (*Id.* at 167).
3. On March 3, 2003, this Court assessed the applicant’s punishment at death by lethal injection following the jury’s affirmative answers to the first and second special issues, and a negative answer to the mitigation special issue. (26 R.R. at 4-5).²
4. On January 26, 2005, the Court of Criminal Appeals (“CCA”) affirmed the applicant’s conviction in an unpublished opinion. *Sales v. State*, No. AP-74,594, 2005 WL 8153975 (Tex. Crim. App. 2005) (not designated for publication).
5. The applicant filed his initial post-conviction writ application on October 9, 2004, in cause no. 0893161-A.
6. This Court recommended denial of habeas relief to the CCA on August 15, 2014. *St. Writ Ex. P.*
7. The CCA denied the applicant habeas relief in his initial post-conviction writ on January 14, 2015. *Ex parte Sales*, No. WR-78,131-01, 2015 WL 222162 (Tex. Crim. App. 2015) (not designated for publication).
8. The applicant then filed a Writ of Habeas Corpus application in federal district court on January 14, 2016. On February 13, 2017, the federal district court stayed and

¹ Clerk’s Record.

² Reporter’s Record.

administratively closed the federal proceedings to allow for the applicant to exhaust his claims in state court. *Sales v. Davis*, No. H-15-256 (S.D. Tex. Feb. 14, 2017).

9. The applicant filed the instant subsequent writ application, cause number 0893161-B, on July 11, 2017, alleging eight grounds for relief.
10. The Harris County District Clerk forwarded the applicant's subsequent writ application to the CCA on July 31, 2017. Tex. Code Crim. Proc. art. 11.071, § 5 (b).
11. The CCA remanded the instant subsequent writ application to this Court. The CCA noted that with the possible exception of the applicant's first claim, the applicant's remaining allegations failed to meet the requirements of Article 11.071, §5. *Ex parte Sales*, No. WR-78,131-02, 2018 WL 852323 (Tex. Crim. App. 2018) (not designated for publication).
12. In the remand order, the CCA ordered this Court as follows:

The trial court shall first determine the meaning of the reference to "Mr. Stone" in Ostine's counsel's affidavit. After clarifying that issue, the trial court shall decide whether its determination of that issue supports a finding that the requirements of Article 11.071, §5, have been met with regard to Allegation One. If appropriate, the trial court shall enter factual findings and credibility determinations. If the trial court determines that Allegation One does not satisfy the requirements of Article 11.071, §5, then it shall immediately return the case to [the CCA]. If the trial court determines that Allegation One satisfies the requirements Article 11.071, §5, the court shall proceed to address it on the merits. Id.

13. This Court conducted a live evidentiary hearing on June 8, 2022. (W.H.R. at 1)³.

This Court requested argument of counsel to be presented along with proposed findings of fact on August 5, 2002. *See Reporter's Record Final Argument*.

³ Reporter's record from the June 8, 2022 evidentiary hearing.

B. FACTUAL SUMMARY

14. The State presented evidence at trial that complainant Tyrone Butler (“Butler”)—a mall security guard—was killed after the complainant witnessed the applicant firing gunshots at a vehicle in the parking lot of Sharpstown Mall on February 8, 2000 (“the Sharpstown shooting”). The applicant was arrested and charged with the felony offense of deadly conduct. (14 R.R. at 42-56).
15. Herschel Ostine (“Ostine”) and the applicant’s girlfriend, Cheryl Kissentaner, (“Kissentaner”) were both charged with carrying a weapon and evading arrest, respectively, for their involvement in the Sharpstown shooting. (14 R.R. at 131-32).
16. The State presented evidence the applicant offered \$5,000 to Leon Hatfield (“Hatfield”); and to a friend of Hatfield to have the complainant killed. Hatfield did not specifically state that the applicant had offered money to Ostine to kill the complainant, Hatfield however, did testify that the applicant was willing to have any of his “hommies” from Tennessee, or a “dopehead” to take care of the complainant. (16 R.R. at 130-40).
17. Hatfield also testified that after the applicant was released on bond pending his trial for deadly conduct, he bought a .357 firearm, the applicant learned the complainant’s work schedule, the applicant and Kissentaner followed the complainant home, and that applicant talked about having a gun “to take care of it.” (16 R.R. at 137-39).
18. The week before the complainant’s murder, the applicant, Kissentaner, Deandra Darfour (“Darfour”), and Ostine arrived and stayed at Kevin Howell’s (“Howell”) apartment; on their last day at the apartment Ostine and Darfour left the apartment around 6:00 p.m. and returned around 1:00 a.m. while the applicant remained at the

apartment with Kissentaner and Howell (*Id.* at 17-19, 23-26).

19. The complainant was killed in the late evening hours of July 20, 2000, while stopped at a red light. A black male exited a vehicle stopped behind the complainant's vehicle, approached the driver side of complainant's vehicle, and shot the complainant twice through his open driver-side window. (*Id.* at 193-206).
20. When Ostine and Darfour returned to Howell's apartment around 1:00 a.m. on July 21, 2000, the applicant asked "did you take care of it" and Ostine answered in the affirmative. Later, the group watched the news about the complainant being killed. (*Id.* at 13-29).
21. A couple of hours after watching the news about the complainant's murder, the applicant, Ostine, and Howell drove to Hobby Airport; the group stopped on the way to the airport and Ostine threw a gun into a wooded area. (*Id.* at 31-33).
22. The applicant used Howell's identification to purchase a plane ticket and flew to Nashville, TN with Ostine. (*Id.* at 31-35).
23. Howell was arrested on February 15, 2001; on July 8, 2001, Ostine was charged with capital murder, but remained at large. Kissentaner was charged with retaliation (15 R.R. at 128, 142, 147).
24. After the applicant's arrest in the primary case he told Martinez Hardnett ("Hardnett"), a fellow inmate in the Harris County jail, that a security guard was shot and killed at a red light in the applicant's case; that the complainant was wearing a security guard uniform at the time of his death and that the complainant's car crashed into a pole after he was shot. (17 R.R. at 23).
25. The applicant told Hardnett he was worried his friend, the shooter, might have been

- caught and might talk to police, and the applicant wanted to be released on bond so that he could sell drugs to raise money to hire a lawyer for the shooter (*Id.* at 25-29).
26. The applicant also told Hardnett that he told his girlfriend, who was charged with retaliation and on bond, to “take out” the witnesses in his case and to be nice to them so they would not testify at the applicant’s trial. (*Id.* at 31, 42).
27. Five fired cartridges and a 9 millimeter firearm were recovered at the scene of the Sharpstown shooting when the applicant was arrested for deadly conduct. (15 R.R. at 17-18).
28. Two fired projectiles recovered from inside the complainant’s vehicle were fired from the same firearm. Both fired projectiles were consistent with the type of bullet fired from a .38 Special or .357 Magnum. (17 R.R. at 120-25, 127-29; 19 R.R. at 103, 113).
29. An autopsy revealed the complainant died from gunshot wounds to the left side of the neck and left arm. (17 R.R. at 150).
30. During the punishment phase of trial, the applicant’s jury learned the applicant was on bond for a murder case in Nashville, TN at the time of the Sharpstown shooting (22 R.R. at 3-4).

C. PRELIMINARY ISSUES

Meaning of the Reference to “Mr. Stone” in Ostine’s Counsel’s Tyrone Moncriffe’s Affidavit.

31. Tyrone Moncriffe (“Moncriffe”) represented Ostine in the capital murder charge involving Butler’s death. St. Writ Ex. K; St. Writ Ex. R.
32. Pat McCann represented applicant in his initial post-conviction writ application cause

no. 0893161-A. App. Writ Ex. 9.

33. Moncriffe's initial affidavit indicated he represented a "Mr. Stone" who was the shooter in a capital murder in Harris County, Texas. Moncriffe states McCann called him to interview his client, but, Moncriffe instructed McCann not to speak with his client, and his client not to speak with McCann. App. Writ Ex. 6.
34. The record does not reflect that anyone involved in the applicant's case had the last name Stone.
35. On June 19, 2020, the applicant filed a pro se request asking this Court to incorporate into the record a corrected version of Moncriffe's affidavit. The corrected affidavit was attached to the applicant's request as "Exhibit A". St. Writ Ex. K; St. Writ Ex. R.
36. On June 10, 2021, the State stipulated that Moncriffe meant to refer to Ostine when referring to "Mr. Stone" in his original affidavit. June 10, 2021 Status Conference Tr. at 4–5.
37. This Court finds both affidavits are identical except for the changing of "Mr. Stone" to "Mr. Ostine". Compare App. Writ Ex. 6, with St. Writ Ex. R.
38. This Court finds Moncriffe's corrected affidavit does not offer any other identifying details regarding Ostine's representation or Ostine's connection to the primary case such as a cause number or case-specific details.
39. This Court finds Moncriffe's reference to "Mr. Stone" in his affidavit attached to the instant writ application was a mistake, and that Moncriffe meant to refer to Ostine when he referred to "Mr. Stone" in his first affidavit.
40. Based on Moncriffe's corrected affidavit, this Court finds Moncriffe would not permit McCann to interview Ostine while Ostine's capital murder case was pending. St. Writ

Ex. R.

41. Based on Moncriffe's corrected affidavit, this Court finds Moncriffe instructed Ostine not to speak with McCann. *Id.*

Requirements of Article 11.071, §5

42. Newly discovered evidence is that which "was not known to [the applicant] at the time of trial and could not be known to him even with the exercise of due diligence." *Ex parte Mayhugh*, 512 S.W.3d 285, 295 (Tex. Crim. App. 2016).

43. The new evidence upon which the applicant relies is the previously unavailable testimony of Herschel Ostine (Ostine), the individual who shot and killed Butler.

44. The applicant was sentenced on March 1, 2003. (C.R. at 167).

45. Ostine was arrested on September 30, 2003, in Nashville, Tennessee. *St. Writ Ex. A* at 111.

46. The applicant filed his initial habeas application on October 9, 2004. *St. Writ Ex. N.*

47. Ostine's case resolved on May 2, 2005. *St. Writ Ex. H*; *St. Writ Ex. I.*

48. This Court entered findings of fact and conclusions of law in the applicant's initial habeas proceeding on August 15, 2014. *St. Writ Ex. P.*

49. In 2015, the applicant's appointed federal habeas attorney, Kenneth McGuire, interviewed Ostine for the first time. Ostine executed the affidavit attached to the instant writ application on December 23, 2015. *App. Writ Ex. 7.*

50. In his 2015 affidavit, Ostine claims that no lawyer asked to interview him about the facts of his murder case until 2015 when he was interviewed by Mr. McGuire. *App.*

Writ Ex. 7 at 3.

51. In his 2015 affidavit, Ostine states he was “of course” interviewed about his case by his own attorney while his case was pending. *Id.*⁴
52. This Court finds Ostine’s claim that no lawyer interviewed him about the facts of his murder case until 2015 is corroborated by Moncriffe’s and McCann’s affidavits.
53. In this affidavit, Ostine further stated: “I made the decision on my own to shoot Tyrone Butler”; “Tarus [Sales] had nothing to do with the decision to do that.” *Id.* at 1.
54. Ostine further averred that the applicant did not “hire” or “ask” or “assist” or “counsel” him to murder Butler. *Id.* at 1.
55. Ostine explained in his affidavit that he “came down from Houston to Nashville to buy drugs in Houston in approximately July 2000” with Mr. Sales. *Id.* While in Houston, “a person [Ostine] knew as D-Low and Kevin Howell took a large amount of money” that Ostine “had to buy drugs with, over \$50,000, that was entrusted to [Ostine].” *Id.* “After the money got stolen,” Ostine states, “I felt like my life could be in danger.” *Id.*
56. Ostine stated in his affidavit, “Shooting Butler was my idea alone,” explaining that he believed at the time that doing so “might make Sales protect [him], since Butler was a witness against Sales in another case.” *Id.* Specifically, Ostine explained that he thought that “killing Butler was a way to maybe get Sales to maybe vouch for [him] with Cecil back in Nashville so that Cecil would not kill [Ostine] for losing [Cecil’s] money.” *Id.*

⁴ At a post-conviction evidentiary hearing, Ostine admitted the third page of his affidavit is handwritten, not typed like the first two pages, and that the handwriting on the third page is not his own. Ostine did not know whose handwriting appears on the third page of his 2015 affidavit, but stated the handwritten page was attached to the typewritten portion when he signed the affidavit on December 23, 2015 (W.H.R. at 71-76).

57. Ostine stated: “On the day of the shooting I had been snorting cocaine all day long” and “had taken four hits of acid or LSD that day,” admitting, “If I think about it with a clear mind now, I wouldn’t have done what I did.” *Id.*
58. Ostine further related that when he “came back to Kevin Howell’s apartment after shooting Butler,” and “saw the news clip showing that the security guard had been murdered,” “Tarus [Sales] was upset and said to me ‘Do you realize you really fucked up[?].’” *Id.* at 2.
59. Ostine explained in his affidavit that around the time that he came up with the idea to shoot Butler, Kissentaner, applicant’s then-girlfriend, and her friend “had been trying to meet with Butler so they could offer him a bribe not to testify against Tarus [Sales] in that other case.” *Id.* at 1. The women had been “talking to Butler and trying to get Butler to not show up in court or testify against Tarus [Sales].” *Id.*
60. Ostine stated “did not know whether [this] effort was successful or not,” but he “heard the two girls talking about, that they had not gotten Butler to agree yet to take a bribe.” *Id.*
61. In light of the circumstances rendering this testimony unavailable at the time of the applicant’s trial and initial application for writ, this Court finds that the parties’ stipulation related to Ostine’s affidavit is supported by the evidence, thus, this Court agrees that Ostine’s affidavit constitutes new evidence, previously unavailable. See *Mayhugh*, 512 S.W.3d at 295; Ex. 11, 2021 CCA Order at 2.

D. THE MERITS OF THE APPLICANT'S FIRST GROUND FOR RELIEF

Ostine's Post-Arrest Interview

62. In 2003, after his arrest, Ostine provided a video recorded statement to Houston Police Department ("HPD") homicide investigator Eric Mehl ("Mehl"). St. Writ Ex. B1; St. Writ Ex. C1.
63. Ostine confirmed Kissentaner was the driver at the Sharpstown shooting. *Compare* (14 R.R. at 106), with St. Writ Ex. B1 at 12:25:12 ; St. Writ Ex. C1.
64. Ostine confirmed that the applicant entered another party's car at the Sharpstown mall, exited the car a short time later, and began shooting at that car. *Compare* (14 R.R. at 46-47), with St. Writ Ex. B1 at 12:25:52; St. Writ Ex. C1.
65. Ostine confirmed that he possessed two weapons at the conclusion of the Sharpstown shooting. *Compare* (14 R.R. at 99-103, 125), with St. Writ Ex. B1 at 12:26:15; St. Writ Ex. C1.
66. Ostine confirmed that he and the applicant were together when they observed the complainant assisting the police at the scene of the Sharpstown shooting. *Compare* (14 R.R. at 110-111), with St. Writ Ex. B1 12:26:42; St. Writ Ex. C1.
67. Ostine confirmed that the applicant had a pending murder case in Nashville at the time of the Sharpstown shooting. *Compare* (21 R.R. at 51-128; 22 R.R. at 34), with St. Writ Ex. B1 at 12:28:50; St. Writ Ex. C1.
68. Ostine confirmed that in the summer of 2000, he returned to Houston with approximately \$55,000 dollars in his possession. *Compare* (16 R.R. at 14-16, 141),

with St. Writ Ex. B1 at 12:30:00-12:30:16; St. Writ Ex. C1.

69. Ostine confirmed that upon his arrival in Houston, the applicant and Kissentaner were not with him at first but later joined him in Houston. *Compare* (16 R.R. at 14-19), with St. Writ Ex. B1 at 12:30:00-12:30:16; St. Writ Ex. C1.

70. Ostine confirmed that the applicant offered money to other people to kill the complainant, and that Ostine was aware of the applicant's desire to kill the complainant before he murdered the complainant. *Compare* (16 R.R. at 133-135), with St. Writ Ex. B1 at 12:31:14; St. Writ Ex. C1.

71. Ostine confirmed that D-Low stole the money Ostine was sent to Houston with, and that immediately after the theft, Ostine called the applicant who came to Houston. *Compare* (16 R.R. at 14-16), with St. Writ Ex. B1 at 12:31:27-12:33:57; St. Writ Ex. C1.

72. Ostine confirmed that Kissentaner and Darfour came to the courthouse looking for D-Low's girlfriend, Vanetta Rich, who had a pending case at the time. *Compare* (17 R.R. at 117-119), with St. Writ Ex. B1 at 12:35:06-12:35:50; St. Writ Ex. C1.

73. Ostine confirmed that Kissentaner and Darfour were conducting surveillance on the complainant. *Compare* (16 R.R. at 136-138, 146), with St. Writ Ex. B1 at 12:37:29; St. Writ Ex. C1.

74. Ostine confirmed Kissentaner and Darfour planned to seduce the complainant after learning that he was engaged in extra-marital conduct. *Compare* (14 R.R. at 59-60), with St. Writ Ex. B1 at 2:37:56; St. Writ Ex. C1.

75. Ostine confirmed Darfour went with him to Sharpstown mall on the night of the murder. *Compare* (16 R.R. at 24-26), with St. Writ Ex. B1 at 12:40:56; St. Writ Ex. C1.

76. Ostine confirmed the murder weapon was a .38 revolver. *Compare* (16 R.R. at 33), with St. Writ Ex. B1 at 12:41:19; St. Writ Ex. C1.
77. Ostine confirmed that he shot and killed the complainant while stopped at a stop light by shooting the complainant twice through the open driver-side window. *Compare* (14 R.R. at 201-202; 15 R.R. at 17-20), with St. Writ Ex. B1, at 12:45:36-12:47:26; St. Writ Ex. C1.
78. Ostine confirmed the applicant asked him whether he had killed the complainant when he returned to Howell's apartment after the murder. *Compare* (16 R.R. at 26-29), with St. Writ Ex. B1 at 12:47:54-12:48:03; St. Writ Ex. C1.
79. Ostine confirmed that the day after the murder he and the applicant watched the local news which reported on the complainant's murder. *Compare* (16 R.R. at 29), with St. Writ Ex. B1 at 12:49:32; St. Writ Ex. C1.
80. Ostine confirmed he disposed of the murder weapon in a wooded area on the way to the airport to leave Houston. *Compare* (16 R.R. at 30-33), with St. Writ Ex. B1 at 12:50:44-12:51:17 ; St. Writ Ex. C1.
81. Ostine confirmed after the murder that he stayed in Nashville, TN until his arrest in September 2003. *Compare* (17 R.R. at 25), with St. Writ Ex. B1 at 12:53:23-12:53:30; St. Writ Ex. C1.
82. This Court finds that Ostine's 2003 statement implicates the applicant as either a party or co-conspirator to the complainant's capital murder.
83. Based on the foregoing, this Court finds that Ostine's 2003 statement to Mehl corroborated much of the trial testimony and accompanying physical evidence from the applicant's trial.

Evidentiary Hearing, June 8, 2022

84. When an applicant presents new exculpatory evidence under Article 11.071 of the Texas Code of Criminal Procedure alleging facts that, if true, prove his or her actual innocence, the habeas court may conduct a live evidentiary hearing and consider affidavits, depositions, and interrogatories. See Tex. Code Crim. Proc. Ann. art. 11.071 § 9(a) (West).
85. This Court held one such live evidentiary hearing on June 8, 2022, to hear testimony from, and assess the credibility of, affiant Ostine. (W.R.H at 1).
86. At the June 8 hearing, Ostine testified, that the applicant did not “have anything to do with” his decision to shoot the complainant. (W.R.H at 18).

Credibility of Ostine’s Testimony

87. This Court finds that Ostine’s demeanor at the hearing although calm and matter of fact, it was not “sincere”. See, *contra*, e.g., *Vazquez*, 2013 WL 7045041, at *13.
88. This Court finds that Ostine’s testimony was vague and uncertain as to the key relevant facts surrounding the complainant’s murder. this Court finds Ostine’s testimony seemed “rehearsed” and unbelievable. See, *Ex parte Navarajo*, 433 S.W.3d 558, 568 (Tex. Crim. App. 2014) (finding “lack of detail” in recantation and complainants “inability to recall basic facts” affected the likelihood that a reasonable juror would credit her testimony).
89. Although during his testimony Ostine did not hesitate in agreeing that he was the

person who shot the complainant and that applicant had nothing to do with his decision in doing so⁵, his testimony and affidavit are silent as to any information on how his idea and plan to kill the complainant came about or any other surrounding meaningful details regarding the incident.

90. Based on the totality of the trial record, this Court finds that the State presented evidence that that this murder was not a murder as a result of sudden passion or heat-of-the-moment type of crime. Instead, it was a murder where the complainant was a witness to a crime allegedly committed by the applicant that led to a series of events where the complainant was found, followed and eventually killed.

91. Ostine's testimony does not give any details regarding the plan and preparation of the

⁵ During the June 8 2022 hearing Ostine answered to habeas counsel's questions as follows:

Q Whose decision was it to shoot Mr. Butler?

A My decision.

Q Did Mr. Sales have anything to do with that decision?

A No, sir.

Q Did he ask you to kill Mr. Butler?

A No, sir.

Q Did Mr. Sales direct you in any way to kill Mr. Butler?

A No, sir.

Q Did Mr. Sales hire you to kill Mr. Butler?

A No, sir.

Q Did Mr. Sales assist or counsel you in any way in killing Mr. Butler?

A No, sir.

Q Did Mr. Sales directly or indirectly tell you to kill Mr. Butler?

A No, sir.

Q Did you ever have any agreement with Mr. Sales to kill Mr. Butler?

A No, sir.

(W.H.R. at 18)

murder. Instead, Ostine's testimony goes from "the day starts like any other day. I wake up, roll some weed up, probably drank some liquor, try to make some money some type of way" to killing the complainant with no detail of preparation. (W.H.R. at 91-92).

92. When given the opportunity to share what happened the day of the murder, Ostine's details were limited to stating "[s]o we went to the mall, waited until he got off from work, followed him. He made a stop at the red light. I jumped out the car, walked to the driver's side and shot him, got back in the car, rolled back to the apartment with Mr. — where everybody was at." (W.H.R. at 92).

93. Ostine stated he tried to get the applicant's "girlfriend to drive me to the mall. She broke down crying, didn't want to do it." (W.H.R. at 91). Ostine gave no details as to why, for example, he asked the applicant's girlfriend as opposed to anyone else to drive him. Ostine did not give any details as to when did he ask the applicant's girlfriend to drive him, the place where they were when he asked her to drive him, the reasons why she did not want to do it, if any, the reasons why she broke down crying, whether he told her not to tell anyone about his intentions or any other details surrounding their interaction.

94. Ostine stated he then "made Finesse drive" him. (W.H.R. at 92). Similarly, Ostine gave no details as to how he made Finesse drive him, the place where they were when he made her drive him, any details as to any struggle or resistance he made have encountered from Finesse as he "made" her drive him, or any other details surrounding their interaction.

95. Ostine testified he never left with a gun after the murder. (W.H.R. at 24). The court

finds Ostine's testimony regarding the gun are in direct contradiction to his statements to Mehl and to the evidence presented by the State at trial. The court finds Ostine's testimony does not support an explanation to the inconsistencies between his statements to Mehl and his affidavit.

96. Ostine testified that "I decided that today was the day to kill Mr. Butler and I proceeded to do just that." (W.H.R. at 91).

97. This Court finds a reasonable juror would *not* credit Ostine's statements that "I decided that today was the day to kill Mr. Butler and I proceeded to do just that."

98. Upon observing Ostine's live testimony at the June 8 evidentiary hearing, reviewing Ostine's 2015 affidavit and prior statements, and taking into account the totality of the record and the underlying case against the applicant, this Court finds Ostine's testimony that he decided on his own to kill the complainant, Tyrone Butler, to *not* be credible and to *not* be persuasive.

99. This Court finds that Ostine's inability or perhaps unwillingness to recall basic facts and his lack of detail in his statement affects the likelihood that a reasonable juror would credit his testimony.

Ostine's Motive and Bias

100. Ostine and the applicant are lifelong cohorts who grew up together in Nashville. . (W.H.R. at 33-34); St. Writ Ex. B1; St. Writ Ex. C1.

101. Ostine and the applicant have a history of selling drugs together. (W.H.R. at 11); St. Writ Ex. B1; St. Writ Ex. C1.

102. Ostine was with the applicant when the applicant was arrested and charged with deadly conduct in the Sharpstown shooting. (14 R.R. at 111-12).

103. Ostine fled with the applicant's weapon following the Sharpstown shooting. (14 R.R. at 125).

104. Ostine and the applicant observed the complainant assisting police at the scene of the Sharpstown shooting. (W.H.R. at 43-44); St. Writ Ex. B1; St. Writ Ex. C1.

105. Ostine was charged with carrying a weapon for his participation in the Sharpstown shooting. The applicant was charged with deadly conduct. (W.H.R. at 41); (14 R.R. at 132-33).

106. The applicant picked Ostine up from the Harris County Jail when he was released from his sentence in his carrying a weapon case, and after the applicant bonded out of jail on his deadly conduct case following the Sharpstown shooting. (W.H.R. at 42); St. Writ Ex. B1; St. Writ Ex. C1.

107. Ostine was aware the applicant had a pending murder case in Tennessee at the time the applicant was charged with deadly conduct in the Sharpstown shooting. Ostine was also aware the applicant was worried about the effect the deadly conduct case would have on the Tennessee murder case. Ostine was also aware Butler would testify against applicant in the deadly conduct charge from the Sharpstown shooting. (W.H.R. at 48, 92-93); St. Writ Ex. B1; St. Writ Ex. C1.

108. Ostine and the applicant were together in Houston in the days leading up to the complainant's murder, and on the evening of the complainant's murder. (16 R.R. at 19).

109. Ostine and the applicant traveled back to Tennessee together right after the

complainant's murder. (16 R.R. at 30-35).

110. At the 2022 post-conviction evidentiary hearing, Ostine admitted dealing drugs could be dangerous, and that due to the inherent danger in the practice, he and the applicant had some trust in each other. (W.H.R. at 35).

111. At the 2022 post-conviction evidentiary hearing, Ostine admitted he did not know the complainant's name and was only familiar with who the complainant was because of what transpired after the Sharpstown shooting. (W.H.R. at 90-91).

112. Of all the direct participants in the complainant's murder (i.e., Ostine, Darfour, Kissentaner) and ancillary witnesses (i.e., Daniel Fleary ("D-Low"), Howell, Hatfield), the record shows Ostine is the only individual who the applicant knew from childhood and who the applicant consistently trusted with large sums of money and as his partner during narcotics transactions. St. Writ Ex. B1; St. Writ Ex. C1.

113. Based on the totality of the circumstances and the habeas record, the court finds that Ostine both understood the applicant's concern about his deadly conduct case vis-à-vis the applicant's Tennessee murder case, consistently spent time with the applicant between the Sharpstown shooting and the complainant's murder, and who the applicant could trust to carry out the complainant's murder.

114. This Court finds based on the close nature of the relationship between Ostine and the applicant, including their simultaneous arrests in the Sharpstown shooting and their simultaneous departure from Texas after the complainant's murder, that Ostine had sufficient knowledge and motive to murder the complainant on behalf of the applicant.

115. This Court finds Ostine's lifelong friendship with the applicant and history of dealing

drugs with the applicant demonstrates bias toward the applicant, and reduces the persuasiveness of his 2015 writ affidavit when weighed against the existing trial testimony and evidence.

Ostine's Inconsistencies

116. Ostine listened to his statement to Mehl during the 2022 post-conviction evidentiary hearing. (W.H.R. at 46). Ostine stated to Mehl during their interview that:

- a. the applicant was aware that the complainant was a witness against him in his deadly conduct case;
- b. the applicant was concerned his deadly conduct case would affect his pending Tennessee murder case;
- c. before murdering the complainant, Ostine knew the applicant had offered D-Low money to murder the complainant;
- d. the applicant knew D-Low failed to kill the complainant;
- e. D-Low stole a large sum of money from Ostine that belonged to the applicant;
- f. the applicant told Ostine to kill the complainant;
- g. Kissentaner and Darfour watched the complainant and reported his activity to the applicant;
- h. Kissentaner and Darfour planned to seduce the complainant as a means of luring him into being killed;
- i. the applicant attempted to locate D-Low by confronting D-Low's girlfriend at the courthouse;

j. after the murder, the applicant verified that Ostine had killed the complainant by checking the amount of bullets in the gun; and

k. the applicant ceased searching for D-Low after the complainant's murder.

St. Writ Ex. B1; St. Writ Ex. C1.

117. In his 2015 writ affidavit, Ostine stated:

a. the applicant did not ask, direct, or instruct him to kill the complainant;

b. Ostine made the decision to kill the complainant on his own;

c. the applicant had nothing to do with Ostine's decision to kill the complainant;

d. Ostine came to Houston to buy drugs with a large sum of money given to him by Cecil, a corrupt police officer in Nashville, TN;

e. D-Low stole the money from Ostine;

f. Ostine feared for his safety after D-Low stole Cecil's money;

g. Ostine believed killing the complainant would curry favor with the applicant, and would earn the applicant's protection from Cecil;

h. Kissentaner and Darfour were attempting to get close to the applicant so they could bribe him, not kill him;

i. Ostine used cocaine and LSD on the day of the murder; and

j. the applicant was displeased with Ostine after learning he killed the complainant.

App. Writ Ex. 7.

118. At the 2022 post-conviction evidentiary hearing, Ostine claimed that in 2003 he lied to Mehl when he said:

a. he knew the applicant had offered D-Low money to kill the complainant;

- b. the applicant explicitly told him to kill the complainant;
- c. Kissentaner and Darfour tried to lure the complainant into getting killed; and
- d. the applicant asked him how many times he shot the complainant.

(W.H.R. at 21-24).

119. This Court finds that Ostine claims to have been dishonest with Mehl about facts which only implicate the applicant and do little to lessen Ostine's own culpability.

120. At the 2022 post-conviction evidentiary hearing, Ostine said he told Mehl inculpatory details about the applicant's involvement in the primary case because:

- a. he was mad at the world;
- b. he was mad at the applicant;
- c. he wanted to tell Mehl what he thought Mehl wanted to hear;
- d. of drug use; and
- e. he wanted to avoid the death penalty.

(W.H.R. at 25-26, 30, 48-51, 82).

121. Ostine knew the applicant had been tried and sentenced to death when he spoke to Mehl in 2003. (W.H.R. at 50).

122. Ostine admitted his 2003 statement to Mehl implicated both himself and the applicant in the complainant's murder. (W.H.R. at 50-51).

123. This Court is unpersuaded by Ostine's claim that he blamed and implicated the applicant out of anger. Ostine testified several times he was angry at the world, but only when redirected during questioning he said he was specifically mad at the applicant. Even when prompted to state the reasons why he was mad at the applicant Ostine responded "I mean, I was mad a the world, I was upset at everybody." (W.H.R.

at 25, 30, 50, 89).

124. Based on the video recording of Ostine's 2003 conversation with Mehl, this Court finds that Ostine appeared calm and lucid throughout the interaction with Mehl. St. Writ Ex. B1.

125. This Court further finds that Ostine appeared to understand Mehl's questions and responded to them in a cohesive and coherent manner. *Id.*

126. The record does not support Ostine's claim that he was under the influence of narcotics at the time of his 2003 statement to Mehl. St. Writ Ex. B1.

127. Based on Ostine's 2003 video statement to Mehl and Ostine's demeanor and speech at the 2022 evidentiary hearing, this Court is unpersuaded by Ostine's claim that drug use affected his judgment during his 2003 conversation with Mehl.

128. Ostine admitted that it was generally bad to lie to the police. (W.H.R. at 53).

129. The record also shows Ostine made an allegation that Mehl assaulted him and forced him to signed a confession.

130. The record does not show there was ever a written confession signed by Ostine, instead, there is a video recording of when Mehl interrogated Ostine.

131. This Court finds that Mehl's interview of Ostine consists in large part of Ostine simply agreeing with Mehl's leading questions. However, at the 2022 evidentiary hearing, Ostine did not claim to have lied to Mehl about facts which implicated himself, he claimed he only lied about facts which implicated the applicant as a party to capital murder or that corroborated the existence of a conspiracy to retaliate against the complainant, despite knowing the outcome of the applicant's case.

132. This Court is unpersuaded by Ostine's explanation that he lied to Mehl to avoid the

death penalty.

133. This Court finds Ostine failed to provide adequate or persuasive reasons for the inconsistencies between his 2003 statement to Mehl and his 2015 writ affidavit at the 2022 post-conviction evidentiary hearing.

134. This Court finds Ostine's 2015 writ affidavit unpersuasive given that Ostine's 2003 statement to Mehl corroborated much of the trial testimony and accompanying physical evidence from the applicant's trial.

Ostine's Conduct while In Custody in Davidson County

135. Ostine was housed in the Davidson County Jail after his interview with Mehl. (W.H.R. at 27)⁶.

136. Ostine provided his statement to Mehl on October 1, 2003. (W.H.R. at 60); St. Writ Ex. J.

137. Ostine made jail calls to various people from within the Davidson County Jail while awaiting extradition. The calls were recorded. St. Writ Ex. D1, E1, and F1.

138. In a jail call on October 1, 2003, Ostine told a man named "Hair", "they know everything" and "ain't nothing they don't know." St. Writ Ex. D1, Jail Call A11B10JL.

139. On October 14, 2003, Hair told Ostine "don't say nothing about nothing." St. Writ Ex. F1, Jail Call AE1H10PF.

140. Hair advised Ostine that the applicant would not be back in the courtroom except for

⁶ Ostine testified he was "in jail in Nashville." The jail records played during the hearing contained in St. Writ Ex D-1, E-1, and F-1, identify the calls as being placed from the Davidson County Jail.

appeals; that “[Ostine] doesn’t know anything about anybody hiring him to do anything;” that Ostine has not done anything; and that they needed to get their heads on straight. *Id.*

141. On October 15, 2003, Ostine told Hair he was made to sign a confession, and that Mehl beat Ostine in order to get Ostine to sign a confession (W.H.R. at 56-58); St. Writ Ex. F1, Jail Call AF1H10RB.

142. Keisha Johnson, the mother of Ostine’s children, filed a complaint with the Metro Nashville Police Department (“MNPDP”) claiming a detective from Houston, Texas struck Ostine in his eye and squeezed his testicles to obtain a confession. St. Writ Ex. G.

143. The MNPDP thoroughly investigated the complaint and found it to be meritless and unfounded. *Id.*

144. At the 2022 post-conviction hearing, Ostine admitted his comments “they know everything” and “ain’t nothing they don’t know” meant that everything Mehl knew about the case was accurate. (W.H.R. at 62).

145. At the 2022 post-conviction hearing, Ostine admitted that Mehl did not physically assault him during the video interview with Mehl. (W.H.R. at 58).

146. This Court finds Ostine’s post-arrest comments that Mehl “knows everything” and that “there ain’t nothing they don’t know” detract from the persuasiveness of his 2015 writ affidavit and habeas testimony in support of.

147. This Court finds Ostine’s post-arrest conversation with Hair where Hair tells Ostine that “[Ostine] doesn’t know anything about anybody hiring him to do anything;” that Ostine has not done anything; and that they needed to get their heads on straight.

detract from the persuasiveness of his 2015 writ affidavit and habeas testimony in support of.

148. Overall, this Court finds Ostine's post-arrest conduct detract from the persuasiveness of his 2015 writ affidavit and habeas testimony in support of.

Ostine's Claims about Cecil

149. In 2003, Mehl questioned Ostine about a supposed threat to Ostine's life. St. Writ Ex. B1; St. Writ Ex. C1.

150. Ostine told Mehl that after the complainant's murder, Ostine learned he was not supposed to leave Texas. Ostine interpreted this to mean he was supposed to die in Texas. *Id.*

151. Ostine did not tell Mehl the applicant threatened him. St. Writ. Ex. B1; St. Writ Ex. C1.

152. Ostine told Mehl the money that D-Low stole belonged to the applicant. *Compare* (W.H.R. at 14); App. Writ Ex. 7, with St. Writ Ex. B1; St. Writ Ex. C1.

153. At the evidentiary hearing, Ostine admitted that he could have mentioned Cecil to Mehl using a nickname but did not. (W.H.R. at 52-53).

154. On October 26, 2003, while talking to Keisha Johnson on a jail call, Ostine declined an opportunity to speak on the phone with the applicant's mother and sister. (W.H.R. at 63-65); St. Writ Ex. F1, Jail Call AQOK102Q.

155. Ostine admitted at the 2022 post-conviction evidentiary hearing that, in October 2003, he failed to tell the applicant's mother and sister about Cecil when given an

opportunity to do so. (W.H.R. at 65-66); St. Writ Ex. F1, Jail Call AQOK102Q.

156. This Court finds at no time during Ostine's 2003 statement to Mehl did Ostine mention Cecil, or being threatened by Cecil. (W.H.R. at 53).

157. In his 2015 writ affidavit, Ostine claims he murdered the complainant to curry favor with the applicant in exchange for protection from Ernest Cecil, a corrupt MNPd police officer, because Ostine lost Cecil's money to D-Low. (W.H.R. at 15, 94); App. Writ Ex. 7.

158. To corroborate Ostine's claim regarding Cecil, the applicant attaches the trial transcript for Cecil's federal trial as the applicant's writ exhibit 8. App. Writ Ex. 8.

159. This Court has reviewed Cecil's federal trial transcript and finds the following:

- a. Cecil's trial commenced on September 20, 2007—approximately seven years after the events of the primary case, four years after the applicant's trial, and two years after Ostine's plea;
- b. Cecil was tried for conduct that occurred between the Spring of 2003 and September 7, 2005;
- c. Cecil engaged in assisting his nephew—Corey, a Nashville drug dealer—with stealing narcotics from other Nashville-area drug dealers because Cecil was struggling financially;
- d. Corey obtained narcotics for distribution primarily from Los Angeles, not Houston;
- e. Neither Corey nor any of Corey's associates testified that they obtained narcotics from any source in Texas, or that they trafficked narcotics from California to Tennessee via Texas; and

- f. Cecil occasionally borrowed money from Corey, but did so in small amounts, not thousands of dollars. App. Writ Ex. 8.

160. In light of the evidence from the applicant's trial and the evidence from Cecil's federal trial, this Court is unpersuaded that protection from Cecil was Ostine's motivation for killing the complainant.

161. This Court finds that Cecil's conduct as described in his federal trial is inconsistent with Ostine's fear that Cecil would murder him for losing money to D-Low.

162. This Court finds Ostine's post-conviction claims that he murdered the complainant in exchange for protection from Cecil are inconsistent with his 2003 statement to Mehl, and with the testimony and evidence from the applicant's trial.

Other evidence

163. The applicant presented proposed findings regarding Cheryl Kissentaner's and Deandra Darfour's "statements" and suggested they should be considered as statements corroborating Ostine's testimony. this Court is unpersuaded by said proposed findings. The CCA has already ruled those statements do not support a finding that applicant's claim should overcome the Section 5 procedural bar. The transcripts of habeas counsel interviews of both women presented with applicant's writ are the same transcripts that applicant presented to this court. This court was never presented with sworn and signed affidavits or live sworn testimony by either woman. Therefore, this Court does not find the transcripts to be evidence to be used by this court to make a determination on statements corroborating Ostine's testimony.

See Applicants Proposed Findings 77-86.

164. The trial record reflects that any deals offered by the State to Hatfield and Hardnett that could affect their credibility and show bias on their motive to testify were known by the jury and were either elicited during direct or cross-examination. (17 RR 11–12, 15–16, 74–75); (15 RR 118–21; 16 RR 120).

165. The applicant presented proposed findings stating that witnesses Hatfield, Hardnett and Howell's testimony was either uncorroborated or contradicted during trial. However, the trial record shows the jury was privy of those statements when making their assessment of credibility of the witnesses in reaching their verdict. *See Applicants Proposed Findings 95-118.*

E. FINDINGS REGARDING THE APPLICANT'S WRIT CLAIM

166. This Court finds the applicant's actual innocence claim solely relies on the inconsistent and biased statements of the applicant's lifelong friend and co-defendant to the complainant's murder.

167. This Court finds that Ostine's 2015 writ affidavit is unpersuasive given that his 2003 statement to Mehl is corroborated by the trial testimony and accompanying physical evidence from the applicant's trial, and Ostine's post-arrest conduct.

168. In all things, this Court does not find the information in Ostine's 2015 writ affidavit persuasive when weighed against the existing trial evidence and testimony.

169. This Court finds the applicant fails to provide sufficient evidence that would raise Ostine's persuasiveness higher than that of the witnesses who testified at trial.

170. In all things, this Court finds the applicant has failed to prove by clear and convincing

evidence that no reasonable juror would have convicted him, had they known the information in Ostine's 2015 affidavit.

II. CONCLUSIONS OF LAW

A. APPLICABLE LAW

1. The applicant's claim is a bare innocence claim requiring him to prove by clear and convincing evidence that, given newly discovered evidence, no reasonable juror could have found the applicant guilty. *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002) (citing *Herrera v. Collins*, 506 U.S. 390 (1993)); *Ex parte Harleston*, 431 S.W.3d 67, 70 (Tex. Crim. App. 2014).
2. When an applicant presents an actual innocence claim based on newly discovered evidence, the evidence presented must constitute affirmative evidence of the applicant's innocence. Examples of such affirmative evidence include *trustworthy* recantations and eyewitness accounts. *Ex parte Franklin*, 72 S.W.3d 671, 678, n.7 (Tex. Crim. App. 2002) (emphasis added).
3. The applicant's burden of proving innocence is "Herculean." Evidence which merely "muddies the waters" and only casts doubt on the applicant's conviction is insufficient to prevail in a free-standing actual-innocence claim because that evidence does not affirmatively establish the applicant's factual innocence by clear and convincing evidence. *Harleston*, 431 S.W.3d at 89 (citing *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)).

4. In an actual innocence claim, the reviewing court weighs evidence of guilt against new evidence of innocence to determine whether the applicant has proven, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the new evidence. *See Tuley*, 109 S.W.3d at 390; *See Franklin*, 72 S.W.3d at 672 (citing *Elizondo*, 947 S.W.2d at 209).
5. The applicant's claim of innocence alone is not a sufficient Constitutional claim to either move past a procedural bar to successive writs, or to warrant review of the applicant's successive writ claims of innocence with a standard lower than clear and convincing evidence (i.e., a preponderance). *Herrera v. Collins*, 506 U.S. 390, 416-17 (1993).
6. Texas Code of Criminal Procedure Article 11.071, § 5 sets the requirements for the applicant to obtain review of a successive writ; however, § 5 does not set the standard of proof the applicant must meet in order to prove his successive habeas claims. *Ex parte Blue*, 230 S.W.3d 151, 162-63 (Tex. Crim. App. 2007).
7. Evidence of motive is admissible because it is meant to prove the emotion that would then provoke or incite the commission of the criminal offense. Motive can also be used to rebut defensive theories raised by the defense at trial. *See Rodriguez v. State*, 486 S.W.2d 355 (Tex. Crim. App. 1972); *See Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983) (extraneous offense admissible to show motive and to rebut defensive theories); *See Bush v. State*, 628 S.W.2d 441, 444 (Tex. Crim. App. 1982) (extraneous offense admissible to prove motive to commit charged offense).

B. THE APPLICANT FAILS TO PROVE HIS INNOCENCE

8. The trial evidence established the applicant as both a party to capital murder, and as a coconspirator to capital murder for conspiring to retaliate against the complainant. Similarly, Ostine was guilty as a direct actor, a party, and a coconspirator. Tex. Penal Code § 7.02.
9. Ostine's 2015 affidavit does not constitute the trustworthy type of eyewitness account that qualifies as affirmative evidence sufficient to prove the applicant's innocence. Ostine is the only party involved in the Sharpstown shooting and the complainant's murder who has a bias toward the applicant, has knowledge of the complainant's involvement in the Sharpstown shooting case and the applicant's Tennessee murder case sufficient to form a motive to murder the complainant, and who the applicant consistently trusted and engaged in criminal conduct with. *See Franklin*, 72 S.W.3d at 678, n.7. (emphasis added).
10. Ostine's 2015 affidavit only muddies the water regarding the applicant's guilt, and does not unquestionably establish the applicant's innocence. Ostine's 2015 affidavit is inconsistent with statements Ostine made in 2003 to HPD homicide investigator Mehl. Furthermore, Ostine failed to offer reasonable explanations for the inconsistencies between his 2003 statement to Mehl, and his 2015 affidavit. Such inconsistencies and actions when considered with Ostine's 2015 affidavit do not establish the applicant's innocence by clear and convincing evidence when weighed against the trial evidence. *See Harleston*, 431 S.W.3d at 89 (inconsistent statements insufficient to satisfy the applicant's 'Herculean' burden when proving innocence); *See*

Tuley, 109 S.W.3d at 390.

11. Ostine's 2015 affidavit and corresponding 2022 post-conviction evidentiary hearing testimony fails to overcome the weight of the trial testimony and accompanying physical evidence establishing the applicant's guilt. Therefore, the applicant fails to prove his innocence by clear and convincing evidence. *See Tuley*, 109 S.W.3d at 390.

NO. 893161-B

EX PARTE	§	IN THE 179th DISTRICT
	§	COURT OF
TARUS VANDELL SALES	§	HARRIS COUNTY, TEXAS

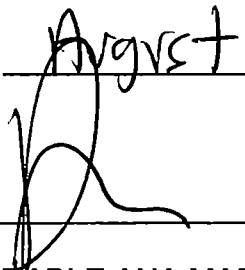
ORDER

THE CLERK is ORDERED to prepare a transcript and transmit same to the Court of Criminal Appeals as provided by Tex. Crim. Proc. Code art. 11.071. The transcript shall include certified copies of the following documents:

1. remand order WR-78, 131-02;
2. the State's proposed findings of fact, conclusions of law, and order after remand, including all attached exhibits;
3. the applicant's proposed supplemental findings of fact and conclusions of law and order after remand including any attached exhibits;
4. the applicant's objections to state's proposed findings including any attached exhibits;
5. the Court's order;
6. the habeas record in cause number 0893161-B;
7. the reporter's record from the live evidentiary post-conviction hearing in cause number 0893161-B;
8. all filings after February 14, 2018 in cause number 0893161-B.

THE CLERK is further ORDERED to email a copy of this Court's findings of fact and conclusions of law, including its order, to habeas counsel Andrew LeGrand at ALeGrand@gibsondunn.com and Chris Wilson at CWilson@gibsondunn.com, and State's habeas counsel, Joseph M. Sanchez, at Sanchez_joseph@dao.hctx.net.

SIGNED this 19th day of August, 2022.



THE HONORABLE ANA MARTINEZ
JUDGE PRESIDING, 179th DISTRICT COURT
HARRIS COUNTY, TEXAS

APPENDIX D

Texas Court of Criminal Appeals Order Denying Relief, *Ex parte Tarus Vandell Sales*, No. WR-78,131-02 (Aug. 19, 2022)



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-78,131-02

EX PARTE TARUS VANDELL SALES

**ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 893161-B IN THE 179TH DISTRICT COURT
HARRIS COUNTY**

Per curiam.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.¹

Applicant was convicted in 2003 of capital murder in the course of retaliation based

¹ Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

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on evidence that he directed another person, Herschel Ostine, to murder Tyron Butler.² TEX. PENAL CODE ANN. § 19.03(a). Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure, Article 37.071, Sections 2(b) and 2(e), the trial court sentenced Applicant to death. Art. 37.071, § 2(g). This Court affirmed Applicant's conviction and sentence on direct appeal. *Sales v. State*, AP-74,594 (Tex. Crim. App. Jan. 26, 2005) (not designated for publication).

Applicant filed his initial post-conviction application for writ of habeas corpus in the trial court on October 9, 2004. Although the State filed its response on April 2005, for reasons the record does not reflect there was no further activity in this case in the trial court until this Court issued an order in August 2012 directing the trial court to resolve any remaining issues and forward the complete writ record to this Court. The trial court thereafter entered findings of fact and conclusions of law, and forwarded the application to this Court in August 2014. We received that application later that month and denied relief on the claims raised therein in January 2015. *Ex parte Sales*, WR-78,131-01 (Tex. Crim. App. Jan. 14, 2015) (not designated for publication).

Applicant then filed a petition for a writ of habeas corpus in federal district court. *Sales v. Davis*, No. H-15-CV-256 (S.D. Tex. Feb. 13, 2017). The federal district court stayed and administratively closed the proceedings to allow Applicant to exhaust his claims in state court. Applicant then filed this subsequent application for writ of habeas corpus in the

² At the time of the capital offense, Butler was scheduled to testify against Applicant in a deadly conduct trial which arose from a drug-related shootout outside the mall where Butler worked.

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convicting court on July 10, 2017. In compliance with Article 11.071, § 5(b)(1), the convicting court forwarded this application to this Court. We received it on August 9, 2017.

Applicant alleged that this subsequent application should be considered on the merits because the factual basis for his claims was unavailable when he filed his previous application.³ *See* Art. 11.071, § 5(a). To satisfy Article 11.071, § 5(a), the factual basis must have been unavailable as to all previous applications. *See* Art. 11.071, § 5(a)(1). A factual basis was “unavailable” if it was not ascertainable through the exercise of reasonable diligence. *See* Art. 11.071, § 5(e). Further, the specific facts alleged, if proven, must establish a federal constitutional violation sufficiently serious as to likely require relief from either the conviction or sentence. *See Ex parte Campbell*, 226 S.W.3d 418, 422 (Tex. Crim. App. 2007).

This application contains eight allegations. In Allegation One, Applicant asserts that no reasonable juror would have convicted him if the juror had learned of the previously unavailable factual bases for Applicant’s claim of innocence. In Allegation Two, Applicant asserts that he is actually innocent of capital murder and the death sentence, incorporating “by reference all the facts and arguments set forth in Claims # 1 and # 3-4.” In Allegations Three and Four, Applicant asserts that he was denied the effective assistance of counsel at

³ Although Applicant asserts that he meets the requirements of Article 11.071, Section 5(a)(1), he seems also to invoke the language of Article 11.071, Section 5(a)(2), which provides that a court may not consider the merits of a claim raised in a subsequent application, unless the application contains sufficient specific facts establishing that “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[.]” However, he does not specifically argue that he is entitled to a review of any of his claims under this section.

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trial, on appeal, and in his initial habeas proceedings. In Allegation Five, Applicant avers that the State suppressed evidence in violation of *Brady*.⁴ In Allegation Six, Applicant states that the cumulative effect of the ineffective assistance of counsel and *Brady* violations undermines confidence in the verdict. In Allegations Seven and Eight, Applicant asserts that his death sentence violates the Eighth and Fourteenth Amendments because the jury failed to make the required *Tison/Enmund*⁵ findings.

After reviewing this subsequent application, we determined that Allegations Two through Eight failed to satisfy Section 5. *Ex parte Sales*, No. WR-78,131-02 (Tex. Crim. App. Feb. 14, 2018) (not designated for publication); *see Campbell*, 226 S.W.3d at 421. However, we stated that Allegation One arguably contained sufficient specific facts which, if true, established that part of the factual basis Applicant relied on was unavailable on the date he filed his previous application, and, if established, would likely require relief from the conviction.

Specifically, we explained, Applicant averred in Allegation One that no reasonable juror would have convicted him if the juror had learned the information contained in the post-conviction statements of three of Applicant's associates who were present immediately before or during the offense. In support of his claim, Applicant attached to his application the "statements" of Cheryl Kissentaner,⁶ his girlfriend; Deannadra Darfour, the driver during

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵ *Tison v. Arizona*, 481 U.S. 137 (1987), *Enmund v. Florida*, 458 U.S. 782 (1982).

⁶ The record indicates that Kissentaner also went by the name "Jasmine."

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the offense; and Ostine, the shooter.

We rejected Applicant's assertion that Kissentaner's and Darfour's statements supported a finding that Allegation One should overcome the Section 5 procedural bar. First, we explained, what Applicant referred to as Kissentaner's and Darfour's "statements" were only unsworn transcripts of their recorded interviews with habeas counsel. Further, Applicant acknowledged that neither Kissentaner nor Darfour was willing to sign an affidavit. Second, we concluded, Kissentaner's and Darfour's "statements" were not sufficient to present a *prima facie* showing that Applicant is actually innocent or otherwise entitled to relief under Article 11.071, Section 5(a). Third, we noted, the record contradicted Applicant's assertion that Kissentaner was unavailable when Applicant filed his initial habeas application.

However, we concluded that the record arguably supported Applicant's assertion that Ostine's 2015 affidavit⁷ was previously unavailable. In the affidavit, Ostine states that he decided on his own to murder the victim, Butler, without any encouragement or direction from Applicant. Applicant also asserted that Ostine was previously unavailable because he was a fugitive during Applicant's trial.

Applicant further asserted that, once Ostine was apprehended, he was in jail awaiting trial until after the deadline for filing Applicant's initial habeas application. Applicant averred that, during this period, Ostine's attorney would not permit Applicant's habeas

⁷ The document Applicant refers to as Ostine's "affidavit" more closely resembles an inmate declaration. *See Bahm v. State*, 219 S.W.3d 391, 393 n.2 (Tex. Crim. App. 2007) (citing Tex. Civ. Prac. & Rem. Code §§ 132.001-132.003). To avoid confusion, we will refer to this document as an affidavit.

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attorney to speak with Ostine. In support of the latter assertion, Applicant provided an affidavit from Ostine's attorney, Tyrone Moncriste. But in the affidavit, Moncriste stated that he would not allow Applicant's habeas counsel to speak with Moncriste's client, "Mr. Stone," who was facing capital murder charges when Applicant filed his initial habeas application.

We observed that it was possible that "Mr. Stone" was meant to refer to Ostine, but we also noted the possibility that "Mr. Stone" identified another participant in the capital offense, someone who was otherwise significant to the resolution of Allegation One, or someone who was not involved at all in Applicant's offense. Given the questions created by Moncriste's reference to "Mr. Stone," we determined that further fact finding was necessary.

Accordingly, we remanded Allegation One to the trial court with the following instructions. First, we directed the trial court to determine the meaning of the reference to "Mr. Stone" in Moncriste's affidavit. We then instructed the trial court to decide whether its determination of the "Mr. Stone" question supported a finding that the requirements of Article 11.071, Section 5, had been met regarding Allegation One, and we encouraged the entry of factual findings and credibility determinations if appropriate. If the trial court determined that Allegation One did not satisfy the requirements of Article 11.071, Section 5, we directed the trial court to immediately return the case to this Court. But if the trial court determined that Allegation One satisfied the requirements of Article 11.071, Section 5, we instructed the trial court to address Allegation One on the merits.

On remand, the trial court held a live evidentiary hearing at which Ostine testified and

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was cross-examined. The trial court thereafter entered written findings of fact and conclusions of law in which it: (1) determined that the reference to “Mr. Stone” in Moncriffe’s affidavit was a clerical error and was meant to say “Ostine”; (2) determined that Ostine’s 2015 affidavit and the information contained therein was not previously available under Article 11.071, Section 5(a)(1), when Applicant filed his initial habeas application; (3) addressed the merits of Allegation One; and (4) recommended a denial of habeas relief as to that claim.

We have reviewed the trial court’s findings and conclusions regarding Allegation One and adopt them as being supported by the record. On the basis of the trial court’s findings and conclusions and our own independent review of the record, we conclude that Applicant has not established an entitlement to habeas relief as to Allegation One and we accordingly deny habeas relief on that claim. We dismiss Applicant’s remaining habeas claims in this application (i.e., Allegations Two through Eight) as an abuse of the writ.

IT IS SO ORDERED THIS THE 25th DAY OF JANUARY, 2023.

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APPENDIX E

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.