APPENDIX

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APPENDIX A

Opinion, *Ramey v. State*, No. AP-75,678 (Tex. Crim. App. Feb. 11, 2009) (not designated for publication)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. AP-75,678

KER'SEAN OLAJUWA RAMEY, Appellant

v.

THE STATE OF TEXAS

Direct Appeal of Case 05-12-7342 of the
24th Judicial District Court,
Jackson County

WOMACK, J., delivered the opinion for a unanimous Court.

The appellant Ker'sean Olajuwa Ramey was convicted of capital murder on January 16, 2007. Pursuant to the jury's answers to the special issues set forth in Code of Criminal Procedure Article 37.071, sections 2(b) and 2(e),[1] the trial judge sentenced the appellant to death. The

[1] *See* Act of June 16, 1991, 72nd Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2899-900 (amended 2005) (current version at CODE CRIM. PROC. art. 37.071, § 2(g)). Unless otherwise indicated, all references to Articles refer to the Code of Criminal Procedure.

appellant raises eight points of error in direct appeal to this court.[2] Finding no reversible error, we affirm.

I. Jury-selection Issues

The appellant's first and second points of error focus on alleged *Batson* violations during jury selection. In *Batson v. Kentucky,* the United States Supreme Court held that discrimination on the basis of race during jury selection violates the Fourteenth Amendment.[3] Motivated by a need to eliminate racial prejudice from peremptory strikes, the *Batson* court devised a three-part test to determine whether purposeful racial discrimination was employed in voir dire procedures.[4] The *Batson* holding (1) requires defendants to establish a prima facie case of discrimination, (2) requires prosecutors then to offer race-neutral explanations for their use of peremptory strikes, and (3) ultimately gives the trial court discretion in determining whether the neutral reasons offered are pretextual.[5] We now turn to the appellant's two *Batson* claims.

A. Applying *Batson* to Jury Shuffles

In his first point of error, the appellant argues that the State performed an impermissible jury shuffle on the second venire panel in violation of his Equal Protection rights. The appellant contends that the principles established in *Batson* naturally extend to the jury shuffle, since it is part of the Texas jury-selection process. The appellant relies on *Miller-El v. Dretke*, a Texas death-penalty case reversed based on racial discrimination in jury selection. He posits that the

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[2] *See* CODE CRIM. PROC. art. 37.071, § 2(h).

[3] *Batson v. Kentucky,* 476 U.S. 79, 81 (1986).

[4] *Id.,* at 87.

[5] *Batson,* 476 U.S., at 96-97; *Miller-El v. Dretke*, 545 U.S. 231, 267 (2005) (Breyer, J., concurring).

United States Supreme Court's decision in *Miller-El* impliedly overruled this Court's decision in *Ladd v. State*,[6] which previously addressed this issue. While *Ladd* did not endorse the argument that *Batson* applies to jury shuffles,[7] neither did it reject the argument.[8]

Pursuant to Article 35.11, when selecting a jury "either side may [require the court to] literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning."[9] The question of discrimination in connection with the jury shuffle was addressed in *Miller-El*, in which the appellant argued that race was a factor in the State's request for a shuffle. The Court looked to "'the totality of the relevant facts' about a prosecutor's conduct" in determining purposeful discrimination for the *Batson* claim.[10] Although the jury shuffle was indeed one of four considerations in determining purposeful discrimination in *Miller-El*, it merely "raise[d] a suspicion that the State sought to exclude African-Americans from the jury."[11] Thus, the jury shuffle was "the first clue" to a wide spectrum of racial discrimination practiced in the jury-selection practices of the State, and not the

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[6] *Ladd v. State,* 3 S.W.3d 547, 563-64 (Tex. Cr. App. 1999).

[7] *Id*, at 563 n.3.

[8] *Id.*, at 564 ("Assuming *arguendo* that *Batson* extends to jury shuffles, we find no clear error ....").

[9] *Miller-El*, 545 U.S., at 255; CODE CRIM. PROC. art. 35.11.

[10] *Miller-El*, 545 U.S., at 239 (quoting *Batson*, 476 U.S., at 94).

[11] *Miller-El,* 545 U.S., at 254. The *Miller-El* holding was based on the "totality of the relevant facts" regarding racially motivated peremptory strikes. *Miller-El,* 545 U.S., at 239, citing *Batson,* 476 U.S., at 94. The relevant facts included (1) substantial similarities in a side-by-side comparison between white venire members and African-American venire members who were peremptorily stricken; (2) the request of the jury shuffle; (3) the "contrasting voir dire questions posed respectively to black and nonblack panel members" regarding descriptions of the death penalty; and (4) the Dallas County District Attorney's manual and his long-standing policy of "systematically excluding blacks from juries." *Miller-El,* 545 U.S., at 241, 253-255, 255, 263. While this evidence in the aggregate suggests purposeful racial discrimination, it does not answer the question of whether jury shuffling on its own would be subject to the *Batson* rule.

crux of the issue.[12]

Other appellants also have attempted to argue, without success, that *Batson* extends to jury shuffles.[13] In *Urbano v. State*, the appellant argued in the Court of Appeals that he was denied a *Batson* hearing following the State's request for a jury shuffle.[14] The Court was "not inclined to make the type of broad expansion of the law appellant [sought]."[15] And, as previously discussed in *Ladd*, this court reviewed an appellant's argument that *Batson* naturally extends to jury shuffles and ultimately did "not endorse such a view."[16] We decline to hold that *Miller-El* overrules *Ladd*. We will determine this issue by looking at the shuffle as one of the facts of the case.

When the first venire panel did not provide sufficient jurors for the trial, a second venire panel was brought into the court. The trial court asked the State and the appellant whether they would like to shuffle this second jury panel. The defense declined, and the State requested a shuffle. The appellant contends that the State's request for a jury shuffle was based on racially-motivated presumptions because the State had not yet viewed the juror questionnaires, which would have included their opinions on the death penalty.

The State argues that, because the appellant made no objection to the jury shuffle, he has no right to appeal this issue. The appellant brought to the trial court's attention the fact that the

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[12] *Miller-El*, 545 U.S., at 253.

[13] *See Densey*, 191 S.W.3d, at 304; *Urbano v. State*, 808 S.W.2d 519, 520 (Tex. App.–Houston [14th Dist.] 1991, no pet.).

[14] 808 S.W.2d, at 520.

[15] *Id.*

[16] *Ladd*, 3 S.W.3d, at 563.

shuffle would cause many jurors who were ethnic minorities to be moved further down the list. The trial court engaged in a discussion of the racial motivations for the jury shuffle at the request of the defense. We shall assume, *arguendo*, that this was sufficient to preserve the issue for review.

Because "the burden shifts to the State to come forward with a race-neutral explanation for challenging black jurors," we turn to the explanation proffered by the State.[17] The prosecutor told the court:

> I have individuals here in Victoria who have assisted me in going through the list and given me information about the prospective jurors. ... I have gotten that information from a number of different individuals. And in doing that I looked at this list and the overwhelming majority of the folks that they had suggested would be good State's jurors were towards the back of the panel. And so in light of that I requested a shuffle. ... I will tell the Court as an officer of the Court that those individuals, probably 75-80 percent of the ones they had told me would be good State's jurors were towards the back. And so that's why I asked for a shuffle.

The defense offered nothing further, and the trial court recessed. It is unclear whether the trial court made a ruling; however, the trial court's subsequent actions implicitly denied the appellant relief.

The explanation proffered by the State, if believed, is sufficiently race-neutral. We defer to the trial court's ruling on this point.

B. *Batson* Motion on Venire Member Cheryl Steadham-Scott

In point two of his brief, the appellant argues that the State used a peremptory challenge against venire member Cheryl Steadham-Scott in a racially discriminatory manner in violation of *Batson.* Again the appellant objected to the strike by requesting a racially-neutral explanation,

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[17] *Batson*, 476 U.S., at 97.

much as he did in the first point of error.

The State had informed the trial court that it would not challenge this juror for cause. The appellant passed on questioning the witness. The State peremptorily challenged her. The appellant did not object to this strike at the time, nor did he even use the word "Batson." He merely requested that her questionnaire be included in the record. After the jury was selected, but before it was sworn in, the appellant requested a racially-neutral explanation for the striking of Steadham-Scott. During the discussion which followed, the State declared that it was unprepared for a *Batson* motion since one was never requested, but claimed that Steadham-Scott's answers to the prosecutor's questions as well as her juror questionnaire led to racially-neutral reasons for a peremptory strike, such as her ambivalence regarding inflicting the death penalty.

While indeed there was a brief allusion to race in the jury questionnaire and then on individual voir dire, the record supports the trial court's ruling that the State struck Steadham-Scott because of her inconclusive opinions on the death penalty and not her identity as an African-American. Steadham-Scott was repeatedly unable to answer the State's questions regarding her ability to adjudge the death penalty, both in her jury questionnaire and during voir dire. When asked whether she understood the death penalty or whether she would change it, she replied, "Yea. I don't know how I would change it, but–I don't know how I would change it." When asked if she believed in the death penalty, she responded, "I mean, you're asking me stuff like do I believe in the death penalty. I don't know if I believe in it, you know." On the jury questionnaire, she left blank the question, "Have you ever been opposed to the death penalty?" and responded in another section on the questionnaire that she was "not opposed or . . . in favor of it." Points of error one and two are overruled.

II. Guilt-Stage Issues

A. Summary of the Evidence

The bodies of Celso Lopez, Tiffany Peacock, and Sam Roberts were found in Roberts's residence by his parents on August 25, 2005. Lopez had been shot four times: once in the cheek and three times in the back of the head. Peacock was shot twice in the head. Roberts was shot five times: once in the chest, once in the neck, and three times in the back of the head. They had been killed on or about August 24.

Stacy Johnson, the appellant's former girlfriend, testified that he called her at 12:29 a.m. and 12:59 a.m. on August 25. He went to her house after their conversation, and slept there until shortly before 6 a.m. She said that he seemed "distant."

Two days later, Johnson accompanied the appellant to his house where he dug up "something" from his backyard. Johnson drove him to a dam. While Johnson was driving, the appellant called his former step-father, Lonny Lyte. (Both Johnson and Lyte testified about this conversation.) The appellant asked Lyte, "If you was to kill somebody, what would you do with the guns?" Lyte responded by saying that he would throw them in the river.

When they reached the dam, Johnson saw the appellant throw two pistols into the water. She later returned to the dam with the police and pointed out to the dive team the place where she remembered him throwing the pistols. They were found in the approximate location she indicated.

After he threw the pistols in the water, the appellant admitted to Johnson that he had committed a murder. He first said, "You know what this is about," to which she responded in the affirmative. When they returned to her house, he admitted to everything in detail, and he threatened to kill her if she told anyone.

A firearms examiner from the Department of Public Safety testified that markings on the bullets that were recovered from the victims' bodies were consistent with the bullets having been fired from the pistols that were recovered from the water at the dam.

The pistols had been stolen from a residence on August 19, 2005. The owner of the pistols identified them, and one of the pistols was further identified by records of registration. Gerald Manzanalez and Christopher Times testified that, on August 19, they and the appellant had broken into a residence where they stole the pistols and some other firearms.

LeJames Norman testified that, on August 24, he and the appellant had gone to the scene of the murders, Sam Roberts's residence. Their objective was to steal 100 kilograms of cocaine they believed to be inside.

He said that he and the appellant prepared by stealing masks from a discount store. The jury saw the store's surveillance videotape which showed them stealing the masks at 9:22 p.m. on August 24.

Norman testified that they also prepared by wrapping tape around their shoes so as not to leave a trail. They donned their masks and cocked their guns before entering the house. They knocked on the door. Celso Lopez answered, and the two men forced their way inside. Norman held a gun on Lopez, while the appellant ran to the rear of the home, where he hoped to find the cocaine. As the appellant searched for the drugs, Norman accidentally shot Lopez in the cheek. The appellant quickly returned to the front room and forced Lopez, bleeding and begging for help, to move to a bedroom and lie on the floor.

At that point Roberts came home, accompanied by Peacock (his girlfriend). When she saw what was happening, Peacock panicked and tried to run away. Norman grabbed her and forced her to her knees inside the house, near the front door. As she was bending down, he shot her in the back of the head. Seeing his girlfriend fall limp to the floor, Roberts attacked Norman. The two men "tussled" in the kitchen until the appellant shot Roberts, freeing Norman who immediately shot Roberts several more times while he lay on the floor. The appellant then returned to the bedroom and shot Lopez in the back of the head as he lay on the floor.

The appellant and Norman left the house. As they walked away, Norman realized that he had left his police scanner inside the house. The appellant quickly returned to retrieve the scanner. While inside, he shot the victims several more times to ensure that they were dead.

The appellant and Norman did not find any cocaine.

Eight other witnesses testified that the appellant had admitted to them that he had participated in the murders.

B. Extraneous-Offense Issues

In his sixth point of error, the appellant argues that the trial court erred in admitting evidence relating to an extraneous offense in which the appellant, along with three other men, stole several firearms from the residence of Kenneth Nairn five days before the shootings in the instant case. Two of the pistols stolen from the Nairn residence were later used in the triple homicide, and the appellant was connected to both offenses. The appellant repeatedly objected at trial to the admission of this evidence as irrelevant. On appeal, the appellant now wishes to contest the evidence as irrelevant *and* as being improper character evidence, pursuant to Rule of Evidence 404(b), which deems evidence about a person's prior bad acts inadmissible if it shows action in conformity therewith.[18] The State contends that the appellant did not preserve error for a Rule 404(b) objection since the appellant never objected to the evidence on this basis. This court has previously held that relevancy objections will not preserve error for Rule 404 claims on appeal.[19] Because the record does not show any objection at trial to improper character evidence with respect to the Nairn burglary, we shall not review it on appeal, and thus look only to relevance.

Evidence is relevant if it makes a fact of consequence "more probable or less probable than it would be without the evidence."[20] All relevant evidence is therefore admissible, unless inadmissible under other rules or statutory authority.[21] This court has previously held that extraneous offenses are admissible when they are relevant to a material issue in the case.[22]

The evidence that the appellant sought to exclude—the testimony of Kenneth Nairn, Agent David Taylor, Texas Ranger Morgan Miller, Gerald Manzanales, and Christopher Times, in addition to State's Exhibits 1 through 38—is relevant to a material fact of the offense: the means of its commission. The pistols used in the triple homicide were two of the pistols stolen in the Nairn burglary by the appellant. This evidence connects the appellant to the homicides.

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[18] R. EVID. 404(b).

[19] *See Camacho v. State*, 864 S.W.2d 524, 533 (Tex. Cr. App. 1993); *Medina v. State*, 7 S.W.3d 633, 643 (Tex. Cr. App. 1999) ("Appellant made only a relevancy objection at trial. Such an objection does not preserve error concerning a Rule 404 extraneous offense claim.").

[20] R. EVID. 401.

[21] R. EVID. 402.

[22] *Crank v. State*, 761 S.W.2d 328, 342 (Tex. Cr. App. 1988); *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Cr. App. 1983); *Elkins v. State*, 647 S.W.2d 663, 665 (Tex. Cr. App. 1983); *Rubio v. State*, 607 S.W.2d 498, 506 (Tex. Cr. App. 1980) ("Extraneous transactions constituting offenses shown to have been committed by the accused may become admissible upon a showing by the prosecution both that the transaction is relevant to a material issue in the case ... and ... the relevancy value of the evidence outweighs its inflammatory or prejudicial potential.").

1. The Testimony

Kenneth Nairn was the owner of the home that was burglarized and the firearms that were stolen. He testified that the specific pistols stolen were family heirlooms which he knew were missing immediately after the burglary and which he was able to identify following their discovery in the water at the local dam. His testimony was relevant because it helps to identify the two guns stolen by the appellant as the same guns used in the triple homicide by the appellant through special markings and serial numbers.

David Taylor was a special agent of the Bureau of Alcohol, Tobacco, Firearms and Explosives, who testified as to the discovery and identity of one of the weapons used in the offense, the H&R .22 short-barreled pistol found at the dam. His testimony is relevant because it tends to connect the appellant to the murder weapon, which is a material component of the case, and thus makes the appellant's use of the gun in the triple homicide more probable than not. He was able to track ownership of the H&R pistol by researching the serial numbers that remained on it. The registration identified Nairn as the purchaser of the gun in 1984 from a pawn shop.

Texas Ranger Morgan Miller testified that he was present with Johnson and the dive team when they recovered the two pistols thrown in the water by the appellant. He testified that they were in the approximate location directed by Johnson, who was with the appellant when he threw the pistols in the water.

Gerald Manzanales and Christopher Times testified that they were the appellant's accomplices for the Nairn burglary, in which they and others stole several firearms from the Nairn residence. Their testimony linked the appellant to the theft of a pistol that was used in the triple homicide.

2. State's Exhibits 1-38

State's exhibits 1-38 include physical and demonstrative evidence pertaining to the Nairn burglary, primarily in the form of photographs. Two of the exhibits were the actual pistols retrieved from the water by the dive team. Nairn identified them as two of the guns missing from his collection. The photographs admitted include photographs of the Nairn residence, particularly of the extensive firearms collection. The evidence also included the firearms registration associated with the pistol found in the water and used in the shootings, as registered to Nairn in 1984. The photographs in evidence were also showed the exterior of the residence where the appellant and Johnson resided at the time of the offense, as well as photographs of its torn-up floorboards, under which a large black duffel bag stuffed with rifles was found. These exhibits aided the witnesses with their testimony and are relevant because they illustrate the appellant's access to the murder weapon.

3. Conclusion

The evidence that the appellant contests is the testimony and photographs relating to the Nairn burglary. These exhibits and testimony helped the finder of fact to determine whether the appellant had access to the pistol, which is evidence tending to prove that he was a participant in the murders. We overrule the appellant's sixth point of error.

C. Expert Witnesses

1. Dr. John Stash

In his fourth point of error, the appellant argues that the autopsy report on Roberts should not have been admitted because the physician who performed the autopsy, Dr. John Stash, was not a qualified medical examiner at the time the autopsy was performed. The appellant further contends that Dr. Stash committed perjury by testifying about the autopsy results when he stated that he "worked as a medical examiner for the Bexar County Medical Examiner's Office," and that this testimony intentionally misled the jury, helping to convict the appellant.

The State contends that the appellant did not preserve this error because he did not object to Dr. Stash's qualifications at voir dire or during his testimony. In order to preserve an issue for appeal, an objection must be made at trial.[23] The appellant made no objection during trial regarding Dr. Stash's qualifications as a medical examiner.

In order to overcome this deficit, the appellant filed a motion in arrest of judgment, which is "a defendant's oral or written suggestion that, for reasons stated in the motion, the judgment rendered against the defendant was contrary to law."[24] But a motion in arrest of judgment is directed to substantive defects in the indictment[25] or the verdict,[26] or to an invalidity in the judgment.[27] It may not be based on the proof offered at trial.[28] The proper motion for such a claim would be a motion for new trial.

If we assume that the motion in arrest of judgment could have been treated as a motion for new trial,[29] it has no merit. The appellant would seem to argue that the qualifications for

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[23] R. APP. PROC. 33.1.

[24] R. APP. PROC. 22.1.

[25] R. APP. PROC. 22.2(a).

[26] R. APP. PROC. 22.2(b).

[27] R. APP. PROC. 22.2(c).

[28] *State v. Savage*, 905 S.W.2d 268, 269 (Tex. App.–San Antonio, 1994), *aff'd*, 933 S.W.2d 497 (Tex. Cr. App. 1996).

[29] *See State v. Savage*, 933 S.W.2d 497, 499 (Tex. Cr. App. 1996) ("We have held that when an order is the functional equivalent of granting a motion for new trial, the reviewing court can look past the label assigned to the order by the trial court and treat the order as a motion for new trial.").

being the Medical Examiner must also be met by other medical examiners in the office. We do not read the applicable statutes that way.

The appellant reads the Occupations Code, section 155.105, as conflicting with Article 49.25, sections 2, 3, and 9, as well as with Article 38.35(f), thus precluding any physician in training from performing autopsies. Article 49.25 states that "no person shall be appointed medical examiner unless he is a physician licensed by the State Board of Medical Examiners," and also provides that "the medical examiner may, subject to the approval of the commissioners court, employ such deputy examiners, scientific experts, trained technicians, officers and employees as may be necessary to the proper performance of the duties imposed by this Article upon the medical examiner."[30] The Occupations Code, section 155.105 grants physicians-in-training permits to physicians "not otherwise licensed by the Board who [are] participating in a graduate medical education training program approved by the Board." It permits physicians-in-training to work as physicians, provided they do so under the supervision of a physician, and as part of a graduate medical education program.[31]

Dr. Stash was operating under a physician-in-training permit within the confines of Article 49.25. He was a graduate of an osteopathic medical school, an anatomic-pathology residency, and a forensic-pathology fellowship. He had been working as a medical examiner with the Bexar County Medical Examiner's Office when he performed the autopsy on Roberts on August 26, 2005. Dr. Stash was issued a physician-in-training permit beginning July 1, 2005, before the date of the autopsy in question, and was thus operating within the statute. Further, the

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[30] CODE CRIM. PROC. art. 49.25, §§ 2, 3.

[31] OCC. CODE § 155.105.

autopsy report was signed by Dr. Stash, along with the Chief Medical Examiner, Vincent J.M. Di Maio, M.D., and other medical examiners in the Bexar County Medical Examiner's office.[32] Article 49.25's provision that "no person shall be appointed medical examiner unless he is a physician licensed by the State Board of Medical Examiners" means that no person shall be appointed *the* Medical Examiner; it does not apply to other medical examiners working in the office of the medical examiner. The appellant's fourth point of error is overruled.

2. Ronald Crumley

The appellant argues in his fifth point that the court erred in admitting the testimony of Ronald Crumley, the State's ballistics expert, because he was not a qualified expert witness and he could not conclusively determine whether the bullets and guns he examined were in fact the bullets and guns used in the shootings.

At trial, the appellant objected vaguely to Crumley's testimony based on materiality and relevance. He argues on appeal that he was objecting to the testimony based on the doctrine of law following *Daubert*, *Kelly*, and *Robinson*.[33] The appellant expressly did not object to Crumley's methodology at trial.

The Rules of Evidence permit expert witnesses to testify as to scientific or technical knowledge that will aid the trier of fact in determining relevant facts in a case.[34] The United

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[32] Other medical examiners in the office who signed the autopsy report include Randall E. Frost, M.D., Deputy Chief Medical Examiner, Jennifer J. Rulon, M.D., medical examiner, D. Kimberly Molina, M.D., medical examiner, and Matrina J. Schmidt, M.D., assistant medical examiner.

[33] *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (U.S. 1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Cr. App. 1992); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

[34] Rule of Evidence 702 reads, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* that expert testimony must be both reliable and relevant.[35] Earlier, in *Kelly*, this court enumerated factors affecting the trial court's determination of reliability of scientific theories for expert testimony.[36] *Daubert* has to do with experts' qualifications to testify based on their methodology and expertise, not their conclusions, which the finder of fact must weigh. "[T]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[37]

According to the record, the appellant did not object to Crumley's testifying as an expert at trial, nor to his methodology and practice as an expert. Rather, his objection was based on the expert's conclusions that resulted from his methodology and examination. The following exchange occurred during a discussion for a *Daubert* motion:

> [DEFENSE COUNSEL]: We're not questioning his methodology as to what he did. We're saying that his report states that he is unable to determine if any of the submitted bullets were fired from either of the submitted revolvers. With that being the case, he can't comment on the revolvers. He can't say whether they were fired from them. He can't say whether they weren't fired from them. He doesn't know and he says he hasn't changed his report and that is still his opinion today; is that correct?
>
> [THE EXPERT WITNESS]: That's correct.

Rule of Evidence 703 reads, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

[35] *Daubert,* 509 U.S., at 579.

[36] *Kelly,* 824 S.W.2d, at 573. Such factors include "(1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the experts testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question."

[37] *Daubert,* 509 U.S., at 595.

[DEFENSE COUNSEL]: He can't testify to those guns, your honor.

[TRIAL COURT]: All right. Well, to the extent you're asking me to exclude him as an expert because of that, that's denied.

The appellant focuses his argument on the conclusions generated by the expert. He claims that because Crumley could not conclusively prove that the bullets he examined came from the guns he examined, then his methodology is untested and challengeable. This argument does not address methodology, the cornerstone of *Daubert*, and is therefore misplaced.

Crumley indeed satisfied the *Kelly* factors for "general acceptance" of a scientific theory or technical field, and he has even been recognized as a qualified firearms-identification expert by this court.[38] At the time of the appellant's trial, Crumley had been working as a firearm and tool-mark examiner with the Texas Department of Public Safety Crime Lab in Austin for almost fifteen years, had examined thousands of firearms and bullets, and had been qualified as an expert and testified for both the prosecution and defense in over one hundred trials. He held a Bachelor's degree, trained for a year and a half for this speciality in a crime lab in Austin, and also received training from the Southwest Institution of Forensic Science in Dallas, the Federal Bureau of Investigations ("FBI"), and the Bureau of Alcohol Tobacco and Firearms ("ATF"). At the time of the trial, Crumley was continuing his attendance at training seminars from various organizations, such as the Association of Firearm and Tool Mark Examiners and the Department of Public Safety ("DPS") Academy, and had been made supervisor of other firearm and tool-mark examiners. He also had published three brief articles in the *Association of Firearm and*

[38] *See Sexton v. State,* 93 S.W.3d 96, 101 (Tex. Cr. App. 2002).

Tool Mark Examiners' Journal.[39]

Additionally, Crumley testified to the tool-mark theory for identification of fired bullets. We have recognized that the underlying theory of tool-mark identification could be reliable for identifying fired bullets from individual firearms.[40] Crumley relied on this theory in identifying which bullets had been fired from the pistols and was able to make conclusions based on the evidence. In his testimony, Crumley testified to his examination of the two pistols allegedly used in the triple homicide: a long-barrel .22 caliber R.G. model and a short-barrel Herrington and Richardson model, along with the bullets retrieved from the victims' bodies. He examined the lands and grooves of the barrels of the guns compared to the lands and grooves of the bullets so that he could determine how they were fired and from which of the two firearms in question.

While Crumley was unable to determine whether any of the submitted bullets were fired from either of the firearms to the exclusion of all others, he was able to determine what bullets were *not* fired from certain guns. In comparing the types of bullets, guns, and gunshot wounds, Crumley was able to exclude specific bullet entries based on their lands and grooves. Placing his testimony with the rest of the evidence, a rational jury could determine the gun the appellant used during the shootings.

The trial court did not abuse its discretion in ruling that Crumley was qualified to testify as to these elements of lands and grooves on the bullets. The weight of his testimony was for the finder of fact. Because the appellant tries to object to the expert's conclusions by claiming his methodology is not generally accepted, his argument fails. Point of error five is overruled.

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[39] *Sexton v. State,* 93 S.W.3d 96, 101 (Tex. Cr. App. 2002).

[40] *Ibid.*

D. Court's Charge on Guilt

The appellant alleges in his third point of error that the trial court's instructions on accomplice testimony and lesser-included offenses were erroneous.

1. Accomplice Testimony

The appellant argues that the jury charge during the guilt phase of the trial did not sufficiently instruct the jury regarding the use of accomplice testimony. Specifically, he contends that the instruction stating that accomplices cannot corroborate each other's testimony was omitted, and that he was harmed by the omission of the requested instruction regarding the witness, Bradford Butler, since the witness could have been found to be an accomplice. He posits that, although Butler was not physically present during the shootings, he was indeed an active participant in the offense from the moment he stole the firearms with the appellant to the moment he discussed the burglary of the victim's home with the two shooters prior to the offense. Since the jury could have found him to be an accomplice as a matter of fact, Article 38.14 would have applied to his testimony.[41]

The appellant relies on *Gamez v. State*, which holds that accomplice witnesses cannot corroborate each other's testimony.[42]

The jury charge stated that Norman was an accomplice as a matter of law, because he could be charged and was charged with the same offense. It also said that Butler could have been an accomplice as a matter of fact, because the jury could find him to be an accomplice based on

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[41] A witness is an accomplice as a matter of law if he could be indicted for the same offense. *Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Cr. App. 2006). Norman, the appellant's co-defendant, was an accomplice as a matter of law.

[42] *Id.*, at 323; *Caraway v. State*, 550 S.W.2d 699, 702 (Tex. Cr. App. 1977).

the evidence. Because there was a possibility that the jury could have found Butler to be an accomplice as a matter of fact, the appellant posits that the jury should have been instructed that Butler and Norman could not corroborate each other.

Code of Criminal Procedure Article 38.14 provides: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." An individual is not rendered an accomplice by mere presence at the scene of the crime, or by mere knowledge about the crime without disclosure of that knowledge.[43] It is well established that an accomplice is an individual who participates with a defendant before, during, or after the commission of a crime, and acts with the requisite culpable mental state to commit that crime.[44] Such participation or contribution in the culpable act must foster the commission of the offense.[45] The contribution need not be in the form of a physical act in the actual offense.[46] Thus, Article 38.14 prohibits convictions based on accomplice testimony alone.[47] There must be corroborating evidence that tends to connect the defendant to the

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[43] *Cocke*, 201 S.W.3d, at 748; *Blake*, 971 S.W.2d, at 454.

[44] *Cocke*, 201 S.W.3d, at 748; *Paredes v. State,* 129 S.W.3d 530, 536 (Tex. Cr. App. 2004).

[45] *Cocke*, 201 S.W.3d, at 748; *Paredes,* 129 S.W. 3d, at 536.

[46] *Cocke,* 201 S.W.3d, at 748. *See also Paredes*, 129 S.W.3d, at 536. ("Participation requires an affirmative act or omission that promotes the commission of the offense with which the defendant is charged.").

[47] "The purpose of the instruction, therefore, is not to cast suspicion on the testimony provided by the accomplice or to encourage jurors to give it less weight than other testimony. Rather, the instruction merely reminds the jury that it cannot use the accomplice's testimony to convict the defendant unless there also exists some non-accomplice testimony tying the defendant to the offense." *Cocke*, 201 S.W.3d, at 747; *See also Herron v. State*, 86 S.W.3d 621, 632 (Tex. Cr. App. 2002).

offense.[48]

If the record shows error in overruling a defendant's objection to the jury charge, we look to the record to determine whether the error "was calculated to injure the rights of the defendant."[49] The error made in trial must cause "some harm" to the defendant in order to be reversible.[50] The "actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and the weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole."[51] Looking at the full record "may illuminate the actual, not just theoretical, harm to the accused."[52]

The non-accomplice witnesses to whom the defendant admitted his involvement include Stacy Johnson, Lonny Lyte, Cortney Hardaway, Otis Santellana, Marvin Ceasar, Jonathan Snyder, Kevin Childs, and Myron Hardaway. Additionally, there were several more witnesses who corroborated the testimony of both Norman and Butler without admissions; however, we will focus on the witnesses who testified to the appellant's admissions, and it is the testimony from these witnesses that corroborates both Norman and Butler's testimony–not each other.

a. Stacy Johnson and Lonny Lyte

The testimony of Johnson and Lyte was corroborative because it contained admissions of

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[48] *Cathey v. State*, 992 S.W.2d 460, 462 (Tex. Cr. App. 1999) ("If the combined weight of the non-accomplice evidence tends to connect the defendant to the offense, the requirement of Article 38.14 has been fulfilled.").

[49] CODE CRIM. PROC. art. 36.19.

[50] *Almanza v. State,* 686 S.W.2d 157, 171 (Tex. Cr. App. 1985).

[51] *Almanza*, 686 S.W.2d, at 171.

[52] *Id.*

guilt by the appellant and showed that the appellant possessed the murder weapons.

b. Cortney Hardaway

Cortney Hardaway, one of the appellant's girlfriends at the time of the offense, who was also the mother of his two children, gave a statement and testified that the appellant admitted to her that he was in the house during the triple homicide. He also told her that people were shot. He also asked her to serve as his alibi for his whereabouts for the night of August 24 and threatened to kill her if she told anyone about the shootings. The appellant visited Hardaway at her parents' home on the 25th of August, the night following the shootings. When he confessed to her, he never expressly said, "I shot" someone, but rather that he was involved in the offense and that people "were shot."

c. Inmates

Otis Santellana, Marvin Ceasar, Jonathan Snyder, Kevin Childs, and Myron Hardaway were inmates with the appellant during various stages of his incarceration following his arrest for this triple homicide. They either shared a cell with the appellant or spoke with him through the vents in prison, during which the appellant confessed to each of them of his involvement in the shootings. He discussed the details of his preparation for the shootings with various inmates – from the taping of the shoes to the use of face masks to the burning of the clothing. He detailed the order of events from the surprise presence of Lopez to the return to the house to retrieve the police scanner. He also emphasized his confidence in escaping a conviction because he believed the police did not have enough evidence on him. While the appellant admitted different portions of the events to different inmates, the course of events remained the same in each admission. These admissions collectively corroborated the testimony of the accomplice witnesses.

In light of the non-accomplice testimony heretofore discussed, we find that the omission in jury instructions with respect to Butler's testimony was harmless. Point of error three is overruled.

2. Lesser-included Offenses

The appellant also argues in the same point of error that the trial court erred because it did not instruct the jury regarding lesser-included offenses. Article 37.09 reads:

> An offense is a lesser included offense if:
> (1) it is established by proof of the same or less than all of the facts required to establish the commission of the offense charged;
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

A two-prong test is used to determine whether a lesser-included offense should be included in the jury charge.[53] First, "the lesser included offense must be included within the proof necessary to establish the offense charged, and, second, some evidence must exist in the record that if the defendant is guilty, he is guilty only of the lesser offense."[54]

The appellant's only argument on lesser-included offenses consists of one sentence: "The defendant further contends that the testimony of LeJames Norman, Bradford Butler and Cortney Hardaway proffers enough evidence that the Defendant did not shoot anybody to require lesser included offenses to be submitted to the jury." The appellant does not state which lesser-included

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[53] *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Cr. App. 1993).

[54] *Id.* ("In applying the two-prong test, the trial court should make a determination as to whether the evidence of the lesser offense would be sufficient for a jury rationally to find that the defendant is guilty only of that offense, and not the greater offense.").

offenses he requested in the jury charge or whether they were denied. The appellant cites no testimony from the record to support his claim that he was entitled to lesser-included-offense instructions. And the appellant does not cite any case law specifically supporting his argument. He merely cites case law that generally discusses the doctrine of lesser-included offenses. The point of error is inadequately briefed, and it is overruled..

E. Sufficiency of Evidence of Guilt

In his eighth and final point of error, the appellant raises both legal and factual insufficiency claims. He argues that the non-accomplice testimony was not sufficiently corroborated to convict the appellant. He further contends that the testimony of Stacy Johnson, Otis Santellano, and Cortney Hardaway does not corroborate the forensic evidence pertaining to the guns and the bullets, thus contradicting the witnesses' testimony detailing how the victims were killed. He argues that because these witnesses did not have personal knowledge of the shootings, their testimony was pure speculation.

1. Legal Sufficiency

Legal-sufficiency claims are based upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution. On appeal, we view the evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have convicted the appellant based on proof of the essential elements of the crime beyond a reasonable doubt.[55]

The appellant's argument assumes that Article 38.14 eliminates accomplice testimony from consideration. The appellant relies on *Brown v. State*, which states that "the test to determine the sufficiency of the corroboration is to eliminate from consideration the evidence of

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[55] *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

the accomplice witness and then examine the testimony of other witnesses to ascertain if there is inculpatory evidence which *tends to link* the accused with the commission of the offense."[56] But that is not the test for sufficiency of evidence to convict.

2. Factual Sufficiency

Claims of factual sufficiency are viewed–not in the light most favorable to the verdict–but rather in a neutral light.[57] The standard is (1) whether the evidence is so weak as to make the conviction clearly wrong and manifestly unjust, or (2) the trial court's finding is so against the great weight and preponderance of the contrary evidence as to be clearly wrong and manifestly unjust.[58]

The appellant's argument appears to be premised upon the claim that a jury must find proof beyond *all* doubt, and not proof beyond a reasonable doubt, in order to convict. The standard is that "the state must prove each issue submitted ... beyond a reasonable doubt ...."[59] The appellant centers this argument on (a) the claim that the guns could not be conclusively proven to be the guns that shot the victims, (b) the argument that accomplice testimony must be eliminated, and (c) the argument that the appellant's admissions were not factually sufficient since the people to whom the appellant confessed did not actually see the offense.

As previously discussed in point of error six, the appellant's argument regarding the

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[56] *Brown v. State,* 672 S.W.2d 487, 488 (Tex. Cr. App. 1984) (emphasis in original).

[57] *Clewis v. State*, 922 S.W.2d 126 (Tex. Cr. App. 1996); *Escamilla v. State,* 143 S.W.3d 814, 817 (Tex. Cr. App. 2004).

[58] *See Clewis,* 992 S.W.2d, at 131-34; *Escamilla,* 143 S.W.3d, at 817; *Johnson v. State,* 23 S.W.3d 1 (Tex. Cr. App. 2000).

[59] CODE CRIM. PROC. art. 37.071, § 2(c).

weapons is unpersuasive. He argues that, because the guns were never conclusively proven to be the guns that shot the victims, the evidence is factually insufficient to convict. While the guns were never conclusively proven to the exclusion of all other guns to be the two used in the offense, a rational trier of fact could look at the evidence presented and determine that they were in fact the guns used. The testimony of ATF Agent Taylor, the serial numbers on the pistol found at the dam, Nairn's 1984 purchase and registration of the weapon, and the testimony of Johnson, who watched the appellant dig up the pistol and throw it in the lake two days after the murders, cumulatively provide sufficient factual evidence for a jury to find beyond a reasonable doubt that they were the guns used in the shootings. We hold that the jury's verdict was not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

As previously discussed in point of error three, the appellant's argument regarding accomplice testimony is also unpersuasive. The appellant reads Article 38.14 as requiring the court to eliminate all accomplice evidence in determining whether other evidence sufficiently connects the appellant to the offense. And as previously stated, we do not read the statute so. Article 38.14 requires corroboration – not elimination – in order to consider accomplice testimony.

The appellant further argues that the testimony from the individuals to whom he made admissions does not amount to direct evidence that he shot anyone. While this statement is indeed true of all admissions, it does not preclude a rational jury from determining that the appellant did commit the offense. We believe that there is sufficient evidence as a matter of fact to support a just conviction on the elements of the offense. Therefore, the appellant's eighth point of error is denied.

V. Punishment-stage Issues

In a capital-murder trial, where the State seeks the death penalty, two questions must be submitted to the jury during the sentencing phase.[60] The jury must determine beyond a reasonable doubt "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," and whether the defendant "actually caused the death of the deceased."[61] The court must also charge the jury to consider all evidence of mitigating circumstances when considering the special issues.[62] In proving future dangerousness, the State may rely on several factors, including but not limited to: "(1) the circumstances of the capital offense, including the defendant's state of mind and whether he was working alone or with other parties; (2) the calculated nature of the defendant's acts; (3) the forethought and deliberateness exhibited by the crime's execution; (4) the existence of a prior criminal record, and the severity of the prior crimes; (5) the defendant's age and personal circumstances at the time of the offense; (6) whether the defendant was acting under duress or the domination of another at the time of the offense; (7) psychiatric evidence; and (8) character evidence."[63] We note that these factors do not constitute an exhaustive list.[64]

In one point of error, the appellant complains of the testimony of two witnesses.

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[60] CODE CRIM. PROC. art. 37.071, § 2(b)(1) & (2).

[61] *Id.*

[62] CODE CRIM. PROC. art. 37.071, § 2(d).

[63] *Keeton v. State,* 724 S.W.2d 58, 61 (Tex. Cr. App. 1987); *see also Martinez v. State*, 924 S.W.2d 693, 696 (Tex. Cr. App. 1996); *Barnes v. State*, 876 S.W.2d 316, 322 (Tex. Cr. App. 1994).

[64] *Barnes*, 876 S.W.2d, at 322.

A. Royce Smithey

The appellant submits that the trial court erred when it overruled his objection to the testimony of Royce Smithey because Smithey was not an expert on future dangerousness. He was not offered as an expert witness regarding the future dangerousness of the appellant pursuant to the Rules of Evidence and *Daubert*; rather, Smithey was offered as a fact witness testifying to the nature of the prison system and not to the individualized nature of the appellant. He described individual prison "unit[s] like a city," in which different people hold different responsibilities. He also graphically described incidents of prison violence and escapes, as well as testifying about how the prison system operates, and how inmates are admitted, classified, housed, and transported.

This court has previously addressed such a claim about such testimony from this witness and has held that testimony regarding general prison conditions is both relevant and permissible.[65] The appellant suggests that the State surreptitiously offered Smithey as an expert witness for future dangerousness. The trial court, however, did not even proceed with a *Daubert* motion at the time because the witness was not being offered as an expert for future dangerousness. We agree with the State and read the record as presenting Smithey as a fact witness regarding prison life and not as a predictor of behavior.

The appellant also argues on appeal that Smithey's testimony describing prison life was more prejudicial than probative.[66] This argument is not preserved for appeal, however, because

[65] *Lucero v. State*, 246 S.W.3d 86, 97 (Tex. Cr. App. 2008) ("Smithee's [sic] testimony that inmate violence can occur under current prison conditions had some relevance to, and would have aided the jury in determining, appellant's future dangerousness.").

[66] R. EVID. 403.

the appellant did not make such an objection at trial. The appellant's argument regarding Smithey is overruled.

B. Dr. Richard Coons

The appellant next posits that Dr. Richard Coons, the State's witness, was not qualified to testify as an expert witness as to future dangerousness. He contends that Dr. Coons's qualifications are insufficient to satisfy the *Daubert*, *Kelly,* and *Robinson* criteria for expert witnesses discussed in the appellant's fourth point of error.[67]

The evidence was that Dr. Coons held both a law degree and a medical degree, served in the United States Army Medical Corps, and was a consultant for the Brook Army Medical Center. He was certified by the Board of Psychiatry and Neurology, trained in neurology and psychiatry, and had been in private practice since 1975. Dr. Coons had evaluated approximately 8,000 people for competency to stand trial, and had consulted on 150 capital cases for either the prosecution or the defense.

In evaluating the appellant for the special issue on future dangerousness, Dr. Coons examined "twenty pounds of printed material and quite a number of CDs regarding statements" as well as offense reports, pictures, and educational records. While he did not personally interview the appellant, the Rules do not require an expert to complete personal interviews in order to make such determinations.[68] Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or

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[67] Texas Rule of Evidence 702 contains three requirements for the admission of expert testimony: "(1) the witness must be qualified; and (2) the proposed testimony must be 'scientific . . . knowledge'; and (3) the testimony must 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *See also Robinson*, 923 S.W.2d, at 556.

[68] *See Jordan v. State,* 928 S.W.2d 550, 556 (Tex. Cr. App. 1996).

> inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

We find that the trial court did not abuse its discretion in finding Dr. Coons qualified as an expert witness with respect to future dangerousness.

We affirm the judgment of the trial court.

Delivered February 11, 2009.
Do not publish.

APPENDIX B

Opinion, *Ex parte Ramey*, 382 S.W.3d 396
(Tex. Crim. App. 2012)

382 S.W.3d 396
Court of Criminal Appeals of Texas.

Ex parte Ker'Sean Olajuwa RAMEY, Applicant.

No. AP–76,533.
|
Nov. 7, 2012.

Synopsis
Background: Application for habeas corpus was forwarded from the 24th District Court, Jackson County, Stephen Williams, J.,

[Holding:] The Court of Criminal Appeals, Keller, P.J., held that any error in admission of expert testimony did not give rise to a claim that was cognizable on habeas corpus.

Denied.

Meyers, J., dissented and filed opinion.

West Headnotes (3)

[1] **Habeas Corpus** Jurisdictional Defects
Habeas Corpus Deprivation of fundamental or constitutional rights; miscarriage of justice

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k443 Jurisdictional Defects
197k443.1 In general
197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k447 Deprivation of fundamental or constitutional rights; miscarriage of justice

Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights.

10 Cases that cite this headnote

[2] **Habeas Corpus** Evidence
Habeas Corpus Opinion evidence

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k489 Evidence
197k489.1 In general
197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k489 Evidence
197k490 Admissibility
197k490(5) Opinion evidence

Any error in admission of expert testimony did not give rise to a claim that was cognizable on habeas corpus; a claim alleging the violation of a rule of evidence was not cognizable on habeas corpus.

9 Cases that cite this headnote

[3] **Habeas Corpus** Particular Issues and Problems
Habeas Corpus Evidence and witnesses; arrest and search

197 Habeas Corpus
197I In General
197I(C) Existence and Exhaustion of Other Remedies
197k275 Particular Issues and Problems
197k275.1 In general
197 Habeas Corpus
197I In General
197I(C) Existence and Exhaustion of Other Remedies
197k290 Appeal, Error, or Other Direct Review of Conviction
197k293 Evidence and witnesses; arrest and search

Claim by applicant for habeas corpus that expert's testimony was not reliable was not preserved at trial, where applicant's motion did not allege that expert's testimony was unreliable, much less explain in what respect that testimony was unreliable, and his brief on direct appeal did not raise the issue.

1 Case that cites this headnote

Attorneys and Law Firms

***397** Richard W. Rogers, Corpus Christi, for Appellant.

Jim Vollers, Asst. District Atty., Lisa C. McMinn, State's Attorney, Austin, for State.

Opinion

KELLER, P.J., delivered the opinion of the Court in which PRICE, KEASLER, HERVEY, COCHRAN and ALCALÁ, JJ. joined.

This is an application for a writ of habeas corpus forwarded to this Court pursuant to Article 11.071 of the Texas Code of Criminal Procedure. Allegation twenty-one of the application complains, in part, about the admission of testimony from Dr. Richard Coons concerning whether applicant would pose a future danger to society. While the application was pending, we issued our opinion in *Coble v. State,* [1] where we found that Dr. Coons's testimony was inadmissible under Texas Rule of Evidence 702. [2] We filed and set this application to further consider applicant's twenty-first allegation and sought briefing from the parties.

1 330 S.W.3d 253 (Tex.Crim.App.2010).

2 *See id.* at 270–80.

Applicant claims that Dr. Coons's testimony was inadmissible under Texas Rule of Evidence 702 under our holding in *Coble,* and he contends that this testimony violated the heightened reliability requirement of the Eighth Amendment. He argues that this case differs from *Coble* with respect to the harm analysis [3] because Dr. Coons expressed more certainty in his testimony in the instant case and because the defense did not present any effective rebuttal.

3 In *Coble,* we found the error in admitting Dr. Coons's testimony to be harmless under the standard for non-constitutional errors. *Id.* at 280–87.

Analysis

[1] **[2]** Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights; a claim alleging the violation of a rule of evidence is not cognizable on habeas corpus. [4] *Coble* was a direct appeal case, and its holding was based upon a rule of evidence. Consequently, the holding in *Coble* does not give rise to a claim that is cognizable on habeas corpus.

4 *See Ex parte Douthit,* 232 S.W.3d 69 (Tex.Crim.App.2007).

[3] As for applicant's contention that the admission of Dr. Coons's testimony violated the heightened reliability requirement of the Eighth Amendment, we rejected that same contention in *Coble,* where we said that the United States Supreme Court had rejected such a claim in *Barefoot v. Estelle,* [5] and that "we are required to follow binding precedent from that court on federal constitutional issues." [6] Applicant's allegation with respect Dr. Coons's testimony does not raise a cognizable claim ***398** on habeas corpus. [7] Concluding, after review, that none of applicant's other claims have merit, we deny relief.

5 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

6 *Coble,* 330 S.W.3d at 270. We note that even if we accepted applicant's contention that Dr. Coons's testimony likely had a greater effect in applicant's trial than in *Coble*—a question we do not decide—the importance of that testimony at trial, while relevant to a harm analysis, is not relevant to whether the testimony was reliable.

7 The dissent contends that we can address applicant's current claim because we made a mistake on direct appeal in addressing only Dr. Coons's qualifications and in failing to address the separate issue of the scientific reliability of the testimony. Dissent at 398–400. The dissent claims that applicant preserved the separate issue of reliability at trial and raised it in his brief, albeit "inartfully," on direct appeal. *See* dissent at 398–99, 399–400.
The dissent is mistaken; the separate issue of reliability was not preserved at trial. The record citations provided in applicant's direct-appeal brief referred to a written motion for a *Daubert* hearing, *see Daubert v. Merrell Dow Pharm.,* 509 U.S.

579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and to eleven pages in the court reporter's record at which the *Daubert* hearing was held. Although it recited standards for determining reliability under *Daubert,* applicant's motion did not allege that Dr. Coons's testimony was unreliable, much less explain in what respect that testimony was unreliable. The referenced pages in the court reporter's record show that Dr. Coons was questioned by both parties in a *Daubert* hearing, but those pages contain no specific objection to Dr. Coons's testimony from defense counsel. After Dr. Coons's *Daubert*-hearing testimony was concluded, defense counsel stated, "I'm finished with the witness, Your Honor. I'm ready to make my argument." The trial judge then responded, "All right. I'm determining that he is qualified to testify so the Daubert objection is overruled." Defense counsel did not then urge the trial court to rule upon a separate claim that Dr. Coons's testimony failed to satisfy one or more of *Daubert* 's reliability requirements. *See Davis v. State,* 313 S.W.3d 317, 352–53 (Tex.Crim.App.2010) ("Appellant did not, during this hearing, lodge an objection to the testimony of these witnesses. Defense counsel did not suggest to the trial court that the witnesses were unqualified or the methodologies unreliable, nor did he present any evidence to that effect. Appellant has failed to show us that he has preserved error."). The point of error in applicant's direct-appeal brief that addressed Dr. Coons's testimony stated: "The trial court erred in admitting the testimony of Royce Smithey and Dr. Richard Coons with regards to the future dangerousness of the Defendant." In the portion of the argument relating to Dr. Coons, after claiming that he had objected to and obtained an adverse ruling regarding Dr. Coons's testimony, applicant's brief stated: "Cutting straight to the chase, during the *Daubert* hearing, the State failed to show that Dr. Coons was qualified to give an opinion as to the future dangerousness of the Defendant." Several lines down from that statement, applicant discussed standards for reliability and argued that Dr. Coons's testimony did not meet those standards. It is understandable that this Court addressed only the issue of Dr. Coons's qualifications as that was the only claim that was preserved at trial. We note that the opinion was unanimous, so none of the judges on this Court, including the author of the dissent, perceived that applicant's brief raised a separate reliability claim. Regardless, if applicant had believed that we failed to address an issue that he raised in his brief, he could have filed a motion for rehearing to point that out. He did not do so. He therefore had an opportunity to press this claim at a time when it was cognizable. But it appears that he believed, as we did, that we had addressed the only claim that was actually before us.

MEYERS, J., filed a dissenting opinion.

WOMACK and JOHNSON, JJ., concurred.

MEYERS, J., filed a dissenting opinion.

The majority states that Applicant's allegation regarding the unreliability of Dr. Coons's expert testimony does not raise a cognizable claim on habeas corpus. Normally, the majority would be correct, but in this case, I disagree. If the majority would have taken the time to research the record, it would have discovered that Applicant's claim was raised but not addressed by this Court on direct appeal. Therefore, the majority's entire analysis is based on a false premise. When addressing Dr. Coons's expert testimony in the direct appeal opinion, this Court stated that Applicant was arguing that Dr. Coons ***399** was not qualified to testify as an expert witness on future dangerousness. The Court determined that Dr. Coons was qualified as an expert and explained:

> The evidence was that Dr. Coons held both a law degree and a medical degree, served in the United States Army Medical Corps, and was a consultant for the Brook Army Medical Center. He was certified by the Board of Psychiatry and Neurology, trained in neurology and psychiatry, and had been in private practice since 1975. Dr. Coons had evaluated approximately 8,000 people for competency to stand trial, and had consulted on 150 capital cases for either the prosecution or the defense.
>
> In evaluating the appellant for the special issue on future dangerousness, Dr. Coons examined "twenty pounds of printed material and quite a number of CDs regarding statements" as well as offense reports, pictures, and educational records. While he did not personally interview the appellant, the Rules do not require an expert to complete interviews in order to make such determinations. [1]

1 *Ramey v. State,* No. AP–75,678, 2009 WL 335276, at *14, 2009 Tex.Crim.App. Unpub. LEXIS 124, at *44–5 (Tex.Crim.App. Feb. 11, 2009) (not designated for publication).

While this information is true and Dr. Coons is qualified as an expert, this was not Applicant's argument at the *Daubert/Kelly* hearing or before this Court on direct appeal. Applicant's argument in his appellate brief (although sometimes inartfully worded) focused on the methodology of Dr. Coons's testimony, not his qualifications:

> ... during the *Daubert* hearing, the State failed to show that Dr. Coons was qualified to give an opinion as to the future dangerousness of the Defendant. A witness is not qualified to give an opinion as to future dangerousness under TEX.R. EVID. 702 just because he has a degree and is licensed to practice medicine and/or psychiatry. *See Holloway v. State,* 613 S.W.2d 497, 500 (Tex.Crim.App.1981). An expert's prediction of future dangerousness is inadmissible if "there is no evidence of technical or scientific support for it." *Id.,* at 501.
>
> For Dr. Coons' testimony, the following requirements must be met: (1) the expert's testimony must be based on sufficient facts or data, (2) the expert's testimony must be the product of reliable principles and methods, and (3) the expert must apply the principles and methods reliably to the facts of the case. *See* [*E.I. du Pont de Nemours & Co. v.*]*Robinson,* 923 S.W.2d [549] at 556–557 [(Tex.1995)]; *Kelly,* 824 S.W.2d at 571–572; TEX.R. EVID. 702. None of Dr. Coons' testimony, during the *Daubert* hearing and trial on the merits, came close to meeting the above referenced standards. (38 C.R.R. 26–36, 65–84.) Dr. Coons presented no empirical data and/or scientific principles upon which to support his opinions and conclusions. In short, Dr. Coons' testimony was based solely on supposition and a series of hypotheticals artfully supplied by the State. [2]

2 Appellant's Brief at 19–21. Ramey was "Appellant" on direct appeal and is now "Applicant" so these titles, in this case, may be used interchangeably.

Applicant contended that the trial court erred in admitting the testimony of Dr. Coons regarding Applicant's potential for future dangerousness and preserved this error at the trial level for review on direct appeal. However, although this argument is substantially similar to the appellant's argument in *Coble,* this Court did not address it on direct appeal. The majority alleges that the issue of reliability was not ***400** preserved at trial. This is incorrect. Most of the questions during the *Daubert/Kelly* hearing focused on Dr. Coons's methodology. While the judge's pronouncement at the conclusion of the hearing only addressed Dr. Coons's qualifications, it is clear that Applicant argued methodology beginning with his motion and throughout the hearing. Applicant is not required to correct the judge's deficiency in ruling on qualifications only. Nevertheless, even if it had not been preserved at trial, the fact that it wasn't preserved should have been addressed in the direct appeal opinion. Instead this Court completely avoided the issue. In effect, this claim has not been raised and rejected on direct appeal and the failure of this Court to properly address the argument on direct appeal violated Applicant's due process rights. We made a mistake, and now we have the opportunity and obligation to correct it. [3] This is how I would have analyzed Applicant's cognizable claim in light of *Coble.*

3 It seems apparent that the majority is going to great lengths to prevent Applicant from bringing forth his claim by unsubstantiated claims of non-preservation and cognizability. I have seen previous 11.071 writs with only a fraction of the amount of preservation evidence that this writ contains where we have not rejected the claim based on preservation or cognizability. This also seems particularly peculiar in light of this Court's previous scrutiny of Dr. Coons's methodology in *Coble.* Also, as our dissenting opinion further shows, the harm created by his testimony was clearly established in this case using the same analysis this Court used in *Coble.*

Arguments of the Parties

Applicant contends that the methodology used by Dr. Coons to assess future dangerousness in this case is indistinguishable from the methodology that was found to be unreliable in *Coble.* Applicant argues that when considered post-*Coble,* it was error to admit Dr. Coons's testimony. Applicant further contends that this error denied his right to a fair sentencing trial and affected his substantial rights under Texas Rule of Appellate Procedure 44.2(b). Applicant asserts that the constitutional claims involved in this case distinguish it from *Coble* because they affect the reliability of the jury's factual determination of the future-dangerousness special issue. More specifically, Applicant argues that the heightened reliability standard for death-penalty cases created by the Eighth Amendment applies to expert testimony and the admission of Dr. Coons's testimony violated his due process rights. Applicant requests a new sentencing hearing.

The State responds that there was no violation of Applicant's due process or Eighth Amendment rights because there is no constitutional bar to a psychiatrist's prediction of future dangerousness. The State further argues that there is no heightened reliability standard for evidence in death-penalty cases. The State refers to our decision in *Nenno v. State*[4] and posits that the reliability of Dr. Coons's testimony should be assessed with less rigor than that required for hard-science methods of validation. The State also asserts that the admission of Dr. Coons's testimony was harmless and made no material impact on the jury's determination of the future dangerousness of Applicant.

4 970 S.W.2d 549 (Tex.Crim.App.1998).

Legal Principles

The legal framework surrounding expert psychiatric or psychological testimony with regard to the future-dangerousness special issue was established by the United States Supreme Court in *Daubert v. Merrell Dow* ***401** *Pharmaceuticals.*[5] The admissibility of expert testimony lies within the discretion of the trial court and is subject to an abuse of discretion standard of review.[6] Such testimony is governed by Texas Rule of Evidence 702, which places limits on the admissibility of scientific evidence to ensure that it is both relevant and reliable.[7]

5 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

6 *Joiner v. State,* 825 S.W.2d 701, 708 (Tex.Crim.App.1992).

7 TEX.R. EVID. 702.

In *Daubert,* the Supreme Court held that, in order for expert testimony to be reliable, the expert must have derived his or her conclusions from the scientific method.[8] The Court provided illustrative examples of factors to be considered when determining acceptable scientific methods: (1) whether the theory or technique is refutable, testable, and falsifiable; (2) whether the findings have been subjected to peer review or published; (3) the error rate, including methodological standards; and (4) whether the theory or technique has been accepted by a relevant scientific field.[9] These are flexible guidelines that have since been expanded to include technical and specialized-knowledge testimony.

8 *Daubert,* 509 U.S. at 590, 113 S.Ct. 2786.

9 *Id.* at 593–94, 113 S.Ct. 2786.

In *Kelly v. State,*[10] we determined that to be considered reliable, scientific-theory evidence must also satisfy three specific criteria relevant to its validity and application: "(a) the underlying theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question."[11] The function of the reliability inquiry is to assist trial courts in weeding out novel, unproven scientific theories so that only evidence based in sound scientific methodology is admitted.[12] As we explained in *Nenno v. State,*[13] forensic psychiatry, although considered a "soft science," is clearly a science and the general principles announced in *Kelly* (and *Daubert*) apply.[14] However, the use of "soft sciences" also requires the trial court to determine "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field."[15]

10 824 S.W.2d 568 (Tex.Crim.App.1992).

11 *Id.* at 573.

12 *Jordan v. State,* 928 S.W.2d 550, 555 (Tex.Crim.App.1996).

13 970 S.W.2d 549, 559–62 (Tex.Crim.App.1998).

14 *Id.* at 560.

15 *Id.* at 561.

I agree with the Supreme Court that predictions of future dangerousness are necessary and beneficial to the jury in capital cases; however, along with the Supreme Court and the American Psychological Association,[16] this Court has recognized that psychiatric assessments of future dangerousness can be inaccurate.[17] ***402** Because of this, the *Daubert/Kelly/ Nenno* guidelines and the trial court's role as gatekeeper are crucial when measuring the reliability of future-dangerousness testimony. The proponent of such testimony must establish its admissibility in each case.[18] As we explained in *Coble,* the validity of the expert's conclusions depends upon the soundness of the methodology.[19]

16 The American Psychological Association is a voluntary, non-profit scientific and professional organization with approximately 155,000 members and affiliates.

17 *Barefoot v. Estelle,* 463 U.S. 880, 897–99, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *Coble v. State,* 330 S.W.3d 253, 274–75 (Tex.Crim.App.2010). The American Psychiatric Association (APA) filed an *amicus curiae* brief in the United States Supreme Court explaining that unstructured clinical assessments that are not grounded in science are less reliable than structured risk-assessment approaches. The APA described the unstructured clinical approach as a freeform approach to risk management that is nothing more than a subjective assessment unaided by additional materials.

18 *See Druery v. State,* 225 S.W.3d 491, 506–07 (Tex.Crim.App.2007) (explaining that the State has the burden of proving that there is a probability that the defendant would commit criminal acts of violence in the future, so as to constitute a continuing threat); *Muniz v. State,* 851 S.W.2d 238, 250 (Tex.Crim.App.1993) (emphasizing that the State is required to prove that the defendant "would, more likely than not, commit violent criminal acts in the future").

19 *Coble,* 330 S.W.3d at 276–77.

Application of the Daubert/Kelly/ Nenno factors to Coble and in this Case

In *Coble,* Dr. Coons testified that he developed his own methodology to come to a conclusion on future dangerousness.[20] He explained that he considers factors such as the person's criminal history, conscience, and attitude toward violence.[21] After applying the *Nenno* factors to Dr. Coons's testimony, we determined that the trial judge had abused his discretion by admitting the testimony.[22] The issue under Rule 702 is whether his future-dangerousness testimony is based upon the scientific principles of forensic psychiatry. In *Coble* we said:

20 *Coble,* 330 S.W.3d at 271.

21 *Id.*

22 *Id.* at 279–80.

> From this record, we cannot tell what principles of forensic psychiatry Dr. Coons might have relied upon because he cited no books, articles, journals, or even other forensic psychiatrists who practice in this area. There is no objective source material in this record to substantiate Dr. Coons's methodology as one appropriate in the practice of forensic psychiatry. He asserted that his testimony properly relied upon and utilized the principles involved in the field of psychiatry, but this is simply the *ipse dixit* of the witness. Dr. Coons agreed that his methodology is idiosyncratic and one that he has developed and used on his own for the past twenty to thirty years. Although there is a significant body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions, Dr. Coons did not cite or rely upon any of these studies and was unfamiliar with the journal articles given to him by the prosecution.[23]

23 *Id.* at 277–78.

The record, including the *Daubert/Kelly*[24] hearing conducted by the trial court in this case, indicates that Dr. Coons used the same methodology for assessing future dangerousness as he did in *Coble.* When asked if his technique was objective or subjective during the *Daubert/ Kelly* hearing Dr. Coons responded:

24 *See Daubert,* 509 U.S. 579, 113 S.Ct. 2786; *Kelly,* 824 S.W.2d 568 (requiring a trial judge to conduct a "gatekeeping" hearing outside the presence of the jury to assess the reliability of scientific evidence).

> Well, I mean, I don't know. I can't sit here and quote an absolute piece of literature that says that, but I know that it is certainly well accepted in our field that people who are violent tend to—are ***403** more likely to commit violent acts than they are to be, to not in the future.
>
> Dr. Coons was unfamiliar with the journal articles mentioned by the defense attorney and stated that it is impossible to have an established rate of error for his

predictions.[25] In regard to the underlying scientific or medical support for his methodology he admitted that "in terms of exactly where I have gotten my most recent material, I can't tell you exactly."

25 Determining an established rate of error is not impossible. As we explained in *Coble,* Dr. Coons cannot say what his accuracy rate is because he has never attempted to obtain records to check the accuracy of future-dangerousness assessments he has made in the past. *Coble,* 330 S.W.3d at 272.

In *Coble,* as well as in this case, Dr. Coons's testimony failed to meet the third *Nenno* standard, which requires "soft science" testimony to rely upon and use scientific principles relevant to the appropriate field of psychiatry. Based on these specific problems and omissions, I conclude that the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert/Kelly* gatekeeping hearing in this case. I would hold that the trial judge abused his discretion in admitting Dr. Coons's testimony before the jury.

Harm Analysis

Having established error, it is necessary to determine if Dr. Coons's inadmissible expert testimony affected Applicant's substantial right to a fair sentencing trial. Relief should not be granted unless Applicant demonstrates that the error was harmful. If the error had a substantial and injurious effect or influence on the jury's verdict, a substantial right has been affected and Applicant is entitled to relief.[26] However, if the inadmissible expert testimony had only a slight effect upon the jury's deliberations, such non-constitutional error is harmless.[27] My analysis of the harm associated with the erroneous admission of Dr. Coons's testimony considers everything in the record, as each case must be examined on its own facts.[28] In *Jurek v. State,*[29] we determined that there are several factors that are important for a jury to consider when assessing the future dangerousness of the defendant.[30] These factors include the defendant's criminal record, age, the severity of any prior criminal conduct, and the presence of duress or other extreme form of emotional pressure at the time of the crime.[31]

26 TEX.R.APP. PROC. 44.2(b); *Reese v. State,* 33 S.W.3d 238, 243 (Tex.Crim.App.2000); *Johnson v. State,* 967 S.W.2d 410, 417 (Tex.Crim.App.1998).

27 *Id. See also Williams v. State,* 273 S.W.3d 200, 219 (Tex.Crim.App.2008) (reiterating that if the State's evidence on future dangerousness is overwhelming, error is more likely to be harmless). The future-dangerousness special issue depends on the jury's assessment of the defendant's character. *Id.* at 219–20.

28 *Motilla v. State,* 78 S.W.3d 352, 356 (Tex.Crim.App.2002).

29 522 S.W.2d 934 (Tex.Crim.App.1975).

30 *Jurek v. State,* 522 S.W.2d 934, 939 (Tex.Crim.App.1975).

31 *Id.* at 939–40; *See also Robinson v. State,* 548 S.W.2d 63, 64 (Tex.Crim.App.1977). *See also Roney v. State,* 632 S.W.2d 598, 603 (Tex.Crim.App.1982) (finding that Appellant's young age, lack of a prior record or arrests, the absence of psychiatric evidence, and his surrender to the police did not support a verdict of future dangerousness); *Wallace v. State,* 618 S.W.2d 67, 69 (Tex.Crim.App.1981) (explaining that the death penalty must be set aside where "there was no evidence of prior convictions, no prior acts of violence, no character evidence, and no psychiatric evidence").

***404** In *Coble,* we determined that the admission of Dr. Coons's testimony was harmless error and explained that:

> (1) there was ample other evidence supporting a finding that there was a probability that appellant would commit future acts of violence; (2) the same basic psychiatric evidence of appellant's character for violence was admissible and admitted, without objection, through other entirely objective medical sources; (3) Dr. Coons's opinion was not particularly powerful, certain, or strong; (4) Dr. Coons's testimony was

effectively rebutted and refuted by Dr. Cunningham; (5) the State barely mentioned Dr. Coons during closing argument and did not emphasize him or his opinions. [32]

32 *Coble,* 330 S.W.3d at 286–87.

After reviewing the record, it is clear that the facts of Applicant's case differ from *Coble* in each of these areas.

In this case, Dr. Coons was the only source of psychiatric evidence presented by the State regarding Applicant's future dangerousness. The defense introduced two psychological reports made when Applicant was eight and eleven years old. These reports diagnosed him with ADHD and adjustment disorders, but unlike *Coble,* there was no evidence of "lifelong maladjustment" or any psychological or medical assessments that supported an opinion that Applicant has a character for violence. [33] In *Coble,* we determined that Dr. Coons's testimony was not powerful or strong because he simply stated—based on the State's hypothetical—that there was a *probability* that Appellant would be a continuing threat to society. [34] In this case, Dr. Coons agreed with the State that based on *reasonable medical certainty* Applicant would be a continuing threat to society. This indicates that Dr. Coons's testimony in this case was likely to have a more powerful effect on the jury's assessment of future dangerousness.

33 *See Id.* at 281–82 (explaining that psychological evaluations developed for litigation are less reliable than those conducted independent of litigation by professionals acting in their normal capacity).

34 *Id.* at 286 (emphasis added).

We also determined in *Coble* that the State did not emphasize Dr. Coons or his opinions during closing argument. [35] This is not true in this case. In its closing argument, the State specifically stated, "Dr. Coons said this guy is a killing machine and he is going to kill again and he is going to be dangerous." This clearly emphasized Dr. Coons's testimony and again was likely to have a more powerful effect on the jury's assessment of future dangerousness. [36] Another difference between *Coble* and this case is that in *Coble,* Dr. Coons's testimony was effectively rebutted and refuted by another psychiatric expert. [37] The only other psychiatric expert to testify in this case, Dr. Kunick, did not offer any insight regarding the unscientific nature of Dr. Coons's methodology. Instead, Dr. Kunick's own methodology and lack of experience regarding predictions of future dangerousness were used by the State to impeach his testimony. The jury did not hear any evidence concerning the unscientific nature of Dr. Coons's testimony from a qualified expert. The jury also heard evidence of Applicant's criminal history; ***405** however, when considering his age, the severity of his prior criminal conduct, and his attitude about the offense as reflected in the statements he made to others, the totality of the evidence is not compelling enough to support a finding of future dangerousness absent the reliable testimony of a psychiatric expert. [38] In *Coble,* the appellant had a long history of violence, this is simply not the case here.

35 *Id.* at 283–84.

36 Psychiatric predictions of future violence often have an undue effect on the ultimate verdict. *Barefoot,* 463 U.S. at 929, 103 S.Ct. 3383. The Court further explained that even judges will accept psychiatric assessments with little regard for other testimony or cross-examination. *Id.*

37 *Coble,* 330 S.W.3d at 286–87.

38 In 2001, when he was 16 years old, Applicant received juvenile probation for sexual assault. He was charged with criminal mischief in 2003 when he was 18 years old and again received probation. After violating his probation, he was sentenced to 180 days in the Jackson County Jail. In 2004, when he was still 18 years old, he was charged with burglary of a building and served 180 days in the Jackson County Jail.

Conclusion

It is clear that the testimony given by Dr. Coons concerning Applicant's future dangerousness was improperly admitted at the punishment stage of Applicant's trial. Because this error affected Applicant's substantial right to a fair sentencing hearing, [39] this Court should have remanded the case on direct appeal to the trial court for new punishment proceedings. Because the Court failed to address the correct issue on direct appeal, this Court violated Applicant's right to due process. Unfortunately, the majority refuses to consider

Applicant's properly raised issue which makes it impossible for him to get relief.

39 TEX.R.APP. P. 44.2(b).

With these comments, I respectfully dissent.

All Citations

382 S.W.3d 396

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APPENDIX C

Memorandum and Order, *Ramey v. Davis*,
6:13-cv-00043 (S.D. Tex July 11, 2018)

United States District Court
Southern District of Texas
ENTERED
July 11, 2018
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

KER'SEAN OLAJUWA RAMEY,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 6:13-CV-43
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER DENYING RAMEY'S PETITION FOR A WRIT OF HABEAS CORPUS

Ker'sean Olajuwa Ramey, a Texas inmate incarcerated under a capital conviction and death sentence, filed a federal petition for a writ of habeas corpus on November 13, 2013. (Dkt. No. 7). Ramey alleges that constitutional error infected his trial with unfairness. Having considered Ramey's claims, the state court record, the pleadings, the evidence, and the applicable law, the Court now finds that Ramey is not entitled to federal habeas relief for the reasons provided herein.

FACTUAL AND PROCEDURAL BACKGROUND

On December 17, 2005, the State of Texas indicted Ramey for the offense of capital murder in the 24th Judicial District Court of Jackson County Texas. The four-count indictment charged Ramey for his role in the murders of Sam Roberts, Tiffany Peacock, and Celso Lopez. After a change of venue, Ramey stood trial in Victoria County, Texas.

The State based its case against Ramey on testimony from those to whom he admitted involvement in the murders, as well as his co-defendant LeJames Norman's account of the crime. On direct appeal, the Texas Court of Criminal Appeals summarized the trial testimony:

> The bodies of Celso Lopez, Tiffany Peacock, and Sam Roberts were found in Roberts's residence by his parents on August 25, 2005. Lopez had been shot four times: once in the cheek and three times in the back of the head. Peacock was shot twice in the head. Roberts was shot five times: once in the chest, once in the neck, and three times in the back of the head. They had been killed on or about August 24.
>
> Stacy Johnson, [Ramey's] former girlfriend, testified that he called her at 12:29 a.m. and 12:59 a.m. on August 25. He went to her house after their conversation, and slept there until shortly before 6 a.m. She said that he seemed "distant."

Two days later, Johnson accompanied [Ramey] to his house where he dug up "something" from his backyard. Johnson drove him to a dam. While Johnson was driving, [Ramey] called his former step-father, Lonny Lyte. (Both Johnson and Lyte testified about this conversation.) [Ramey] asked Lyte, "If you was to kill somebody, what would you do with the guns?" Lyte responded by saying that he would throw them in the river.

When they reached the dam, Johnson saw [Ramey] throw two pistols into the water. She later returned to the dam with the police and pointed out to the dive team the place where she remembered him throwing the pistols. They were found in the approximate location she indicated.

After he threw the pistols in the water, [Ramey] admitted to Johnson that he had committed a murder. He first said, "You know what this is about," to which she responded in the affirmative. When they returned to her house, he admitted to everything in detail, and he threatened to kill her if she told anyone.

A firearms examiner from the Department of Public Safety testified that markings on the bullets that were recovered from the victims' bodies were consistent with the bullets having been fired from the pistols that were recovered from the water at the dam.

The pistols had been stolen from [the Nairn family] residence on August 19, 2005. The owner of the pistols identified them, and one of the pistols was further identified by records of registration. Gerald Manzanalez and Christopher Times testified that, on August 19, they and [Ramey] had broken into a residence where they stole the pistols and some other firearms.

LeJames Norman testified that, on August 24, he and [Ramey] had gone to the scene of the murders, Sam Roberts's residence. Their objective was to steal 100 kilograms of cocaine they believed to be inside.

He said that he and [Ramey] prepared by stealing masks from a discount store. The jury saw the store's surveillance videotape which showed them stealing the masks at 9:22 p.m. on August 24.

Norman testified that they also prepared by wrapping tape around their shoes so as not to leave a trail. They donned their masks and cocked their guns before entering the house. They knocked on the door. Celso Lopez answered, and the two men forced their way inside. Norman held a gun on Lopez, while [Ramey] ran to the rear of the home, where he hoped to find

> the cocaine. As [Ramey] searched for the drugs, Norman accidentally shot Lopez in the cheek. [Ramey] quickly returned to the front room and forced Lopez, bleeding and begging for help, to move to a bedroom and lie on the floor.
>
> At that point Roberts came home, accompanied by Peacock (his girlfriend). When she saw what was happening, Peacock panicked and tried to run away. Norman grabbed her and forced her to her knees inside the house, near the front door. As she was bending down, he shot her in the back of the head. Seeing his girlfriend fall limp to the floor, Roberts attacked Norman. The two men "tussled" in the kitchen until [Ramey] shot Roberts, freeing Norman who immediately shot Roberts several more times while he lay on the floor. [Ramey] then returned to the bedroom and shot Lopez in the back of the head as he lay on the floor.
>
> [Ramey] and Norman left the house. As they walked away, Norman realized that he had left his police scanner inside the house. [Ramey] quickly returned to retrieve the scanner. While inside, he shot the victims several more times to ensure that they were dead.
>
> [Ramey] and Norman did not find any cocaine.
>
> Eight other witnesses testified that [Ramey] had admitted to them that he had participated in the murders.

Ramey v. State, 2009 WL 335276, at *3-5 (Tex. Crim. App. 2009).

The defense rested without calling any guilt/innocence witnesses or presenting any evidence.[1] The jury instructions authorized Ramey's conviction: (1) for "caus[ing] the death of Sam Roberts and/or Tiffan[y] Peacock and/or Celso Lopez by shooting them with a firearm" in the course of a robbery or burglary or (2) for assisting Norman in the murders under Texas' law of parties.[2] Clerk's Record at 172-73. The jury found Ramey

[1] Ramey retained Joseph R. Willie II to represent him at trial. Willie is also a licenced dentist and the record often refers to him as Dr. Willie. James D. Evans III served as second chair counsel. Unless necessary to identify one attorney, the Court will refer to Ramey's defense attorneys collectively as "trial counsel."

[2] Texas' law-of-parties allows for a defendant's conviction "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).

guilty of capital murder. The verdict form specified that the jury found Ramey guilty as the principal actor in the crime. Clerk's Record at 175.

A Texas jury decides a capital defendant's sentence by answering special-issue questions. In this case, the special issues asked: (1) will the defendant be a future danger to society; and (2) do sufficient circumstances mitigate against a death sentence? *See* TEX. CRIM.CODE art. 37.071 § 2(b); Clerk's Record at 193-94. The State based its punishment-phase case on Ramey's escalating violent actions. The State presented testimony and evidence that, when Ramey stood trial at age twenty-one, he had already amassed a significant criminal history. Ramey began acting out in school at a young age. His first interaction with the legal system occurred when at age sixteen he coerced a seven-year-old boy into performing oral sex on him. Originally charged with aggravated sexual assault, the charge was reduced to assault and the court sentenced him to juvenile probation for one year.

At age seventeen, Ramey pleaded guilty to criminal mischief for breaking into a vending machine at his high school. Less than six months later, Ramey and another friend, broke into his alternative learning school and ransacked the principal's office. His probation for the two offenses was eventually revoked for failing to pay fees, perform his community service hours, and report to his probation officer. Ramey's subsequent stay in the county jail did not squelch his lawlessness.

Jurors found out that Ramey had actually burglarized the Nairn residence three times. The State also presented evidence that, after burglarizing a different location, Ramey attempted to run over the homeowner with his car. Witnesses testified that

Ramey had planned other burglaries. Additionally, Ramey told friends that he had carried out various crimes for which he was never charged. Importantly, Ramey bragged that he had committed other murders.

Ramey's behavior did not improve while incarcerated before trial. He armed himself with weapons, created disturbances, and threatened guards.

The State's final witness was Dr. Richard Coons, a psychologist. Dr. Coons did not examine Ramey, but his review of relevant records led him to opine that an offender like Ramey would "commit criminal acts of violence in the future which would constitute a continuing threat to society." Tr. Vol. 38 at 81.

The defense only called two witnesses in the penalty phase. Ramey's mother, Ms. Terral Stevens, provided an overview of Ramey's life. Ms. Stevens told jurors of Ramey's early emotional and mental problems, including a diagnosis of dyslexia and ADHD at age four. Early evaluations revealed emotional disturbances and a lack of social skills. Ramey told evaluators that his step-father had abused him. Ramey's mother, however, failed to seek the necessary help for her son's problems.

Dr. Mark Kunick, a psychiatrist, based his testimony on an interview with Ramey and Ramey's mother, his review of records, and his understanding of the facts of the case. Dr. Kunick opined that Ramey's nonviolence since incarceration, his close-knit family, and his lack of mental illness would make it unlikely that Ramey would be a future danger.

The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

Trial counsel represented Ramey on direct appeal. On February 11, 2009, the Texas Court of Criminal Appeals affirmed Ramey's conviction and sentence in an unpublished opinion. *Ramey v. State*, No. AP-75,678, 2009 WL 335276 (Tex. Crim. App. 2009).

During the pendency of his state appeal, Ramey filed a state application for a writ of habeas corpus. The same judge who presided over Ramey's trial adjudicated his state habeas application. After the submission of proposed factual findings and legal conclusions, the trial-level court entered an order recommending that the Texas Court of Criminal Appeals deny habeas relief. State Habeas Record at 145-61. The Court of Criminal Appeals filed Ramey's case and set it for submission. *Ex parte Ramey*, No. AP-76,533, 2011 WL 1288284, at *1 (Tex. Crim. App. 2011). After additional briefing by the parties, the Court of Criminal Appeals entered an order denying relief on November 7, 2012. *Ex parte Ramey*, 382 S.W.3d 396, 398 (Tex. Crim. App. 2012). The Court of Criminal Appeals issued a mandate on December 4, 2012.

On November 14, 2013, Ramey filed a skeletal federal petition for a writ of habeas corpus raising five claims. Ramey, however, did not provide any extensive legal or factual discussion of the issues raised by his petition. Instead, Ramey provided the following brief list of claims:

1. The State violated Ramey's constitutional rights by failing to disclose favorable evidence.

2. Ramey is innocent of capital murder.

3. Trial counsel provided ineffective representation in the guilt/innocence phase of trial.

4. Trial counsel provided ineffective representation in the penalty phase of trial.

(Dkt. No. 7). Ramey also informed the Court that he "incorporates into his claims for relief the claims filed in his direct appeal brief and in his state habeas application . . . ." (Dkt. No. 7 at 4, n.1).

Ramey's attorneys believed that they had filed their petition outside the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") limitations period. The Court appointed new counsel to represent Ramey throughout federal review. (Dkt. No. 11). Ramey amended his habeas petition on December 15, 2015. Ramey's amended petition raised eleven claims:

1. The State violated Ramey's right to equal protection by systematically excluding jurors based on their race.

2. Trial counsel provided ineffective representation during jury selection.

3. Ramey was denied a trial by an impartial jury when a juror was excluded for expressing reservations about the death penalty.

4. The State violated Ramey's rights by knowingly presenting false testimony.

5. The State deliberately elicited information from Ramey in violation of *Massiah v. United States*, 377 U.S. 201 (1964).

6. Trial counsel provided ineffective assistance during pre-trial investigation and in the guilt phase.

7. Trial counsel provided ineffective representation in the penalty phase.

8. The cumulative effect of counsel's errors violated Ramey's constitutional rights.

9. The admission of unreliable testimony by an expert witness violated Ramey's rights.

10. Appellate counsel was constitutionally inadequate.

11. Ineffective assistance of trial, appellate, and state habeas counsel forgive the default of any procedurally deficient claims.

Respondent moves for summary judgment. (Dkt. No. 40). Respondent argues that (1) Ramey's skeletal petition was not timely; (2) any new claims in his amended petition are also not timely; (3) Ramey presents several claims in a procedurally inadequate manner; and (4) all claims lack merit. Ramey has filed a reply. (Dkt. No. 49). This matter is ripe for adjudication. Before turning to Ramey's habeas claims, the Court must determine whether he filed his initial petition in a timely manner.

TIMELINESS OF RAMEY'S PETITION AND ISSUES AVAILABLE FOR FEDERAL REVIEW

All federal habeas corpus petitions filed after April 24, 1996, are subject to a one-year limitations period. The Court must first decide whether Ramey filed his skeletal petition in a timely manner. The Court will then decide whether any claims first raised in Ramey's amended petition are timely.

I. Timeliness of the Skeletal Petition

The AEDPA "enacted a one-year period of limitation for federal habeas proceedings that runs, unless tolled, from the date on which the petitioner's conviction became final at the conclusion of direct review . . . ." *Cantu-Tzin v. Johnson*, 162 F.3d

295, 298 (5th Cir. 1998). Ramey's conviction became final when the Supreme Court denied his petition for certiorari from direct appeal on October 5, 2009.[3]

A "pending" application for state post-conviction relief tolls the one-year limitations period. 28 U.S.C. § 2244(d)(2). State post-conviction habeas proceedings in capital cases run concurrently to the direct appeal. *See* TEX. CODE CRIM. PRO. art. 11.071, § 4(a). Ramey filed a state habeas application during the pendency of direct appeal. The Texas Court of Criminal Appeals set his case for submission and eventually denied state habeas relief on November 7, 2012.

The Court of Criminal Appeals does not issue a mandate in every habeas case. A mandate only issues in cases where the matter is "set for submission" by the Court of Criminal Appeals. The Court of Criminal Appeals issued the mandate on December 4, 2012.

In the standard state habeas case, no mandate issues and a decision by the Texas Court of Criminal Appeal ends state habeas review. *See Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (stating that a habeas "application becomes final after a decision by the state's high court"). The specific question before the Court is whether, in a capital case set for submission, the Court of Criminal Appeals decision or its mandate is a final judgment that ends state review. The answer turns on whether the habeas action is "pending" under section 2244(d)(2) between the issuance of the appellate court's decision and its mandate. Because Ramey filed his initial federal petition on November

[3] The Court emphasizes that the issue in this case involves "interpreting the AEDPA's tolling provision, § 2244(d)(2), not its triggering provision, § 2244(d)(1)." *Gonzalez v. Thaler*, 623 F.3d 222, 225 (5th Cir. 2010). The discussion that follows above does not relate on when a conviction is "final" under 28 U.S.C. § 2244(d)(1).

14, 2013, his pleading was timely only if state habeas review was tolled until the mandate issued.

The federal courts have not rendered a one-size-fits-all standard for when a state habeas case is no longer "pending," but rather look to the "state post-conviction procedures to determine . . . when state review ended . . . ." *Watts v. Brewer*, 416 F. App'x 425, 428 (5th Cir. 2011) (quotation omitted); *see also Carey v. Saffold*, 536 U.S. 214, 219 (2002) (refusing to establish a "uniform national rule" governing when a habeas case is pending). The Supreme Court has loosely said that a case is pending until "the state courts have finally resolved an application for state postconviction relief" which generally is when, "[a]fter the State's highest court has issued its mandate or denied review, no other state avenues for relief remain open." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007); *see also Saffold*, 536 U.S. at 220.[4] The Supreme Court has instructed to look at "[w]hen the state courts have issued a *final judgment* on a state application" to decide if "it is no longer pending." *Lawrence*, 549 U.S. at 334 (emphasis added).

The Fifth Circuit has not yet decided when a Texas habeas case stops "pending" after being set for submission.[5] Respondent argues that, without exception, a state habeas action concludes and tolling ends when the Court of Criminal Appeals issues its decision denying relief. Respondent cites cases for the proposition that "[t]he Fifth Circuit has plainly stated that a Texas habeas 'application becomes final after a decision by the

4 The Supreme Court has looked to the dictionary use of the word pending: "The dictionary defines 'pending' (when used as an adjective) as 'in continuance' or 'not yet decided.' It similarly defines the term (when used as a preposition) as 'through the period of continuance . . . of,' 'until the . . . completion of.'" *Saffold*, 536 U.S. at 220 (quoting Webster's Third New International Dictionary 1669 (1993)).

5 The Fifth Circuit has held that a habeas case in Mississippi is pending until the mandate issues. *Watts v. Brewer*, 416 F. App'x 425, 430 (5th Cir. 2011).

state's high court.'" (Dkt. No. 54 at 3 (quoting *Ott*, 192 F.3d at 513). While true as far as it goes, the Fifth Circuit's language is limited because the federal courts in those cases did not face the unique issue before this Court – no mandate had issued because the state courts did not set the cited cases for submission.

Respondent also argues that "the mandate in Texas habeas procedure serves no real function affecting the state or federal habeas process." (Dkt. No. 54 at 7). Respondent argues that the federal courts should not consider that state habeas review remains pending "for what is simply a ministerial act: issuing the mandate." (Dkt. No. 54 at 3). The Court of Criminal Appeals has refused to characterize the mandate as merely "ministerial." *Ex parte Webb*, 270 S.W.3d 108, 111 (Tex. Crim. App. 2008). Instead, Texas treats a mandate as "an appellate court's official notice, directed to the court below, advising it of the appellate court's decision and directing it to have the appellate court's judgment duly recognized, obeyed, and executed." *Id*. at 9 n.2. The Texas courts do not intend the mandate to be a mere formality, but an indication that "the judgment was final." *Hartfield v. Thaler*, 403 S.W.3d 234, 239 (Tex. Crim. App. 2013); *see also Brown v. Thaler*, 455 F. App'x 401, 406 (5th Cir. 2011) (stating that "Texas law is unambiguous" that collateral review is final when the mandate issues).

The Texas legislature has structured capital habeas procedure in a manner that presupposes that the mandate is the point of final resolution for cases set for submission. For example, the convicting court may usually set an execution date when "the court of criminal appeals denies relief." TEX CODE CRIM. PRO. art. 43.141(a)(1). If the case is "filed and set for submission," however, statutory law prohibits the lower court from setting an execution date until "the court of criminal appeals issues a mandate." TEX CODE CRIM. PRO. art. 43.141(a)(2). Similarly, the mandate serves as the defining point at which jurisdiction can transfer from the state to the federal courts. The Texas statutes recognize that, in a case set for submission, inmates should not avail themselves of federal jurisdiction until the mandate issues. *See* TEX. CODE CRIM. PRO. art. 11.071(2)(e).

Both of those statutes cited above presuppose that Texas considers a case pending until the mandate has issued.[6] In fact, the Court of Criminal Appeals itself has said in a different context that "[a] cause is pending until mandate is issued from this Court." *Cuellar v. State*, 521 S.W.2d 277, 280 (Tex. Crim. App. 1975) (direct appeal); *see also Stevenson v. State*, 499 S.W.3d 842, 849 (Tex. Crim. App. 2016) ("[A] conviction with a pending appeal is not final until the appellate court affirms the conviction and issues its mandate.").

With that understanding of state law, the Court holds that, in a capital habeas case set for submission, a case is pending for the purposes of section 2244(2) until the Texas Court of Criminal Appeals issues an mandate. The Court emphasizes that this holding is limited to *capital* habeas cases *set for submission* and does not apply to traditional habeas actions.

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6 Respondent correctly observes that Texas law does not permit the filing of a motion for rehearing or other similar pleading after the habeas court issues a decision. TEX. R. APP. P. Rule 79.2(d). The Fifth Circuit has held, however, that filing a motion for reconsideration tolls the limitations period. *Lookingbill v. Cockrell*, 293 F.3d 256, 261 (5th Cir. 2002); *Emerson v. Johnson*, 243 F.3d 931, 934 (5th Cir. 2001). The decision of the Court of Criminal Appeals cannot be the unwaivering point of finality if a disallowed subsequent motion for reconsideration tolls the federal limitations period.

Here, the Court of Criminal Appeals set Ramey's case for submission and, after rendering a decision, issued a mandate on December 4, 2012. Ramey filed his skeletal petition within a year afterward. Ramey's skeletal habeas petition was timely.

II. Timely Claims in Amended Petition

Even though Ramey's initial petition was timely, he raised new claims in his amended petition. Respondent argues that only claims four, six, and seven were included in the skeletal petition. Respondent says that the Court cannot reach the remaining claims in Ramey's amended petition because they do not "relate back" to his initial arguments.

Under Rule 15(c)(1)(B), Federal Rules of Civil Procedure, an amended pleading relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." The Supreme Court has construed this provision narrowly when applied to federal habeas corpus cases. Only those claims in an amended petition filed after the AEDPA deadline that are tied to "a common core of operative facts" will relate back to the original petition and will be considered timely filed. *Mayle v. Felix*, 545 U.S. 644, 664 (2005). Habeas claims do not relate back "when [they] assert[] a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id*. at 650.

As previously noted, Respondent concedes that claims four, six, and seven relate back to the skeletal petition. The remaining claims fall into two categories. First, the amended petition contains several claims that Ramey did not raise in state court or in his skeletal petition. Specifically, Ramey did not exhaust portions of claim two and all of claims five, eight, ten, and eleven in state court. Those claims do not share a common core of operative facts with the skeletal petition. Ramey did not file them in a timely manner.

Second, Ramey's amended petition contains some claims that he exhausted in state court (part of claim two and claims one, three, and nine). Ramey's initial petition mentioned in a footnote that he intended to "incorporate[ ]into his claims for relief the claims filed in his direct appeal brief and in his state habeas application . . . ." (Dkt. No. 7 at 4, n.1). The most generous reading of Ramey's petition allows for federal review of those claims.

Claims one, two, three, four, six, seven, and nine are timely.

III. Equitable Tolling of Claims That Do Not Relate Back

Claims five, eight, ten, and eleven do not relate back to his initial petition. The Court can only reach the merits of those claims if Ramey can show equitable tolling forgives a strict application of the AEDPA limitations period. "Equitable tolling is permissible only in 'rare and exceptional circumstances.'" *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (quoting *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). "To obtain the benefit of equitable tolling, [an inmate] must establish that (1) he pursued habeas relief with 'reasonable diligence', and (2) some 'extraordinary circumstances' stood in his way and 'prevented' timely filing." *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (quoting *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012)); *see also Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v.*

DiGuglielmo, 544 U.S. 408, 418 (2005)). Both criteria must be satisfied, and a petitioner seeking application of the doctrine bears the burden of showing that it should apply to him. *See Lawrence*, 549 U.S. at 336.

Ramey argues that his initial federal attorneys' representation should allow equitable tolling of the limitations period. "[P]rofessional misconduct" by an attorney may constitute an extraordinary circumstance warranting equitable tolling if the misconduct is not a "garden variety claim of excusable neglect," but rather is such that it is "egregious behavior" equivalent to abandonment. *See Holland*, 560 U.S. at 649-53; *see also Maples v. Thomas*, 565 U.S. 266, 283 (2012).

The Court has reviewed Ramey's extensive evidence and argument about the representation of his initial set of federal habeas attorneys.[7] To summarize, the federal attorneys originally concluded that a federal petition was due on November 7, 2013. As that date neared, Ramey claims that they abandoned him. The evidence, however, shows that they became confused and assumed that the AEDPA deadline would include any time from which Ramey could have sought Supreme Court review of his state habeas action. *See Lawrence*, 549 U.S. at 332 (holding that the time to file a certiorari petition from state habeas review does not toll the limitations period). When the attorneys realized their mistake, they acted quickly and a skeletal petition was filed. The initial attorneys also moved to withdraw. The skeletal petition that was filed, however, did not include all the claims Ramey's new attorneys later put in the amended petition.

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[7] The Court observes that Ramey lost months of the limitations period because federal habeas resource counsel sought to secure representation without filing a federal motion for the appointment of counsel (as required by state law). Ramey does not argue that the delay in filing a federal motion should toll the limitations period.

Despite Ramey's arguments, he has not shown that his federal attorneys left him effectively without counsel. They incorrectly assessed the filing date. Simply miscalculating a deadline is not grounds for equitable tolling. *See Maples*, 565 U.S. at 282; *Holland*, 560 U.S. at 651-52; *Lawrence*, 549 U.S. at 336. The record otherwise shows that the initial attorneys made efforts to meet with their client, research the record, and develop a federal petition consistent on a timeline based on their miscalculation. At best, this is a case of garden variety negligence or error, not abandonment.

Importantly, Ramey's arguments do not explain why anything but negligence accounts for the fact that his attorneys did not include his new claims in the skeletal petition. The omission of those claims is not "egregious" or "extraordinary" conduct that would equitably toll the limitations period. *Holland*, 560 U.S. at 649-50. After considering all of Ramey's argument and evidence, the Court finds that he has not shown a basis for equitable tolling. Claims five, eight, ten, and eleven are time barred.

STANDARD OF REVIEW

The writ of habeas corpus provides an important, but narrow, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). How an inmate litigates his claims determines the course of federal habeas adjudication. The exhaustion doctrine precludes federal consideration of any claim raised for the first time in federal court. *See* 28 U.S.C. § 2254(b)(1).[8] As a corollary to exhaustion, the procedural-bar doctrine requires inmates

[8] Ramey asks the Court to stay this case to raise any unexhausted claim in state court. Ramey has not shown that a stay is proper under *Rhines v. Weber*, 544 U.S. 269 (2005), or that an avenue for state review is open to him.

to litigate their claims in compliance with state procedural law. *See Dretke v. Haley*, 541 U.S. 386, 392 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A federal court may review an inmate's unexhausted or procedurally barred claims only if he shows: (1) cause and actual prejudice; or (2) that "a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent[.]'" *Haley*, 541 U.S. at 393 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

If the inmate has presented his federal constitutional claims to the state courts in a procedurally proper manner, and the state courts have adjudicated their merits, AEDPA provides for a deferential federal review. Under AEDPA's rigorous requirements, an inmate may only secure relief after showing that the state court's rejection of his claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1),(2).

Inmates arguing legal error in state court decisions must comply with § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). A petitioner does not merit relief by merely showing legal error in the state court's decision. *See White v. Woodall*, ___ U.S. ___, 134 S. Ct. 1697, 1702 (2014) (stating being "merely wrong" or in "clear error" will not suffice for federal relief under AEDPA). "[F]ocus[ing] on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), AEDPA requires inmates to "'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woodall*, 134 S. Ct. at 1702 (quoting *Richter*, 562 U.S. at 103); *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

A petitioner challenging the factual basis for a state decision must show that it was an "unreasonable determination of the facts in light of the evidence . . . ." 28 U.S.C. § 2254(d)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (*Miller-El I*). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

Federal courts presume the underlying factual determinations of the state court to be correct, unless the inmate "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The Court of Criminal Appeals summarily denied habeas relief on all but one claim. In evaluating Ramey's claims under AEDPA, the federal courts will "look through" the "summary denial of [Ramey's state habeas application] and evaluate the state trial court's reasoned decision." *Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2276 (2015) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991)). As the same judge presided over the trial proceedings and the state habeas action in this case, the presumption of correctness for state habeas factual findings is especially strong. *See Mays v. Stephens*, 757 F.3d 211, 214 (5th Cir. 2014); *Woods v.*

Thaler, 399 F. App'x. 884, 891 (5th Cir. 2010); *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000).[9]

An inmate's compliance with 28 U.S.C. § 2254(d) does not guarantee habeas relief. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) (observing that no Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]"); *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). A habeas petitioner meeting his AEDPA burden must still comply with weighty jurisprudential tenets, as the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989) that prevents habeas courts from creating new constitutional law.

ANALYSIS

I. The State Violated Ramey's Right to Equal Protection by Systematically Excluding Jurors Based on Their Race. (Claim One)

Ramey's first claim alleges that the prosecutor systematically excluded African-Americans from serving on his jury. The jury selection process in this case involved the questioning of individual jurors from two jury panels. The 135-member initial venire dire contained seven African-American individuals. Five of those potential jurors were dismissed for cause, and two were excused because they were distant relatives of Ramey. The parties did not select any African-American jurors from the first panel. When the trial court called a second panel, eight jurors were already seated. Of the forty-nine member second panel, six were African-American.

[9] Section 2254(e)(2) authorizes evidentiary hearings under narrow conditions. No evidentiary hearing is necessary to adjudicate Ramey's petition.

When members of the second panel assembled in the courtroom, four African-American potential jurors sat toward the front of the courtroom. The prosecutor requested a jury shuffle,[10] which left only two African-American prospective jurors among those who would eventually be questioned before the jury was selected. After the jury shuffle, African-American veniremember Cheryl Steadham-Scott was the second juror questioned. The State removed Ms. Steadham-Scott by peremptory strike. The next juror questioned was also African-American but she was dismissed for cause.

No African-American jurors served at trial. Ramey contends that the State systematically excluded jurors based on their race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

Under *Batson*, the prosecution violates the equal protection clause by striking potential jurors based on race. *Batson* jurisprudence has established a three-step burden shifting scheme to ascertain the State's intent when striking members of a protected category:

> First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding

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10 Texas provides that either party, based solely upon visual inspection of the venire, may request the court to shuffle or randomly reseat the entire panel. *See* TEX. CODE CRIM. PRO. art. 35.11. Both the State and the defendant have the absolute right to one jury shuffle. *Smith v. State*, 648 S.W.2d 695, 696 (Tex. Crim. App. 1983).

> racial motivation rests with, and never shifts from, the opponent of the strike.

Rice v. Collins, 546 U.S. 333, 338 (2006) (quotations and citations omitted); *see also Johnson v. California*, 545 U.S. 162, 168 (2005); *Miller-El v. Dretke*, 545 U.S. 231, 251-52 (2005) (*Miller-El II*).

While Ramey contends that racism permeated jury selection, he only points to one African-American prospective juror, Ms. Steadham-Scott, against whom the State used a peremptory strike. Ramey challenged her strike in the appellate and habeas proceedings. On appeal, Ramey claimed that the trial court did not properly engage in the *Batson* procedure and that the prosecution shuffled the jury for racial purposes. Ramey's habeas application faulted the State for not coming forward with a sufficient race-neutral explanation for striking Ms. Steadham-Scott.

Ramey raises a robust *Batson* claim in federal court. Ramey contends that he can show purposeful discrimination in the State's exercise of peremptory strikes. Relying primarily on inferences, Ramey (1) disputes the State's reason for striking Ms. Steadham-Scott; (2) argues that the prosecution used a jury shuffle to lessen the chance of receiving an African-American juror; (3) points to a purported history of discrimination in Jackson County criminal trials; and (4) asserts that the State questioned the African-American jurors differently. Ramey, however, only gave the state courts an opportunity to consider the first two arguments.

A. The Questioning of Ms. Steadham-Scott

The prosecution used a peremptory strike against one black potential juror, Ms. Steadham-Scott. After extensive questioning, the prosecution concluded by asking her whether she could, as required by the future-dangerousness special issue, impose a death sentence when "the only evidence was that it would be slightly more likely than not" that "he will be dangerous in the future." Tr. Vol. 29 at 77-78. Ms. Steadham-Scott said that she would "need much more of a burden." Tr. Vol. 29 at 78. The State then passed her.

Trial counsel began the defense's question by "go[ing] over this last issue" with her. Tr. Vol. 29 at 78. At that point, the prosecutor interrupted and said that he "was not going to challenge [Ms. Steadham-Scott] for cause." Tr. Vol. 29 at 78. Trial counsel then passed her without asking any additional questions. Tr. Vol. 29 at 79.

The prosecutor subsequently exercised a peremptory challenge against Ms. Steadham-Scott without explanation. Tr. Vol. 29 at 79. The defense did not raise a *Batson* objection then, but asked for the trial court to include her questionnaire in the record. The trial court excused her.

Three weeks later, and after the jury had been selected but not yet sworn in, trial counsel told the court:

> just for a housekeeping matter, when we were doing the voir dire on the jury and the supplemental panel, juror number two, which is Cheryl Steadham-Scott, was peremptorily struck by the prosecution and we were just wanting to note that the prosecution did not give any race neutral explanations for that . . . .

Tr. Vol. 30 at 9.[11] The prosecutor then said:

> it was my understanding that if I would have continued to pursue the line of questioning, that juror would most likely been challengeable for cause, but I didn't do it because her questionnaire clearly indicated that she could not impose the death penalty and there were many other racially neutral reasons and, if the Court wants, I can try to go back and resurrect those notes.

Tr. Vol. 30 at 10. In short, the prosecution provided two race-neutral reasons: (1) continuing the last line of questioning would have shown her to be challengeable for cause and (2) she was not strong on the death penalty. The trial court said that it "was comfortable with the record reflecting what it did with respect to that juror" and the defense did not make any further objection. Tr. Vol. 30 at 10.

Because the prosecutor explained the peremptory strike of Ms. Steadham-Scott by providing reasons that were not inherently discriminatory, the state courts found that this process sufficiently complied with required *Batson* procedure.[12] Ramey now argues that the prosecutor's explanation was a pretext for purposeful discrimination.

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[11] Ramey made his observation only minutes before the jury was sworn. Tr. Vol. 30 at 12. Under Texas law, a *Batson* challenge is not timely if made after the jury is selected and sworn. *See* TEX. CODE CRIM. PRO. art. 35.261(a); *Hill v. State*, 827 S.W.2d 860, 864 (Tex. Crim. App. 1992). As explained by the Court of Criminal Appeals, "[d]uring the discussion which followed, the State declared that it was unprepared for a *Batson* motion since one was never requested, but claimed that Steadham-Scott's answers to the prosecutor's questions as well as her juror questionnaire led to racially-neutral reasons for a peremptory strike, such as her ambivalence regarding inflicting the death penalty." *Ramey*, 2009 WL 335276, at *3.

[12] The state habeas court, presided over by the same judge who oversaw the trial, made the following factual findings relating to Ms. Steadham-Scott's individual voir dire:

> [T]he petitioner voiced no objection and raised no issue as to whether or not the State improperly exercised a peremptory challenge. Twenty-one days after this prospective juror was peremptorily struck by the prosecutor petitioners attorney pointed out that at the time of the exercise of this peremptory challenge the prosecution did not give a race-neutral explanation for the challenge and petitioner wanted that for the record. Since no objection was made at the time of the challenge of this prospective juror and no *Batson* claim had been made the State did not have its notes and was not prepared to address the race-neutral reasons for the strike because of the delay. However the court recalled that there were issues which the State went into in the examination of this prospective juror which would give rise to a peremptory strike and was comfortable with the record showing that the strike was made for those purposes and not based upon any racial reason.

This Court's review "turns on factual determinations, and, in the absence of exceptional circumstances, [courts] defer to state court factual findings unless we conclude that they are clearly erroneous." *Synder*, 552 U.S. at 477 (quotation omitted). Ramey assumes that, because of racial bias, the prosecutor framed his questioning in a way to disqualify Steadham-Scott from service. The state courts, however, found that Ms. Steadham-Scott "was repeatedly unable to answer the State's questions regarding her ability to adjudge the death penalty, both in her jury questionnaire and during voir dire":

> When asked whether she understood the death penalty or whether she would change it, she replied, "Yea. I don't know how I would change it, but – I don't know how I would change it." When asked if she believed in the death penalty, she responded, "I mean, you're asking me stuff like do I believe in the death penalty. I don't know if I believe in it, you know." On the jury questionnaire, she left blank the question, "Have you ever been opposed to the death penalty?" and responded in another section on the questionnaire that she was "not opposed or . . . in favor of it."

Ramey, 2009 WL 335276, at *3.

The state habeas court also found that "Steadham-Scott's standing on the death penalty was very questionable and the peremptory challenge by the State was based upon her inconclusive opinions on the death penalty and not upon her do identity as an African-American." State Habeas Record at 152. On that basis, the state habeas court found that "the use of the State's peremptory challenge was not based on racial motivations." State Habeas Record at 152.[13] In fact, the state habeas court commented

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State Habeas Record at 152. Ramey does not renew his state habeas challenge that the trial court did not sufficiently perform the required *Batson* inquiry.

[13] As the Court of Criminal Appeals observed on direct review, the "there was a brief allusion to race in the jury questionnaire and then on [Ms. Steadham-Scott's] individual voir dire . . . ." *Ramey*, 2009 WL 335276, at *3.

that there was a "complete failure to show that there was any basis for a claim that the challenge was racially motivated." State Habeas Record at 152.

This is not a case where jury selection involved a definitive pattern of the prosecution striking black jurors. Of the nine African-Americans identified on the jury panels, six were dismissed for cause and two because they were relatives of Ramey. The record does not demonstrate a stark disparity in the percentage of blacks peremptorily struck as opposed to whites. The prosecutor provided race-neutral reasons for striking Ms. Steadham-Smith.

On their face, the State's reasons for dismissing Ms. Steadham-Smith are race neutral. *See Hernandez*, 500 U.S. at 360. First, questioning immediately before the peremptory strike raised serious concerns about Ms. Steadham-Smith's ability to impose the correct burden on the future-dangerousness issue. *See Muniz v. State*, 851 S.W.2d 238, 250 (Tex. Crim. App. 1993) (requiring the State only to prove that the defendant "would, more likely than not, commit violent criminal acts in the future"). Second, some of Ms. Steadham-Scott's answers supported the prosecutor's belief that "she could not impose the death penalty": she did not know if she believed in the death penalty, she was ambivalent toward capital punishment, and was neither opposed to or in favor of it. Tr. Vol. 29 at 64-66. She also did not answer questions such as whether she had previously been opposed to the death penalty. Tr. Vol. 29 at 66. While elsewhere she said that she

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Ramey argues that the prosecutor asked questions about capital punishment and then "abruptly shifted course and began asking her about her experience as an African American." (Dkt. No. 30 at 45). In reality, the prosecutor was reviewing Ms. Steadham-Scott's jury questionnaire and, moving from the pages talking about capital punishment, came to the section where she had answered that she had "feelings about African Americans being treated fairly." Tr. Vol. 29 at 69. The prosecution then engaged her in questioning that allowed her to explain her answer, particularly because she specified that she "[ran] into issues like that all the time at work." Tr. Vol. 29 at 69-70.

would "have to be fair and open" about reaching a decision, Tr. Vol. 29 at 65, the record reasonably supports the prosecution's belief that she would not be favorable to considering a death sentence.

Even though the record does not strongly question the State's motives here, courts may consider relevant facts and circumstantial evidence to assess possible discriminatory intent. Ramey relies on other inferences to prove that the State engaged in purposeful discrimination: the use of a jury shuffle, an alleged history of discrimination in Jackson County, and disparate questioning.

B. The Jury Shuffle

Ramey argues that the State's use of the jury shuffle shows that it intended to keep African-Americans off the jury. A jury shuffle may suggest discrimination. *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *Miller-El II*, 545 U.S. at 254-55. Ramey argues that the State used a jury shuffle on the second panel because "most of the African American veniremembers were seated towards the front of the panel." (Dkt. No. 30 at 52).

Ramey argued to the state courts that the jury shuffle itself amounted to a *Batson* violation. Trial counsel asked for a race-neutral explanation when the prosecutor requested a jury shuffle. While Ramey did not make a classic *Batson* challenge, the trial court nonetheless required the prosecution to explain why it had asked for a jury shuffle. The prosecutor told the court:

> I have individuals here in Victoria who have assisted me in going through the list and given me information about the prospective jurors . . . . I have gotten that information from a number of different individuals. And in

> doing that I looked at this list and the overwhelming majority of the folks that they had suggested would be good State's jurors were towards the back of the panel. And so in light of that I requested a shuffle . . . . I will tell the Court as an officer of the Court that those individuals, probably 75–80 percent of the ones they had told me would be good State's jurors were towards the back. And so that's why I asked for a shuffle.

Tr. Vol. 21 at 20. The defense did not make any other argument, and the trial court recessed without making an express ruling.

The Court of Criminal Appeals found that the trial counsel "implicitly denied [Ramey] relief" on his jury selection complaint which means that it believed that "[t]he explanation proffered by the State" was "sufficiently race-neutral." *Ramey*, 2009 WL 335276, at *2. Ramey has not shown clear and convincing evidence to rebut the state court's finding that the State did not use the jury shuffle for racial reasons. *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) ("As a federal habeas court, we are bound by the state habeas court's factual findings, both implicit and explicit.").

C. History of Exclusion and Comparative Juror Analysis

For the first time in federal court, Ramey also asks the Court to consider other factors to show that the State exercised its peremptory strike against Ms. Steadham-Scott on the basis of race. Ramey particularly emphasizes historical discrimination in Jackson County and disparate questioning of African-American potential jurors by the prosecutor. Ramey's failure to raise these issues previously deprived the state courts from the opportunity to consider his arguments.

In arguing that prosecutors in Jackson county have historically excluded African-American jurors, Ramey relies heavily on *Hernandez v. State*, 347 U.S. 475 (1954), a case in which the Supreme Court found that had been a systematic exclusion from jury service in Jackson County. Ramey also says "[u]pon information and belief, the racial discrimination present in this case is not an isolated incident and [the District Attorney] has employed similar discriminatory tactics throughout his tenure . . . ." (Dkt. No. 30 at 57). Ramey, however, has not provided any evidence of a systematic racism in jury selection by the prosecutor's office in recent years. Ramey's reliance on case from more than sixty years ago and his bare supposition about current racism cannot overcome the deference paid to state court adjudications.

Without any other basis to support his *Batson* claim, Ramey tries to show "a comparative analysis of the jurors – that is, 'side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *United States v. Minor*, 698 F. App'x 765, 768 (5th Cir. 2017) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("*Miller-El II"*)). If the government's explanation "for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El II*, 545 U.S. at 241.

Ramey has not identified any jurors from his trial who, like Ms. Steadham-Smith, displayed difficulty with imposing the burden for the future-dangerousness issue. Instead, Ramey's argument tries to show that the prosecution treated African-American jurors differently during questioning about the death penalty. In particular, Ramey points to two white jurors, Marjorie Jean and Carol Laza, who were selected to serve despite leaving some answers blank on their questionnaire and expressing that they did not understand the death penalty. (Dkt. No. 30 at 44-45). Despite some similarities in how they answered the jury questionnaire, questioning of both Jurors Jean and Laza confirmed that they would be able to return a death sentence. Tr. Vol. 29 at 90-120; Tr. 29 at 150-58. Even after questioning, Ms. Steadham-Smith could not say that she believed in capital punishment. Tr. Vol. 29 at 64-66. Ramey has not identified jurors who gave such ambivalent responses during questioning. Although he attempts to point out discrepancies in the State's questioning, his arguments about disparate questioning are not compelling. Ramey has simply not shown that the prosecutor's proffered reason for striking Ms. Steadham-Smith "applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, [thus] . . . tending to prove purposeful discrimination." *Miller-El II*, 545 U.S. at 241.

D. Conclusion of the *Batson* Claim

This Court's role is "to determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary." *Miller-El I*, 537 U.S. at 341. State court review centered on the integrity of the prosecutor's reason for striking Ms. Steadham-Scott, and to a lesser extent whether the jury shuffle showed racism. With the record and argument in state court, significant and binding state factual findings found no impropriety in the prosecutor's peremptory removal of jurors, and particularly the peremptory strike against Ms. Steadham-Scott.

Ramey's more extensive briefing on federal review does not make a stronger case of purposeful discrimination by the State. Taken as a whole, Ramey has not made a persuasive argument that the State struck Ms. Steadham-Scott, or otherwise treated potential jurors differently, because of race. Ramey has not provided clear and convincing evidence that the state court factfindings were incorrect, 28 U.S.C. § 2254(e)(1), nor shown that its decision was unreasonable, 28 U.S.C. § 2254(d)(2). *See Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2199 (2015) (emphasizing AEDPA's impact on *Batson* claims).

II. Trial Counsel Provided Ineffective Representation During Jury Selection. (Claim Two)

In his second claim, Ramey argues that trial counsel provided deficient representation during jury selection in four ways. First, Ramey claims that trial counsel did not ask potential jurors the right questions. Second, Ramey argues that his attorneys should not have agreed to dismiss many venire members without questioning. Third, Ramey claims that trial counsel ineffectively questioned one specific potential juror. Finally, Ramey argued that trial counsel did not object when the State misstated the law. Respondent argues that Ramey did not exhaust the third argument in state court.

A. *Strickland* Standard

Courts evaluate an attorney's efforts under the standard from *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

A court's review "of counsel's performance must be highly deferential," and made without "the distorting effects of hindsight." *Id*. at 689. Courts assess counsel's "challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct[,]" because otherwise "[i]t is all too tempting for a defendant to second-guess counsel's assistance . . . ." *Id*. The law honors an attorney's "conscious and informed decision on trial tactics and strategy," allowing for federal relief only when "it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003). The prejudice element requires the movant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The state courts rejected many of Ramey's *Strickland* claims. While "[s]urmounting *Strickland*'s high bar is never an easy task," a habeas petitioner's duty to "[e]stablish[] that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "The standards created by *Strickland* and § 2254(d) are both highly deferential, . . . and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (citation omitted); *see also Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

B. Questioning about Bias

Ramey argues that trial counsel "(1) failed to ask life-qualifying questions and assert cause challenges for jurors who demonstrated obvious bias and inability to follow the law, and (2) failed to rehabilitate and agreed to excuse jurors who expressed a reservation to the death penalty, without any voir dire." (Dkt. No. 30 at 66). Despite making general allegations about deficiencies during voir dire, Ramey only provides briefing on the questioning of four jurors (Craig Ullmann, Jose Loredo, Sharon Reynolds, and Nancy Wind).

Respondent contends that much of Ramey's second claim involves "nitpicking" of trial counsel's questioning. (Dkt. No. 40 at 121). Ramey challenged trial counsel's voir dire questioning on state habeas review. The state habeas court found that his arguments "are simply based upon tactics expressed with generality and with no specific allegation of specific conduct which constituted ineffective assistance of counsel. In regard to these claims the court finds that the record simply does not support [Ramey's] allegations of ineffective assistance of counsel." State Habeas Record at 155.

While "[v]oir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored," *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (quotation omitted), "no hard-and-fast formula dictates the necessary depth or breadth of voir dire." *Skilling v. United States*, 561 U.S. 358, 362 (2010). Not every attorney will conduct voir dire in the same manner. The mere fact that another attorney might have asked different questions will not support a finding of ineffective assistance. *See Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) ("Moreover, Garza cites no authority, and we have found none, that would require a defense attorney to ask specific questions at voir dire."). Indeed, a defense attorney's method of voir dire is strategic, and thus it "cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness." *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (quotation omitted). Further, a petitioner "alleging deficient performance during jury selection must identify any particular juror who was in fact prejudiced and must establish that had counsel's questioning focused on a specific area of bias, the bias would have been found." *Villanueva v. Stephens*, 555 F. App'x 300, 306 (5th Cir. 2014). This Court's review will center on whether additional questioning by counsel would have made the four jurors subject to removal by cause.

1. Ullman

Ramey argues that two jurors (Ullman and Loredo) were biased because they would "automatically impose" a death sentence. (Dkt. No. 30 at 67). The prosecution engaged Ullman in wide-ranging questioning. When the prosecutor passed Ullman, trial counsel only asked for clarification on his jury questionnaire response that he was "in favor in [sic] capital punishment except in a few cases where it may not be appropriate." Tr. Vol. 9 at 213. Ullman said: "I would say that that would play towards the circumstances involved around the case. How could I be more specific? Cases where the person may have been legally insane or not mentally capable of knowing what they were doing." Tr. Vol. 9 at 213. Afterwards, trial counsel told the trial court that "after consultation with the client, . . . the Defense accepts this juror." Tr. Vol. 9 at 214.

Ramey faults trial counsel for not asking Ullman more questions. Ramey, however, does not acknowledge the State's earlier questioning that explored Ullman's opinions and ability to serve as a juror in a capital case. Ullman said that he would consider all of the evidence before deciding whether a death sentence was appropriate. Tr. Vol. 9 at 183. His answers showed that he understood the presumption of innocence and reasonable-doubt standard. Tr. Vol. 9 at 191-95 Nothing in Ullman's questioning by the State would give rise to a challenge for cause.

2. Loredo

Trial counsel engaged Juror Loredo in much longer questioning. A full review of the defense questioning, however, shows that he was not necessarily an unfavorable juror. Pursuant to trial counsel's questions, Loredo said he was "conservative" on some issues and "liberal on some issues" such as being "pro choice." Tr. Vol. 17 at 68. Loredo explained that he had a friend accused of a killing and the thought of being a witness in that case made him worry that he could not deal with being the one whose testimony "is what actually sends him to prison." Tr. Vol. 17 at 71. Loredo told trial counsel that, on a scale of one to ten with one being against capital punishment and ten being positively in favor of it, he was a "seven." Tr. Vol. 17 at 76.

Ramey emphasizes an answer in which Loredo said he would "favor" the death penalty. Tr. Vol. 17 at 80. Even when Loredo said he "favored" the death penalty, he clarified that he only meant that he "believed in it" and his opinion on the death penalty would not affect his ability to consider the evidence. Tr. Vol. 17 at 80. Loredo, in fact, expressed a willingness to impose a life sentence "if a single mitigating factor were presented to [him]." Tr. Vol. 17 at 81. Given the exhaustive questioning by the defense, Ramey's emphasis on one answer misrepresents trial counsel's efforts and mischaracterizes the juror's ability to be impartial.

3. Reynolds

Similarly, Ramey picks out some elements from Juror Reynolds' questioning that he says made her biased toward law enforcement. For instance, Juror Reynolds said that her favorite television program was "Law & Order" and that she worked as a 911 dispatcher. Juror Reynold's discussion about her favorite television program did not reveal any pro-prosecution bias. Tr. Vol. 13 at 103. Trial counsel's questioning, also, revealed that her experiences through her employment would help her "be a fair juror to both sides, you know, to listen to all that is said and see that everything that's being said." Tr. Vol. 13 at 100-01.[14]

Ramey somewhat misconstrues Ms. Reynolds' answers to questions about the death penalty. For instance, he criticizes trial counsel for not striking for her "pro death penalty ideation" based on a statement that "inmates are on death row for too long," but does not quote her actual statement which reflected compassion for the inmates: "it's, I would think, a very hard place to be, never knowing . . . how long you're going to be there or . . . if you're going to make it to your actual execution date . . . for being in the system. You hear of . . . people not actually making it to the execution date, you know. You live with that stuff every day." Tr. Vol. 13 at 99. Ms. Reynolds signaled compassion that a reasonable attorney could see as helping the defense. Ms. Reynolds'

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14 Ramey relies on a post-judgment affidavit from Ms. Reynolds in which she expresses surprise at her selection as a juror. Respondent argues that the Court cannot consider the affidavit under Rule 606(b) of the Federal Rules of Evidence which specifically limits the admissibility of juror testimony during an inquiry into the validity of a verdict. Here, however, the affidavit does not expressly fall within Rule 606(b)'s prohibition because it relates to voir dire, not the juror's statements, impressions, or reaction to outside factors directly impacting the "validity of a verdict." *See Austin v. Davis*, 647 F. App'x 477, 493 (5th Cir. 2016); *see also Hatten v. Quarterman*, 570 F.3d 595, 602-03 (5th Cir. 2009). The affidavit, however, is not useful because Ms. Reynolds does not express any actual bias.

jury questionnaire showed that she was "right in the middle" and able "to consider all the choices, albeit life or death, and let the facts of the case and the facts of the defendant decide it." Tr. Vol. 13 at 69. Ramey has not shown that counsel needed to ask any additional questions of Ms. Reynolds about the death penalty.

4. Wind

Finally, Ramey contends that Juror Wind could not be impartial because of knowing information about the case. Juror Wind said she had close ties with Edna, Texas, the location of the murders. She read things in the paper about the case. She had discussed the murders with others. Tr. Vol. 24 at 36. Trial counsel did not ask Juror Wind if she had any bias, likely because Juror Wind had already told the prosecutor that her true knowledge of the murders was spotty and that she had not formed an opinion about the case. Tr. Vol. 24 at 33-34. Ramey has not shown that a reasonable attorney should have asked her more questions.

In the end, Ramey has not shown that any of the challenged jurors harbored views that would have resulted in dismissal for cause. As the state habeas court found, Ramey's complaint "simply reveals claims that [his] trial counsel did not conduct the voir dire in a manner in which [his] present counsel would conduct voir dire. . . . [A]ll of these claims are simply based upon tactics . . . ." State Habeas Record at 155. Ramey has not shown that trial counsel provided deficient performance, or that actual prejudice resulted, from the questions he asked on voir dire.

C. Agreement to Excuse by Consent

The parties agreed to dismiss thirty-nine veniremembers based on their answers to the written juror questionnaire, without any individual voir dire.[15] Without identifying which jurors he refers to, Ramey contends that "[a]t least 15 of those prospective jurors who were 'excused by agreement' were clearly not challengeable for cause based on their answers to the questionnaire." (Dkt. No. 30 at 75). Ramey contends that trial counsel's failure to require adequate questioning of those jurors violated his rights.

No authority requires all potential jurors to be questioned. Texas law allows excusal by the consent of parties. *See* TEX. CODE CRIM. PRO. art. 35.05. Here, Ramey does not allege that the summary excusals were based on race or any impermissible factor other than individual feelings about the death penalty. Ramey does not specify which potential jurors were removed by consent, but could have been rehabilitated with additional questioning. Even if trial counsel agreed to remove all jurors unequivocally opposed to or in favor of a death sentence, such an approach falls within an area reserved traditionally for strategic decision making. *See Teague*, 60 F.3d at 1172. Ramey has not shown *Strickland* deficient performance or prejudice with regard to this claim.

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[15] It does not appear that Ramey exhausted this portion of his claim in state court. Respondent, however, does not move for dismissal of the claim on that basis.

D. Dismissal of Mary Natividad

Ramey argues that trial counsel allowed potential juror Mary Natividad to be excused without any voir dire. The parties agreed to dismiss Ms. Natividad based only on her questionnaire showing general opposition to the death penalty. Tr. Vol. 16 at 21. When the State observed that Ms. Natividad answered that "she not only has been opposed to the death penalty now, but she has been opposed in the past," trial counsel responded, "[a]s much as I would like for her to be here, she is really on absolutes." Tr. Vol. 16 at 21.

Because Ramey did not exhaust this portion of his claim in state court, it is procedurally barred. The Court, however, alternatively finds that Ramey's briefing on this matter does not strongly show deficient performance or prejudice in trial counsel's choice to allow dismissal of Ms. Natividad. Trial counsel could tactically agree to her excusal for various reasons, none of which would questionably result from deficient legal performance. Ramey has not shown that he can overcome the procedural bar or that this argument merits relief.

E. The Prosecutor's Alleged Misstatements of Law

Finally, Ramey contends that trial counsel provided deficient performance by not objecting when the prosecutor misstated the law.[16] The prosecutor repeatedly told jurors that the mitigation special issue was the only opportunity to give mitigating evidence any effect. Under Texas law, however, a jury can consider and give effect to some mitigating

[16] Again, it is not clear that Ramey exhausted this portion of his claim. Respondent, however, does not ask for dismissal on exhaustion grounds.

evidence through the future dangerousness special issue. *See Scheanette v. Quarterman*, 482 F.3d 815, 826 n.64 (5th Cir. 2007) (listing several categories of evidence that jurors can consider under the future-dangerousness issue). Ramey has shown that trial counsel probably missed a viable objection and an opportunity to provide jurors a correct understanding of the law.

Even if the prosecution misstated the law, a great deal of time had passed and much had happened before the jury deliberated Ramey's punishment. The jury had heard significant evidence and argument in both phases of trial, making it unlikely they remembered the complained-of statements. The Court is "skeptical that, by the time their . . . deliberations began, the jurors would have remembered the explanations given during voir dire, much less taken them as a binding statement of the law." *Penry v. Johnson*, 532 U.S. 782, 801 (2001).

Jurors had a full ability to give effect his evidence under the mitigation special issue which ameliorated any harm from the prosecutor's misstatement. At any rate, before deliberations began, the trial court correctly instructed jurors on how to consider the evidence in answering the special issues. Because courts presume that juries will follow their instructions, *see Zafiro v. United States*, 506 U.S. 534, 540 (1993); *Richardson v. Marsh*, 481 U.S. 200, 209 (1987), the jury charge cured any error during voir dire. *See Styron v. Johnson*, 262 F.3d 438, 454 (5th Cir. 2001) (finding that, despite prosecutor's misstatement of the law during voir dire, there was no constitutional error because the court properly instructed the jury in accordance with law). Given the significant amount of time, evidence, and testimony that the jury had to consider after hearing the prosecutor's statements, and in light of the correct jury instructions, "[t]he comments of . . . counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on . . . [Ramey's] sentence." *Penry*, 532 U.S. at 802. Ramey has not shown *Strickland* error with regard to this portion of claim two.

In sum, Ramey has not shown any constitutional error with regard to claim two, much less that the state court's adjudication of his claim was unreasonable.

III. Juror Excluded for Expressing Reservations about the Death Penalty. (Claim Three)

Ramey contends that his constitutional rights were violated "because veniremember Laurilyn F. Warren was excluded from the jury simply because she expressed reservations about the death penalty." (Dkt. No. 30 at 80). Exclusion of prospective jurors "hesitant in their ability to sentence a defendant to death" without any limitations violates the Fourth and Fourteenth Amendments. *Morgan v. Illinois*, 504 U.S. 719, 732 (1992); *see also Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968). The State must demonstrate through questioning that the potential juror it seeks to exclude lacks impartiality, and the judge must then determine whether the state's challenge is proper. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985). The key issue is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams*, 448 U.S. at 45). The state habeas court issued explicit factual findings relating to Ms. Warren's dismissal. This Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Fuller v. Johnson*, 114 F.3d 491, 500-01 (5th Cir. 1997).

While Ramey contends that Ms. Warren was dismissed "simply for expressing a reservation about the death penalty" (Dkt. No. 30 at 80), the record reveals her concerns about the death penalty were not the only, or even most important, reason the trial court removed her for cause. At the beginning of her questioning, Ms. Warren said that she was "definitely more opposed" to the death penalty than for it. Tr. Vol. 22 at 279, 290. In subsequent questioning she said "depending on the circumstances [she] could vote for a death penalty." Tr. Vol. 22 at 291. "[B]ecause of [her] answers to the opposition to the death penalty," the prosecution then engaged Ms. Warren in questions about her ability to consider the evidence under the beyond-a-reasonable-doubt standard. Ms. Warren subsequently provided waffling opinions about how she would consider evidence in a capital case.

Ms. Warren told the prosecutor that she would hold the State to a higher standard in a death case. Tr. Vol. 22 at 299. After trial counsel's questioning rehabilitated her, Tr. Vol. 22 at 301, Ms. Warren again said she would require a "greater quantum of proof" in a capital case than another criminal action. Tr. Vol. 22 at 309. Trial counsel's subsequent questioning extracted that Ms. Warren "hope[d] that she could follow what the Judge tells her to do" regarding the reasonable-doubt standard. Tr. Vol. 22 at 310.

The prosecution then challenged Ms. Warren for cause:

The State:	Now this is the classic vacillating juror. She has vacillated but she has clearly stated on at least two if not three occasions that she would require a greater burden of proof than beyond a reasonable doubt which she would establish, and based on that the State would challenge for cause.
Trial counsel:	Your Honor, I think in all due respect I think that the prosecution tried to testify for the witness. The witness said she could follow the standards. This is not one that's challengeable for cause, and if they want to exercise a peremptory strike that's fine, but this one's not challengeable for cause. This juror says she can follow the law.
The Court:	Well, just in the interest of time if – would the State want to proceed with more examination of the witness?
The State:	Oh, absolutely, Judge
The Court:	Yeah.
The State:	There's many other issues that I don't think she would be able to – I think she would probably fall on, but whatever.
The Court:	All right. The challenge is granted.

Tr. Vol. 22 at 310–311.

Here, Ramey contends that the trial court dismissed Warren because of her opposition to the death penalty, but in reality her vacillation on the beyond-a-reasonable-doubt standard precluded her jury service. With regard to her dismissal on that ground, the state habeas court found no error because "she would impose a greater burden of proof upon the State in a capital murder case than in other cases." State Habeas Record at 148. Even though "upon questioning by [Ramey's] trial counsel she testified she would follow the law and the evidence," after "further questioning by the State the venireperson again stated she would require a greater burden of proof in a death penalty case." State Habeas Record at 148. The state habeas court found that Warren "was the classic vacillating juror and the State's challenge for cause was granted because she had a bias against a rule of law the State was entitled to rely upon in the trial of this cause." State Habeas Record at 148.

Here, the trial court could reasonably conclude that Warren would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following [her] oath[.]" *Witt*, 469 U.S. at 423. Ms. Warren went back-and-forth in her answers, yet the best she could say is that she "hope[d]" to apply the reasonable-doubt standard correctly. Tr. Vol. 20 at 309-10. As the trial court clearly could have been "left with the definite impression that [Ms. Warren] would be unable to faithfully and impartially apply the law," *Witt*, 469 U.S. at 426, the trial court had a reasonable basis for granting the State's challenge for cause. *See Drew v. Collins*, 964 F.2d 411, 417 (5th Cir. 1992) (finding no error in dismissing juror who on occasions indicated that he would hold the State to a higher burden of proof in a death case). The state habeas court's rejection of this claim was not an unreasonable determination of the facts. The Court will deny this claim.

IV. Knowingly Presenting False Testimony and Suppressing Evidence. (Claim Four)

Ramey's fourth ground for relief raises three arguments: (1) the State presented false testimony through trial witnesses Otis Santellana and Gerald Manzanalez; (2) the State suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 82 (1963) relating to plea deals, pending charges, prior statements, and plea agreements for numerous witnesses; and (3) the State violated Ramey's constitutional rights by delaying the signing of a witness' plea agreement until after trial. Ramey did not exhaust any of these arguments in state court. The unexhausted nature of these issues bars federal review unless Ramey can show cause and prejudice. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004).

Ramey summarily argues that "[t]he State's misconduct, combined with the ineffectiveness of Dr. Willie for failing to conduct an adequate pretrial investigation and object to the testimony described below at trial, and the ineffectiveness of state appellate counsel and state habeas counsel for failing to later raise these issues, all serve as the 'cause and prejudice' of any potential procedural default." (Dkt. No. 30 at 88). In reality, Ramey for the most part bases his procedural arguments on the merits of his claims. Before turning to his arguments, and alternatively the merits, the Court makes the following observations about Ramey's cause-and-prejudice briefing.

First, ineffective assistance by his prior attorneys cannot forgive the procedural bar of these issues. Ramey alleges that all his prior attorneys were ineffective for not raising the barred claims, but does not provide specific briefing on how their efforts did not comply with the deficient performance and actual prejudice prongs in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ramey has not shown that his prior attorneys can even serve as cause in this case. Appellate counsel cannot raise extra-record claims on direct appeal. *See Whitehead v. State*, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004). The Supreme Court has said that ineffective assistance of habeas counsel can only forgive *Strickland* claims involving trial counsel's representation. *See Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058 (2017). Ramey cannot show cause by blaming his prior attorneys for not raising these arguments.

Second, Ramey largely briefs the "cause" component without providing any briefing specifically addressing the "actual prejudice" requirement. In this circuit, "actual prejudice" requires the petitioner to "establish not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008); *see also Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013); *Barrientes v. Johnson*, 221 F.3d 741, 769 (5th Cir. 2000). Ramey simply assumes that the merits of the claim justifies finding cause and prejudice. Ramey, however, does not provide specific briefing on actual prejudice.

The Court will review whether Ramey has otherwise overcome the procedural bar or, alternatively, whether this claim has merit.

A. False Testimony

Ramey argues that the prosecution presented false evidence at trial. In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Supreme Court explained that the prohibition against false testimony is "implicit in any concept of ordered liberty." *See also Giglio v. United States*, 405 U.S. 150, 154 (1972). "In order to establish a *Napue* violation, the defendant must show (1) the statements in question are actually false; (2) the prosecution knew that the statements were false; and (3) the statements were material." *United States v. Haese*, 162 F.3d 359, 365 (5th Cir. 1998). Ramey argues that "[t]he State knowingly presented false testimony from several witnesses," (Dkt. No. 30 at 87), but only provides argument concerning witnesses Gerald Manzanalez and Otis Santellana.

1. Manzanalez

Manzanalez testified that he helped Ramey and Christopher Times break into Kenneth Nairn's residence and steal firearms. After the murder, Ramey told Manzanalez that he threw two of the stolen pistols "off the dam." Tr. Vol. 31 at 31. The State used Manzanalez's testimony, along with that from Times, to tie Ramey to the murder weapons.

During his trial testimony, the prosecution asked Manzanalez if he had "any kind of deal, or anything worked out as far as you getting something for your testimony today?" Tr. Vol. 31 at 17. Manzanalez answered, "No." Tr. Vol. 31 at 17. Ramey argues that "Manzanalez was less than forthcoming" because "[d]uring a 2014 interview with Petitioner's investigator, Mr. Manzanalez stated that he was aware that the State had offered a lenient disposition of his pending burglary charges, in exchange for his testimony – before he testified at Mr. Ramey's trial." (Dkt. No. 30 at 90).

Ramey claims that the prosecution should have corrected Manzanalez's testimony. "The prosecution must . . . reveal the contents of plea agreements with key government witnesses." *California v. Trombetta*, 467 U.S. 479, 485 (1984) (citing *Giglio v. United States*, 405 U.S. 150 (1972)). Ramey has developed evidence suggesting that Manzanalez had received a plea offer from the State, though he had not yet formalized the deal. Manzanalez has provided an affidavit in which he says that the State made him a plea offer for the charges stemming from his involvement in the Nairn robbery. (Dkt. No. 30, Ex. 65). He was "sure that [he] knew" of the deal before testifying or, in his words, "I would not have testified against [Ramey] had I not understood that I would get a deal." (Dkt. No. 30, Ex. 65).

Ramey supports this argument with criminal history records showing that the State indicted Manzanalez for several charges before trial, but he pleaded guilty fifty-one days after trial with a recommendation if he agreed "to testify truthfully against co-defendants including . . . Ramey at any of Ramey's trials, including capital murder trial." (Dkt. No. 30, Ex. 62). Also, time records from Manzanalez's attorneys show they had engaged in plea negotiations six months before trial, though no contact with the prosecution resumed until Manzanalez pleaded guilty.

As an initial matter, Ramey has not shown cause or prejudice to overcome the procedural bar of this portion of his claim. Cause "constitut[es] something external to the petitioner, something that cannot fairly be attributed to him, that impeded compliance with the State's procedural rule." *Maples v. Thomas*, 565 U.S. 266, 293 (2012). Ramey contends that the State's misconduct, ostensibly in suppressing evidence of the plea deal, and ineffective representation by his former attorneys forgives his failure to raise this claim. (Dkt. No. 30 at 88). The record, however, does not contain any evidence that the State suppressed the information serving as a basis for this claim. A diligent investigation could have uncovered Manzanalez's plea agreement, his attorneys' time records, and, presumably, his testimony as recorded in his affidavit. The record does not suggest that Ramey's prior attorneys could not have uncovered the material his current ones have discovered.

He has also not shown actual prejudice. Manzanalez's testimony was important to connect Ramey to the murder weapons. But it was not the only testimony that did so. Norman and Times likewise testified about the robbery of the Nairn residence that put the murder weapon in Ramey's possession.[17] Ramey told Bradford Butler that he stole guns from the Nairn residence. Other witnesses testified about Ramey's disposal of the weapon after the murders, including the individual who led the police to the weapon. And, importantly, Ramey repeatedly told other people about his involvement in the crime. Ramey has not shown that any failure to disclose the pending plea deal harmed the defense. Ramey's *Napue* claim relating to Manzanalez's testimony is procedurally barred.

Even if the Court could reach the merits of this issue, the Court would alternatively deny relief because Ramey has not shown that any false testimony from Manzanalez was material. Testimony is material if "in any reasonable likelihood [it could] have affected the judgment of the jury." *Giglio*, 405 U.S. at 154; *see also Wearry v. Cain*, ___ U.S. ___, 136 S.Ct. 1002, 1006 (2016). The evidence supporting Ramey's conviction was solid. Manzanalez provided incriminating details, but significant other testimony connected Ramey to the Nairn robbery and subsequent murders. Even if the existence of a deal may have allowed jurors to view Manzanalez's testimony with skepticism, trial counsel told jurors that Manzanalez's testimony "has no bearing on the

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17 The prosecutor referred to Manzanalez and Times together in closing arguments. Tr. Vol. 35 at 27, 73-76.

guilt or innocence on Mr. Ramey as to whether or not he committed the offense of capital murder." Tr. Vol. 35 at 29. Any false testimony about Manzanalez's plea agreement was not material to trial.

2. Santellana

Ramey also contends that Otis Santellana testified falsely. Santellana was incarcerated in a cell near Ramey before trial. Santellana testified that Ramey disclosed several details about the crime, including that Ramey shot one of the victims. Ramey argues that Santellana provided false testimony when he said that law enforcement officers did not ask him to talk to Ramey. Also, Ramey argues that the State fed Santellana details about the crime.

As an initial matter, Ramey has also not overcome the procedural bar of this issue. In addition to not showing any external impediment that would amount to cause, Ramey has not shown actual prejudice. Santellana was one of a parade of witnesses who described Ramey's incriminating admissions. Ramey told other witnesses, such as Stacey Johnson, about the murders in much greater detail than he did Santellana. Norman provided extensive testimony about Ramey's role in the killings. Ramey has not shown cause or actual prejudice to forgive the procedural bar of this portion of claim four.

The Court observes, alternatively, that Ramey does not support his arguments relating to Santellana with competent evidence. Ramey relies on two documents to support this claim. First, Ramey relies on a document allegedly containing Santellana's account of jailors instructing him to secure information about the murders from Ramey.

Ramey's federal habeas investigator apparently drafted the document as an affidavit, but Santellana would not sign it. (Dkt. No. 30, Ex. 69). While Ramey provides an affidavit from his investigator vouching for the contents of the document, the unsigned document still is not competent evidence.

Second, Ramey provides an affidavit from a jailor explaining events that happened soon after Ramey was incarcerated. The jailor saw Santellana, who had a reputation for being a "snitch," in a long meeting with other jailors. Afterwards, "it was obvious what was going on" because Santellana was heard asking Ramey questions about the murders. (Dkt. No. 30, Ex. 67). The jailor's affidavit, however, demonstrates that she lacks personal knowledge about any agreement. The jailor's statement that it was "completely obvious . . . that [Santellana] was asked to get certain information from Ramey during that meeting," shows that she bases her opinion in conjecture, not knowledge.

Ramey, therefore, provides no competent evidence to substantiate his claim that Santellana was an agent of the State when Ramey divulged details about the murder to him. Without anything more than his own speculation, Ramey cannot show cause or actual prejudice to overcome the procedural bar of this claim.

Alternatively, even considering his evidence, Ramey has failed to show that any falsity in Santellana's testimony was material. Ramey agues that "Santellana's testimony provided details that supported the State's theory of the case, and was one of the few coherent hearsay narratives." (Dkt. No. 30 at 93). Santellana's testimony was not the only, and far from the most detailed, account of the crime. Ramey confessed to other witnesses in jail. Ramey detailed various elements of his role in the crime to others before his incarceration. And Norman provided a complete description of the killings. Even if he could show that the prosecution knowingly adduced false testimony from Santellana, Ramey has not shown that it was material.

B. *Brady*

Ramey argues that the prosecution violated his due process rights by suppressing evidence. Specifically, Ramey argues that the prosecution suppressed: (1) prior criminal offenses committed by witnesses Christopher Times, Kevin Childs, Otis Santellana, Myron Hardaway, Jonathan Snyder, and LeJames Norman; (2) outstanding criminal charges against Childs; (3) a prior statement that Santellana gave to investigators but was turned over to the defense three days after his trial testimony; and (4) the fact that the prosecution coerced Norman into testifying against Ramey by threatening to prosecute his mother for aiding in his flight from prosecution.[18]

"There are three components to a *Brady* violation. First, the evidence must be favorable to the accused, a standard that includes impeachment evidence. Second, the State must have suppressed the evidence. Third, the defendant must have been prejudiced." *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). Cases often add a fourth requirement: "nondiscovery of the allegedly favorable evidence was not the result of a lack of due diligence." *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003); *see also Graves v. Cockrell*, 351 F.3d 143, 153–54 (5th Cir. 2003). "When evidence is equally available to both the defense and the prosecution, the defendant must

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[18] Ramey also alleges that the prosecution suppressed the evidence discussed above. The Court's discussion relating to the false-evidence claim applies with equal force to any related *Brady* claim.

bear the responsibility for failing to conduct a diligent investigation." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002).

Ramey first contends that the State did not turn over information about various witnesses' prior criminal offenses and pending criminal charges. Ramey, however, does not have any affirmative proof that the prosecution withheld information about witnesses' prior crimes. Ramey has not secured any affidavit in which trial counsel expresses surprise at the witnesses' criminal convictions and other information that was not discussed at trial. Instead, Ramey says that he reviewed trial and habeas counsel's records and did not find any information about the criminal convictions.

The State had an open file policy in this case. Tr. Vol. 3 at 14. The State sent the defense a great deal of information, but also allowed the defense to visit and review the prosecutor's files. Tr. Vol. 4 at 4. Ramey has not shown that the prosecution kept information about criminal histories secret. Ramey's speculation does not give rise to a *Brady* claim.

Moreover, the criminal convictions and charges at issue were matters of public record. "*Brady* rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence." *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983); *see also United States v. Infante*, 404 F.3d 376 387 (5th Cir. 2005) (holding no *Brady* violation occurs where the complained of evidence is a matter of public record, obtainable upon request). The fact that the witnesses were all currently jail inmates or had participated in criminal acts with Ramey would have alerted the defense to research their criminal histories.[19] The State, in fact, referred to some of the allegedly undisclosed offenses during the inmates' testimony. Tr. Vol. 34 at 93, 143-44, 190. For those reasons, Ramey has not shown a *Brady* violation regarding the witnesses' criminal records.

Next, Ramey argues that the police did not turn over a statement that Santellana gave until three days after his trial testimony. Santellana gave the police voluntary statements on December 13 and December 15, 2005. The defense had a copy of the second statement, but did not receive the first until after Santellana had been returned to TDCJ custody. Ramey, however, has not shown that the failure to turn over the December 13, 2005 statement was material. The parties discussed the issue and trial counsel said that, even though the defense did not have the statement, the prosecution had allowed the defense to review the notes an investigator had taken of the statement. (Dkt. No. 30, Ex. 16 at 5). Trial counsel also said:

> I have looked at that statement, and everything else. There are some discrepancies between the first and the second statement of which, if we decide that there's enough of a discrepancy, we will address it with the Court in a motion for new trial, if we feel that there is enough of a discrepancy. If there's not enough of a discrepancy, there will be no issue with it at all.

(Dkt. No. 30, Ex. 16 at 4-5). Trial counsel did not file a motion for new trial or otherwise describe what discrepancies exist between Santellana's statements.

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[19] The record contains a defense exhibit labeled "trial witnesses" in which the defense noted that Norman and Childs were in jail. Tr. Vol. 43, DX-4. Hardaway testified that he was in prison for burglary of a habitation. Tr. Vol. 34 at 190. Snyder testified that he was in the Jackson County jail for a parole violation. Santellana testified that he in TDCJ custody for escape, aggravated assault with a deadly weapon, and possession of a firearm by a felon. Only Times was not currently incarcerated, but was under deferred adjudication for his role in the Nairn robbery. Tr. Vol. 31 at 48. Jurors could visibly see from their handcuffs and jail attire that the other witnesses had committed crimes, and further details about those crimes would have taken little away from what credibility they had.

Likewise, Ramey makes no effort to show what differences exist between Santellana's statement and the trial testimony. Indeed, the best Ramey can say is that "the suppressed statement may constitute impeachment evidence." (Dkt. No. 30 at 102). Ramey, however, provides no description of the alleged differences, much less briefing on how that would have affected the fairness of his trial. Ramey has not sufficiently briefed a *Brady* claim regarding Santellana's prior police statements.

Finally, Ramey argues that the prosecution should have divulged that fact that it coerced Norman into testifying against Ramey by threatening to prosecute his mother for aiding in his escape. During his flight before arrest, Norman's mother traveled to "the U.S. and Mexico border to get [Norman] to return to Edna, Texas." (Dkt. No. 30, Ex. 72). The district attorney later spoke with Norman's mother and, she recounts: "I may also have been told that I might be in trouble for my trip to the border." (Dkt. No. 30, Ex. 72). Norman's mother then avers:

> Soon after the meeting with [the prosecutor] Mr. Bell and those other people, I went to see my son LeJames in the Jackson County jail. LeJames *told me* that Bobby Bell *told him* that he was going to *put me*, his mama, in prison for 10 years for that trip to the border if LeJames didn't cooperate and testify in the capital cases that LeJames and Ker'Sean Ramey were charged with.

(Dkt. No. 30, Ex. 72) (emphasis added). Respondent points out that Norman's mother provides only a hearsay recitation of the purported reason for which Norman chose to testify. Such hearsay is an insufficient basis to craft a *Brady* claim.[20] In this case,

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[20] In his own trial, Norman explained why he testified against Ramey. At no point in his testimony did he suggest that he felt any degree of coercion from the State to do so. *Norman v. Davis*, No. V-012-cv-54, DE 10, Tr. Vol. 95 at 108-163.

Norman's own testimony does not suggest that he testified from coercion, and the hearsay laden affidavit is insufficient to show that prosecutorial coercion forced his cooperation. Ramey has not shown cause and prejudice to overcome the procedural bar. Alternately, this claim lacks merit.

C. Delayed Signing of Santellana's Plea Deal and the Confrontation Clause

Ramey finally argues that the State violated the Confrontation Clause when it "delayed the signing of Gerald Manzanalez's plea agreement until after [his] trial had concluded." (Dkt. No. 30 at 110). Ramey contends that not disclosing the proposed plea deal denied him the opportunity to cross-examine Manzanalez about its contents. This argument lacks a sturdy factual or legal foundation. Ramey builds this claim on an unproven factual premise, that the State intentionally halted Santellana's plea negotiations and then hid any information about them. The record instead suggests that Santellana had not yet agreed to the terms of that deal when he testified. Ramey also bases his argument on a false legal premise. Ramey concedes that "a plurality of the Supreme Court has opined that the Confrontation Clause does not extend to a state's nondisclosure of evidence before trial." (Dkt. No. 30 at 110, n.41); *see Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987). Federal habeas review is not the forum for the creation of new constitutional law. Ramey's proposed Confrontation Clause claim violates the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 301 (1989). Without a legal or factual foundation, Ramey's Confrontation Clause claim cannot overcome the procedural bar or command habeas relief.

D. Conclusion

This Court's review of Ramey's unexhausted arguments shows that (1) he has not demonstrated cause and prejudice to overcome their procedural defects and (2) that they lack merit. The Court will deny Ramey's fourth ground for relief.

V. Trial Counsel Provided Ineffective Assistance During Pre-trial Investigation and in the Guilt Phase. (Claim Six)

In a dense, meandering claim, Ramey faults numerous features of trial counsel's pre-trial investigation and guilt/innocence representation. Among arguments dealing with failures in the development and presentation of evidence and testimony, Ramey intersperses general criticism of his trial attorneys, and most particularly Willie. For instance, Ramey contends that Willie's schedule was overloaded and that he did not spend enough time developing Ramey's case. Federal law, however, does not require a specific quantum of hours before a capital investigation is constitutionally adequate. The Court's concern is on what counsel did not investigate, develop, or present, and how that would have made a difference.

Ramey's sixth claims centers on three areas. First, Ramey contends that trial counsel should have interviewed certain trial witnesses better, more-intensely challenged Norman's testimony, shown that the State deliberately used Santellana to secure information against him, and sought exclusion of Myron Hardaway's testimony. Second, Ramey claims that trial counsel failed to use readily available impeachment evidence, particularly the criminal histories of witnesses Childs, Snyder, Times, Manzanalez, and Ceasar. Finally, Ramey argues that trial counsel should have relied on a ballistics expert to dispute the State's evidence against him.

A. Procedural Default Law

Ramey did not exhaust the allegations from his sixth claim in state court. The Court of Criminal Appeals would apply its abuse-of-the-writ doctrine to keep Ramey from raising those issues in a successive state habeas application, thus resulting in a federal procedural bar. *See Coleman*, 501 U.S. at 736 n.1. The Court can forgive the procedural bar if "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law . . . ." *Id*. at 750.

Ramey relies on *Martinez v. Ryan*, 566 U.S. 1 (2012), to argue that deficiencies in state habeas counsel's representation provide cause. A federal habeas petitioner relying on *Martinez* must make three important showings before the Court can consider the underlying defaulted *Strickland* claim. First, an inmate must show that "his claim of ineffective assistance of counsel at trial is substantial – *i.e.*, has some merit . . . ." *Cantu v. Davis*, 665 F. App'x 384, 386 (5th Cir. 2016); s*ee also Allen v. Stephens*, 805 F.3d 617, 626 (5th Cir. 2015).

Second, an inmate must "show that habeas counsel was ineffective" for not raising the underlying *Strickland* claim. *Garza*, 738 F.3d at 676. A court applies traditional *Strickland* jurisprudence and "indulge[s] a strong presumption that [habeas] counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Courts recognize that habeas counsel "'who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Vasquez v. Stephens*, 597 F. App'x 775, 780 (5th Cir. 2015) (quoting *Smith v. Robbins,* 528 U.S. 259, 288 (2000)). In order to prove ineffective assistance, the defendant must demonstrate that "'a particular nonfrivolous issue was clearly stronger than issues that counsel did present.'" *Vasquez*, 597 F. App'x at 780 (quoting *Robins*, 528 U.S. at 288).

Third, even after showing cause flowing from habeas counsel's representation, an inmate still must demonstrate "actual prejudice." *Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014); *see also Martinez*,132 S.Ct. at 1321 (remanding for an assessment of actual prejudice). The Fifth Circuit has held that, even after showing cause under *Martinez*, an inmate must show actual prejudice by "establish[ing] not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Hernandez*, 537 F. App'x at 542; *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986); *United States v. Frady*, 456 U.S. 152, 170 (1982). At a minimum, actual prejudice requires an inmate to show a reasonable probability that he would have been granted state habeas relief had his habeas counsel's performance not been deficient. *See Barbee v. Davis*, 660 F. App'x 293, 314 (5th Cir. 2016)*; Newberry v. Stephens*, 756 F.3d 850, 872 (5th Cir. 2014).[21]

[21] This Court's analysis of the prejudice requirement would be the same if considered only under *Strickland*'s reasonable-probability-of-a-different-result standard.

This Court's review of Ramey's *Martinez* arguments, placed in the proper context of the prior proceedings, shows that he cannot overcome the procedural deficiencies.

B. Weaknesses in Ramey's Sixth Claim

Before turning to the question of habeas counsel's representation, the Court makes some observations about weaknesses in Ramey's federal claim. Lacking physical evidence at the crime scene, Tr. Vol. 31 at 173, 178-82, the State relied heavily on the testimony of those involved in crimes with Ramey and those to whom he confessed.[22] Relying on affidavits and other evidence, Ramey's sixth claim intends to chip away at the credibility of various trial witnesses. Ramey, however, overstates the effect his new evidence would have had.

For example, Ramey claims that counsel failed to interview witnesses Childs, Manzanalez, Snyder, DeLeon, Santellana, Times, and Myron Hardaway. Ramey claims that interviewing Childs would have shown that he "was coerced into giving a statement against Mr. Ramey." (Dkt. No. 30 at 143). Childs' affidavit, however, does not provide any evidence of coercion. Instead, Childs describes how during interviews after an escape attempt he "was told to let the sheriff deputies know if I heard anything from Ramey or Norman about the triple homicide," which he subjectively took as "they were saying that they had me on this escape, so I better cooperate." (Dkt. No. 30, Ex. 64).

[22] Ramey made incriminating statements to: Stacy Johnson, Tr. Vol. 31 at 192-197, 206-210; Bradford Butler, Tr. Vol. 34 at 490-544; Cortney Hardaway, Tr. Vol. 34 at 172-174, 184-187; Otis Santellana, Tr. Vol. 34 at 100-1076; Marvin Ceasar, Tr. Vol. 34 at 136-138; Jonathan Snyder, Tr. Vol. 34 at 145-147; Kevin Childs, Tr. Vol. 34 at 159-161; Myron Hardaway, Tr. Vol. 34 at 192-194; and Lonnie Lyte, Tr. Vol. 31 at 224-25.

Childs' subjective perception of what the police meant does not necessarily prove coercion.

Also, as discussed previously, Ramey has not provided competent evidence for some of his allegations. Ramey relies on hearsay allegations and unsworn affidavits to impeach testimony by Manzanalez, Santellana, and Times. Likewise, as previously discussed, if trial counsel called jailor DeLeon as a witness she could only say that it was her impression that Santellana had been told to get information from Ramey. (Dkt. No. 30, Ex. 67).

Ramey particularly emphasizes trial counsel's cross-examination of Norman, arguing he (1) failed to challenge Norman's testimony on the grounds that the State coerced him by threatening to prosecute his mother; (2) failed to cross-examine Norman about his long criminal record; and (3) failed to ask Norman about his violent escape from jail and his pending escape charges. The defense, however, extensively cross-examined Norman on other grounds, particularly his multiple statements to police and during the grand jury testimony which conflicted with trial testimony. Tr. Vol. 33 at 132–99, 211–12.

Some of the evidence only would have made a marginal difference at trial. Ramey faults trial counsel for not using the criminal histories from Childs, Snyder, Times, Manzanalez, and Ceasar to dispute their testimony. The jury knew that each of those men had committed crimes. With the exception of Times, who testified that he was on deferred adjudication, each of those men were in state custody at the time of trial.

Additional testimony about their crimes may not have undercut their testimony any more significantly than their obvious status as inmates.

Finally, Ramey does not verify all his allegations. For example, Ramey also faults trial counsel for not retaining an expert in ballistics. The State's expert could only say that the victims were shot by bullets sharing characteristics as those fired from the murder weapons, Tr. Vol. 33 at 97-126. Trial counsel, however, extensively cross-examined witnesses regarding issues relating to the weapons. Ramey has not shown what different conclusions an independent expert in ballistics would have reached. With extensive testimony linking Ramey to the weapons the police recovered, his various incriminating statements, and Norman's testimony, a reasonable attorney could choose not to employ a ballistics expert.

With that understanding, the Court looks at the evidence from trial which Ramey does not challenge in this claim.

C. Evidence Unaffected by Ramey's Sixth Claim

This Court's inquiry into state habeas counsel's failure to raise the indicated *Strickland* claim assesses not just the evidence counsel did not present, but the whole of the incriminating evidence from trial. *See Sears v. Upton*, 561 U.S. 945, 954-55 (2010); *Trevino v. Davis*, 861 F.3d 545, 554 (5th Cir. 2017). Even taking Ramey's *Strickland* arguments into account, other witnesses whose testimony is unaffected by his federal claims provided testimony putting the events into a highly incriminating context. Without actually saying that he killed anyone, Ramey asked Lonny Lyte, "If you was to kill somebody, what would you do with the guns?" Tr. Vol. at 224-25. Lyte told him to throw them in a river. Tr. Vol. 31 at 225. Jessica Castro said that Ramey called her on the night of the murders and asked her to make up and alibi for her. Tr. Vol. 34 at 22. Ramey also asked Courtney Hardaway to form an alibi for him. Tr. Vol. 34 at 169. Ramey's cousin Bradford Butler testified that he saw Ramey and Norman with the murder weapons on the night of the crime. Tr. Vol. 34 at 41-75.

Evidence unaffected by Ramey's habeas arguments show his involvement in the crime. Ramey told his girlfriend Stacey Johnson that he stole the murder weapons from the Nairn residence. Tr. Vol. 31 at 215.[23] Ramey confessed to Johnson that the pistols he disposed of were used in the triple homicide. Tr. Vol. 31 at 205-06. She later helped the police recover the weapons. Tr. Vol. 31 at 202-03. Ramey repeatedly told others, such as Johnson, that he was involved in the murders and how they happened. Tr. Vol. 31 at 206-07. In particular, Ramey told Johnson that he shot all three victims. Tr. Vol. 31 at 205-210. Ramey told Courtney Hardaway about the murders, but said that the victims "got shot" without identifying whether he or Norman did the shooting. Tr. Vol. 34 at 172–74. While bragging, joking, and laughing about the crime, Butler heard Ramey say that he shot Tiffany Peacock in the head. Tr. Vol. 34 at 54.

The State presented testimony that Ramey had confessed to numerous inmates. Ramey points to areas in which a trial attorney could have challenged much of that

[23] Other evidence tended to corroborate the accounts. Stacy Johnson testified that she helped Ramey stash weapons, Tr. Vol. 30 at 153-54, and later helped him dispose of pistols, Tr. Vol. 30 at 158-69; Tr. Vol. 31 at 195-97. Richard Wright, the principle at Edna High School, testified that he received information indicating Ramey and Norman were involved in the murders, but a hearsay objection preventing him from offering any additional testimony. Tr. Vol. 32 at 91. The State presented Wright's testimony to show how the police came to suspect Ramey's involvement in the murders. Tr. Vol. 30 at 40

testimony, his arguments do not completely eviscerate their testimony, only create issues of credibility for jurors to resolve.

With all that evidence, Ramey has not shown prejudice had counsel performed consistent with his federal arguments, particularly given the decision jurors had to make. Counsel faced an onerous task in crafting a guilt/innocence defense. The jury instructions made that task harder. The State prosecuted Ramey both as a principal and as a party to the murders. Clerk's Record at 173. The jury found that Ramey was the principal, so it did not have to answer whether or not the evidence would have allowed for his conviction even if he had not been the shooter. Clerk's Record at 176. Still, the jury instructions allowed for his conviction if "acting with intent to promote or assist the commission of the murder or murders," he "any solicited encouraged directed aided or attempted to aid LeJames Norman" in them. Clerk's Record at 173. The State could have convicted Ramey without showing that he fired the killing shots.

With that strong evidence against his client, trial counsel rested without calling any witnesses. Ramey himself approved that decision on the record. (Dkt. No. 30, Ex. 16 at 6-7).

D. *Martinez*

Ramey now attacks numerous elements of the trial testimony against him through the prism of habeas counsel's representation. A competent state habeas attorney could reasonably forgo extensive investigation and argument challenging the guilt/innocence testimony in favor of expending resources in more productive areas. More to the point, the avalanche of evidence against Ramey would preclude the state habeas court from granting relief had habeas counsel raised the claims alleged in the federal petition. Given the overwhelming evidence in the guilt/innocence phase, and in light of the nature of the claims Ramey contends should have been raised, Ramey has not shown that he meets the *Martinez* exception to the procedural bar doctrine. And with a broad review of the trial evidence placed in the context of Ramey's federal allegations, he has not shown actual prejudice. Claim six is procedurally barred from federal review.[24]

VI. Trial Counsel Provided Ineffective Representation in the Penalty Phase. (Claim Seven)

Ramey argues that trial counsel provided prejudicial performance in the penalty phase. Ramey concedes that he exhausted this claim in state court, but acknowledges that his state habeas claim "did not contain the level of detail or reflect the abundant investigation conducted by" his federal attorneys. (Dkt. No. 30 at 191). The Court can only consider arguments and evidence that Ramey exhausted in state court. The Supreme

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[24] That is not to say that the prior attorneys' efforts were perfect. A zealous state habeas attorney could have raised the Strickland claims contained in the federal petition, and possibly others. A reasonable state habeas attorney, however, could also decide not to raise them. *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). For the same reasons discussed above, the Court alternatively finds that Ramey has not shown *Strickland* deficient performance and prejudice with respect to his underlying allegations against trial counsel.

Court in *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), has made it clear that federal habeas review "focuses on what a state court knew and did." "The import of *Pinholster* is clear: because [Ramey's] claims have already been adjudicated on the merits, § 2254 limits [federal] review to the record that was before the state court." *Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012).

Ramey argues that "[b]oth common sense and Fifth Circuit precedent hold that the mitigation evidence gathered for a federal habeas petition that was not presented at any lower level may be excused under the *Martinez/Trevino* standard." (Dkt. No. 49 at 130). The Fifth Circuit, however, has held that "*Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted." *Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014); *see also Villanueva v. Stephens*, 619 F. App'x 269, 276 (5th Cir. 2015); *Allen v. Stephens*, 619 F. App'x 280, 290 (5th Cir. 2015). Once a state habeas court has denied a claim on the merits, *Martinez* "may not function as an exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court." *Escamilla*, 749 F.3d at 395. Simply, "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. 420, 437 (2000). This Court, therefore, will only consider the issues Ramey exhausted in state court.

Ramey's state habeas claim focused on showing a "clear lack of preparation" in the presentation of testimony which caused "a breakdown in the adversarial process." State Habeas Record at 49. Ramey argued that his trial attorney failed to "investigate the life of the client, uncover any and all evidence tending to counsel for life, including appropriate diagnostic testing and evaluations, and present that evidence to the jury in a clear understandable manner." State Habeas Record at 49. Ramey criticized trial counsel for "only present[ing] two witnesses," his mother and gerontological psychologist Mark Kunik. State Habeas Record at 49. Ramey particularly emphasized that trial counsel should have secured the services of a different, better-prepared punishment phase expert.

Ramey, however, did not support his allegations with any evidence. Ramey did not explain what experts counsel should have called, provide any indication of which uncalled witnesses should have testified, develop any previously undiscovered mitigating theories, verify what more witnesses could have told jurors, or otherwise substantiate his habeas claim.

The unsupported nature of Ramey's truncated claim led the state habeas court to find that he "failed to show that [a future dangerousness] expert was available in this case," "what such an expert could have presented in the case," and "that such an expert could have presented any testimony which was likely to bring about a different result." State Habeas Record at 155-56. Similarly, the state habeas court found that Ramey "fails to even suggest as to how [an] expert could have been successfully prepared to meet the successful cross-examination conducted by the prosecution." State Habeas Record at 156. The state habeas court denied relief because the "record does not affirmatively demonstrate the alleged ineffectiveness of trial counsel and this claim of ineffective assistance of counsel should be denied." State Habeas Record at 156.

Based on the information Ramey presented, the state habeas court's decision was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). The defense's punishment-phase testimony and evidence was not extensive. Trial counsel called only two witnesses, Ramey's mother and Dr. Kunik. The decision to rely only on those witnesses, however, was not on the shoulders of trial counsel alone. Trial counsel said on the record that they had "discussed the witnesses at length at both the guilt-innocence phase and the mitigation phase, the punishment phase, and we also discussed the potential witnesses with the client, including his own testimony, prior to the decision of being made to call only those two witnesses." (Dkt. No. 30, Ex. 16 at 6-7). Ramey agreed with trial counsel's statement. (Dkt. No. 30, Ex. 16 at 6-7).

In state habeas court, Ramey complained about trial counsel's efforts without showing what he should have done. A habeas petitioner challenging his trial attorney's punishment investigation "must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial." *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005); *see also Greer v. Thaler*, 380 F. App'x 373, 386 (5th Cir. 2010); *Carty v. Quarterman*, 345 F. App'x 897, 903 (5th Cir. 2009). An inmate cannot only allege that his attorney should have called more or different witnesses. He "must name the [uncalled witnesses] 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) (citing *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985)). Constitutional error cannot rest on the naked assertion that trial counsel should have done more, for "speculations as to what [uncalled] witnesses would have testified is too uncertain." *Alexander*, 775 F.2d at 602; *see also Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2002) ("[C]omplaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what the witness would have testified are largely speculative."). Because Ramey did not verify what more trial counsel could have done, the state habeas court's decision was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

The full argument Ramey makes on federal review shows that trial counsel could have done much more. The strictures of federal review, however, preclude federal consideration of information Ramey did not present to state court. AEDPA precludes relief on the claim Ramey exhausted in state court and review of any issues he did not exhaust there. The Court will deny this claim.

VII. The Admission of Unreliable Testimony by an Expert Witness Violated Ramey's Rights. (Claim Nine)

Ramey's ninth claim argues that his Eighth Amendment rights were violated by the State's use of an expert who allegedly based his opinion on unreliable methodology. The punishment phase required the jury to answer whether "there is a probability that [Ramey] would commit criminal acts of violence that would constitute a continuing threat to society?" State Habeas Record at 193. The prosecution sought to introduce expert testimony from Dr. Richard Coons, a psychiatrist, regarding Ramey's future dangerousness. Trial counsel requested that the trial court hold a *Daubert*/*Kelley*[25] hearing to examine Dr. Coons' qualifications and the methodology underlying his opinions. State Habeas Record at 178; Tr. Vol. 38 at 26-36. After questioning by the parties, the trial court allowed him to testify. Tr. Vol. 38 at 65-84.

As the State's final witness, Dr. Coons explained that he had not interviewed Ramey but based his testimony on reviewing extensive records. Tr. Vol. 38 at 71, 74. From the amount of information he reviewed, Dr. Coons felt that he could reasonably assess whether Ramey would be a future societal danger. In response to a hypothetical question, Dr. Coons testified that a person such as Ramey would "commit criminal acts of violence in the future which would constitute a continuing threat to society." Tr. Vol. 38 at 81.

Trial counsel cross-examined Dr. Coons and attempted to point out weaknesses in his testimony, particularly because he did not examine Ramey personally. Tr. Vol. 39 at 83-84.

Ramey first challenged Dr. Coons' testimony on direct appeal. Construing his arguments as attacking Dr. Coons' qualifications, the Court of Criminal Appeals held that the trial court did not err in finding him qualified as a expert witness under Rule 703 of the Texas Rules of Evidence. *See Ramey*, 2009 WL 335276 at *14-15.[26]

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[25] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

[26] Ramey argues that "[t]he Court of Criminal Appeals of Texas construed Mr. Ramey's attack on Dr. Coons' methodology as merely an attack on Dr. Coons' qualifications, and thus did not review the trial court's assessment of Dr. Coons' methodology." [DE 30 at 193, n.57]. Ramey's appellate brief discussed various concerns about Dr. Coons' testimony. The Court of Criminal Appeals' emphasis on his qualifications, however, is understandable because Ramey argued that, "[c]utting straight to the chase, during the *Daubert* hearing the State failed to show that

Ramey also challenged Dr. Coons' testimony in his habeas application, clarifying that his habeas claim was the same "as presented in [his] direct appeal." State Habeas Record at 8, 60. The trial-level habeas court found that Dr. Coons' testimony was admissible:

> Dr. Coons held both a law degree and medical degree, served in the United States Army Medical Corp and was a consultant for Brooke Army Medical Center; was certified by the Board of Psychiatry and Neurology, trained in neurology and psychiatry and had been in private practice more than 30 years. Dr. Coons was properly qualified as an expert witness and his testimony was relevant and assisted the trier of fact to determine the issue of [Ramey's] future dangerousness.

State Habeas Record at 160.[27]

During the pendency of Ramey's habeas action, the Court of Criminal Appeals issued *Coble v. State*, 330 S.W.3d 253, 270 (Tex. Crim. App. 2010), which concluded that the State had not shown the scientific reliability of Dr. Coons' testimony under Texas Rule of Evidence 702. *Coble*, however, found that Dr. Coons' testimony did not violate the Eighth Amendment's heightened reliability standard and was not harmful. *Coble*, 330 S.W.3d at 270, 287. Because the *Coble* case questioned the state-law basis for admitting Dr. Coons' testimony, the Court of Criminal Appeals set Ramey's case for submission and ordered additional briefing. *Ex parte Ramey*, 2011 WL 1288284 at *1. Ultimately, the Court of Criminal Appeals held that (1) Ramey's state-law challenge to Dr. Coons' testimony was not cognizable on habeas review and (2) his testimony did not

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Dr. Coons was qualified to give an opinion as to the future dangerousness of the Defendant" Brief of Appellant at 20

[27] Additionally, the trial-level habeas court observed: "These contentions were raised on direct appeal by [Ramey] and found to be without merit by the Court of Criminal Appeals. This court adopts the findings and conclusions of the Court of Criminal Appeals on these issues." State Habeas Record at 160.

violate the heightened reliability requirement of the Eighth Amendment. *See Ex parte Ramey*, 382 S.W.3d 396, 397 (Tex. Crim. App 2012).

Ramey renews his federal and state law challenges to Dr. Coons' testimony on federal review. Ramey first contends that Dr. Coons' testimony was unreliable, and thus inadmissible, under Rule 702 of the Texas Rules of Evidence because his methodology was "not in line with the state of the art of his field," "completely subjective and unsubstantiated by reference to any source other than [Dr. Coons'] own conclusory statements," and without information about the "error rate of his predictions." (Dkt. No. 30 at 199). Federal courts, however, do "not sit to review the mere admissibility of evidence under state law." *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998). "A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling violates a specific federal constitutional right or is so egregious that it renders the petitioner's trial fundamentally unfair." *Kittelson v. Dretke*, 426 F.3d 306, 320 (5th Cir. 2005) (quotation omitted). The Fifth Circuit has found that Dr. Coons' testimony in a similar case was sufficiently reliable for presentation in federal court, *see United States v. Fields*, 483 F.3d 313, 345 (5th Cir. 2007), suggesting that the state court's admission of his testimony was not so egregious that his trial was unfair.

Ramey also argues that psychiatric evidence of future dangerousness does not meet *Daubert*'s standards for admissibility, thus violating the Eighth Amendment's heightened reliability requirement in capital cases. In rejecting this claim, the Court of Criminal Appeals relied on *Barefoot v. Estelle*, 463 U.S. 880 (1983), a case in which the

Supreme Court refused to prohibit categorically all psychological predictions of future dangerousness from capital sentencing proceedings. The *Barefoot* court specified:

> The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel. In the first place, it is contrary to our cases. If the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L.Ed. 2d 929 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.

Id at 899.

The Fifth Circuit has repeatedly relied on *Barefoot* to approve the admissibility of future dangerousness testimony similar to that given by Dr. Coons. *See Roberts v. Thaler*, 681 F.3d 597, 608-09 (5th Cir. 2012); *Fields*, 483 F.3d at 343-45. In particular, the Fifth Circuit has "consistently held that *Daubert* did not overrule *Barefoot* for the proposition that expert testimony regarding future dangerousness is permissible . . ." *Gonzales v. Stephens*, 606 F. App'x 767, 774 (5th Cir. 2015); *see also Holiday v. Stephens*, 587 F. App'x 767, 783 (5th Cir. 2014); *Johnson v. Cockrell*, 306 F.3d 249, 253-55 (5th Cir. 2002). In fact, the Fifth Circuit has held that "*Daubert* does not apply to the standards governing the admissibility of expert evidence at a capital sentencing hearing." *Williams v. Stephens*, 761 F.3d 561, 571 (5th Cir. 2014). The Fifth Circuit has found that similar challenges to Dr. Coons' testimony "present[] no cognizable Eighth Amendment claim." *Coble v. Davis*, ___ F. App'x ___, 2018 WL 1611434, at *3 (5th

Cir. 2018). With that legal precedent, Ramey has not shown constitutional error in the admission of Dr. Coons' testimony.

Ramey has not shown that the state court's decision regarding this claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

VIII. Alternative Review of Claims Five, Eight, Ten, and Eleven

Ramey did not raise claims five, eight, ten and eleven in a timely manner and he does not merit equitable tolling. Even if Ramey had timely filed those claims, the unexhausted nature of the untimely claims adds a second layer of procedural hurdles to federal adjudication. Federal review only becomes available after a showing of cause and actual prejudice.

A. Exhaustion of Claims Eight, Ten, and Eleven

Claims eight, ten, and eleven challenge the representation provided by Ramey's prior attorneys. Claim eleven is not a ground for relief, but rather argues that ineffective assistance of prior attorneys acts as cause to forgive any default. The Court, therefore, summarily denies claim eleven.

Claim eight argues that the cumulative effect of his attorneys' errors violated Ramey's rights and claim ten argues that appellate counsel provided ineffective representation by not raising any unexhausted claims. To overcome the procedural bar of those claims, Ramey relies on the ineffective assistance of his prior attorneys under *Martinez*. The Supreme Court, however, has held that *Martinez* only allows review of ineffective-assistance-of-trial-counsel claims. *See Davila v. Davis*, __ U.S. __, 137 S. Ct. 2058, 2070 (2017). *Martinez* only applies to the portion of claim eight arguing cumulative error from trial counsel's efforts. This Court, however, has considered Ramey's arguments about trial counsel's representation and found no error to cumulate. Ramey, therefore, has not shown that state habeas counsel missed a meritorious, and potentially successful, habeas claim by not raising cumulative error. Ramey has not overcome the procedural bar of claims eight, ten, and eleven.

B. Exhaustion of Claim Five

Claim five argues that the State used Otis Santellana to elicited information from Ramey in violation of *Massiah v. United States*, 377 U.S. 201 (1964). Ramey argues that he could not discover this claim before federal review because the State violated *Brady* by suppressing its factual basis. A *Brady* violation may establish cause to excuse procedural default. *See Banks v. Dretke*, 540 U.S. 558, 691 (2004); *Strickler v. Greene*, 527 U.S. 263 (1999).

As discussed previously, Ramey does not present any competent evidence that Santellana was a state actor sent to secure testimony from him. Further, Ramey has not shown that he could not have secured during state habeas review the same unconvincing evidence on which he bases his federal habeas claim. Also, as the Court discussed previously, any impropriety in Santellana's testimony is not material in light of the significant – and overwhelming – testimony of others to whom Ramey confessed his involvement in the crime. The Court finds that Ramey has not overcome the procedural bar of claim five. Additionally, even if the full merits of claim five were before the Court, Ramey does not provide competent evidence that shows that a material constitutional error deprived him of a fair trial.

C. Conclusion

Ramey has not shown that he can overcome the procedural bar of his time-barred claims or that they merit federal habeas relief. The Court would deny relief if claims five, eight, ten, and eleven were fully available for judicial review.

CERTIFICATE OF APPEALABILITY

Under AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a Certificate of Appealability ("COA"). *See* 28 U.S.C. § 2253(c). Ramey has not yet requested that this Court grant him a COA, though this Court can consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). The Fifth Circuit anticipates that a court will resolve any questions about a COA in the death-row inmate's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "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 I*, 537 U.S. at 336-38. On the other hand, a district court that has denied habeas relief on procedural grounds should issue a COA "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 I*, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Ramey's petition raises issues worthy of judicial review. Nevertheless, having considered the merits of Ramey's petition, and in light of AEDPA's standards and controlling precedent, this Court determines that a COA should not issue on any claim.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Respondent's motion for summary judgment (Dkt. No. 40) and **DENIES** Petitioner Ker'sean Olajuwa Ramey's Petition for Writ of Habeas Corpus (Dkt. No. 7) **WITH PREJUDICE**. All outstanding motions are otherwise **DENIED**. A Certificate of Appealability is **DENIED** with respect to all claims.

It is so ORDERED.

SIGNED on this 9th day of July, 2018.

Kenneth M. Hoyt
United States District Judge

APPENDIX D

Opinion, *Ramey v. Lumpkin*, No. 18-70034
(5th Cir. 2021)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 29, 2021
Lyle W. Cayce
Clerk

No. 18-70034

Ker'sean Olajuwa Ramey,

Petitioner—Appellant,

versus

Bobby Lumpkin, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 6:13-CV-43

Before Smith, Higginson, and Duncan, *Circuit Judges*.

Stephen A. Higginson, *Circuit Judge*:

A Texas jury found Ker'sean Olajuwa Ramey guilty of capital murder and imposed the death penalty for his role in the murders of Celso Lopez, Tiffani Peacock, and Sam Roberts. Ramey challenged his conviction and sentence both on direct appeal and through state habeas proceedings, but the Texas courts denied his requests for relief. The United States District Court for the Southern District of Texas again rejected Ramey's claims for relief and his request for a certificate of appealability ("COA"). This court granted Ramey's application for a COA on two issues: (1) whether Ramey's trial was tainted by the exclusion of black jurors (the "*Batson* Claim"), and (2) whether trial counsel rendered unconstitutionally ineffective assistance before trial and during the guilt phase of trial by failing to conduct an adequate investigation (the "*Strickland* Claim"). *Ramey v. Davis*, 942 F.3d 241, 246 (5th Cir. 2019). For the reasons articulated herein, we AFFIRM the district court's denial of Ramey's habeas petition.

I.

A.

Other courts have detailed the facts of this case, *see Ramey v. Davis*, 314 F. Supp. 3d 785 (S.D. Tex. 2018); *Ramey v. State*, No. AP-75,678, 2009 WL 335276 (Tex. Crim. App. Feb. 11, 2009), but we repeat the critical ones here for completeness.

On August 25, 2005, the bodies of Celso Lopez, Tiffani Peacock, and Sam Roberts were found at Roberts's home. They each had been shot multiple times. The Texas Department of Public Safety Crime Unit ("DPS") collected fingerprints and other items from the scene. This physical evidence yielded no immediate suspects.

In November 2005, investigators received an anonymous tip implicating Ramey, LeJames Norman,[1] and two others in the crime. Investigators interrogated Ramey on December 12, 2005, at a Texas detention center where he was being held on unrelated charges. Ramey did not confess to the crimes and was arrested for capital murder.

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[1] Norman pleaded guilty for his role in the triple murder, and a jury sentenced him to death. *Norman v. Stephens*, 817 F.3d 226, 228 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1201 (2017).

At trial, the State presented testimony from numerous witnesses. The trial evidence showed that, a few days before the shooting, Ramey and others broke into the home of a neighbor, Kenneth Nairn, to steal weapons. The group stole approximately 25 guns and ammunition.

Norman testified that, soon after the Nairn burglary, he and Ramey decided to rob the home of his neighbor, Sam Roberts, because Norman believed that Roberts had at least a kilogram of cocaine at his residence. In preparation for the robbery, Norman testified that Ramey agreed to carry a short-barrel Harrington & Richardson .22 revolver, and Norman agreed to carry a long-barrel Rohm Gesellschaft .22 revolver. Both weapons originated from the Nairn burglary.

Norman testified that, on the day of the triple homicide, Norman and Ramey entered Roberts's apartment and they fatally shot Celso Lopez, Tiffani Peacock, and Sam Roberts—with Ramey shooting Roberts twice and Lopez once, and Norman shooting Lopez once, Peacock once, and Roberts three times. The pair fled back to Norman's house, which was across the street. Upon realizing they had left a police scanner at the crime scene, Ramey returned to retrieve it. According to Norman, while inside the house, Ramey shot Peacock once and shot Lopez three times. The State's ballistic expert gave testimony consistent with Norman's account, testifying that a Harrington & Richardson revolver was used to shoot Roberts twice, Lopez three times, and Peacock once, while a Rohm Gesellschaft revolver was used to shoot Roberts three times, Lopez once, and Peacock once.

The next day, Roberts's mother and father discovered their son's, Peacock's, and Lopez's bodies. Ramey and Norman watched from Norman's front porch as law enforcement investigated the crime scene. Norman testified that Ramey disposed of the weapons used in the crime by throwing them off the edge of a local dam. Ramey's former girlfriend, Stacey

Johnson, testified that she drove Ramey to the dam three days after the murders and accompanied him while he disposed of two revolvers. During the drive home from the dam, Johnson testified that Ramey told her about the murders and threatened to kill her if she revealed his role in the murders to police. Four months later, Johnson led investigators to the dam and indicated to law enforcement precisely where Ramey had thrown the weapons. A dive team recovered both weapons. Other weapons from the Nairn burglary were found hidden under floorboards at Ramey's house.

Although the State presented extensive testimonial evidence, there was no physical evidence—fingerprints, DNA, blood, or hair samples—connecting Ramey to the crime scene or either of the alleged murder weapons recovered from the dam. Further, the DPS firearm examiner was unable to determine conclusively whether any of the bullets recovered from the victims and crime scene had been fired by the alleged murder weapons.

B.

On December 17, 2005, the State of Texas indicted Ramey for capital murder and burglary of a habitation. Ramey pleaded not guilty to both offenses and the case proceeded to trial.

Voir dire lasted more than a month, from October 30, 2006 to December 14, 2006. To select a jury, the parties cycled through two venire panels totaling 184 people. The first venire panel contained seven black venire members. However, none of these venire members was selected as jurors: the State challenged five for cause, and two were excused because of their biological relationship to Ramey. After one month of voir dire and after exhausting one venire panel, the parties had selected eleven jurors and needed three more. The eleven jurors included ten white people and one Hispanic person.

A second venire panel consisting of 49 venire members was called on December 4, 2006. When the venire panel was first seated, four of the first ten venire members would have been black. However, the State requested a jury shuffle before the venire members began answering any questions. Defense counsel requested a race-neutral reason for the State's shuffle, and the State explained that "the overwhelming majority of the folks that . . . would be good State's jurors were towards the back of the panel." Defense counsel did not pursue the objection further. After the shuffle, there were two black venire members among the first dozen to be questioned.

The first black venire member to be questioned was Cheryl Steadham-Scott. During voir dire, Steadham-Scott expressed what might be described as confusion, ambivalence, or reservation concerning the death penalty. Steadham-Scott was also asked a variety of race-specific questions, including her perception of the guilt or innocence of numerous famous black people. The State ultimately used a peremptory strike to remove her—the subject of Ramey's *Batson* Claim. At the time of the strike, no objection was registered. Ramey's trial counsel did object to the State's peremptory strike of Steadham-Scott the following court day, which was three weeks after the strike was exercised, but before the jury was sworn.[2] When challenged, the prosecutor's proffered reason for striking Steadham-Scott was that "her questionnaire clearly indicated that she could not impose the death penalty." In the end, there were no black people on Ramey's jury.

On January 16, 2017, after a four-day trial, the jury found Ramey guilty of capital murder after deliberating for just over an hour. Following the sentencing phase of the trial, and after deliberating for about 15 minutes, the

[2] The Christmas and New Year holidays intervened.

jury answered Texas's special issue questions in a manner requiring imposition of the death penalty.

C.

Ramey, through the same counsel who represented him at trial, appealed directly to the Texas Court of Criminal Appeals ("TCCA"). In that appeal, the TCCA rejected Ramey's *Batson* claim with respect to the jury shuffle because the State provided a race-neutral reason for the shuffle. *Ramey*, 2009 WL 335276, at *1–3. The court also rejected Ramey's *Batson* claim with respect to Steadham-Scott because it credited the State's race-neutral reason for striking her. *Id.* at *3 ("[T]he record supports the trial court's ruling that the State struck Steadham-Scott because of her inconclusive opinions on the death penalty and not her identity as an African–American."). On direct appeal, Ramey did not claim ineffective assistance of counsel. The TCCA rejected Ramey's remaining claims on direct appeal and affirmed Ramey's conviction and sentence. *Id.* Ramey's petition for a writ of certiorari to the U.S. Supreme Court was denied. *Ramey v. Texas*, 558 U.S. 836 (2009).

Through separate, appointed counsel, Ramey also filed a state application for a writ of habeas corpus. The same judge who presided over Ramey's trial sat as a habeas reviewer and made habeas recommendations to the TCCA. In his habeas application, Ramey raised twenty-two claims, including that the jury selection process violated *Batson* (claims 13 and 14) and that trial counsel was constitutionally ineffective during voir dire and during the punishment phase (claims 15 and 16).[3] The judge entered an order

[3] At the state habeas stage, Ramey did not raise the *Strickland* Claim that he now raises, which is that trial counsel was constitutionally ineffective before trial and during the guilt phase by failing to conduct an adequate investigation.

recommending that the TCCA deny habeas relief. With respect to Ramey's *Batson* claim, the judge concluded that the State's use of the jury shuffle and peremptory strike of Steadham-Scott were not racially motivated and, in the alternative, that the *Batson* claim had been "waived" because Ramey "fail[ed] to object" immediately. The TCCA denied Ramey's request for habeas relief. *Ex parte Ramey*, 382 S.W.3d 396, 398 (Tex. Crim. App. 2012).

Ramey subsequently filed a federal petition for a writ of habeas corpus that listed five claims and "incorporate[d] into his claims for relief the claims filed in his direct appeal brief and in his state habeas application." After his initial federal habeas counsel withdrew and new federal habeas counsel was appointed, Ramey amended his filing, raising six additional claims. The district court denied relief and denied a COA in a lengthy opinion. *Ramey*, 314 F. Supp. 3d at 831–32.

With respect to Ramey's *Batson* Claim, the district court found that the State's use of its peremptory strike on Steadham-Scott was the result of "serious concerns about [her] ability to impose the correct burden on the future-dangerousness issue" for imposing the death penalty, not her "identity as an African-American." *Id.* at 804–07. With respect to Ramey's guilt-phase *Strickland* Claim, the district court held the claim was procedurally defaulted because Ramey did not raise it in state habeas proceedings. *Id.* at 822–23. The district court also concluded that Ramey's state habeas counsel's failure to (or decision not to) raise the claim did not satisfy the cause-and-prejudice standard. *Id.* The district court opined that the underlying claim was weak. *Id.* at 823–25 & n.24. Accordingly, the district court entered final judgment dismissing Ramey's claims with prejudice. Ramey then filed a post-judgment Rule 59(e) motion, which the district denied. Ramey timely applied to this court for a COA on three issues, and this court granted Ramey's application as to two issues: (1) whether Ramey's trial was tainted by the exclusion of black jurors (the "*Batson*

Claim"); (2) whether trial counsel rendered unconstitutionally ineffective assistance before trial and during the guilt phase of trial by failing to conduct an adequate investigation (the "*Strickland* Claim"). *Ramey*, 942 F.3d at 246.

II.

We first consider Ramey's *Batson* Claim. He argues that an unconstitutional and discriminatory jury selection process tainted his trial. He contends that the State's peremptory strike of Cheryl Steadham-Scott was a violation of the Equal Protection Clause. *See* U.S. CONST. amend. XIV, § 1.

A.

Ramey's *Batson* Claim is subject to the deferential standard set out in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") because it was adjudicated by Texas courts on the merits. 28 U.S.C. § 2254(d). Under that standard, also known as the relitigation bar, we may grant habeas relief only if the Texas courts' adjudication of Ramey's *Batson* Claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . ; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*; *Dale v. Quarterman*, 553 F.3d 876, 879 (5th Cir. 2008).

A state court's decision is contrary to clearly established precedent if it "contradicts the governing law set forth in [the Supreme Court's] cases" or if the state court confronts facts that are materially indistinguishable from a decision of the Supreme Court yet reaches a different result. *Wooten v. Thaler*, 598 F.3d 215, 218 (5th Cir. 2010) (alteration in original) (quoting *Wallace v. Quarterman*, 516 F.3d 351, 354 (5th Cir. 2008)). If fair-minded jurists could disagree about whether the state court's decision was correct, deference under AEDPA precludes federal habeas relief. § 2254(d)(1); *see* *also Harrington v. Richter*, 562 U.S. 86, 101 (2011). In a habeas appeal, this court reviews legal conclusions de novo and factual findings for clear error. *Perez v. Cain*, 529 F.3d 588, 593 (5th Cir. 2008). This court presumes the state court's factual findings are correct unless rebutted with clear and convincing evidence. *Wooten*, 598 F.3d at 218.

B.

Before addressing the merits of Ramey's *Batson* Claim, we first reject Texas's procedural default, abandonment, and waiver arguments.

Texas first argues that Ramey's *Batson* Claim is procedurally defaulted because he failed to contemporaneously object to the State's strike of Steadham-Scott before the state trial court judge. This argument fails because Ramey's *Batson* challenge was timely under Texas law. In Texas, a *Batson* challenge must be raised "before the court has impanelled the jury." TEX. CODE CRIM. PROC. art. 35.261(a). In Texas, "[a] jury is considered impaneled when the members of the jury have been both selected and sworn." *Heard v. State*, 887 S.W.2d 94, 99 (Tex. App. 1994). Thus, in Texas, "[b]y objecting before the jury [i]s sworn, [a defendant] timely raise[s] the *Batson* issue." *Brown v. State*, 56 S.W.3d 915, 918 (Tex. App. 2001); *Hill v. State*, 827 S.W.2d 860, 862–65 (Tex. Crim. App. 1992). The record indisputably reflects that Ramey raised his *Batson* objection before the jury was sworn in. Ramey complied with Texas's procedural rule for registering a timely *Batson* objection and, thus, there is no procedural default.

Next, Texas argues in a footnote that Ramey abandoned his *Batson* Claim immediately after making his objection. Texas notes that, after the prosecutor provided purportedly race-neutral reasons for striking Steadham-Scott, the trial court stated, "I'm comfortable with the record reflecting what it did with respect to that juror at this time." Ramey's counsel responded, "Yes, sir, yes, sir," and when the trial court judge asked if Ramey's counsel had "[a]nything else," Ramey's counsel responded, "No, sir." Texas argues that this constituted an abandonment of Ramey's *Batson* Claim because Ramey's counsel made no effort to show that the prosecutor's proffered reasons for striking Steadham-Scott were pretextual. Texas did not argue before the district court—or any other court—that Ramey's *Batson* Claim was abandoned at the trial court. Further, the state habeas court did not rely on this reasoning to reject Ramey's *Batson* Claim. We decline to find abandonment.

Finally, Texas argues that Ramey has forfeited any argument that his *Batson* Claim can surmount AEDPA's relitigation bar. Texas contends that Ramey's briefing completely disregards the relitigation bar and "reads like a normal appeal on direct review." We reject this argument because, as Texas acknowledges elsewhere, Ramey's briefing explicitly recognizes that his *Batson* Claim must surmount the relitigation bar. As Ramey notes, portions of his appellate briefing *do* read as if his arguments are being made on direct review because, if this court determines that he has surmounted the relitigation bar, this court will review his *Batson* Claim de novo. *Johnson v. Williams*, 568 U.S. 289, 303 (2013); *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

C.

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019). Claims challenging the use of race-based peremptory strikes require the application of *Batson*'s three-step test. A defendant must first make a prima facie case that race motivated the challenged strikes. *Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986). If the defendant carries this burden, the prosecutor must provide race-neutral reasons for the challenged strikes. *Id.*

at 97–98. Finally, at step three, the court considers whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98.

Under AEDPA, we may grant habeas relief, as relevant, only if the state habeas court's adjudication of Ramey's *Batson* Claim "'resulted in a decision that . . . involved an unreasonable application' of the relevant law." *Panetti*, 551 U.S. at 953 (alteration in original) (quoting § 2254(d)(1)). "A state court's decision constitutes an unreasonable application of clearly established federal law if it is 'objectively unreasonable.'" *Gray v. Epps*, 616 F.3d 436, 439 (5th Cir. 2010) (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (2000)). "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

Ramey presents two primary arguments about why the state habeas court's adjudication clears AEDPA's relitigation bar.

First, Ramey argues that the state habeas court unreasonably applied clearly established federal law by considering justifications for the peremptory strike of Steadham-Scott that were never articulated at the trial court. Ramey notes that while the prosecutor's proffered reason for striking Steadham-Scott was because "her questionnaire clearly indicated that she could not impose the death penalty," the state habeas court concluded Steadham-Scott was struck because of her "inconclusive opinions on the death penalty." A reviewing court is not allowed to supply its own justifications for the striking of a particular juror when the prosecutor did not articulate that justification before the trial court. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("*Miller-El II*"); *Chamberlin v. Fisher*, 885 F.3d 832, 841 (5th Cir. 2018) (en banc). But here, the state habeas court characterized the prosecutor's stated reason for striking Steadham-Scott only slightly differently from the prosecutor's verbatim stated reason; it did not alter the basic reason the prosecutor gave for striking Steadham-Scott. This is not an unreasonable application of federal law, and this argument is insufficient to surmount AEDPA's relitigation bar.

Second, Ramey argues that the state habeas court unreasonably applied federal law because it failed to account for all relevant facts and circumstances when assessing whether the State's strike of Steadham-Scott was pretextual. Specifically, Ramey points to one juror who he contends expressed ambivalence or uncertainty about imposing the death penalty in her juror questionnaire similar to that expressed by Steadham-Scott—Carol Laza, a white juror.

At *Batson*'s third step, courts are generally required to consider the State's race-neutral explanations "in light of all of the relevant facts and circumstances." *Flowers*, 139 S. Ct. at 2243. The Supreme Court has identified circumstances that may bear on a *Batson* challenge: (1) a "side-by-side" comparison of a black venire member who was struck and a white venire member who was seated; (2) the ultimate racial composition of the jury; (3) statistical significance of peremptorily stricken venire members; (4) disparate questioning of black venire members; and (5) the State's use of a jury shuffle. *Miller-El II*, 545 U.S. at 241–53. The last state court to consider Ramey's claim did not undertake this analysis. Indeed, the record reflects that no state court has ever considered the full panoply of facts and circumstances when analyzing Ramey's *Batson* Claim.

But that does not render the state habeas court's decision contrary to clearly established federal law or an unreasonable application of it. This is because Ramey did not direct the state courts to what he now asserts are relevant facts and circumstances. Ramey cannot identify clearly established federal law requiring state courts *sua sponte* to find and resolve all facts and circumstances that may bear on whether a peremptory strike was pretextual and racially motivated when those facts and circumstances were not identified and urged by the strike's challenger.

Although the Supreme Court in *Miller-El II* conducted a comparative juror analysis for the first time on appeal, 545 U.S. at 241 nn.1 & 2, and the Court did the same in *Flowers*, albeit in a case beyond the strictures of AEDPA, 139 S. Ct. at 2249–50, it is not clearly established that habeas courts *must*, of their own accord, uncover and resolve all facts and circumstances that may bear on whether a peremptory strike was racially motivated when the strike's challenger has not identified those facts and circumstances. Indeed, in *Chamberlin v. Fisher*, this court sitting en banc held that "*Miller-El II* did not clearly establish any *requirement* that a state court conduct a comparative juror analysis at all, let alone *sua sponte*." 885 F.3d at 838. "This is especially true where, as here, the defendant never sought a comparative juror analysis." *Id.* at 839. *Chamberlin* reversed the district court for embracing the rule that a state habeas court's "decision not to conduct a comparative juror analysis [*sua sponte*] violated . . . 'clearly established law.'" *Id.* at 838.

As noted, Ramey did not direct the state habeas court to specific portions of the record suggesting evidence of pretext and racial bias. Ramey's state habeas claims *did* broadly note that the "facts and circumstances" surrounding a peremptory challenge can "suggest[] that the exclusion was racially motivated." Ramey also focused the state habeas court's attention on the State's jury shuffle by including it as a separate claim in his state habeas petition. But Ramey did not specifically assert the facts and circumstances that would bear on whether the peremptory strike of Steadham-Scott was racially motivated. Further, this court has observed that, for the relevant time period, "no case law indicated that *Batson* applied to an allegedly discriminatory jury shuffle," and the TCCA has "refused to extend *Batson* to jury shuffles." *Blanton v. Quarterman*, 543 F.3d 230, 241–242 (5th Cir. 2008). Because Ramey cannot identify clearly established federal law requiring state courts *sua sponte* to find and consider all facts and circumstances that may bear on whether a peremptory strike was racially motivated when those facts and circumstances were not identified by the strike's challenger, this argument is insufficient to surmount AEDPA's relitigation bar, and we are unable to grant relief on Ramey's *Batson* Claim.

III.

We next consider Ramey's *Strickland* Claim. In his federal habeas application, Ramey argued for the first time that his Trial Counsel[4] was constitutionally ineffective during pre-trial investigation and during the guilt-innocence phase of the trial. Specifically, Ramey alleges that his Trial Counsel engaged in no independent pre-trial investigation, which Ramey argues would have yielded impeachment material of the State's witnesses.

A.

Ramey did not present his *Strickland* Claim in state court. Nor can he now—the TCCA would apply its abuse-of-the-writ doctrine to prohibit Ramey from raising his unexhausted *Strickland* Claim in a successive state habeas application, an adequate and independent state ground. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991), *abrogated in part on other grounds by Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *Canales v. Stephens*, 765 F.3d 551, 566 (5th Cir. 2014). Ramey's claim is thus procedurally defaulted, *see Canales*, 765 F.3d at 566, and therefore not subject to the strictures of AEDPA, which requires an adjudication on the merits, *see* 28 U.S.C. § 2254(d). We pretermit whether Ramey can overcome the procedural default by

[4] Ramey was represented at trial by Dr. Joseph Rutherford Willie, II, D.D.S., J.D. and Mr. James Donald Evans, III (collectively, "Trial Counsel").

demonstrating "cause for the default and actual prejudice as a result of the alleged violation of federal law," *Coleman*, 501 U.S. at 750, and we instead "cut straight to the merits to deny his claim," *Murphy v. Davis*, 901 F.3d 578, 589 n.4 (5th Cir. 2018). We review the district court's conclusions of law de novo and factual findings for clear error. *Id.* at 590.

B.

To warrant relief, Ramey must demonstrate "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Proving deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Proving prejudice requires that Ramey show a "reasonable probability"—"a probability sufficient to undermine confidence in the outcome"—that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Adekeye v. Davis*, 938 F.3d 678, 683 (5th Cir. 2019) (prejudice requires showing that "it was 'reasonably likely' the jury *would* have reached a different result, not merely that it *could* have reached a different result"). When assessing prejudice, this court must "evaluate the totality of the available . . . evidence," including "evidence adduced in the habeas proceeding." *See Williams v. Taylor*, 529 U.S. 362, 397 (2000).

Ramey asserts that Trial Counsel's performance was deficient because they did not conduct any pre-trial investigation of the State's case against Ramey. He argues that this deficient performance prejudiced him because proper investigation would have yielded valuable impeachment material of the State's witnesses, which was particularly important because the State built its case against Ramey around testimony rather than physical evidence.

Indeed, the State's ballistics expert admitted that he could not say the guns recovered from the dam were the same guns used in the murders. The ballistics expert also could not say who fired the guns. Further, there was no physical evidence connecting Ramey to the crime scene. In the absence of physical evidence, the State relied on testimony from an array of witnesses to incriminate Ramey, many of whom, Ramey argues, Trial Counsel failed to properly investigate and then impeach.

We do not decide whether Ramey's Trial Counsel was deficient because we find that Ramey cannot meet his burden to show prejudice—that is, he has not shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Trevino v. Davis*, 861 F.3d 545, 549 (5th Cir. 2017). Although some of the witnesses presented by the State posed credibility issues that, according to Ramey, Trial Counsel could have exposed through proper investigation and impeachment, the parties do not dispute that other witness testimony was unaffected by alleged investigative error committed by Trial Counsel.

Indeed, the district court found that Ramey had not shown prejudice because the "witnesses whose testimony is unaffected by his federal claims provided testimony [that] put[] the events into a highly incriminating context" and "show [Ramey's] involvement in the crime." *Ramey*, 314 F. Supp. 3d at 824–25. We agree. This "unaffected" circumstantial evidence of Ramey's crime—including Ramey's direct confession—is overwhelming.[5]

[5] The district court painstakingly parsed government witnesses, highlighting incriminating testimony that would be unaffected by allegations of deficient trial investigation. *Ramey v. Davis*, 314 F. Supp. 3d at 824–25. These witnesses included Lonny Lyte (Ramey's stepfather), Courtney Hardaway (Ramey's former girlfriend and his

Notably, the testimony of Stacey Johnson, which the parties do not dispute is unaffected by Trial Counsel's alleged errors, is particularly damaging. Johnson, Ramey's former girlfriend, told the jury that Ramey admitted his involvement in the triple murder and that she assisted Ramey in disposing of the purported murder weapons. She testified that on August 27, 2005, Ramey called her and asked if she would drive him to a location with running water. Johnson agreed to take Ramey to a local dam. Johnson testified that during the drive, Ramey spoke on the phone with his stepfather, Lonny Lyte. Once they arrived at the dam, Johnson saw Ramey wipe off two pistols and throw them into the water. Johnson remembered precisely where Ramey disposed of the pistols and led investigators there to retrieve them four months later. Johnson testified that, during the drive home from the dam, Ramey admitted that the guns she watched him toss into the water were the same guns used in the triple murder. Once the pair arrived at Johnson's home, Ramey explained in detail how the triple murder played out. Johnson testified that Ramey admitted to shooting Lopez, Peacock, and Roberts. After telling Johnson about the triple murder, Ramey told Johnson he would kill her if she spoke to the police. Finally, Johnson testified that Ramey told her he stole the pistols used in the triple murder during the Nairn burglary.

Johnson provided the jury with facts that interlocked with and bolstered the testimony of numerous other witnesses, including other witnesses unaffected by Trial Counsel's alleged ineffectiveness. For example, her testimony is consistent with Lyte's testimony, which Ramey does not dispute is also unaffected by alleged pretrial investigative error that Trial Counsel committed. Lyte testified that, on August 27, 2005, Ramey

children's mother), Bradford Butler (Ramey's cousin), and Stacey Johnson (Ramey's former girlfriend). *Id*. We agree and elaborate above the prominent testimony of Stacey Johnson.

called him to ask: "If you was to kill somebody what would you do with the guns?" Lyte recommended throwing the guns in a river.

Ramey attempts to downplay Johnson's testimony by noting that her description of the guns Ramey threw into the water did not match the guns recovered by the dive team. This factual discrepancy does not negate Ramey's damaging admissions to Johnson. Ramey's other attempts to undermine Johnson's testimony also fail: (1) Ramey faults the State for seeking to elicit hearsay testimony from Johnson, but Trial Counsel objected to such testimony and the trial judge sustained the objection; (2) Ramey contends the State used leading questions to elicit testimony, but most of Johnson's testimony was not the result of leading questions; (3) Ramey complains that the State refreshed Johnson's recollection using her voluntary statement to police, but that tended to make her testimony more reliable because it was derived from a written record; and (4) Ramey states that Johnson had an "obvious motive to testify" against him, namely a feud with Ramey's new girlfriend—but the jury was made aware of this fact during cross-examination, and it seems improbable that, as a result of a domestic dispute, Johnson would be willing to testify against her ex-boyfriend, a man who had threatened to take her life if she spoke to the police, in a capital murder trial where his life was on the line. Lastly, Ramey asserts that Johnson's testimony was "contradicted by" Norman's testimony because, while Johnson testified that Ramey told her he shot all three victims, Norman testified that Norman shot at least one of the victims. But the statements are not inconsistent—it is possible that both Ramey and Norman shot the same victim at least once each.

Although some of the witnesses presented by the State posed potential credibility issues, the remaining and unaffected witness testimony, above all that of Stacey Johnson, assures us that those credibility issues do not "undermine confidence in the outcome" of the trial. *Trevino*, 861 F.3d at 549. For that reason, we do not grant relief on Ramey's *Strickland* Claim.

IV.

For the foregoing reasons, we AFFIRM the district court's denial of Ramey's habeas petition.

APPENDIX E

Petition for Writ of Cert., *Ramey v. Lumpkin*,
No. 21A133 (U.S. Dec. 23, 2021) (without attachments)

No. 21A133

IN THE

Supreme Court of the United States

KER'SEAN OLAJUWA RAMEY,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

****CAPITAL CASE****

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. In rejecting Ramey's claim for relief under *Batson* v. *Kentucky*, 476 U.S. 79 (1986) ("*Batson* Claim") and ignoring Ramey's argument that 28 U.S.C. § 2254(d)(2) entitled him to relief without addressing any of the considerations this Court's decisions identify as relevant to determining whether racial bias motivated the prosecution's exercise of a peremptory strike, did the Fifth Circuit decide that important federal question "in a way that conflicts with relevant decisions of this Court"? Sup. Ct. R. 10(c).

2. Did the Fifth Circuit err in denying Ramey a certificate of appealability ("COA") on his claim of ineffective assistance of counsel at the penalty phase ("Mitigation Claim"), given that reasonable jurists could debate whether the equitable considerations underlying *Martinez* v. *Ryan*, 566 U.S. 1 (2012) (as extended by *Trevino* v. *Thaler*, 569 U.S. 413 (2013)) ("*Martinez / Trevino*") demand a similar narrow exception to *Cullen* v. *Pinholster*, 563 U.S. 170 (2011) that would apply here?

3. Alternatively, did the Fifth Circuit err in denying Ramey a COA on the Mitigation Claim because reasonable jurists could debate whether the new evidence he developed in federal court fundamentally altered the claim that had been adjudicated on the merits in state court, thereby rendering it a new, unexhausted claim eligible for consideration in federal court via *Martinez / Trevino*?

LIST OF RELATED PROCEEDINGS

Criminal District Court of Texas (Jackson County):

- *Texas* v. *Ramey*, No. 05-12-7342 (Jan. 23, 2007)

Texas Court of Criminal Appeals:

- *Ramey* v. *Texas*, No. AP-75,678 (Feb. 11, 2009)
- *Ex parte Ramey*, No. AP-76,533 (Nov. 7, 2012)

United States District Court (S.D. Tex.):

- *Ramey* v. *Davis*, No. 6:13-CV-43, Docket No. 59 (July 11, 2018)
- *Ramey* v. *Davis*, No. 6:13-CV-43, Docket No. 65 (Nov. 16, 2018)

United States Court of Appeals (5th Cir.):

- *Ramey* v. *Davis,* No. 18-70034 (Nov. 1, 2019)
- *Ramey* v. *Lumpkin*, No. 18-70034 (July 29, 2021)
- *Ramey* v. *Lumpkin*, No. 18-70034 (Aug. 25, 2021)

United States Supreme Court:

- *Ramey* v. *Texas*, No. 08-10291 (Oct. 5, 2009)

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Petitioner Ker'Sean Olajuwa Ramey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The District Court's opinion denying habeas relief is reported at 314 F. Supp. 3d 785 (S.D. Tex. 2018). App.A at 1a. The Fifth Circuit's opinion granting a Certificate of Appealability ("COA") on the *Batson* Claim but denying a COA on the Mitigation Claim is reported at *Ramey* v. *Davis*, 942 F.3d 241 (5th Cir. 2019). App.B at 83a. The Fifth Circuit's opinion affirming the denial of habeas relief is reported at *Ramey* v. *Lumpkin*, 7 F.4th 271 (5th Cir. 2021). App.C at 108a.

JURISDICTION

The court of appeals granted in part and denied in part Ramey's application for a COA on November 1, 2019. App.B at 107a. Its judgment was entered on July 29, 2021, and a rehearing was denied on August 25. App.C at 128a; App.D at 129a. On November 5, Justice Alito extended the time to file this petition until and including December 23, 2021. Order, *Ramey* v. *Lumpkin*, No. 21A133 (S. Ct. Nov. 5, 2021). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Anti-terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

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

The Fourteenth Amendment to the Constitution provides, in relevant part:

> No State shall. . .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.

The Sixth Amendment to the Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Ker'Sean Olajuwa Ramey, a young Black man, was convicted of capital murder and quickly sentenced to death by a nearly all-white jury. The deck was stacked against him; Ramey had no chance of receiving a fair trial. His jury was handpicked by the prosecution ("State") in a voir dire infected with racial bias. Worse still, Ramey was represented by inexperienced and overburdened trial counsel—lead counsel was a lawyer, full-time dentist, and military reservist—who conducted

no independent investigation and was thus unprepared to defend Ramey at any stage of trial. This perfect storm paved the way for a guilty verdict and a death sentence even though **no physical evidence** tied Ramey to the crime. The jury deliberated only ***14 minutes*** before sentencing Ramey to death.

Ramey's state habeas counsel only made matters worse, also **failing to conduct any extra-record investigation.** He raised a wholly undeveloped ineffective assistance claim, which did not present any of the ample (and readily available) evidence showing that the penalty phase of Ramey's trial was botched by his trial counsel. Indeed, after considering Ramey's "full argument"—which was presented for the first time in federal court—both the District Court and Fifth Circuit agreed that "trial counsel could have done much more," (App.A at 73a), and relevant here, that federal habeas counsel had presented "a much more detailed analysis" of what trial counsel "could have—**and should have**—done at the mitigation phase" (App.B at 107a) (emphasis added). But the perceived procedural bar of *Cullen* v. *Pinholster*, 563 U.S. 170 (2011), prevented both courts from reviewing the merits of Ramey's fully developed Mitigation Claim.

The Court's review is warranted here to:

(1) correct the Fifth Circuit's persistent misunderstanding of the letter and spirit of this Court's *Batson* v. *Kentucky*, 476 U.S. 79 (1986), jurisprudence, which has yielded a series of opinions that unjustifiably narrow this Court's precedents and threaten to erode equal justice under the law by tolerating manifest racial discrimination in jury selection; and

(2) resolve the tension between *Pinholster* and *Martinez* v. *Ryan*, 566 U.S. 1 (2012) (as extended by

Trevino v. *Thaler*, 569 U.S. 413 (2013)), which has created confusion in the lower courts and undermined *Martinez*'s aim of ensuring that substantial claims of ineffective assistance of trial counsel receive federal review.

Batson Violation: This case presents an opportunity to correct the Fifth Circuit's decades-long recalcitrance toward *Batson* and progeny. In rejecting Ramey's *Batson* Claim, the Fifth Circuit ignored an independent basis for relief under 28 U.S.C. § 2254(d)(2)—despite ample evidence (e.g., disparate questioning tactics and a questionable jury shuffle, *see infra* REASONS FOR GRANTING CERTIORARI ("REASONS") I.B.1) that the State's peremptory strike of the sole qualified Black veniremember, Cheryl Steadham-Scott, was racially motivated—such that the Texas courts' denial of Ramey's *Batson* Claim rests on an "unreasonable determination of the facts."

The Fifth Circuit declined to address, in the context of § 2254(d)(2), a reviewing court's obligation to consider all facts and circumstances bearing on possible racial animus in jury selection, despite this Court's clear instruction in *Miller-El* v. *Dretke,* 545 U.S. 231, 240 (2005) ("*Miller-El II*").

Unfortunately, this is consistent with the Fifth Circuit's pattern of narrowly interpreting and limiting the reach of *Batson*. *E.g.*, *Miller-El II*; *Chamberlin* v. *Fisher*, 885 F.3d 832 (5th Cir. 2018). The Court's intervention is necessary to end the Fifth Circuit's continued misapplication of *Batson* and preserve constitutional rights essential to the public integrity of our justice system.

Ineffective Assistance of Counsel: This case also presents an opportunity to address the tension between *Pinholster* and *Martinez*/*Trevino*, which has simmered in the lower courts ever since *Martinez* was issued. That tension arises from the fact that even though the equitable considerations driving *Martinez*/*Trevino* apply equally to petitioners like Ramey, whose state habeas counsel nominally raised but barely developed substantial ineffective assistance of trial counsel ("IATC") claims ("Undeveloped IATC Claims"), only the former category of petitioners are permitted to present their fully developed claims in federal court.

Circuit courts have struggled to resolve this tension because *Pinholster* bars federal courts from considering new evidence supporting these substantial IATC claims. Some Circuits, prioritizing equity, have found that *Pinholster* does not bar Undeveloped IATC Claims where new evidence fundamentally alters them, rendering them new, unexhausted, and procedurally defaulted. *E.g.*, *Dickens* v. *Ryan*, 740 F.3d 1302, 1319-20 (9th Cir. 2014). Others have withheld federal court review of such Undeveloped IATC Claims, holding that *Pinholster* bars consideration of even the strongest new evidence. *E.g.*, *Carter* v. *Bigelow*, 787 F.3d 1269, 1289-90 (10th Cir. 2015). The Fifth and Sixth Circuits have internally split over the issue. *See infra* REASONS II.A.1.

As such, in some Circuits, petitioners with Undeveloped IATC Claims have a path to federal court review, while petitioners in others have no such opportunity. And in the Fifth and Sixth Circuits, petitioners cannot predict whether the panel hearing their case will consider new evidence in support of their Undeveloped IATC Claim. The Court must intervene to ensure that petitioners in all Circuits have a path to federal court review of substantial IATC claims, either through a narrow exception to *Pinholster* or the fundamental alteration approach, as equity demands.

STATEMENT OF FACTS

I. THE STATE'S REASONS FOR REMOVING NON-WHITE VENIREMEMBERS WERE RACIALLY MOTIVATED.

Ramey's jury was ultimately selected from two venire panels that collectively comprised 184 people. The first panel of 135 individuals was qualified on October 30, 2006. ROA.3577-81. Each panelist provided identifying information—including race—and completed a 23-page questionnaire that asked about their background and views on the death penalty. ROA.6115-37; ROA.5995-6063. Most panelists were also questioned individually.

The first panel contained seven Black veniremembers. *See* ROA.5995-6063. None sat on Ramey's jury; the State successfully challenged five, purportedly for cause, and two were excused. ROA.3611, 3729-43, 3821-23, 3987-89, 4575-76, 4599-4615, 4655-59. The State questioned certain Black veniremembers differently than similarly situated white veniremembers. *See infra* REASONS I.B.1.(a). After a month, the first panel was exhausted, and 11 jurors had been seated—ten white and one Hispanic. *See* ROA.4635-4712; 5995-6063.

A second panel of 49 veniremembers was called on December 4, 2006. ROA.4290-4320, 4327. Shortly after the second panel entered the courtroom and sat in order—***four*** of the first 10 veniremembers to be questioned were Black—the State requested a jury shuffle. ROA.6064-89, 4328.

After the jury shuffle, only ***two*** Black veniremembers remained among the first 30 panelists to be questioned.

ROA.6064-89. Cheryl Steadham-Scott was the first Black veniremember questioned. The State asked her racially-charged questions and sought her view on the guilt or innocence of certain Black defendants in high profile trials. ROA.4688-99. Steadham-Scott maintained that she could and would apply the law as directed, so the State used a peremptory strike to remove her. ROA.4690-91. Shortly thereafter, the full jury—which had no Black people—was selected. ROA.4711.

Ramey challenged the State's strike of Steadham-Scott, and the State offered three "race-neutral" reasons for its actions: (1) "if [the State] would have continued to pursue the line of questioning, [Steadham-Scott] would have most likely been challengeable for cause"; (2) "her questionnaire clearly indicated that she could not impose the death penalty"; and (3) "there were other many [sic] racially-neutral reasons." App.E at 133a-34a. The trial court accepted the State's reasons and denied Ramey's *Batson* challenge. *Id.* at 134a.

II. TRIAL COUNSEL PERFORMED NO MITIGATION INVESTIGATION.

Ramey was represented by Dr. Joseph Rutherford Willie, II, a full-time dentist, part-time lawyer and Marine reservist, and James Donald Evans, III, who associated with Willie just before trial to assist with voir dire.[1] ROA.550-51. Ramey's counsel did almost nothing to rebut the State's evidence or impeach witnesses—largely because of their complete failure to conduct any independent investigation. On January 16, 2007, after deliberating for about an hour, the jury found Ramey guilty of capital murder. ROA.5038.

[1] Willie and Evans are collectively referred to as "trial counsel."

Trial counsel continued their abysmal performance at punishment, failing to conduct any investigation despite repeated offers of assistance from the trial court—which expressed reservations on the record about counsels' preparations and lack of investigation—and others. ROA.535; 551-53, 588-90, 600-06. At the penalty phase, the state presented 38 "factual" witnesses who alleged various bad acts by Ramey over the years. *See generally* ROA.5045-5144. Most inflammatory was testimony from a young boy who claimed to have witnessed Ramey sexually assault another boy. ROA.5074-75. A reasonable investigation by trial counsel would have identified three exonerating witnesses who would have testified that Ramey was not involved in the assault. ROA.400, 516, 548.

Had trial counsel conducted any investigation, they also would have learned that Ramey suffered a difficult and traumatic childhood. His mother was a habitual drug user who consumed alcohol while pregnant with Ramey. ROA.458. From infancy, Ramey was surrounded by substance abuse and crime. Until he was seven, Ramey lived in public housing with his mother and her long-term boyfriend, who cooked crack and sold drugs from their residence. ROA.457-58. Both regularly used drugs around Ramey. ROA.458-59. Ramey was the victim of frequent physical and psychological abuse. *E.g.*, ROA.459-60, 472, 544.

The jury heard none of this—instead, they heard from psychiatrist Mark Kunik, trial counsel's ill-chosen "expert," who specialized in the treatment of the elderly and lacked any experience in assessing future dangerousness. ROA.555-58, 560-61, 534-35. Instead of providing Kunik with the fruits of an actual investigation, Willie gave him portions of the State's open file. ROA.602. Kunik inaccurately concluded that

Ramey faced no physical violence at home and his mother was "loving, overprotective, and always worried about his well-being." ROA.565. A simple investigation would have shown this was false.

Ramey suffered from developmental disorders and scored well below average on academic and intelligence assessments throughout his schooling and failed to finish high school or earn a GED. ROA.462-64, 481-85, 545. Trial counsel presented this incomplete information—gleaned from the State's open file—via its only other mitigation witness, Ramey's mother. ROA.5144-48. She was not asked about any abuse Ramey suffered as a child.

The trial court, evidently worried that trial counsel were bungling the punishment phase, questioned them *ex parte* (but on the record) *for a third time* about their deficient investigative efforts:

> Now, in effect what you've done is called Dr. Kunik and the Defendant's mother and have rested, and is there any other witnesses that you were unable to call that you were, you know, unable to subpoena, or obtain, or did you make a determination that there were other witnesses, but none that you thought would help in the case? I just want to hear what you have to say about that.

ROA.602. Willie responded: "none that we thought would help in this case. . ." *Id.*

The jury took less than 14 minutes to sentence Ramey to death. ROA.5182.

PROCEDURAL HISTORY

After the judgment was affirmed on direct appeal, *see Ramey* v. *State*, No. AP-75,678, 2009 WL 335276 (Tex. Crim. App. Feb. 11, 2009), Ramey sought state habeas relief. State habeas counsel was similarly ineffective. He conducted **no extra-record investigation**, even though an outside lawyer flagged trial counsel's nonexistent mitigation investigation as an issue. *See* ROA.1339-44; 1894. Thus, he failed to provide any factual support for several claims he asserted, including Ramey's summarily raised penalty phase IATC claim. ROA.5859-62.

After state habeas relief was denied, Ramey sought review in federal court. Undersigned counsel entered the case, filing Ramey's amended federal habeas on December 15, 2015. ROA.226-440. On July 11, 2018, the District Court denied relief and a COA. App.A at 82a. The Fifth Circuit granted a COA on Ramey's *Batson* Claim, but denied a COA on the Mitigation Claim. App.B at 107a. The Fifth Circuit affirmed the District Court's denial of relief on July 29, 2021 (App.C at 128a) and denied Ramey's petition for rehearing on August 25, 2021 (App.D).

REASONS FOR GRANTING CERTIORARI

I. IN REJECTING RAMEY'S *BATSON* CLAIM, THE FIFTH CIRCUIT IGNORED AN INDEPENDENT BASIS FOR RELIEF UNDER 28 U.S.C. § 2254(D) AND CONTINUED ITS TROUBLING RECALCITRANCE IN APPLYING *BATSON* AND ITS PROGENY.

Batson defined a three-step framework for evaluating whether racial discrimination motivated a peremptory strike. 476 U.S. at 96-98. Only the third step—where the trial court must evaluate the proponent's proffered race-neutral reason and decide whether the reason was pretextual—is at issue. *Purkett* v. *Elem*, 514 U.S. 765, 767 (1995). In making this determination, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder* v. *Louisiana*, 552 U.S. 472, 478 (2008).

That did not happen here. The State used a series of questionable tactics to exclude most Black veniremembers from Ramey's jury; when that strategy failed against the sole qualified Black potential juror (Cheryl Steadham-Scott), the State struck her from the panel—excluding 100% of qualified Black prospective jurors. Ramey's objection failed when the trial court accepted the State's proffered reasoning.

But in so ruling, the trial court failed to take account of "all. . .the circumstances," which leaves no doubt that racial bias was the primary motivation for striking Steadham-Scott, including, *inter alia*: (1) the State's ***admitted*** use of disparate questioning, by which it whittled down the group of qualified Black veniremembers to just Steadham-Scott; (2) the State's shuffling of the jury; (3) the State's claimed reasoning for striking Steadham-Scott applied as forcefully to Carol

Laza, a white seated juror; and (4) the State's shifting explanation for striking Steadham-Scott.

After unsuccessfully appealing his *Batson* Claim in the Texas courts, Ramey sought federal habeas relief. To surmount 28 U.S.C. § 2254(d), Ramey asserted three legal theories on two independent statutory bases:[2]

- Texas courts considered justifications for striking Steadham-Scott that the State never articulated to the trial court (the "First § 2254(d)(1) Argument");
- Texas courts failed to follow clearly established federal law (*Batson* and progeny) when, in assessing whether the strike was pretextual, they did not consider all available relevant information (the "Second § 2254(d)(1) Argument"); and
- Given the Texas courts' failure to consider all relevant information, their determination that the strike was not racially motivated rested on an unreasonable determination of the facts (the "§ 2254(d)(2) Argument").

The Fifth Circuit's opinion addressed the first two theories, but, as noted below, ignored Ramey's § 2254(d)(2) Argument. *See infra* REASONS I.A. This omission should concern the Court, especially given the Fifth Circuit's prior failures in evaluating *Batson* claims. *See Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"); *see also Chamberlin*, 885 F.3d at 845 (Costa, J., dissenting) ("[A] high proportion of the recent cases in which the Supreme Court has found a *Batson* violation come from states in our circuit."). Intervention is necessary to change this trajectory, correct the injus-

[2] *See infra* REASONS I.A.

tice done to Ramey, and remove the taint of racial discrimination from the integrity of the justice system.

A. The Fifth Circuit ignored Ramey's § 2254(d)(2) Argument.

A petitioner surmounts AEDPA's bar on federal habeas relief upon showing that a State court's adjudication of a claim resulted in a decision that was ***either***: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court" "***or***" (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1)-(2) (emphasis added). Each prong provides an independent basis for relief, and a petitioner may prevail by satisfying either prong. *Id.*; *see also McWilliams* v. *Dunn*, 137 S. Ct. 1790, 1792 (2017) (relief under § 2254(d)(1)); *Miller-El II*, 545 U.S. at 266 (relief under § 2254(d)(2)).

Ramey sought relief under ***both*** prongs of § 2254(d). *See* ROA.289; *see also* Appellant's Br. 18-19, 21-22; Appellant's Reply Br. 30-31. His First and Second § 2254(d)(1) Arguments explained how the Texas courts' adjudication of his *Batson* Claim was "contrary to, or involved an unreasonable application of, clearly established Federal law." ROA.289; *see also* Appellant's Br. 18-19, 21-22; Appellant's Reply Br. 30-31; 28 U.S.C. § 2254(d)(1). But Ramey also contended that the Texas courts' refusal to consider all available facts relevant to the *Batson* Claim resulted in a decision that "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2); ROA.289 ("The [state court's] denial of th[e *Batson* C]laim is…based on an unreasonable determination of the facts."); Appellant's Br. 21-22; Appellant's Reply Br. 31.

Nonetheless, the Fifth Circuit treated Ramey's *Batson* Claim as "present[ing] two primary arguments," both based on § 2254(d)(1):

> First, Ramey argues that the state habeas court ***unreasonably applied clearly established federal law*** by considering justifications for the [Steadham-Scott strike] that were never articulated at the trial court.… Second, Ramey argues that the state habeas court ***unreasonably applied federal law*** because it failed to account for all relevant facts and circumstances when assessing whether the State's strike of Steadham-Scott was pretextual.

App.C at 119a (emphasis added). The Fifth Circuit did not acknowledge—much less analyze—Ramey's § 2254(d)(2) Argument. *See* App.C at 115a-123a.

The Fifth Circuit's silence on this independent basis for relief warrants review. At best, the Fifth Circuit's omission suggests that it once again failed to understand that for all the deference built into federal habeas review, "the standard is demanding but not insatiable." *Miller-El II*, 545 U.S. at 240. At worst, it reflects the Fifth Circuit's systemic narrowing of the Court's *Batson* jurisprudence. *See infra* REASONS I.C. Either way, review is appropriate to prevent this error from becoming the instrument of Ramey's execution and, equally important, to impress upon the Fifth Circuit the need to follow this Court's *Batson* jurisprudence, to preserve for Americans of all races the right to trial by an impartial jury.

B. The relevant facts and circumstances point inexorably to the conclusion that the State struck Steadham-Scott because she is Black.

The Court has modeled how to evaluate a state court's rejection of a *Batson* claim challenged as "an unreasonable determination of the facts in light of the evidence presented." *Miller-El II*, 545 U.S. at 240-41, 253. Had the Fifth Circuit followed that guidance, the inescapable conclusion is that relief is warranted under § 2254(d)(2).[3]

In determining whether a habeas petitioner has established that the state courts unreasonably determined the facts in accepting the State's proffered race-neutral explanation for the challenged strike,[4] the reviewing court must examine every fact that was available to the trial judge. *Miller-El II*, 545 U.S. at 240; *see also Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2243-44 (2019) (reviewing courts "look[] at the same factors as the trial judge"). The Court has been clear that "all" circumstances bearing on possible racial animus must be examined, *see Snyder*, 552 U.S. at 478, and has specifically identified the following as relevant:

[3] The Fifth Circuit signaled that it would depart from *Batson* and its progeny when, in rejecting Ramey's Second 2254(d)(1) Argument, it declined to consider all relevant facts and circumstances because some of those facts had not been argued to the Texas courts. *See* App.C at 119a-123a.

[4] Here, the State claimed "[Steadham-Scott's] questionnaire clearly indicated that she could not impose the death penalty." App.E at 134a.

- Questioning and investigating Black prospective jurors differently than white prospective jurors, *Flowers*, 139 S. Ct. at 2243;
- Using "trickery" in questioning Black prospective jurors, *id.*; *Miller-El II*, 545 U.S. at 261;
- The prosecutor's shuffling the venire panel, *Flowers*, 139 S. Ct. at 2243; *Miller-El II*, 545 U.S. at 253-54;
- Comparing Black prospective jurors who were struck side-by-side with white prospective jurors who served, *Flowers*, 139 S. Ct. at 2243;
- Critically examining the State's shifting explanations or misrepresentations of the record in defending the strikes during the *Batson* hearing, *id.*; *Foster* v. *Chatman*, 578 U.S. 488, 512-13 (2016);
- Comparing (statistically) how frequently the prosecutor struck Black prospective jurors as opposed to white prospective jurors, *Flowers*, 139 S. Ct. at 2243;
- Weighing any other relevant circumstances that bear on racial discrimination, *id.* at 2243.

If the evidence persuades the reviewing court that the state court was "wrong to a clear and convincing degree" in finding no racial bias behind the challenged strike(s), then that determination was "unreasonable as well as erroneous" and habeas relief is warranted under § 2254(d)(2). *Miller-El II*, 545 U.S. at 266.

As shown below, an evaluation of all circumstances available to the Texas courts reveals the State's proffered reason was pretext: the Steadham-Scott strike was racially motivated.

1. Ramey established by clear and convincing evidence that the State's strike of Steadham-Scott was racially motivated.

(a) Disparate questioning.

The State's voir dire of Black veniremembers differed from its inquiry of white panelists. The State now defends that disparate questioning was designed to "ferret out" "a bias against the State[,] flowing from their perceived mistreatment at the hands of the State, *because of their race*." ROA.1631 (emphasis in original). This admission is deeply troubling because, *inter alia*, it is apparent the tactic was used to manufacture cause for a challenge of otherwise qualified Black veniremembers. *See, e.g.*, ROA.4658 (using religion to goad a Black veniremember into an answer justifying a cause challenge); *see also* Appellant's Br. 48-54. The State also employed "trickery" during voir dire to achieve the same goal. *See, e.g.*, ROA.4611-12 (attempting to lead a Black veniremember into endorsing a higher standard for a death penalty case); *see also* Appellant's Br. 52-54. Notably, the State asked Black panelists if they thought O.J. Simpson or Michael Jackson were guilty, made much of the role of religion and the death penalty (while offering only white veniremembers an avenue for rehabilitation), and, depending on the panelist's race, changed how it described the burden of proof, from educating to interrogating. *See, e.g.*, ROA.4688-89 (O.J. Simpson and Michael Jackson); ROA.3885, 4583, 4658 (questioning Black and non-Black veniremembers differently about religion and the death penalty); ROA.4589, 4689-90 (questioning Black and non-Black panelists differently about the burden of proof).

The State's disparate questioning had a predictably disparate effect. After 135 persons had been questioned, 11 jurors had been impaneled but ***all*** Black panelists had been excluded for cause.[5] The disparate questioning used to eliminate all Black panelists is "probative of discriminatory intent." *Flowers*, 139 S. Ct. at 2247.

(b) To stack the deck, the State shuffled the jury.

To fill the last three seats, the trial court pulled a second venire panel at random from individuals who reported for the county's "central jury pool." ROA.4288, 4327. The trial court qualified the second panel; nothing indicates that Ramey or the State attended that session or had any information about the new panelists until they entered the courtroom. ROA.4321-29.

Once the new panelists were seated in court, the parties could see that four of the first 10 to be questioned were Black. ROA.267, 6065-89. The State promptly requested a jury shuffle to re-order the panelists. ROA.4327-29. The result was striking: where four of the first 10 panelists had been Black, now just ***two*** Black veniremembers remained among the first ***30*** panelists. ROA.267, 6065-89. The Court has recognized that seeking a shuffle "when a predominant number of African-Americans were seated in the front of the panel. . .raise[s] a suspicion that the State sought to exclude African-Americans from the jury." *Miller-El I*, 537 U.S. at 346.

[5] Two Black veniremembers were excused because they were distantly related to Ramey. ROA.3611-12, 3823.

(c) The State's disparate questioning and trickery continued with Steadham-Scott.

Steadham-Scott was the second veniremember questioned in the second panel. As with the first panel, *see supra* REASONS I.B.1.(a), the State continued its disparate questioning with Steadham-Scott. Hinting at racial tropes and stereotypes of fatherless families and lax discipline, the State asked if Steadham-Scott's "dad [was] in the picture" when she was growing up and whether she "g[o]t any spankings" as a child. ROA.4683-84. Laza and other seated white jurors were not asked such questions. *See, e.g.,* ROA.4708-11. Instead of being given a reassuring and helpful education, like white panelists, *see, e.g.,* ROA.3768-69 (example soliloquy to white juror Jan Groh), Steadham-Scott faced a series of confusing questions about burden of proof, ROA.4689-90. After asking 175 questions—more than the white panelists generally faced—without eliciting any basis for a cause challenge, the State moved to emotional and overtly-racial questions. *See, e.g.,* ROA.4689 (asking Steadham-Scott's opinion on the guilt of O.J. Simpson and Michael Jackson). Of note, the State asked Steadham-Scott if she thought she was transferred at work "***because [she is] Black***[.]" ROA.4688. *See supra* REASONS I.B.1.(a).

(d) The State's claimed reasons for striking Steadham-Scott applied equally to a seated white juror.

Unable to manufacture cause to remove Steadham-Scott, the State was forced to exercise a peremptory strike. ROA.4691. The trial court denied Ramey's subsequent *Batson* challenge. App.E at 133a-34a.

A comparison of Steadham-Scott's and Laza's questionnaires and voir dire responses shows that the State's only substantive proffered reason for striking Steadham-Scott—"her questionnaire clearly indicated that she could not impose the death penalty"—was pretextual. As shown below, Laza's questionnaire responses reflected more reservations about imposing the death penalty than Steadham-Scott's.

Juror Questionnaire	Laza	Steadham-Scott
59: Assume you are on a jury to determine the sentence for a defendant who has already been convicted of a very serious crime. If the law gives you a choice of death or life imprisonment, or some other penalty: (Check only one):	There are some kinds of cases which ***I know I could not vote for the death penalty*** even if the law allowed me to, but others in which I would be willing to consider voting for it." ROA.6154 (emphasis added).	I would consider all of the penalties provided by law and the facts and circumstances of the particular case. ROA.6697
62: Whether because of religious, moral, or personal beliefs, do you feel you would have difficulty 'standing in judgment' of another human being?	Yes. ROA.6157	No. ROA.6700
62 Follow-Up: If "Yes", do you feel it would affect your ability to serve as a fair and impartial juror in this case?	Yes. ROA.6157	

Comparing the State's voir dire of Laza and Steadham-Scott only highlights how differently white and Black panelists were questioned. Laza fielded 31 questions, while Steadham-Scott answered ***237 questions*** (7.6 times more than Laza). ROA.4708-11, 4682-90. Unlike Steadham-Scott, Laza was not questioned about her upbringing, family, or views of the law. *Compare* ROA.4708-11 (Laza), *with* ROA.4683-90 (Steadham-Scott). Nor was Laza asked explicitly about race or racially-charged prosecutions. *Compare* ROA.4708-11 (Laza), *with* ROA.4688-89 (Steadham-Scott). *See Flowers*, 139 S. Ct. at 2243.

(e) The State's explanation for striking Steadham-Scott has changed significantly over the years.

The only cognizable reason the State offered the trial court for striking Steadham-Scott was that "her questionnaire clearly indicated that she could not impose the death penalty." App.E at 134a. But this explanation has evolved to Steadham-Scott's "ambivalence regarding inflicting the death penalty," "inconclusive opinions" on the death penalty, and Steadham-Scott's purported confusion about the requisite burden of proof. ROA.2983, 2064-65. These shifts in the State's defense of its strike are directly pertinent to the *Batson* analysis. *Foster*, 578 U.S. at 512-13.

* * *

Ramey presented evidence bearing on almost every circumstance the Court has identified as relevant in evaluating whether racial bias underpinned the State's strike of Steadham-Scott. *See supra* REASONS I.C.2.a-g. This evidence cannot be ignored. *Miller-El II*, 545 U.S. at 266. Relief is warranted because—considering the clear and convincing evidence before the Fifth Circuit—the Texas courts' *Batson* decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2); *Miller-El II*, 545 U.S. at 266.

C. The Fifth Circuit's improper treatment of Ramey's *Batson* Claim is consistent with its troubling history of systematic departures from the Court's *Batson* jurisprudence.

"[R]acial discrimination in the jury system pose[s] a particular threat both to the promise of [equal protection under the Fourteenth] Amendment and to the integrity of the jury trial." *Pena-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 867 (2017). The Court established the *Batson* framework to "end[] the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants." *Flowers*, 139 S. Ct. at 2242. "In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Id.* at 2243.

Unfortunately, the Fifth Circuit has not consistently embraced the Court's "vigorous enforce[ment]" of *Batson* and its progeny, as evidenced by a series of opinions that misunderstand or unjustifiably narrow this Court's precedents. For example, this Court's *Miller-El* decisions arose from the Fifth Circuit's repeated refusal to properly analyze the petitioner's *Batson* claim. *See Miller-El II*, 545 U.S. at 235; *Miller-El I*, 537 U.S. at 326. Repeated intervention was necessary to guard against any backsliding from *Batson*. *Miller-El II*, 545 U.S. at 266; *Miller-El I*, 537 U.S. at 346-48.

Regrettably, more than a decade after *Miller-El II*, problems with the enforcement of *Batson* continue in the Fifth Circuit. Consider, for example, *Chamberlin*, 885 F.3d at 835. After conducting the thorough factual and legal analysis required by this Court's *Batson* jurisprudence, the District Court concluded the State's claimed race-neutral reasons for a peremptory strike were pretextual. *See Chamberlin* v. *Fisher*, No. 2:11-CV-72-CWR, 2015 WL 1485901, at *15-16 (S.D. Miss. Mar. 31, 2015); *compare id. with, Miller-El II*, 545 U.S. at 239-40.

The Fifth Circuit reversed, allowing the State to offer a previously unasserted argument to justify the strike and warning the District Court against "sua sponte" comparative juror analysis. *Chamberlin*, 885 F.3d at 839-40. This decision has created a split of authority concerning how to apply *Batson* and *Miller-El*, as two other Circuits have expressly rejected the Fifth Circuit's decision to allow the State to defend a strike based on purported race-neutral reasons articulated only "after the fact." *See, e.g.*, *Love* v. *Cate*, 449 Fed. Appx. 570, 572-73 (9th Cir. 2011); *United States* v. *Taylor*, 636 F.3d 901, 905 (7th Cir. 2011).

The Fifth Circuit's divergence from the Court's *Batson* jurisprudence continued in *Sheppard* v. *Davis*, 967 F.3d 458 (5th Cir. 2020). Instead of relying on precedent that clearly establishes that the reviewing court must look to the totality of the circumstances in evaluating a *Batson* claim, the Fifth Circuit took a narrow approach that is inconsistent with the Court's *Batson* jurisprudence. *See Flowers*, 139 S. Ct. at 2243 (observing the ultimate question is "whether racial discrimination occurred" and not if it can be explained). Although subtle, this too represents a "backslide" from the Court's *Batson* jurisprudence. *Id.*

The Fifth Circuit continued its erosion of *Batson* in *Broadnax* v. *Lumpkin*, 987 F.3d 400 (5th Cir. 2021). In affirming a denial of Broadnax's habeas petition, the Fifth Circuit refused to consider new evidence from the State's file—a spreadsheet referencing panelists' race that the State ***first disclosed at federal habeas***—which provided direct proof of the trial prosecutors' discriminatory intent during jury selection. *Id.* at 406-07. In so doing, the Fifth Circuit again departed from the letter and spirit of *Batson*. *See Foster*, 578 U.S. at 501 (emphasizing that reviewing courts "cannot blind ourselves" to directly probative evidence).

Ramey's case falls solidly within the Fifth Circuit's troubling pattern of limiting *Batson*. In *Miller-El, Chamberlin*, and *Sheppard*, the Fifth Circuit limited legal avenues to recognize *Batson* violations. In *Broadnax*, it circumscribed the facts a reviewing court can consider in evaluating a *Batson* claim. Here, the Fifth Circuit did both—limiting Ramey's legal avenues by ignoring an independent basis for relief and failing to evaluate all the relevant facts as required by *Miller-El II*.[6] The net effect of these limitations, more than 35 years after *Batson*, is to erode equal protection under the law by tolerating manifest racial discrimination in jury selection. This backsliding pattern must be addressed by the Court to preserve constitutional rights that are essential to the public integrity of our justice system. *See Flowers*, 139 S. Ct. at 2243.

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[6] Here, much as in *Chamberlin*, the Fifth Circuit also signaled it would consider only a subset of the relevant facts. *Compare Ramey*, App.C at 119a-123a (ignoring any facts not argued before the last state court), *with Miller-El II*, 545 U.S. at 239-40 (requiring evaluation of all circumstances known to the state trial court and presented to the federal habeas court).

What emerges from these decisions, including *Ramey*, is a systematic misunderstanding in the Fifth Circuit of both the letter and spirit of the Court's *Batson* jurisprudence. Review is necessary to course-correct and prevent "the very integrity of the courts [from being] jeopardized," because prosecutorial discrimination "invites cynicism respecting the jury's neutrality. . .and undermines public confidence in adjudication." *Miller-El II*, 545 U.S. at 238.

II. RAMEY'S MITIGATION CLAIM RAISES IMPORTANT ISSUES ABOUT THE IMPLICATIONS OF *MARTINEZ/TREVINO* ON WHICH LOWER COURTS ARE DIVIDED.

Since *Martinez* and *Trevino*, federal courts have grappled with how to treat petitioners like Ramey, whose state habeas counsel only barely and inadequately raised IATC claims. Such petitioners are virtually identical to *Martinez/Trevino* petitioners, whose counsel failed to raise such claims at all, except that *Pinholster* appears to foreclose consideration of new evidence supporting their IATC claims where Undeveloped IATC Claims were presented at state collateral-review proceedings. The Court should articulate a narrow and logical equitable exception to *Pinholster* putting petitioners like Ramey on equal footing with *Martinez/Trevino* petitioners. Alternatively, the Court should confirm that Undeveloped IATC Claims can be fundamentally altered by significant new evidence, rendering those claims unexhausted and eligible for *Martinez/Trevino*. Accordingly, the Court should grant review and hold that the Fifth Circuit erred in denying Ramey's Application for Certificate of Appealability ("ACOA") on his Mitigation Claim.

A. A narrow equitable exception to *Pinholster* is warranted.

1. The Circuits have struggled to navigate the tension between *Pinholster*'s inflexible rule and the equitable considerations underlying *Martinez/Trevino*.

Under long-standing precedent, ineffective assistance by state collateral-review counsel typically does not excuse a procedural default. *Coleman* v. *Thompson*, 501 U.S. 722, 752-54 (1991). In *Martinez / Trevino*, the Court created an equitable exception to this rule to protect petitioners who have (1) substantial IATC claims (2) that were defaulted by ineffective state habeas counsel (3) at an initial collateral-review proceeding (4) where state law formally or functionally requires that IATC claims be raised at that juncture. *Martinez*, 566 U.S. at 17; *Trevino*, 569 U.S. at 423, 429.

Since those decisions, federal courts have struggled with the inequity of barring review of IATC claims raised by petitioners like Ramey, who are identical to *Martinez / Trevino* petitioners, with one doctrinally significant—but equitably insignificant—exception: unlike state habeas counsel for *Martinez / Trevino* petitioners, who failed to raise IATC claims at all, state habeas counsel for Ramey-like petitioners raised such claims <u>but</u> failed to adequately develop or support them. *E.g.*, *Gallow* v. *Cooper*, 570 U.S. 933 (2013) (Breyer & Sotomayor, JJ., regarding denial of certiorari) (noting that petitioners whose counsel failed to support IATC claims at initial-review collateral proceedings are "indistinguishable from" *Martinez / Trevino* petitioners). The main hurdle to equitable treatment for Ramey and petitioners like him is *Pinholster*, which appears to foreclose consideration of evidence not before the state court when it adjudicated the IATC claim on the merits, no matter how derelict state habeas counsel may have been in presenting that claim.

Some Circuits have weighed in on the side of equity, recognizing the unfairness of treating raised-but-botched IATC claims as meaningfully different from IATC claims that were never raised at all. *See Dickens* v. *Ryan*, 740 F.3d at 1319-20 (holding new evidence fundamentally altered IATC claim presented in state habeas, rendering it unexhausted, procedurally defaulted, and eligible for *Martinez/Trevino*); *Vandross* v. *Stirling*, 986 F.3d 442, 451 (4th Cir. 2021) (stating *Pinholster* does not apply when "'new evidence. . . 'fundamentally alter[s]' the 'substance' of the claim so as to make the claim a new one' that was not presented to the state court") (quoting *Moore* v. *Stirling*, 952 F.3d 174, 182 (4th Cir. 2020)).

Other Circuits have felt constrained to enforce a regime of inflexibility, reading *Pinholster* as requiring them to turn a blind eye to new evidence, no matter how strong. *See, e.g.*, *Carter*, 787 F.3d at 1289-90 (stating that although new evidence was "compelling," *Pinholster* barred its consideration). The Fifth and Sixth Circuits' approach, on the other hand, has been inconsistent, highlighting the need for this Court to intervene. *See infra* n.7; *compare Moore* v. *Mitchell*, 708 F.3d 760, 785 (6th Cir. 2013) (refusing to consider new evidence in support of Undeveloped IATC Claim), *with Rogers* v. *Mays*, 814 Fed. Appx. 984, 987 (6th Cir. 2020) (granting COA on whether Undeveloped IATC Claim was procedurally defaulted or adjudicated on the merits).

In some Circuits, then, petitioners like Ramey have a path to vindicate their right to effective assistance of trial counsel. In others, by contrast, the courthouse doors are shut. And in the Fifth Circuit, caselaw on the issue is so muddled that whether petitioners like Ramey have an avenue to adjudicate IATC claims may depend entirely on the panel they draw. This Court is the *sole* authority that can resolve this disparity and resolve the tension between *Pinholster* and *Martinez / Trevino* by recognizing that the same considerations that demanded creation of the *Martinez / Trevino* exception apply equally in circumstances like Ramey's. To ensure fairness and equal treatment, the Court should articulate a virtually identical, narrow exception to *Pinholster*.

2. The equitable concerns behind *Martinez/Trevino* apply just as powerfully here.

Martinez / Trevino provide equitable relief where federal review of a procedurally defaulted, substantial IATC claim would otherwise be barred. Several considerations weigh in favor of the *Martinez / Trevino* exception:

First, the importance of the right to effective assistance of trial counsel—a "bedrock principle" of justice and the lynchpin of our adversarial system—which ensures that defendants' rights are protected. *Martinez*, 566 U.S. at 12.

Second, the recognition that prisoners need effective counsel to adequately develop and present substantial IATC claims. *Id.* at 11-12. Prisoners lack the training, experience, and skills necessary to show trial counsel's errors were not strategic choices, and they lack the resources and freedom to conduct any meaningful investigation.

Third, the acknowledgment that direct appeal and initial-review collateral proceedings are substantially equivalent where petitioners cannot raise IATC claims on direct review, and the awareness that ineffective assistance in the former would constitute cause for excusing procedural default while ineffective assistance in the latter would not. *Id.* But in both situations, no advocate has prepared a case for IATC and no court has adjudicated the claim, leaving petitioners without prior briefs or opinions to guide them and in need of adequate counsel to effectively develop and litigate those claims. *Id.*

Finally, the inequitable result of failing to provide a relief valve to *Coleman*'s rule. When petitioners cannot raise substantial IATC claims until collateral review, and when collateral-review counsel is ineffective, no court will ever consider the petitioner's claim. *Id.* at 10-11, 14. And if petitioners have no forum in which to vindicate violations of their right to effective trial counsel, they effectively, have no such right at all.

These considerations apply equally where IATC claims were nominally raised in an initial-collateral-review proceeding but inadequately supported by ineffective state habeas counsel. *See Gallow*, 570 U.S. at 933 ("A claim without. . .evidence to support it might as well be no claim at all."). Indeed, the sole difference between Ramey's situation and the one the Court confronted in *Martinez/Trevino* is the way in which collateral-review counsel was ineffective: one failed to raise a claim entirely, while the other raised the same claim deficiently, without conducting the investigation necessary to support it. The net effect is the same: collateral-review counsel's deficient performance deprived petitioners of *any* court review of their substantial IATC claims. Here, as in *Martinez/Trevino*, inflexible application of a rule prevents petitioners from vindicating their constitutional right to effective assistance of trial counsel. This Court should not tolerate such an illogical and unfair result.

3. An equitable exception would apply here.

Adopting the rationale underlying *Martinez*/*Trevino*, an exception to *Pinholster*'s evidentiary bar should exist where: (1) the IATC claim is "substantial"; (2) new evidence was not presented at the state collateral-review proceeding because of collateral-review counsel's ineffectiveness; (3) the state collateral-review proceeding was the "initial" review proceeding for the IATC claim; and (4) state law requires, formally or functionally, that an IATC claim be raised at that juncture. *Trevino*, 569 U.S. at 423, 429.

Ramey's Mitigation Claim satisfies these elements.

First, the Mitigation Claim is substantial. To succeed on an IATC claim, a petitioner must show: (1) counsel's performance fell below an objective standard of reasonableness and (2) prejudice from counsel's deficient performance. *Strickland* v. *Washington*, 466 U.S. 668, 688, 692 (1984).

Here, even viewed through a lens of deference, trial counsel's performance fell far below any standard of reasonableness. Counsel has an "obligation to conduct a thorough investigation of the defendant's background," *Porter* v. *McCollum*, 558 U.S. 30, 39 (2009) (citing *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000)); *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003), and to pursue any "red flags" and potentially aggravating circumstances, *Rompilla* v. *Beard*, 545 U.S. 374, 385, 390-91 & n.8 (2005).

Despite this duty, Ramey's trial counsel conducted *no* independent investigation. ROA.390-92. This failure meant substantial mitigation evidence was never uncovered and or presented to the jury, including Ramey's:

- mother's drug use, ROA.458;
- unstable and impoverished childhood, ROA.457-59;
- early exposure to drug abuse and criminal activity, *id.*;
- verbal, psychological, and physical abuse from caretakers, ROA.459, 460, 472, 544;
- emotional and developmental disorders and "borderline intellectual functioning," ROA.461-64, 481-85, 505-22 545; and
- abandonment by father figures, ROA.411, 457-61, 464-65.

Trial counsel's failure to investigate and uncover these critically important mitigating facts crippled the defense and prevented them from: (1) eliciting useful testimony from the only witnesses they called during the punishment phase (including their own "future dangerousness" expert, a geriatrics expert lacking any relevant expertise), *see* ROA.394, 456-68, 535, 537, 5145-48, and (2) adequately defending Ramey during the punishment phase, ROA.400, 516, 548, 5161. For example, had trial counsel investigated the sexual assault charges wrongfully brought against Ramey, they would have discovered and presented exonerating witnesses who would have neutralized this otherwise highly prejudicial evidence. ROA.400, 516, 548.

Compounding these deficiencies, trial counsel failed to effectively: prepare their witnesses, ROA.467, 535-36, 396-535, 397, 537; challenge the State's evidence, *see* ROA.5054, 5057, 5061, 5061, 5088-89, 5098-99, 5104; and object when the State elicited inflammatory testimony and made inflammatory, prejudicial, and false statements during the punishment phase, *see* ROA.5074, 5174-82.

Trial counsel's deficient performance prejudiced Ramey. Prejudice exists where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rompilla*, 545 U.S. at 390. Here, had the jury heard the mitigating evidence that a basic investigation would have uncovered, it is reasonably likely that Ramey's life would have been spared. Ramey's own unqualified expert told the jury—wrongly—that Ramey enjoyed a stable childhood, free from abuse, and presented a single (not fully developed) mitigation theory regarding Ramey's intellectual disabilities. ROA.565. It is reasonably probable that had the jury been presented with even some of the mitigation evidence that reasonably competent trial counsel would have uncovered, the jury would have found another sentence appropriate.

Second, new evidence was not presented to the state habeas court because state habeas counsel was ineffective. Under Texas law, state habeas counsel had a duty to investigate, exercise reasonable diligence in uncovering the factual bases for all claims, and discover any new mitigating evidence, Tex. Code Crim. Proc. art. 11.071 §§ 3, 5(e); *Ex parte Reynoso*, 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008); ROA.1373-78. State habeas counsel utterly failed to investigate, even though another lawyer alerted him to trial counsel's deficient mitigation investigation. *See* ROA.1893-94, 2550, 2555; *see also* ACOA at 76. As a result, state habeas counsel could allege only a brief, seven-paragraph penalty phase IATC claim focused exclusively on trial counsel's selection of an unqualified and unprepared future dangerousness expert. *See* ROA.5859-62.

State habeas counsel's deficient performance prejudiced Ramey. Given the substantial nature of his Mitigation Claim, had state habeas counsel conducted an adequate investigation and presented trial counsel's numerous deficiencies, it is reasonably likely that the state habeas proceedings would have had a different outcome.

Third and fourth, the state habeas proceeding was the initial collateral-review proceeding for Ramey's IATC claim, which Texas functionally requires be raised at state habeas. *Trevino*, 569 U.S. at 413, 428.

Because Ramey satisfies the elements of the proposed narrow exception to *Pinholster*, his case presents an opportunity for the Court to put petitioners like him on equal footing with *Martinez / Trevino* petitioners, as equity demands.

B. Alternatively, the Court should confirm that new evidence can fundamentally alter an Undeveloped IATC Claim, rendering it unexhausted and potentially eligible for merits review under *Martinez/Trevino*.

The Court has long recognized that significant new evidence can fundamentally alter a claim presented in state court, rendering it unexhausted. *See Vasquez* v. *Hillery*, 474 U.S. 254, 257-60 (1986).

Following this doctrine, several Circuits have acknowledged, explicitly or implicitly, that substantial new evidence can fundamentally alter an IATC claim ineffectively presented in state court, rendering it unexhausted, and therefore making it eligible for *Martinez/Trevino*. *See Vandross*, 986 F.3d at 451; *Dickens*, 740 F.3d at 1319-20.[7]

Accordingly, petitioners like Ramey in the Fourth and Ninth Circuits can obtain judicial review of IATC claims supported by significant new evidence, while petitioners in other Circuits with identical claims have no avenue to federal court review. The Court should grant certiorari to adopt the "fundamental alteration" approach and ensure all similarly situated petitioners have access to federal court review.

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[7] Fifth Circuit panels have inconsistently treated the fundamental alteration approach. Earlier panels recognized that substantial new evidence can fundamentally alter Undeveloped IATC Claims and make them unexhausted claims eligible for *Martinez/Trevino*. *See Escamilla* v. *Stephens*, 749 F.3d 380, 395 (5th Cir. 2014); *Sells* v. *Stephens*, 536 Fed. Appx. 483, 490 (5th Cir. 2013).

In 2017, consistent with these early opinions, another panel held that the fundamental alteration doctrine survived *Pinholster* and new evidence fundamentally altered an Undeveloped IATC Claim. *Sorto* v. *Davis*, 859 F.3d 356, 362-63 (5th Cir. 2017). That opinion was vacated, and, on rehearing, the panel was silent on the issue, casting doubt on whether the approach remains viable in the Circuit.

Nevertheless, in 2020, another panel granted a COA on an IATC claim, finding that reasonable jurists could debate whether new evidence fundamentally altered an Undeveloped IATC Claim. *Nelson* v. *Davis*, 952 F.3d 651, 671-72 (5th Cir. 2020). Recently, however, a different panel suggested the doctrine is a dead letter in the Fifth Circuit because the Circuit's "post-*Pinholster* precedent offers no support for it." *Broadnax* v. *Lumpkin*, 987 F.3d 400, 407-08 (5th Cir. 2021). Given the Circuit's inconsistent treatment of the approach, it is unsurprising that the court below ignored Ramey's fundamental alteration argument in denying his ACOA. *See* App.B at 107a.

1. Ramey's new evidence fundamentally altered the penalty phase IATC claim presented to the state habeas court.

This Court has not offered guidance for lower courts to follow in determining when new evidence fundamentally alters an IATC claim. *See Pinholster*, 563 U.S. at 213 n.5 (acknowledging dissent's argument that new evidence can "give[] rise to an altogether different claim" but declining to determine "where to draw the line between new claims and claims adjudicated on the merits"). The Fifth Circuit, however, has developed a test for evaluating this issue in the exhaustion context. Under that test, new evidence fundamentally alters a claim if it "places [the] claim[] in a 'significantly different legal posture.'" *Sells* v. *Stephens*, 536 Fed. Appx. 483, 490-91 (5th Cir. 2013). Put differently, a claim is fundamentally altered where there is a "substantial amount[] of new evidence" that cannot be "derived from the state court record" and that "alters the nature of [the petitioner's] claim," and where "the claims and allegations [in state proceedings] were conclusory and undeveloped." *Id.* at 491. *Cf. Conner* v. *Quarterman*, 477 F.3d 287, 292 (5th Cir. 2007) (holding that new evidence did not fundamentally alter claim where it was largely duplicative of evidence presented to the state court).

Here, Ramey's new evidence fundamentally altered his Undeveloped IATC Claim, rendering it unexhausted, procedurally defaulted, and subject to *Martinez/Trevino*. That claim did not (1) identify the mitigation theories that trial counsel should have investigated, (2) state what a reasonable investigation would have found, (3) name the witnesses that should have been called, (4) demonstrate that they would have testified, (5) demonstrate what they would have testified to, or (6) demonstrate that their testimony would have been favorable to Ramey. *See* ROA.2861. Without such evidence, the Undeveloped IATC Claim was doomed from the start. *Miller* v. *Dretke*, 420 F.3d 356, 361 (5th Cir. 2005); *Gregory* v. *Thaler*, 601 F.3d 347, 352 (5th Cir. 2010).

Ramey's new evidence corrected each of these deficiencies, placing the new Mitigation Claim in a fundamentally stronger legal position. For example, Ramey presented a wealth of evidence to the District Court that trial counsel failed to: conduct *any* mitigation investigation, *see* ROA.391, 399, 551-52, 600-07; adequately prepare or select mitigation witnesses, *see* ROA.395-96, 467, 534-36, 555-58, 5144-48; investigate, discover, and present additional mitigation theories, *see* ROA.238-40, 409-18, 457-65, 544-45, identify mitigation witnesses who should have been called to testify, *see* ROA.457-59, 461-64, 467, 532, 540-41, 544-46; or adequately investigate and defend against the prosecution's evidence, *see* ROA.400-01, 404-05, 530-31, 548.

By correcting the grave deficiencies of the superficial and conclusory Undeveloped IATC Claim, Ramey's new evidence fundamentally altered that claim, creating a new claim demonstrating exactly what trial counsel should have investigated and presented and how Ramey's chances at a life sentence would have dramatically increased as a result. Accordingly, his fully developed Mitigation Claim was never presented to the state court and is unexhausted and procedurally defaulted.

2. Ramey's fundamentally altered Mitigation Claim is unexhausted, procedurally defaulted, and subject to *Martinez/Trevino*.

Ramey's Mitigation Claim is procedurally defaulted, but he can overcome that default. Ramey meets all the requirements to establish cause under *Martinez/Trevino*, and the Fifth Circuit erred in denying Ramey a COA on the claim. *See supra* PROCEDURAL HISTORY. Indeed, in denying a COA on this issue, the Fifth Circuit did not even acknowledge Ramey's fundamental alteration argument. *See* App.B.

Absent explicit guidance from this Court that the fundamental alteration doctrine applies to an Undeveloped IATC Claim, the Court risks continued inequitable treatment of petitioners like Ramey across different circuits—or even within the same one.

The Court should intervene to clarify that a federal habeas court may consider new evidence where new evidence fundamentally alters an Undeveloped IATC Claim and the petitioner shows that the *Martinez/Trevino* exception applies.

CONCLUSION

For the foregoing reasons, Ramey respectfully asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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December 23, 2021

APPENDIX F

First Subsequent Application for Post-Conviction Writ of Habeas Corpus, *Ex parte Ramey*, No. WR-74,896-02 (Tex. Crim. App. Sept. 9, 2026)

IN THE 24TH DISTRICT COURT
JACKSON COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE KER'SEAN O. RAMEY,	§	**WRIT NO. __________**
Applicant	§	**TRIAL COURT CAUSE NO. 05-12-7342**
	§	*****CAPITAL CASE*****

FIRST SUBSEQUENT APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS PURSUANT TO TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 11.071

ORAL ARGUMENT REQUESTED

Mr. Ramey is scheduled to be executed Wednesday, September 23, 2026.

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I. INTRODUCTION

On January 23, 2007, following a trial rife with constitutional errors, applicant Ker'Sean Ramey was sentenced to death for three homicides that occurred during an attempted robbery.

Ramey's trial was riddled with constitutional violations, including the profoundly ineffective performance of trial counsel Joseph R. Willie, II ("Dr. Willie"), a full-time dentist and part-time lawyer who had never tried a capital case to verdict, and failed to conduct *any* independent investigation or interview *any* of the state's witnesses. Dr. Willie's incompetence allowed a cascade of constitutional violations to go unchallenged and unremedied, resulting in Ramey's wholly unreliable conviction and sentence.

First, racial bias in jury selection. During *voir dire*, the State used a pretextual peremptory strike and a jury shuffle to exclude Black jurors. The trial court never completed the constitutionally required *Batson* inquiry, accepting the State's pretextual race-neutral reasons and denying the defense any meaningful opportunity to rebut them.

Second, ineffective assistance at the guilt/innocence phase. Dr. Willie did nothing to investigate the state's case, relying solely on what was produced by the state. He failed to conduct any independent investigation, allowing the State to present a parade of unreliable, biased witnesses unchallenged by any of the substantial discrediting information that an investigation would have uncovered. Indeed, undersigned counsel's investigation discovered unambiguously false testimony, undisclosed deals, and coercion by the State—impeachment evidence that would have substantially undermined the State's case.

Third, ineffective assistance at the penalty phase. Dr. Willie also conducted no mitigation investigation at all, leaving swaths of mitigation evidence that was never presented to or considered by the jury. Moreover, Dr. Willie failed to investigate the State's penalty phase case, leaving unchallenged the State's case for death. With both sides of the scales improperly weighted due to Dr. Willie's failures, ***the jury sentenced Ramey to death in less than 14 minutes.***

Fourth, the State's presentation of materially false evidence. Much of the State's evidence was materially false, including testimony from a series of snitches. The State failed to disclose evidence that would have undermined or impeached their central witnesses. In combination with Dr. Willie's ineffectiveness, the jury was deprived of the means to evaluate the validity of the state's case. The State also presented "expert" testimony from ballistics and future dangerousness expert as unimpeachable, even though it is now clear that their testimony relied on since-discredited methodologies. By presenting this testimony as certain, the State grossly overstated its reliability and the weight the jury should give it in determining critical issues at trial.

In short, serious constitutional violations infected every stage of trial. Ramey's conviction and sentence are constitutionally unreliable, and his claims both satisfy the requirements of Texas Code of Criminal Procedure article 11.071, § 5, and demand relief.[1]

II. BACKGROUND[2]

A. Sean's childhood was marred by poverty, abuse, instability and abandonment, and racism.

1. Sean suffered childhood abuse, instability, poverty, and abandonment

Sean's difficulties began in utero. His mother, Terral Stevens, regularly smoked marijuana and cigarettes, and likely consumed alcohol, while pregnant with Sean. Ex. 2 ¶¶ 2–3 (Aff. of Terral Stevens ("Stevens Aff.")).

[1] Unless otherwise stated, "article" refers to articles in the Texas Code of Criminal Procedure.
[2] *See* Ex. 1 (Aff. of Alisha C. Burgin) (introducing and authenticating proffered exhibits).

Sean grew up primarily in Edna, a town with a history of racial violence and segregation—a history that shaped generations of Black families, including Sean's. Ex. 2 ¶¶ 4, 6 (Stevens Aff.); Ex. 3 ¶ 2 (Stroude Aff.).

From infancy, Sean was surrounded by drug and alcohol abuse and criminal activity. In his first seven years, he lived in public housing with Stevens and her long-term boyfriend, Lonny Lyte. Ex. 2, ¶ 7. Lyte was a drug dealer who cooked crack and sold marijuana in the family home, sometimes in Sean's presence. *Id.* ¶ 13. Stevens and Lyte used drugs around Sean. *Id.* ¶¶ 16–17. Lyte laced Stevens' marijuana cigarettes with crack without her knowledge, resulting in her addiction to the drug. *Id.* ¶¶ 16–17.

In addition, Sean suffered regular physical and psychological abuse. *See* Ex. 4 ¶¶ 6–8 (Aff. of Ilethia Cephus ("Cephus Aff.")). Both Lyte and Stevens beat Sean from at least the age of two or three. *Id.* ¶ 6 (Cephas Aff.). Lyte's brand of "punishment" was typically unprovoked and often savagely violent. Lyte would often abuse Sean in the same way: grabbing and lifting Sean by the arm and beating him all over his body for several minutes, sometimes while Sean was naked. *Id.* Lyte's weapon of choice was his belt, but he also beat Sean with other objects. *Id.* ¶ 8.

Sean's cousin remains haunted by the sounds of the beatings: Lyte's belt hitting Sean's body and toddler Sean's screams and cries. *Id.* After the beatings, Sean would usually lie in the fetal position and cry with welts all over his body. *Id.* ¶ 7.

Even after Lyte left, the abuse continued: while drunk, Terral's new husband, Anthony Stevens, Sr., beat Sean and called him profane names. Ex. 2 ¶ 21–22 (Stevens Aff.).

The abuse escalated. When Sean was nine, his parents were reported to the Texas Department of Protective and Regulatory Services ("CPS"). *Id.* ¶ 24. The

CPS investigator was friendly with Sean's uncle and summarily dismissed the allegations, so the abuse continued. *Id.* Sean's uncle, Raymond Neal Ramey ("Neal"), also brutally beat him as a preteen, purportedly as discipline. *Id.* ¶ 26. Neal, (another drunk) would force Sean to undress from the waist down and beat him bloody with a belt or small tree branch. *Id.* ¶¶ 26, 27, 29.

As a result, Sean's childhood was marked by a sense of deep abandonment by his parental figures. Sean felt abandoned by his mother because she consistently sided with his abusers. Ex. 2 ¶ 25 (Stevens Aff.). And Sean was in fact abandoned by his father figure and his biological father. Until he was seven, Sean and Lyte both believed that Lyte was his biological father. *Id.* ¶ 7. Even before Lyte learned otherwise, he was an unstable presence in Sean's life, stealing from the family—including Sean's toys and Christmas presents—and disappearing for months at a time. *Id.* ¶¶ 15, 19–20. Shortly after learning that he was not Sean's biological father, Lyte ended his relationship with Stevens, abandoning Sean, who did not yet know the truth. *Id.* ¶ 8.

Sean learned the truth about his parentage from his biological father, Bobby Thompson, with whom Sean had no prior relationship. Thompson unceremoniously revealed to Sean that he, not Lyte, was Sean's biological father. *Id.* ¶ 9. Sean desperately wanted a relationship with Thompson, but Thompson cruelly rebuffed Sean, even ignoring him in public. *Id.* ¶ 10.

Sean's sense of abandonment, isolation, and vulnerability was exacerbated after the death of his beloved grandmother. *Id.* ¶¶ 50–51. With no one "to turn to for love and protection," Sean became distant and detached Ex. 5 ¶ 9 (Aff. of Deloris Robinson ("Robinson Aff.")).

Sean's family struggled to make ends meet during his childhood. Stevens relied on government assistance to provide for her family while she was unable to work, and the family received Section 8 housing vouchers for several years. Ex. 2 ¶ 30 (Stevens Aff.).

2. Sean's cognitive, developmental, and emotional difficulties.

Sean also suffered serious developmental disorders for which he received inadequate support. He was diagnosed with ADHD at age four, and his prescribed medication—when he received it—made him lethargic and emotionally withdrawn. *Id.* ¶¶ 31, 33; *see also id.* at Ex. C (Stevens Aff.); Ex. 4 (Cephus Aff.) ¶¶ 12–13. Throughout elementary school, exams showed below-average intelligence in several subject areas. *See* Ex. 2 (Stevens Aff.) ¶¶ 36–41. Sean's functional level was well below that of his peers in verbal analogies, writing fluency, and oral language. *Id.* ¶ 37. After repeatedly failing academic and intelligence assessments, Sean was diagnosed with dyslexia. *Id.* ¶ 42; *see also id.* Ex. F.

Sean continued to score well below average on academic and intelligence assessments throughout high school. *Id.* ¶¶ 42–47. Because of his dyslexia, short attention span, inability to follow directions, and difficulty building or maintaining satisfactory interpersonal relationships, Sean never graduated from high school or earned a GED. *Id.* ¶¶ 36–47. His stunted emotional growth, inadequately treated disorders, and limited intelligence made him vulnerable to negative influence. That vulnerability, his tendency to follow others, poverty, and the pressures of teenage parenthood led him to fall in with LeJames Norman.

The jury did not know any of this. Worse, Dr. Willie, through his "expert witness" told the jury just the opposite: that Ramey's family was socio-economically stable and his childhood was free from abuse. 38 RR 129:5–6, 133:12. Unsurprisingly, ***the jury sentenced Ramey to death after less than fourteen minutes of deliberation.***

B. The Crime and Investigation

On August 25, 2005, the bodies of Celso Lopez, Tiffani Peacock, and Samuel Roberts were found in Roberts' residence. First responders from the Edna Police Department ("EPD") and Jackson County Sheriff's Department ("JCSD") requested support from the Texas Department of Public Safety ("DPS") Crime Unit. Ex. 6 ¶ 7 (Incident Report). DPS technicians collected latent fingerprints and removed numerous items from the crime scene. Ex. 7 ¶ 1.4 (Investigation Report II); Ex. 8 ¶¶ 2.1–2.2 (Investigation Report IV). Processing the physical evidence yielded no suspects. Ex. 7 ¶¶ 1.2–1.6 (Investigation Report II).

EPD's investigation first focused on Roberts's drug dealing and gang associations. Ex. 6 ¶¶ 90–92, 100–103, 112, 118–21 (Incident Report); *see also* Ex. 9 ¶¶ 1.4–1.6 (Investigation Report I); Ex. 10 ¶¶ 2.2–2.7, 2.23 (Investigation Report III); Ex. 11 ¶¶ 2–54 (Supplemental Investigation Report). The investigation shifted focus in November 2005, when law enforcement received an anonymous tip implicating LeJames Norman, a young man with an already long history of crimes, petty and violent alike, *see infra* Part IV.B.3.a, Ramey, and two others. Ex. 11 ¶ 58 (Supplemental Investigation Report).

On December 12, 2005, investigators interrogated Ramey at the Jackson County Detention Center ("JCDC"), where he was held on unrelated charges. Ex. 12 ¶ 1 (Supplemental Investigation Report II). Ramey denied involvement in the murders and was promptly arrested for capital murder. *Id.* ¶ 2. A single-count grand jury indictment charged Ramey with capital murder on December 17, 2005. 1 CR 3-5. Ramey pleaded not guilty at his arraignment on January 4, 2006. 1 CR 230; *see also* 3 RR 4–9.

There was no physical evidence—fingerprints, DNA, blood, or hair—connecting Ramey to the crime scene or alleged murder weapons. *See* Ex. 13 (Supplemental Serontology Report); 31 RR 51–70. Searches of Ramey's home and possessions yielded none of the items believed to have been taken during the murders. 30 RR 152:21–170:19. And though law enforcement recovered two .22-caliber revolvers that the State alleged to be the murder weapons, the State's own forensic firearm examiner could not conclusively connect bullets recovered from the victims to either weapon. *See* 33 RR 91:9–19, 127:11–28:1, 130:20–31:3.

Thus, the State focused on collecting statements and witnesses—often under suspicious circumstances—from incarcerated individuals housed with Ramey and his alleged accomplices. Subsequent investigation by undersigned counsel has revealed that the testimony of each of these witnesses could have been substantially undermined or excluded—revealed as entirely false or the highly suspect product of coercion or promises of favorable treatment. *See infra* Parts IV.B.3.b, IV.D. Unfortunately, Dr. Willie's failure to fulfill even he most basic duties to Ramey prevented him from discovering and presenting this powerful impeachment evidence.

C. Defense Counsel

On December 14, 2005, Ramey's mother retained Dr. Willie. Ex. 14 (Retainer Agreement). Dr. Willie was a full-time dentist based in Houston who also maintained a small private law practice handling a variety of civil and criminal matters. He initially charged Stevens a $17,500 flat fee to ensure that Ramey "didn't fry." *Id.*; Ex. 2 ¶ 59 (Stevens Aff.). But he neglected Ramey and his family, frequently disappearing and resurfacing only to demand more money. *Id.* ¶¶ 60–64.

Dr. Willie was overextended; because he saw dental patients during the day, his law practice was largely confined to outside business hours. *See* Ex. 15 (Texas Board of Dental Examiners Record); Ex. 16 (Decl. of James D. Evans III ("Evans Decl.")) ¶ 6. He was also a reservist in the Marine Corps, and served on active duty in California for 12 days in September 2006, one month before Ramey's trial. 5 RR 6:5–25.

Dr. Willie was also woefully inexperienced. He had never tried a capital case to a jury or conducted or supervised a mitigation investigation. His failures began as early as Ramey's January 4, 2006 arraignment, when he agreed that in exchange for prosecutor Robert "Bobby" Bell's "open file," he would not be entitled to or request advance notice of the witnesses the State intended to offer against Ramey. Ex. 17 (Open File Agreement). The agreement also purported to absolve Bell of rule-and statute-based requirements that the State provide, upon request, notice of its intent to introduce evidence of crimes, wrongs or other acts. *See id.* (providing that Bell would not "be required to comply with" Evidence Rules 404(b) and 609 or article 37.07).[3]

Just before trial, Dr. Willie brought in a second attorney, Evans. Ex. 16 ¶ 7 (Evans Decl.). Evans believed he was recruited to assist with *voir dire* and did not know what preparation Dr. Willie had already done (he had done very little). *Id.* ¶¶ 8–9. Evans' timesheets show that he spent most of his time on the case in court. Ex. 18 (Evans' Billing Records). Of the 115 out-of-court hours he billed, nearly half involved travel to the trial venue. *Id.* His timesheet does not reflect any investigation of Ramey's case. *Id.*

Although apparently too busy to personally conduct the pretrial and mitigation investigations necessary to defend Ramey, Dr. Willie did not delegate those tasks to a qualified professional. His file contains no record of a mitigation specialist or investigator—no payment, invoice, notes, or report. Evans's records unsurprisingly contain none either; he admitted he did not conduct or oversee such an investigation. Ex. 16 ¶¶ 11–17 (Evans Decl.). Despite repeated expressions of concern and offers of assistance from the trial court and others, Dr. Willie did not

[3] TEX. R. EVID. 404(b), TEX. R. EVID. 609(f), and TCCP art. 37.07 § 3(g) each required Bell, upon Dr. Willie's request, to give notice before introducing prior bad acts or prior convictions—whether in the State's case-in-chief, for impeachment, or at punishment.

conduct any independent investigation into the State's case, instead relying blindly on the State's "open file." *See* Ex. 19 (Ake Hearing 1); Ex. 20 (Ake Hearing 2); Ex. 21 (Ake Hearing 3). Nor did Dr. Willie interview Ramey's family or friends. *See infra* Parts IV.B.2 and IV.C.1.

Dr. Willie did not review the witness statements the State produced from its investigation, many of which contained internal contradictions or, where witnesses gave multiple statements, were inconsistent with other versions. *See infra* Part IV.B. These statements would have identified key witnesses and provided substantial impeachment material. *See infra* Part IV.B.

And rather than hiring a qualified future-dangerousness expert to rebut the State's case, Dr. Willie retained a psychiatrist specializing in geriatric patients who had never encountered or testified about the concept of future dangerousness.. Ex. 22 ¶ 2 (Decl. of M. Kunik ("Kunik Decl.")); Ex. 23 (Kunik CV). Finally, although ballistics evidence was central to the State's case, defense counsel did not retain a firearms examiner or consult a crime-scene reconstruction expert. 34 RR 90:18–91:1 (Evans stating that defense had not met with a firearms examiner before the State presented its ballistics case).[4]

Unfortunately, Dr. Willie's gross mishandling of Ramey's case was no isolated deviation from an otherwise stellar record. Dr. Willie has a striking record of professional incompetence, if not total indifference to his ethical and moral obligations. On August 20, 2026, in fact, Judge Finley forcefully dissented from the this Court's refusal to reconsider its denial of an initial habeas petition where Dr. Willie was counsel. *Ex parte Marceaux*, No. WR-97,305-01, 2026 WL 2436060 (Tex. Crim. App. Aug. 20, 2026) (Finley, J., dissenting). There, applicant

[4] If Trial Counsel did meet with a firearms examiner after the State presented its ballistics evidence, there is no indication in counsel's file, and it never called that examiner to testify. Nor did Trial Counsel ever present a crime scene reconstruction expert to testify.

Marceaux alleged that Dr. Willie had filed the petition—which was a copy paste of Marceaux's direct appeal brief—***without his knowledge or consent***. *Id.*

Judge Finley identified several critical failures in Dr. Willie's representation of Marceaux: failing to communicate with his client, making an unauthorized and uninvestigated filing, and insulating himself from liability. *Id.* at *1–3, 6. Marceaux's interactions with Dr. Willie closely resemble Ramey's experience: Dr. Willie did not return calls, respond to correspondence, or otherwise communicate with Ramey or his representative (his mother) *See* Ex. 2 ¶¶ 63–64 (Stevens Aff.).

Judge Finley's *Marceaux* dissent describes a pattern of misconduct, including around the time of Ramey's trial, that has led to multiple suspensions of Dr. Willie's law license and cost clients their freedom or money. In 2012, Dr. Willie unsuccessfully challenged professional discipline imposed on him after his 2007 representation of a criminal defendant. There, Dr. Willie failed to abide by his client's decision, keep him reasonably informed, comply with requests for information, and surrender the client's papers and property. *Marceaux*, 2026 WL 2436060 at *3; *see also Willie v. Comm'n for Law. Discipline*, No. 01-11-00428-CV, 2012 WL 761241, at *1 (Tex. App. Mar. 8, 2012).

In 2014, Dr. Willie's license was suspended for six months after he neglected a civil client ***by failing to appear at trial***. *Marceaux*, 2026 WL 2436060, at *3; *see also Willie v. Comm'n of Law. Discipline,* No. 01-11-00433-CV, 2014 WL 586226 (Tex. App. Feb. 13, 2014). In 2015, Dr. Willie's license was suspended for one year, this time because in 2008 he had filed a criminal appeal falsely representing the State's actions during a plea hearing that Dr. Willie attended. *Marceaux*, 2026 WL 2436060, at *3–5.

Dr. Willie has established a clear pattern of professional misconduct, much of it contemporaneous with his trial representation of Ramey.

D. Trial

1. Voir Dire

During *voir dire*, twelve jurors and two alternates were selected from two panels totaling 156 veniremembers. The first panel (135 veniremembers, juror numbers 91-499) was qualified on October 30, 2006. *See* 7 RR 60–63. Each panelist submitted a sworn Juror Questionnaire Card (identifying, among other things, their race) and completed a 23-page questionnaire. 40 RR 7–29; Ex. 24 (First Venire Panel: Juror Questionnaire Cards).

Prosecutor Bell, a seasoned trial veteran, questioned most veniremembers extensively. *See, e.g.*, 19 RR 7–58; 23 RR 115–160; 12 RR 183–272; 25 RR 13–94. Conversely, defense counsel typically asked few, if any, questions. *E.g.*, 9 RR 213:7–22 (Craig Ullmann). While the State focused on death-qualifying the jury, the defense asked panelists about their favorite television show and whether they salted food before tasting it. *E.g.*, 24 RR 72:17–25; 73:14–19.

Seven members of the first panel were Black.[5] *See* Ex. 24 (First Venire Panel: Juror Questionnaire Cards). On the State's motion, the trial court struck five of the seven Black members for cause, excusing the other two.[6] 8 RR 96; 10 RR 189–243; 12 RR 92–101; 14 RR 272–280; 26 RR 19–23; 26 RR 114:15–179:8; 27 RR 64–80. In establishing his purported "cause" challenges, the prosecutor questioned Black veniremembers differently from similarly situated white veniremembers. *See infra* Part IV.A.3.a(ii); *see also infra* Notes 10 and 11 and associated text.

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[5] Six panelists self-identified as Black on their juror cards: Donyale L. Tyrone, Rhonda G. Davis, Joyce Bell, Cynthia J. Williams, Tommie Youngblood, and Carolyn McGrew. The race of the seventh, Kenneth D. Mumphord, was revealed in post-conviction investigation.

[6] Donyale L. Tyrone and Rhonda G. Davis were excused because they were distantly related to Mr. Ramey.

Once eight jurors had been chosen and it became apparent that the first panel would be exhausted before twelve were seated, the trial court called a second venire panel. 19 RR 160:2–7.

On December 4, 2006, a large central jury panel was qualified and 49 members (juror numbers ranging from 9 to 183) were assigned to Ramey's case. *See* 20 RR 3–30, 21 RR 7–9. The parties were absent when the second panel was qualified and had not reviewed the juror questionnaires before the second panel appeared. *Id.*

The new panel's racial composition was visually apparent as soon as the members entered the courtroom and were seated by juror number. Of the 49 veniremembers in the second panel, only six were Black; but ***four*** of those six were seated among the ***first 10*** to be questioned. *See* Ex. 25 (Second Venire Panel: Juror Questionnaire Cards). The State requested a jury shuffle before veniremembers were even asked to complete their questionnaires. 21 RR 12:3–8; *id*. 12–19. After the shuffle, only ***two*** Black veniremembers were seated among the ***first 30*** panelists to be questioned.[7] *See* Ex. 25 (Second Venire Panel: Juror Questionnaire Cards).

The next day, the parties resumed *voir dire* of the first venire panel and continued until the panel was exhausted on December 13, 2006. Eleven jurors were

[7] After the jury shuffle, the six Black veniremembers were reordered as follows (as identified by their seated position pre and post shuffle):

Name	Pre-shuffle	Post-shuffle
Eleanor Tisdom	1	42
Laura Sanders	5	31
Bennie Green	8	36
Linda McAfee	10	44
Quaahshanea Barnett	44	8
Cheryl Steadham-Scott	18	2

seated from the first panel, leaving three (one juror and two alternates) to be chosen from the second panel. *See* 27 RR–29 RR.[8]

The first veniremember scheduled to be questioned from the second panel was Cheryl Steadham-Scott, a Black woman.[9] The prosecutor began by asking Steadham-Scott if her job would interfere with serving as a juror. 29 RR 46:1–47:15. Although she explained that it would not, Bell persisted in suggesting otherwise. *Id.* When Steadham-Scott mentioned she had been transferred to several locations for work, Bell responded: "***Do you think it's because you were black?***" 29 RR 69:25–70:6 (emphasis added). He also asked whether she believed "the criminal justice system treats African Americans unfairly," *id.* at 70:7–13, and asked her position on the guilt or innocence of famous Black people, *id.* at 70:7–71:19.

More generally, when a Black veniremember's questionnaire suggested opposition to capital punishment, the prosecutor used leading questions to elicit a commitment that the prospective juror could not impose death.[10] When a Black

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[8] The final juror and two alternates were seated from the first 21 members of the second venire (post-shuffle). Two of those panelists were Black. *See* Ex. 25 (Second Venire Panel: Juror Questionnaire Cards). The parties excused 13 panelists without questions or comment (28 RR 4:3–9, 29 RR 138:23–139:21), excused two more after asking about their work obligations (29 RR 141:1–143:25, 145–148), and two were struck for cause (29 RR 84:1–3, 138:2–5). Four eligible veniremembers remained in the second panel: the prosecutor used a peremptory strike against the only Black veniremember and accepted the remaining three nonblack veniremembers.

[9] After the State's requested jury shuffle, Ms. Steadham-Scott became veniremember No. 2. *See* Ex. 25 (Second Venire Panel: Juror Questionnaire Cards). Due to a scheduling issue Raymond Ramirez was questioned first, but the parties deferred a decision on placing him on the jury until after Steadham-Scott had been questioned.

[10] *See* 14 RR 278:5–7 (during the *voir dire* of Joyce Bell, the prosecutor asked, "And just from having read your questionnaire, it's obvious that you have some very strong feelings or oppositions to the death penalty . . ."); 26 RR 20:22–21:1 (the States's first question to prospective juror Cynthia Williams includes: "I'm not unmindful of how you feel about the death penalty. You made it clear, okay?"); 27 RR 76:25–78:9 (upon hearing that veniremember Carolyn McGrew's husband is a church deacon, the prosecutor said, "I know all of the deacons real well in [my] church ... I don't think a single one of them could ever sit on a jury and give the death penalty ... [H]as any of that rubbed off on you?"); and 29 RR 83:2–16 (at the beginning of

veniremember said he or she was *not* opposed to the death penalty, he asked racially charged questions about whether Black people, including their family members, were treated unfairly.[11]

In response to Steadham-Scott's repeated assurances that she could and would apply the law as directed, the prosecutor demanded she pick sides in a hypothetical "debate" about the death penalty and questioned her about the burden of proof in a capital case. 29 RR 70:14–71:6; *id.* at 74:14–78:8. After finally passing Steadham-Scott for defense questioning, the prosecution quickly interrupted to declare it would not challenge her for cause. 29 RR 78:11–79:4. The court temporarily excused Steadham-Scott; the moment she left the courtroom, the State exercised a peremptory strike. *Id.* at 79:5–11.

On January 4, 2007 (the next court day), Dr. Willie challenged the Steadham-Scott strike and requested a race-neutral justification. 30 RR 9:4–10. The State responded:

> Bell: I will tell the Court that it was my understanding if I would have continued to pursue the line of questioning, that the juror would have most likely been challengeable for cause, but I didn't do it because her questionnaire clearly indicated that she could not impose the death penalty and

veniremember Quaahshanea Barnett Ring's *voir dire*, the prosecutor asked, "When I read your questionnaire it seems like that you have some strong feelings against the death penalty ... [and] you just don't believe you could participate with eleven others and sentence somebody to die . . .?").

[11] *See* 10 RR 226:12–23 (the prosecutor asks veniremember Kenneth Mumphord whether he believes his son was treated fairly during his criminal prosecution); 26 RR 153:6–157:19 (the prosecutor questioned veniremember Tommie Youngblood extensively about race, including asking her: "Please don't jump on me too much. Do you think there's anything about the fact that they were African American that may have caused that?"); and 29 RR 69:7–71:19 (the prosecutor questioned veniremember Cheryl Steadham-Scott whether Black people were treated fairly).

	there were other many racially neutral reasons and, if the Court wants, I can try to go back and resurrect those notes.
The Court:	I'm comfortable with the record reflecting what it did with respect to that juror at this time.

30 RR 9:18–10:11.

Shortly thereafter, the full jury—without a single Black member seated on it—was selected, and the court recessed for the holidays. 29 RR 158–162.

2. The Guilt-Innocence Phase

The guilt-innocence phase began January 4, 2007. During his lengthy opening, 30 RR 19–119, Bell told the jury that he would prove that Ramey had committed capital murder by presenting evidence connecting Ramey to the guns used in the crime and testimony from nine individuals to whom Ramey had purportedly confessed. Dr. Willie's much shorter opening, *see* 30 RR 119–22, focused only on the State's burden of proof.

The State's case-in-chief began with evidence suggesting Ramey stole guns from the residence of Kenneth Nairn. Nairn, law enforcement investigators, and an ATF agent testified about the burglaries, identifying several purportedly stolen weapons. 30 RR 124–83. Next up were Gerald Manzanalez and Christopher Times, who described Ramey's purported involvement in the Nairn burglaries—while minimizing their roles. 31 RR 16–51. Dr. Willie barely questioned Times and did not cross-examine Manzanalez. 31 RR 33:9–15, 49:8–51:1

The State presented testimony from various individuals who had discovered the victims' bodies, processed the crime scene, and been in the area that night. 31 RR 72–175. A latent print examiner testified that no fingerprints linked Ramey to either the crime scene or to the alleged murder weapons. 31 RR 51–70.

The State next called Ramey's ex-girlfriend, Stacy Johnson, and drug dealer Lyte, Ramey's former father figure and abuser. 31 RR 182–225. They testified that Ramey sought their assistance disposing of two guns shortly after the crime. 31 RR 190–97. Johnson testified that she drove Ramey to a local dam where he threw two guns into the water. *Id.* The jury then heard how DPS divers had recovered two pistols at the dam. 32 RR 75:18–79:2.

The State then presented testimony from LeJames Norman, Ramey's alleged accomplice. 32 RR 110–81; 33 RR 132–211. Norman initially admitted shooting two of the victims and claimed Ramey shot the third, but later in his direct examination, Norman claimed Ramey shot two victims. 32 RR 147–62.

The State interrupted Norman's testimony to call medical examiner John Stash, 33 RR 8–66, and firearm examiner Ronald Crumley, *id.* at 80–130. Stash described the victims' injuries and his recovery of the bullets. 33 RR 8–66. Crumley could not conclusively state that the bullets taken from the victims were fired by the guns recovered from the dam. 33 RR 91:9–19, 127:11–28:1, 130:20–31:3.

The State then presented a parade of "false friends"—individuals who testified that Ramey confessed his involvement in the crime to them. 34 RR 41–75, 92–123, 133–38, 142–65, 190–203.

Dr. Willie did almost nothing to rebut the State's evidence. As discussed in detail below, the defense failed to properly investigate most of the State's witnesses, leaving undiscovered powerful impeachment evidence that would have disarmed the State's case against Ramey. *See infra* Part IV.B.

On January 16, 2007, after deliberating for about an hour, the jury found Ramey guilty of capital murder. 35 RR 136–37.

3. The Punishment Phase

The punishment phase began on January 17, 2007. 36 RR 6. The State presented 38 “factual” witnesses who described various bad acts allegedly committed by Ramey over the years. 36 RR 10–81; 37 RR 1–183; 38 RR 1–90. Despite having notice of some of the punishment witnesses, the defense did little to impeach them or otherwise rebut the State’s punishment case.

Worse, Dr. Willie failed to investigate and present the abundance of available mitigating evidence. Dr. Willie called only two witnesses at punishment—even Evans believed this was deficient. Ex. 16 ¶ 14 (Evans Decl.); 38 RR 86–163.

After calling Ramey’s mother, Dr. Willie called Kunik to rebut the State’s future dangerousness expert—even though Kunik, a gerontologist, had never been exposed to the concept of future dangerousness. *Id.*; Ex. 22 ¶ 2 (Kunik Decl.). Dr. Willie hired Kunik on referral from Dr. Willie’s own wife, a lawyer for whom Kunik had previously provided guardianship expert opinions in her elder, probate, and trust & estates cases. Ex. 22 ¶ 4. (Kunik Decl.). Kunik was utterly punchless. *See* Ex. 16 ¶ 15. (Evans Decl.). Among other issues, Kunik erroneously concluded there was no physical violence at Ramey’s home and incorrectly described Ramey’s family as psychologically and socio-economically stable. 38 RR 132 10–12; Ex. 26 at 1, 2 (Kunik Report).

The jury sentenced Ramey to death in less than 14 minutes. 39 RR 59:9–17.

E. Post-Conviction Proceedings

The Texas Court of Criminal Appeals ("TCCA") affirmed the judgment on direct review. *Ramey v. State*, No. AP-75,678, 2009 WL 335276 (Tex. Crim. App. Feb. 11, 2009), *cert. denied*, *Ramey v. Texas*, 558 U.S. 836 (2009).

Appointed state post-conviction counsel Richard W. Rogers III ("Rogers") filed a state application for writ of habeas corpus on May 16, 2008.[12] In late 2010, the trial court issued findings of fact and conclusions of law recommending relief be denied.

The TCCA thereafter filed and set the case for submission on a single issue: whether, considering its recent decision in *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010), the trial court had erred in admitting the testimony of Dr. Richard Coons regarding future dangerousness. Order, *Ex parte Ramey*, No. AP-76,533, 2011 WL 1288284 (Tex. Crim. App. Apr. 6, 2011) (per curiam). After receiving briefing, the TCCA denied Ramey's habeas application in November 2012. *Ex parte Ramey*, 382 S.W.3d 396, 398 (Tex. Crim. App. 2012) (holding that any error in admitting Coons's testimony was not cognizable on habeas and summarily denying Ramey's remaining claims). Justice Meyers dissented. *Id.* at 398.

Ramey proceeded to federal court, where after obtaining new counsel, he filed an amended federal habeas petition. *Ramey v. Davis*, No. 6:13-cv-00043 (S.D. Tex. Dec. 15, 2015), ECF No. 30. In July 2018, the district court denied the petition and denied a certificate of appealability ("COA") on all claims. *Ramey v. Davis*, 314 F. Supp. 3d 785, 831 (S.D. Tex. 2018), *aff'd sub nom. Ramey v. Lumpkin*, 7 F.4th 271 (5th Cir. 2021).

[12] Rogers was also constitutionally ineffective. He raised only record claims—many taken verbatim from the direct appeal brief—and conducted no investigation, despite being advised that no mitigation investigation occurred at trial.

In late 2019, the Fifth Circuit granted COA on Ramey's *Batson* claim and his claim of ineffective assistance of counsel at the guilt phase. It denied COA on his punishment-phase ineffectiveness claim. *Ramey v. Davis*, 942 F.3d 241, 246, 258 (5th Cir. 2019). It later affirmed the district court's denial of habeas relief. *Ramey v. Lumpkin*, 7 F.4th 271 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1442 (2022).

F. Execution Date and Post-Setting Proceedings

On May 7, 2026, by order of the 24th District Court of Victoria County, Ramey's execution was set for September 23, 2026.

On August 20, Ramey sought an emergency writ of mandamus in the trial court to compel the Jackson County Criminal District Attorney to release files requested under the TPIA. The motion was heard on September 1 and denied the following day.

Ramey submitted a clemency petition to the Texas Board of Pardons and Paroles on August 31; he supplemented it on September 8. On September 9, 2026, Ramey initiated emergency civil litigation to compel compliance with his TPIA request and obtain disclosure of the requested prosecution files.

III. LEGAL STANDARD

In considering whether to authorize claims raised in a subsequent habeas application, this Court initially asks only whether the applicant has made the threshold showing required by article 11.071 section 5(a). If so, the Court must allow the qualifying claim to proceed. *See Ex parte Blue*, 230 S.W.3d 151, 153 (Tex. Crim. App. 2007) (applicant who makes threshold showing under section 5(a)(3) is "entitled to" merits review). Ramey submits that he clears the hurdles set forth by all three provisions of section 5(a).

For claims under section 5(a)(1), Ramey must show that (1) the factual or legal basis for the claim was unavailable when he filed his previous application and (2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from the conviction. Tex. Code Crim. Proc. ("TCCP") art. 11.071 § 5(a)(1); *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). A claim's factual basis was unavailable if it was not "ascertainable through the exercise of reasonable diligence on or before" the filing of Ramey's initial post-conviction application. TCCP art. 11.071 § 5(e). A claim's legal basis was unavailable if it "was not recognized by or could not have been reasonably formulated from" a Texas or federal appellate decision. *Id.* § 5(d).

For claims under section 5(a)(2), Ramey may obtain review of the merits of any procedurally barred or previously raised claims so long as he alleges a "threshold prima facie showing of innocence by a preponderance of the evidence." *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) ("*Reed I*"); TCCP art. 11.071 § 5(a)(2). Specifically, Ramey must make a threshold showing that "but for a violation of the United States Constitution[,] no rational juror could have found [him] guilty beyond a reasonable doubt. TCCP art. 11.071 § 5(a)(2).

Under section 5(a)(2)'s adoption of the standard in *Schlup v. Delo*, 513 U.S. 298, 321 (1995), "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House v. Bell*, 547 U.S. 518, 537–38 (2006) (cleaned up). The Court must authorize a successive petition under section 5(a)(2) if it concludes that "in light of the new evidence, 'it is more likely than not that no reasonable juror would have rendered a guilty verdict beyond a reasonable doubt." *Reed I*, 271 S.W. at 733 (quoting *Schlup*, 513 U.S. at 327). Moreover, new evidence in support of a claim under section 5(a)(2) need not have been previously unavailable at the time of Ramey's original petition.

See Ex parte Reed, 670 S.W.3d 689, 745–46 (Tex. Crim. App. 2023) (declining to resolve open question of whether new evidence must be previously unavailable for purposes of section 5(a)(2) and considering all evidence proffered).[13]

Finally, this Court must authorize further proceedings on claims under section 5(a)(3) if Ramey demonstrates "sufficient specific facts … to make a *prima facie* showing that no rational juror would have answered one or more of the statutory special punishment issues in favor of the death penalty" but for the federal constitutional violation. *Ex parte Speer*, No. WR-59,101-06, 2025 WL 2151382, at *1 (Tex. Crim. App. July 30, 2025); TCCP art. 11.071 § 5(a)(3). To succeed under this prong, Ramey need not show he would have been ineligible for the death penalty but for a constitutional error; rather, the Court must authorize further proceedings on this claim so long as it finds a *prima facie* showing that no rational juror would have actually sentenced Ramey to death. *See Speer*, 2025 WL 2151382, at *2 (remanding claim "for further factual development" regarding whether, had the constitutional violation not occurred, "any rational juror would have answered one or more of the special punishment issues in favor of the death penalty").

In determining whether Ramey has made the requisite showing under any prong of section 5(a), the Court draws all inferences in Ramey's favor. *See Blue*, 230 S.W.3d at 163 (stating that authorization inquiry under § 5(a)(3) looks only to the "adequacy of the pleading"); *Campbell*, 226 S.W.3d at 421 (stating that TCCA's inquiry under § 5(a)(1) is limited to whether "the specific facts alleged, if established, would constitute a constitutional violation").

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[13] It would make little sense to require new evidence that was unavailable at the time of the initial state habeas petition for the section 5(a)(2) or 5(a)(3) gateways, because that new evidence would, by itself, be sufficient to satisfy section 5(a)(1) without the additional showings required by subsections 2 and 3.

Ultimately, Ramey need not prove entitlement to relief before this Court at this early juncture; he is entitled to further proceedings on a claim if he makes "a *threshold* showing of evidence that would be at least sufficient" to support a finding that the relevant standard is met. *Blue*, 230 S.W.3d at 163 (emphasis in original); *see also Speer*, 2025 WL 2151382, at *2 n.2 (stating that the burden to "justify remand in furtherance of meeting" a section 5(a) exception is "lighter" than the applicant's burden to prove entitlement to such an exception upon remand).

IV. CLAIMS FOR RELIEF

A. Claim 1: The State violated Ramey's right to equal protection by excluding jurors based on race.

The "Constitution forbids striking ***even a single*** prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

* * *

Ramey, a young Black man, was condemned to death by a nearly all-white jury.[14] This was not a coincidence.

The racial composition of the jury was the result of the State's systematic exclusion of every Black prospective juror, achieved by employing strategic tactics that the Supreme Court has recognized as indicators of purposeful racial discrimination. *See Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*").

These tactics culminated in the peremptory strike of Cheryl Steadham-Scott: the only Black venireperson that the prosecution could not challenge for cause. *See supra* Part II.D.1. Ramey challenged the strike, but the trial court immediately accepted the State's proffered reasons, depriving defense counsel of the

[14] Ultimately there were 11 white and 1 Hispanic jurors.

opportunity to rebut those reasons as pretext for racial discrimination. This too was constitutional error. *See Pitchford v. Cain*, 146 S. Ct. 1345, 1349 (2026).

The Supreme Court has refused to uphold a death sentence imposed by a jury where even **one** veniremember had been improperly excluded. *Davis v. Georgia*, 429 U.S. 122, 123 (1976) ("[I]f a venireman is improperly excluded … any subsequently imposed death penalty cannot stand."); *see also Snyder*, 552 U.S. 472 (setting aside conviction and death sentence for race-based peremptory strike). Here, the State used various techniques, all discriminatory, to exclude **every** Black veniremember from Ramey's jury.

Ramey was deprived of his Sixth and Fourteenth Amendment rights to have his trial decided by an impartial jury. His conviction and death sentence cannot stand.

1. Legal Standard

The Supreme Court has consistently reaffirmed that discriminatory jury practices violate the Constitution. *See Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986), *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), *modified by Powers v. Ohio*, 499 U.S. 400 (1991).

In *Batson*, the Supreme Court clarified that race discrimination in peremptory challenges violates the Constitution. 476 U.S. 79. To evaluate such challenges, *Batson* established a three-step framework: (1) the challenger must establish a *prima facie* case of discrimination; (2) the proponent must offer a race-neutral explanation; and (3) after the challenger has an opportunity to rebut the proffered reason as pretextual, the trial court must assess ***all relevant circumstances*** to decide if purposeful racial discrimination occurred. *Id.* at 96–97; *see also Pitchford* 146 S. Ct. at 1349; *Miller-El II*, 545 U.S. at 240; *Snyder*, 552 U.S. at 478.

2. The State struck Cheryl Steadham-Scott after failing to elicit grounds to challenge her for cause.[15]

Eleven jurors were selected from the first venire panel: the remaining juror and two alternates were chosen from a second panel after the first was exhausted. *See supra* Part II.D.1. These three seats were filled after the parties evaluated the first 21 veniremembers on the second panel after it was shuffled. *Id.* Only eight of those first 21 veniremembers were questioned.

Steadham-Scott was the first veniremember from the second panel to complete voir dire. 29 RR 7:1-10, 43:19-44:10. Consistent with her juror questionnaire, *see* Ex. 27 (Steadham-Scott Questionnaire at 41 RR Ex. 23), Steadham-Scott's voir dire established that she would be a fair juror. She asserted that she could and would apply the law as directed. 29 RR 63:19-65:25 ("I have to be fair and open about [the death penalty]."). And she stated that she saw no need to change the laws regarding the death penalty. 29 RR 63:16-64:8. At no point did Steadham-Scott state that she would have trouble applying the death penalty.

Nonetheless, the State's questioning of Steadham-Scott differed markedly from its questioning of other qualified veniremembers: it was calculated to elicit grounds to challenge her for cause. The State relentlessly focused on Steadham-Scott's life and personal beliefs, attempting to conflate Steadham-Scott's philosophical views on the death penalty with an inability to impose it. *See* 29 RR 47-71. The State also preyed on Steadham-Scott's innocent ignorance of how the law defined various degrees of murder, blurred the requisite burden of proof, and never discussed mitigating evidence. 29 RR 71:20-78:8.

After initially failing to elicit grounds for a cause challenge, the State increasingly focused on race. *See* 29 RR 69:25–71:19. When Steadham-Scott mentioned that she had been transferred to several locations for work, Bell

[15] *See supra* Part II.D.1 for additional factual context into jury selection.

inquired: "***Do you think it's because you were black?***" 29 RR 69:25–70:6 (emphasis added). He also asked whether she believed "the criminal justice system treats African Americans unfairly," *id*. at 70:7–13, and sought her view on the guilt or innocence of famous Black people, *id*. at 70:7–71:19.

When, after 30+ pages of interrogation, it was clear that Steadham-Scott could not be challenged for cause, the State passed Steadham-Scott to the defense for questioning, but soon thereafter exercised a peremptory strike. Before striking Steadham-Scott, Bell interfered with Dr. Willie's ability to question her and make a record on the very issue the prosecutor would later proffer as his "race-neutral" justification. *Id.* at 78:11–79:4.

3. The State's peremptory strike of Steadham-Scott violated the Equal Protection Clause.

As noted above, *supra* Part II.D.1, Dr. Willie asserted a *Batson* challenge to Steadham-Scott's strike the next court day. Although the prosecutor did not have his "notes" with him, he offered three purportedly race-neutral reasons for the strike, and the trial court promptly ended the matter, noting "I'm comfortable with the record reflecting what it did with respect to that juror at this time." 30 RR 9:18–10:11.

Where, as here, a prosecutor offers a race-neutral explanation for a peremptory challenge and the trial court rules on the ultimate question of intentional discrimination (even if it does so improperly, *see infra* Part IV.A.4.a), the preliminary issue of whether the defendant has made a prima facie showing is moot. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991).

The remaining questions are whether the prosecutor articulated a race-neutral explanation, and, if so, whether that explanation was a sham or pretext for a discriminatory strike. *See Miller-El II,* 545 U.S. at 239.

a. The State's "race-neutral" reasons are implausible, at best.

"[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El II*, 545 U.S. at 252.

The State gave three purportedly "race-neutral" reasons for his strike of Steadham-Scott: (1) "*if* [he] would have continued to pursue the line of questioning, that juror would have most likely been challengeable for cause;" (2) "her *questionnaire clearly indicated* that she could not impose the death penalty"; and (3) "there were other many racially-neutral reasons." 30 RR 10:1–7 (emphases added); *see also supra* Part II.D.1.

As explained below, these "reasons" do not pass muster. "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Miller-El v. Cockrell,* 537 U.S. 322, 339 (2003) ("*Miller-El I*").

(i) Further questioning "would have most likely" yielded cause.

The State's first "reason"—the decision not to "pursue the line of questioning" on a subject it claims would have warranted a challenge for cause—is evidence of pretext. *See Miller-El II*, 545 U.S. at 246 (failure to question a prospective juror about a reason given for strike suggests pretext) (citing *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000) ("[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.")). If the State believed it could elicit grounds to challenge Steadham-Scott for cause, it would have done so to avoid a *Batson* challenge. *Travis*, 776 So. 2d at 881.

This "reason" is also contradicted by the record. The State used everything in its arsenal to elicit grounds to challenge Steadham-Scott for cause. *See* 29 RR

45-79. In an interrogation spanning 30+ pages, Bell explored details about Steadham-Scott's background, beliefs, and ability to apply the law as directed. *Id.*[16] He was persistent: if he did not like a response, he reframed the question—repeatedly. *See generally* 29 RR 45–79. Eventually, Bell gave up, passing Steadham-Scott to the defense for questioning. 29 RR 78:11–79:4. Shortly thereafter, he ***interrupted*** to concede defeat, *i.e.*, to declare the State would not challenge for cause. If a cause challenge were possible, the State would have used it, if only to preserve his limited peremptory strikes. *Id.* To say, three weeks later (the next court day after the strike), ***after announcing that it would not challenge Steadham-Scott for cause***, that further questioning "would have most likely" yielded a cause challenge is implausible, at best. *Miller-El I,* 537 U.S. at 339.

The State cannot feasibly contend that further examination would have revealed any grounds to strike Steadham-Scott for cause despite the prosecutor's extensive prior efforts to do the same, and this "reason" was a sham, not race-neutral in the least. *See Miller-El II*, 545 U.S. at 265 ("[T]he prosecutor's chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion ….").

[16] For example, when questioned about her feelings on the death penalty during *voir dire*, Ms. Steadham-Scott repeatedly said she did not know if she supported the death penalty or opposed it and that she would be open-minded and apply the law fairly. *See* 29 RR 58:16 ("I won't say I'm opposed to [the death penalty].").

(ii) The questionnaire "clearly indicated" Steadham-Scott could not impose the death penalty.

No record evidence supports the prosecutor's second reason for striking Steadham-Scott—that her questionnaire "clearly indicated that she could not impose the death penalty." 30 RR 10:1–6. In fact, her questionnaire shows she ***could*** and ***would*** impose death where appropriate. *See* Ex. 27 (Steadham-Scott Questionnaire). She stated that Texas criminal laws are too lenient, she was neither opposed to nor in favor of capital punishment, she would consider all lawful penalties based on the case facts, and she disagreed that capital punishment is uncivilized. *Id.* Furthermore, the prosecutor admitted that many capital punishment questions were left blank, rendering his claim demonstrably false. 29 RR 66–67.

Comparative juror analysis further undermines the prosecutor's credibility, as he <u>did not</u> strike non-black jurors in the second panel with similar responses. *See Miller-El II*, 545 U.S. at 241 (holding that a reason for striking a Black veniremember may be considered pretextual if it applies equally to an otherwise similar non-Black veniremember who is permitted to serve on the jury); *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) (holding that accepting non-black jurors with the same cited characteristic evidences pretext).

Comparing Steadham-Scott's questionnaire to those of seated white jurors, Carol Laza and Marjorie Jeane, further shows the prosecutor's justification was pretextual. All three had the same response to Question No. 58: they were "neither generally opposed to nor generally in favor of capital punishment." *See* Ex. 27 (Steadham-Scott Questionnaire); Ex. 28 (Jeane Questionnaire); Ex. 29 (Laza Questionnaire). In fact, Laza's and Jeane's answers indicated they were less inclined to impose a death sentence than Steadham-Scott.

The similarities between Steadham-Scott and two white women seated as jurors the same day she was struck reinforce that the prosecutor's explanation was pretextual. *See Snyder*, 552 U.S. at 483 ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'").

Despite their similar responses, the prosecutor engaged in disparate questioning, demonstrating purposeful discrimination. For example, both Steadham-Scott and Jeane left most sub-parts of Question No. 60 blank.[17] But the prosecutor only challenged Steadham-Scott's omissions as opposing the death penalty while never questioning Jeane about hers. *Compare* 29 RR 58:9–15 (Steadham-Scott) *with* 29 RR 90–117.[18]

In addition to using a different questioning style for non-Black veniremembers, the prosecutor also characterized the actual questions differently. For instance, Juror Questionnaire Question No. 51 asks: "Should people accused of capital murder be treated differently than people accused of committing other crimes?" Ex. 27 (Steadham-Scott Questionnaire). When questioning seated white juror Jan Groh Bell intimated, "[y]ou know, ***quite frankly, I don't know how I***

[17] Steadham-Scott answered four of the 24 sub-parts of Question No. 60, while Jeane answered five. *Compare* Ex. 27 (Steadham-Scott Questionnaire, Question No. 60) *with* Ex. 28 (Jeane Juror Questionnaire, Question No. 60).

[18] The State questioned Ms. Steadham-Scott on this issue as follows:

Bell:	You left blank No. 43, have you ever been opposed to the death penalty. And I noticed you basically left blank pretty much all of the -- on page 17 and 18.
Steadham-Scott:	Right.
Bell:	All of the agree or disagree with the death penalty.
Steadham-Scott:	Right.
Bell:	Why is that? Are you opposed to -- where are you?"

29 RR 58:9–15.

Conversely, when he asked these questions of white juror, James Webb, Bell said: "I will readily admit to you, Mr. Webb, that some of these questions are ambiguous at best." 12 RR 45:5–23.

would answer that, but you did answer yes ....” 11 RR 104:14–18 (emphasis added).

On the other hand, when discussion Question No. 51 with Steadham-Scott, Bell expressed skepticism at her response that the question was insufficiently specific, “***[i]n all due respect, that seems pretty specific.***” 29 RR 61:9–16 (emphasis added). The prosecutor’s starkly different response to Steadham-Scott further establishes that his allegedly “race-neutral” justification was a pretext for discrimination.

(iii) “[O]ther many racially-neutral reasons”

The State’s general assertion that “there were other many [sic] racially neutral reasons,” 30 RR 10:6-7, is patently insufficient. “[A]ffirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.” *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). “Nor may the prosecutor rebut the defendant’s case merely by denying that he had a discriminatory motive.” *Batson*, 476 U.S. at 98.

Instead, *Batson* requires the State to provide a “‘clear and reasonably specific’ explanation” of the legitimate reason for a strike. *Batson*, 476 U.S. at 98 n.20 (citation omitted); *see also Miller-El II*, 545 U.S. at 252 (“[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.”).

Although he supposedly had “many” reasons, Bell did not provide **any** specifics, amounting to no reason at all. 30 RR 10:6-7. The State’s “explanation” is clearly pretext.

b. The circumstances show that the State’s explanation for striking Steadham-Scott was pretextual.

Before ruling on a *Batson* challenge, a trial court must make a cumulative assessment of all evidence bearing on racial discrimination. *Miller-El II*, 545 U.S.

at 265; *see also Snyder*, 552 U.S. at 478 ("all of the circumstances that bear upon the issue of racial animosity must be consulted"). The Supreme Court identified five factors (i.e., circumstances) that may suggest purposeful racial discrimination in *voir dire*: (1) the statistical significance of the use of peremptory strikes; (2) side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve; (3) the shuffling of the venire panel; (4) disparate questioning of Black veniremembers; and (5) a history of systematically excluding jurors on account of race. *Miller-El II*, 545 U.S. at 238, 241, 253, 279.

Several of these factors are present here, which taken together, bolster the conclusion that the State's proffered "race neutral" reasons for striking Steadham-Scott were pretext.

Two factors—comparative analysis and disparate questioning are addressed above. *See supra* Part IV.A.3.a(ii).

(i) Statistical Significance

Statistical evidence supports the inference that "the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El I*, 537 U.S. at 342. Ramey's jury was selected from 156 veniremembers (135 from the first panel and 21 from the second panel). Only nine (~6%) of those veniremembers were Black. ***All nine Black panelists were excluded from Ramey's jury.*** Two were removed because they were distantly related to Ramey and the prosecutor challenged six for cause (under questionable circumstances, using disparate questioning). The State then used one of its four peremptory strikes to exclude the sole remaining Black veniremember from the jury.

In other words, the prosecutor used 25% of his peremptory strikes to eliminate 100% of the eligible Black veniremembers. In stark contrast, the prosecutor only struck about 18% of the eligible non-black veniremembers as compared to 100% of the eligible Black veniremembers—"[h]appenstance is unlikely to produce this disparity." *Miller-El I*, 537 U.S. at 342; *see also Davis v. Fisk Elec. Co.,* 268 S.W.3d 508, 516 (Tex. 2008).

(ii) Jury Shuffle

The prosecutor's use of a jury shuffle also demonstrates racial discrimination. *See supra* Part II.D.1.

"The first clue to [a] prosecutor['s] intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle." *Miller-El II*, 545 U.S. at 253. Indeed, the Supreme Court has held that a prosecutor's "decision to seek a jury shuffle when a predominant number of African Americans were seated in the front of the panel ... raise[d] a suspicion that the State sought to exclude African-Americans from the jury." *Id.* at 254; *Bartee v. Quarterman*, 574 F. Supp. 2d 624, 670 (W.D. Tex. 2008) (noting proffered race neutral reasons for a peremptory strike can be "undermined by evidence showing the prosecution engaged in a pattern of discriminatory behavior, including ... ***a request for a jury shuffle when members of the target group are disproportionately seated near the front of the jury venire***") (emphasis added).

This is exactly what happened at Ramey's trial.

Prior to the State's requested shuffle, the randomized ordering of the panel resulted in most of the Black veniremembers being seated toward the front of the panel. Although only six of the 49 veniremembers were Black, ***four*** of those six potential jurors were seated among the first 10 jurors to be questioned. *See* Ex. 25 (Second Venire Panel: Juror Questionnaire Cards).

The State requested a jury shuffle based only on the visual appearance of the second panel: the parties were absent when the second panel was qualified (*see* 20 RR 3–30, 21 RR 7–9), and veniremembers had not received their 23-page questionnaires, much less completed them. 21 RR 12:3–8; *id*. 12–19.

After the prosecutor shuffled the jury, only ***two*** of the first 20 veniremembers were Black. *See* Ex. 25 (Second Venire Panel: Juror Questionnaire Cards). By shuffling the jury, the State effectively changed the racial composition of the first veniremembers to be questioned from 25% Black to only 10% Black. It cut the likelihood of seating a Black juror by more than half.

Further bolstering the conclusion that the jury shuffle was the State's response to Dr. Willie's *Batson* challenge to the shuffle:

> I have individuals …. who assisted me in going through the list [of potential jurors] and given me information about the prospective jurors.... I have gotten that information from a number of different individuals. And in doing that I looked at this list and ***the overwhelming majority of*** the folks that they had suggested would be ***good State's jurors were towards the back of the panel. And so in light of that I requested a shuffle*** .... I will tell the Court … that those individuals, ***probably 75– to 80 percent of the ones they had told me would be good State's jurors were towards the back. And so that's why I asked for a shuffle.***

21 RR 19:18-20:25 (emphasis added).

The record reveals this excuse was patently false. The State could not have investigated the jurors on the second panel: neither party had access to the list of the members of the second jury panel prior to the panel being qualified and presented on December 4, 2006. *See generally* 21 RR 7-20. And if that list looked anything like the juror cards, *see* Exs. 24–25, it did not provide information from which one could determine whether an individual would be a ***good State's juror***. This would be a plausible excuse if the second panel had already received and completed their 23-page questionnaires; but questionnaires were issued ***after*** the State requested a jury shuffle. *See* 21 RR 3.

The racial composition of the jury panel prior to the shuffle indicates that the prosecutor's oft-repeated phrase "good State's jurors" is a euphemism for "jurors who are not Black." The prosecutor claimed that prior to the shuffle, "the overwhelming majority ... [of] good State's jurors were toward the back of the panel." Given that there was only one Black veniremember in the back half of the panel, Bell tacitly admitted that the referenced "good State's jurors" were not Black. The prosecutor inversely posited that the veniremembers seated at the front of the panel—which included most of the Black veniremembers—were *not* "good State's jurors." Accordingly, in explaining his purportedly "race-neutral" reasoning, the prosecutor actually admitted that the portion of the jury panel containing Black jurors was not "good" for the State, whereas the portion of the jury panel that did *not* include Black jurors *was* "good" for the State.

What makes this explanation particularly damning for the State is that Bell never offered a racially-neutral explanation of what constitutes a "good State's juror." The record indicates that the parties were not given information about the second jury panel prior to the hearing. Thus, the prosecutor identified "good State's juror[s]" based on appearances alone.

* * *

The State's proffered reasons for striking Cheryl Steadham-Scott are contradicted by the record, comparative juror evidence, and the circumstances surrounding jury selection. Taken together, the disparate questioning, jury shuffle, exclusion of every Black veniremember, and implausible justifications for Steadham-Scott's strike compel the conclusion that race motivated the State's conduct. Because the Constitution forbids the discriminatory exclusion of even a single prospective juror, Mr. Ramey's conviction and death sentence cannot stand.

4. Ramey's *Batson* claim is reviewable under article 11.071, § 5(a)(1) because it relies on new law.

Ramey's *Batson* claim satisfies article 11.071, § 5(a)(1) because it relies on previously unavailable law. *See* TCCP Art. 11.071, § 5(a)(1).

Ramey filed his previous state habeas application on May 16, 2008. Here, Ramey relies on the Supreme Court's recent clarification in *Pitchford v. Cain* that to complete the *Batson* analysis, a court must afford the defense an opportunity to show pretext. 146 S. Ct. 1345 (2026). *Pitchford* was decided on May 28, 2026, 18 years after Ramey's 2008 initial petition. Therefore, Ramey can meet his burden to establish his *Batson* claim could not have been presented in his initial application, and this Court should authorize further proceedings on that claim for the reasons explained below.

a. *Pitchford v. Cain* recently established that a court fails to complete *Batson*'s third step by not affording the defense an opportunity to rebut the prosecution's proffered race-neutral reasons for a strike.

In *Pitchford*, the Supreme Court held that the Mississippi Supreme Court had unreasonably applied Batson in determining that Pitchford had waived his opportunity to rebut the race-neutral reasons the prosecutor offered at Batson's second step, as the defense was not afforded a genuine opportunity to show that those reasons were pretextual. Id. at 1353. In so concluding, the Supreme Court determined that the trial court "never conducted the essential third step of the Batson inquiry." Id. at 1349 (emphasis supplied).

At trial, Pitchford objected under *Batson* to the prosecution's use of peremptory strikes against four out of the five Black potential jurors, completing step one of the *Batson* inquiry. *See id.* at 1350. Step two occurred when the prosecution offered purportedly race-neutral reasons for each strike—such as a juror having returned to court 15 minutes late and having similar characteristics to the defendant. *See id.* However, the trial court accepted these proffered reasons before the defense could offer arguments that they were pretextual, cutting off the *Batson* analysis before the "essential" step three. *See id.*

The Supreme Court held that this aborted inquiry could not satisfy *Batson*, which requires that the defense "at least have an opportunity to argue that the asserted race-neutral reasons were not the actual reasons" before the trial court can determine whether the asserted reasons were in fact race-neutral. *Id.* at 1353. *Pitchford*'s reasoning is directly applicable to the events of Ramey's trial, and compels the conclusion that here, a full *Batson* inquiry never occurred.

Instead, and as in *Pitchford*, after Ramey's counsel challenged the State's strike of Steadham-Scott and the State proffered three obviously pretextual race-neutral reasons for that strike, the trial court abruptly cut off the *Batson* inquiry altogether. 30 RR 9:9–12, 9:25–10:8. Before Dr. Willie could argue pretext, the trial court simply stated: "I'm comfortable with the record reflecting what it did with respect to that juror at this time." *Id.* at 10:9–11. The trial court "full-stop ended" the *Batson* inquiry before it could be completed, just as in *Pitchford*. And *Pitchford* makes clear for the first time that a court's acceptance of the State's proffered reasons without giving the defense an opportunity to show pretext does not satisfy *Batson*.

Pitchford therefore provides a previously unavailable legal basis for Ramey's *Batson* claim under article 11.071, § 5(a)(1). As only made clear this year in *Pitchford*, no court has *ever* viewed Ramey's challenge to the Steadham-Scott strike through the proper lens, that the adjudication was necessarily incomplete. The trial court here, as in *Pitchford*, terminated the *Batson* inquiry prematurely—but its error was not plainly visible absent the illumination *Pitchford* has now supplied. The light *Pitchford* casts makes clear that Ramey has never had even one opportunity to raise the challenge he presents here. Simply put, the legal basis for this claim was unavailable before *Pitchford* was decided on May 28, 2026.

Because Ramey's *Batson* claim relies on new law, it must proceed on the merits.

B. Claim 2: But for ineffectiveness of counsel at the guilt/innocence phase, no rational juror could have convicted Ramey beyond a reasonable doubt.

Instead of conducting any independent investigation into the State's case, Dr. Willie opted to rely entirely on the State's "open file." In so doing, Dr. Willie failed to discover (and use) compelling impeachment evidence on key witnesses for the prosecution—including their criminal histories and motives to testify falsely in cooperation with the State.

Dr. Willie's failures prejudiced Ramey: ultimately, the State's efforts to rehabilitate Mr. Norman went unchallenged, as did the credibility of the unreliable witnesses the State presented to purportedly corroborate Norman's account. Without this evidence, it is reasonably probable that Ramey would not have been convicted of capital murder as a principal or a party.

As demonstrated below, Ramey has set forth sufficient facts to make a threshold showing that but for Dr. Willie's ineffective assistance of counsel at the guilt/innocence stage, no rational juror could have convicted Ramey beyond a reasonable doubt. Therefore, Ramey satisfies article 11.071, § 5(a)(2), and the Court should allow it to proceed.

1. Legal Standard

A petitioner establishes ineffective assistance of counsel by showing (1) deficient performance, *i.e.,* "that counsel's representation fell below an objective standard of reasonableness," and (2) prejudice, *i.e.,* "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).

2. Dr. Willie performed deficiently.

"[C]ounsel has a duty to make [a] reasonable investigation[] or to make a reasonable decision that makes [such] investigation[] unnecessary." *Strickland*, 466 U.S. at 691. The reasonableness of counsel's investigation turns "not only [on] the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); *see also Soffar v. Dretke*, 368 F.3d 441, 476 (5th Cir.), *amended on reh'g in part*, 391 F.3d 703 (5th Cir. 2004).

Courts have long "recognized that, at a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985); *Grant v. Lockett*, 709 F.3d 224, 234 (3d Cir. 2013); *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979) *Soffar*, 368 F.3d at 437–74.

When assessing counsel's performance, courts "look at what might have been … to meaningfully examine whether counsels' failure to investigate was based on a 'reasonable decision' that made such an investigation 'unnecessary.'" *Draughon v. Dretke*, 427 F.3d 286, 296 (5th Cir. 2005). Counsel's total failure to independently investigate the facts of a case cannot, however, be construed as a strategic choice. *See Trevino v. Davis*, 829 F.3d 328, 348 (5th Cir. 2016); *United States v. Mohammed*, 863 F.3d 885, 890 (D.C. Cir. 2017).

"An actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results." *Soffar v. Dretke*, 368 F.3d at 474. Courts have "squarely rejected the State's rationale ... that a failure to interview a witness is excusable as a 'strategic decision' if the witness would not have been credible" because without interviewing a witness, counsel cannot "assess his credibility or persuasiveness . . . ." *Id.* at 475 (quoting *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003)).

In short, while a court's review of the reasonableness of counsel's performance is generally deferential, that deference has its limits: courts are not required "to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009). A complete failure to independently investigate cannot be recast as a strategic decision by counsel. *See Mohammed*, 863 F.3d at 890; *Trevino*, 829 F.3d at 348.

Ramey has presented ample evidence that Dr. Willie did not interview or otherwise investigate any of the State's witnesses in Ramey's trial.

Dr. Willie's files do not reflect any independent investigation.[19] There are no records suggesting that Dr. Willie personally investigated the State's likely case: no timesheets, no investigation reports, no interview notes, no photos beyond those provided by the State. The only investigatory materials in his files were produced by the State.[20] Nor do Dr. Willie's files contain any documents (*e.g.,* invoices, memoranda, payments) indicating that he hired an investigator.[21] Significantly, every State's witness contacted by undersigned counsel's investigator stated that they had not previously been interviewed by anyone representing Ramey. Ex. 30 ¶ 12 (Childs Aff.); Ex. 31 ¶ 10 (Manzanalez Aff.); Ex. 32 ¶ 13 (Snyder Aff.); Ex 33 at Ex. B ¶ 11 (Hartley – Santellana Aff.); Ex. 34 at Ex. A ¶ 12 (Hartley – Times Aff.); Ex. 35 ¶ 7 (M. Hardaway Aff.).

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[19] Evans believed Dr. Willie did "some" investigation, Ex. 16 ¶ 11 (Evans Decl.), but could not provide any specifics.

[20] Dr. Willie also admitted that he relied exclusively on the State's discovery production "to sustain the mitigation portion of [his] investigation," Ex. 21 at 16:14–25 (Ake Hearing 3), which strongly suggests that he did the same pre-trial, particularly in light of the lack of any record of any pre-trial investigation in his files.

[21] Although not direct evidence of a failure to investigate, Dr. Willie's limited availability leading up to trial provides additional color to the direct evidence presented: Dr. Willie simply did not have the time to adequately investigate the State's case or prepare a constitutionally sufficient defense. *See supra* Part II.C.

Dr. Willie's deficient investigation was so apparent that the trial court called several *ex parte* conferences to voice its concerns.[22] *See* Ex. 19 (Ake Hearing 1); Ex. 20 (Ake Hearing 2); Ex. 21 (Ake Hearing 3). For example, on July 18, 2006, the trial court expressed "concern[ed] that the file hadn't reflected any sort of motions or pleadings indicating, for example, [investigators] that may have been hired" and asked Dr. Willie to explain what steps he had taken to investigate. Ex. 19 at 3:4–12 (Ake Hearing 1).

Remarkably, even Evans, who cross-examined most of the witnesses purporting to tie Ramey to the crime,[23] failed to fully review the State's open file, much less interview any witnesses. Ex. 16 ¶¶ 10–11 (Evans Decl.) (admitting he "did not go through" all the State's discovery and "never spoke to or investigated" any witness). Perhaps this lapse was understandable (albeit inexcusable): Evans was hired just before *voir dire* and believed his role was limited to jury selection. *Id*. ¶¶ 7, 9

In retrospect, Dr. Willie's failures are unsurprising, in light of his lengthy history of neglecting clients. *See generally Marceaux*, 2026 WL 2436060 (Finley, J. dissenting); *supra* Part II.C.

In sum, Dr. Willie utterly abdicated his duty to investigate the State's case. He did not make a reasonable decision to limit his investigation: he *never investigated at all.* This was textbook deficient performance.

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[22] These conferences, dubbed *Ake* hearings by the trial court, generally focused on the apparent absence of any mitigation investigation, however, some of the trial court's comments on July 18, 2006 indicate concern about the defense's overall trial preparation efforts. Ex. 19 at 6:15–24 (Ake Hearing 1).

[23] 31 RR 171–75; 32 RR 10–19, 179–80; 33 RR 132–98; 34 RR 24–25, 62–73, 138–41; 149–53, 175–82, 198–201.

3. Dr. Willie's deficiencies were prejudicial.

Dr. Willie's deficient performance prejudiced Ramey. Had he fully investigated the State's case it would have uncovered information that would have changed the trial's outcome. *Strickland*, 466 U.S. at 693–94.

When the prosecution's case is weak, counsel's failure to interview witnesses is prejudicial. *See Anderson*, 338 F.3d at 393–94 (finding failure to investigate prejudicial where the prosecution's case lacked physical evidence and was "relatively 'weak'"). Similarly, where testimony is key to the State's case, a defendant is prejudiced by counsel's failure to interview witnesses who could undermine the credibility of such testimony. *See Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 2007).

Prejudice is particularly clear where undiscovered impeachment evidence would have exposed a key witness's motive to lie—especially when the State argued the witness had none. *See Grant*, 709 F.3d at 236–38; *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1350 (11th Cir. 2011); *United States v. Sanfilippo*, 564 F.2d 176, 179 (5th Cir. 1977).

Here, the State's case was "relatively weak." *Anderson*, 338 F.3d at 393–94. There was no physical evidence tying Ramey to the crime scene or alleged murder weapons. Ex. 13 (Supplemental Serontology Report); 31 RR 51–70. Significantly, the State's ballistic expert could not connect bullets recovered from the victims to either of the alleged murder weapons. 33 RR 91:9–19, 127:11–28:1, 130:20–31:3.

To compensate, the State built a circumstantial case, centered on Norman's testimony, and to comply with Texas law requiring corroboration, "corroborated" by a parade of jailhouse "snitches." Witness credibility was therefore essential to the State's case.

Had defense counsel adequately investigated, it would have uncovered evidence that neutralized the State's efforts to rehabilitate the credibility of the *only* purported eyewitness—Norman—and discredited the testimony offered in corroboration, without which the jury could not have convicted Ramey. TCCP art. 38.14. Additionally, the number of discredited witnesses would have raised serious questions about the caliber and integrity of the State's investigation and trial strategy, leading the jury to find a reasonable doubt that Ramey committed capital murder—either as a principal or a party. *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) ("[T]he destruction by cross-examination of the credibility of one of two crucial witnesses—even if the other remains untouched—may have consequences for the case extending far beyond the discrediting of his own testimony.").

Defense counsel missed even obvious impeachment opportunities, giving the State's case an unwarranted veneer of strength.

a. Defense counsel failed to present Norman's motive to lie and challenge the State's efforts to bolster his credibility.

Ramey's alleged accomplice, LeJames Norman, was the sole "witness" to the crime. *See* 32 RR 146:12–14. He was, therefore, the only person who could testify with supposed personal knowledge that Ramey shot any of the victims. As such, establishing and maintaining Norman's credibility was crucial for the State—particularly in the absence of any physical evidence connecting Ramey to the crime scene or the alleged murder weapons. *See* Ex. 13 (Supplemental Serontology Report); 30 RR 152:21–170:19; 31 RR 51–70, 33 RR 91:9–19, 127:11–28:1, 130:20–31:3.

Defense counsel failed to uncover and present evidence of (1) Norman's motives to lie; and (2) Norman's extensive criminal history, which could have been used for impeachment.

Norman's motives to lie. Undersigned counsel's investigation uncovered evidence revealing Norman had two motives—beyond his obvious self-interest—

to lie on the stand. First, by reviewing the State's "open file"—which was equally available to Dr. Willie—undersigned counsel learned that Norman's mother, Emanda Norman ("Emanda"), traveled to Mexico while Norman was a fugitive, to provide him with false identification and money. Ex. 11 ¶¶ 210, 212, 217–20, 224 (Supplemental Investigation Report I); Ex. 36 (Aff. of Emanda Norman ("E. Norman Aff.") ¶¶ 4–8. Shortly thereafter, Norman was apprehended crossing the border with his brother's identification. Ex. 11 ¶¶ 210, 212, 217–20, 224 (Supplemental Investigation Report I). Emanda was subsequently interrogated by the State about her trip to the border. Ex. 36 ¶¶ 6–7 (E. Norman Aff.). In a contemporaneous visit with her son, Norman told Emanda that Bell would put her "in prison for 10 years for that trip to the border if [Norman] didn't cooperate." *Id.* Had defense counsel interviewed Emanda, she would have shared details about Bell's interrogation and threats to prosecute her. *Id.* ¶¶ 6–7, 9 (stating that Emanda would have told defense counsel everything she admitted to undersigned counsel's investigator had it interviewed her before trial).

Second, defense counsel's failure to conduct a basic investigation meant it failed to learn that, when he testified at Ramey's trial, Norman was facing two serious felony charges (aggravated assault on a public servant and escape with a deadly weapon), stemming from his violent June 17, 2006 escape from JCDC along with Kevin Childs. *See* Ex. 37 (Aggravated Assault and Escape Indictments). Norman was likely aware that the pending charges would be used against him at the penalty phase of his upcoming capital murder trial to suggest future dangerousness. He was thus motivated to cooperate with the State to obtain a more favorable resolution of his charges, or, at minimum, to use his cooperation as countervailing mitigating evidence during the punishment phase of his trial.

Defense counsel's failure to uncover and present the above evidence meant the jury never learned about Norman's significant motives to lie on the stand. Had defense counsel obtained this information, it would have been admissible impeachment evidence. *See United States v. Collins*, 472 F.2d 1017, 1019 (5th Cir. 1972).

Instead, the State's efforts to bolster Norman's credibility and paint Ramey as the aggressor went unrebutted. During a deft redirect examination, the State elicited testimony suggesting that Norman's sole motive for cooperating was a desire for personal accountability.

Responding to Bell's leading questions, Norman testified that he received no deal for his cooperation and knew it was against his interest to testify, but he nonetheless wanted to take responsibility for his actions. *See* 33 RR 199:3–202:14. Together with Norman's admission and explanation for lying in his various statements, this testimony tended to restore Norman's credibility, portraying him as a man fighting an internal battle to tell the truth—even though it was against his own interests. *See* 33 RR 148:10–150:10, 161:22–164:15, 176:18–88:25 (Norman testifying that he lied in his earlier two statements but was telling the truth on the stand because he wanted to take ownership of his actions).

This portrayal took the force out of the only impeachment evidence defense counsel presented to the jury, Norman's inconsistent statements, by explaining his previous lies as steps on his journey to personal accountability. For example:

> **Q** Each step of the way, you've accepted more and more responsibility for this triple homicide; have you not?
>
> **A** Yes, sir.
>
> ...
>
> **Q** You were accepting responsibility without anybody helping you in the legal process; were you not?
>
> **A** Yes, sir.

Q And you knew when you stepped up to the plate each time and took responsibility, albeit a little at a time, that ... you could possibly be facing the death penalty; did you not?

A Yes, sir.

33 RR 201:1–3, 10–19; *id.* at 148:10–150:10, 161:22–164:15, 176:18–88:25 (Norman testifying that he gave a second statement because he "fe[lt] bad" but still lied because "a battle going on inside" and he "wasn't ready to admit that [his] hands killed somebody," that he continued to lie in before the grand jury but was feeling like he "couldn't keep up," and that his trial testimony was the truth "[n]o doubt about it" because he was finally "[t]aking ownership" for his crimes).

The State's examination gave credibility to this narrative. The State elicited false testimony that allowed the jury to infer that Norman had no reason to lie, because he did not expect leniency from the State for his cooperation—Norman fully expected his testimony at Ramey's trial to be used against him. 32 RR 177:11–78:7. The jury had no reason to question these inferences because defense counsel presented no counternarrative explaining that Norman had motives other than personal accountability. Evidence of Norman's motives to lie—to protect his mother and establish mitigating evidence to use in his own trial—would have undermined this narrative, and the jury may well have believed that Norman was *still* lying when he testified that Ramey shot any of the victims.

Norman's criminal history. Defense counsel also failed to uncover Norman's extensive criminal record, which included armed robbery; burglary of an elementary school; and various charges of criminal trespass, mischief, and assault. *See* Ex. 38 at 22:12–23:2, 26:20–29:13, 37:9–49:22 (State v. Norman Excerpt). Norman's convictions for these crimes could have been used to impeach his character for truthfulness. Tex. R. Evid. 609(a); *see also Lester v. State*, 366

S.W.3d 214, 215 (Tex. App. 2011) ("Offenses involving 'dishonesty or false statement' are crimes [of] moral turpitude."); *Medina v. State*, 367 S.W.3d 470, 475 (Tex. App. 2012) ("Burglary [is] a crime of deception.").

Even if the jury was aware of Norman's status as an inmate, there is a difference between knowing that witness has been accused of a crime and knowing that a witness has a long history of criminal convictions, including crimes involving dishonesty and violence. It is reasonably probable that a jury provided with a full spectrum of impeachment evidence—rather than his general status as an inmate—would have completely discredited Norman's testimony.

b. Defense counsel failed to discredit the State's corroborating witnesses.

As an accomplice, Norman's testimony could not be the sole basis for Ramey's conviction.[24] Accomplice testimony must be corroborated by other evidence tending to connect the defendant to the crime. TCCP art. 38.14; *Brosky v. State*, 915 S.W.2d 120, 137–38 (Tex. App. 1996). In assessing whether there is corroboration, courts "eliminate all accomplice evidence from the record and determine whether inculpatory facts and circumstances in evidence tend to connect [the defendant] to the offense." *Brosky*, 915 S.W.2d at 137–38, 146.

With no physical evidence, the State was forced to rely on witness testimony to corroborate Norman's account of the crimes, making such testimony critical to the State's case. Had defense counsel conducted an independent investigation, it would have discovered the following impeachment evidence that could have been used to seriously undermine, if not destroy, these witnesses' credibility:

[24] As discussed below, Bradford Butler testified that he gave material assistance to the crime. Thus, as the trial court instructed, *see* 35 RR 15:13–17:4, if the jury believed Butler was also an accomplice, his testimony too required corroboration.

Bradford Butler. At trial, Ramey's cousin, friend, and alleged accomplice, Bradford Butler, described the planning of the crime, and testified (albeit equivocally) that Ramey admitted shooting Peacock. 34 RR 41:9–57:13. Butler also testified that he materially assisted Norman and Ramey in furtherance of the robbery—providing a gun and police scanner. *Id.* Although the trial court ultimately included a jury instruction contemplating Butler's role as an accomplice, 35 RR 15:13–17:4, Butler never faced criminal charges for his role in the crime.

A cursory investigation by defense counsel would have revealed the extent of Butler's involvement—uncovering a compelling motive for Butler to cooperate: the desire to avoid criminal charges. This motive would have been valuable impeachment evidence. *See Grant*, 709 F.3d at 236 ("[T]he fact that [the witness] had a strong reason to lie, and to testify in a manner that would help the prosecutor, in the hopes of getting favorable treatment from the [State], ... establishes the potential bias that would have been extremely compelling impeachment evidence.").

Defense counsel's failure to discover and use this "compelling impeachment evidence" was prejudicial. Butler's testimony was initially disjointed. *See* 34 RR 42:13–53:25. To get a coherent narrative, the State treated Butler as a hostile witness, relying on leading questions. *Id.* at 54:12–15. The State's leading questions were based on a "voluntary statement" that Butler gave the afternoon of December 9, 2005. *Id.* at 54:16–57:15. This statement was one of two given by Butler that day, which were separated by an unexplained almost two-hour break. *Compare* Ex. 39 at 6 (B. Butler Statement) (listing start time of 8:20 AM and end time of 11:02 AM for first statement) *with id.* at 1 (B. Butler Statement) (listing start time of 12:45 PM and end time of 2 PM for second statement). The two statements were inconsistent; for example, in the first, Butler did not state that Ramey confessed to shooting any of the victims, but in the second, Butler said Ramey bragged about shooting Peacock. *Compare id.* at 1–3 *with id.* at 6–9.

Butler was evasive when asked to explain why he gave a second statement at trial. He initially testified that he went home and was called back by EPD to give a second statement because "the first one wasn't right."[25] 34 RR 20–25. He backtracked on redirect, claiming he was unsure if he went home. *Id.* at 73:16–18. And, when asked about discrepancies in the two statements, Butler became "mixed up" about which statement was true. *Id.* at 72:13–24. Butler was similarly confused about who Ramey purportedly said shot Peacock. Butler initially testified that Ramey told him that ***Norman*** was the shooter, but he changed course, claiming Ramey was the shooter, after the State "refreshed" his recollection with the second statement. *Id.* at 54:5–9.

Viewed in isolation, the jury could have found the gaps in Butler's testimony innocent, attributing them to a memory lapse or nerves. Had defense counsel presented evidence of Butler's motive to cooperate with the State, however, the jury would have been much less likely to excuse Butler's evasive responses and confusion. Viewed in light of his desire to avoid criminal charges, these internal inconsistencies would have seemed nefarious: suggesting Butler's second statement was the result of coercion by, or worse, *quid pro quo* with the State. This would have undermined the totality of Butler's testimony. Instead, however, "the jury was never informed of [Butler's motives to lie] and thus 'could [not] appropriately draw inferences relating to [his] reliability[.]'" *Grant*, 709 F.3d at 236.

[25] Butler was not asked and did not explain how EPD knew his first statement was (purportedly) inaccurate.

<u>Otis Santellana.</u> One of the State's key witnesses was a jailhouse informant named Otis Santellana. 34 RR 92:10–117:21. Santellana testified that Ramey admitted to shooting Roberts, along with other details of the crime, while the two were housed in nearby cells at JCDC. *Id.* at 100:6–05:25.

Santellana has now admitted that he lied on the stand: "Ramey never told [him] the order of who was shot or who shot who." Ex. 33 ¶ 12 (Hartley – Santellana Aff.).[26] In addition to this admission, the evidence developed by undersigned counsel—which defense counsel could have obtained, had it investigated—revealed that (1) Santellana's false testimony was manufactured by the State, *see id.* ¶¶ 10–15 (2) Santellana spoke with Ramey at the direction of the State, *see id.*; (3) Santellana cooperated with the State—and lied about Ramey's confession on the stand—in the hope of receiving favorable treatment, *id.* at ¶ 15; and (4) Santellana had an extensive criminal history, which included felony convictions, *id.* at Ex. B.[27]

[26] Fearing retaliation from the State, Santellana refused to sign a declaration documenting his conversation with Ramey's investigator, J. Neil Hartley. *Id.* ¶¶ 16–18. Even still, the Court must consider Hartley's declaration at this stage of proceedings. *House*, 547 U.S. at 538.
If the Court remands this claim, Ramey intends to present Hartley as a live witness, eliminating a layer of hearsay currently present in his declaration. *See* Tex. R. Evid. 801(d)(1) (defining hearsay as an *out-of-court* statement offered for the truth of the matter asserted). Santellana's admission that he lied about what Ramey told him qualifies as a statement against interest. Texas Rule of Evidence 803(24) creates a hearsay exception for statements that tend to "make the declarant an object of hatred, ridicule, or disgrace." Santellana's statement qualifies in two ways. First, Santellana, who was still in prison when he spoke to Hartley, could have been in danger of hatred, disgrace, and even physical violence from other inmates as a result of his admission, who would likely not take kindly to knowing that Santellana was willing to lie on the stand to inculpate a fellow inmate. Second, Santellana's admission that he lied could also make him a target from law enforcement or prison guards, angry that Santellana was willing to admit that he lied—and did so at the direction of the State. *See State v. West*, 367 A.2d 453, 455, 457 (N.J. Super. Ct. App. Div. 1976) (holding that statement that informant falsely incriminated defendant to law enforcement constituted a statement against interest because, among other things, it would "make of him an 'object of hatred, ridicule, or social disapproval'").

[27] Santellana's damning admission to Hartley is supported by other evidence in the record. Specifically, Santellana's contemporaneous handwritten notes included multiple questions

This impeachment evidence would have significantly weakened the State's case against Ramey, had defense counsel discovered and presented it. Santellana's testimony was essential to the State's case-in-chief, as it explained the lack of physical evidence and the inconclusive ballistics and ***was the only remotely coherent (and internally consistent) narrative account of Ramey's supposed involvement that came from a purportedly disinterested witness.*** *See* 34 RR 100:8–17:21. Moreover, the nature of the impeachment evidence—which suggests prosecutorial misconduct—would have led the jury to question the integrity of the State's investigation and case-in-chief. *See Lindsey*, 769 F.2d at 1042.

Myron Hardaway. Myron Hardaway, one of Ramey's cellmates, testified that Ramey admitted he shot Roberts and disclosed other details of the crime. 34 RR 192:19–97:24. Yet again, defense counsel failed to interview Hardaway or to conduct any independent investigation, the results of which were significant: Hardaway's testimony could have been excluded altogether or rendered meaningless had defense counsel done its job.

In October of 2015, Hardaway was interviewed by undersigned counsel's investigator—the first time he was interviewed by someone representing Ramey. Ex. 35 ¶ 7 (M. Hardaway Aff.). ***Hardaway admitted that Ramey never told him anything about the murders other than the fact that Ramey had been charged with them.*** *Id.* ¶ 5. Hardaway further admitted that the sole source of his information regarding the murders was Norman. *Id.* ¶ 6. Had defense counsel interviewed Hardaway, it would have discovered that Hardaway's planned

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clearly indicating that he anticipated brokering a deal in exchange for himself or for his wife: (1) "when is our deal [f]inal" and (2) "when can Pat [Mr. Santellana's wife] go home[?]" 43 RR 66 (first page of Mr. Santellana's notes offered into evidence at trial). Additionally, JCDC Jailer Tracee DeLeon corroborates Santellana's statement that he was directed by the State to collect information from Ramey. *See* Ex. 40, at ¶¶ 10–13 (Aff. of Tracee DeLeon) testimony was false and inadmissible hearsay, thereby completely preventing him from testifying or, at minimum, giving defense counsel the tools to destroy Hardaway's credibility.

Further, had defense counsel conducted a simple background check on Hardaway, it would have uncovered that Hardaway was convicted of three different crimes that could have been used to impeach his character for truthfulness. *See generally* Ex. 41 (M. Hardaway Criminal History). In addition, the background check would have revealed that Hardaway had a motive to lie: to curry favor with the State and obtain its support in parole proceedings for his recent first-degree felony burglary conviction. *See id.* at 14–16. Instead, the record indicates that the first time defense counsel learned the reason for Hardaway's incarceration was when it was solicited in passing on direct examination. *See* 34 RR 190:12–17.

At minimum, defense counsel's complete failure to investigate Hardaway meant the jury heard unimpeached, false testimony about a murder confession that Ramey never made.

Marvin Ceasar. Marvin Ceasar, a jailhouse snitch, testified that Ramey discussed the crime with him while they were cellmates and admitted to shooting two of the victims. 34 RR 136:10–137:25. defense counsel's failure to carefully review the State's "open file" resulted in its failure to undermine Ceasar's credibility with readily available impeachment evidence: the recording of Ceasar's second voluntary statement to law enforcement. There, after Ceasar refused to give a recorded statement confirming his earlier, non-recorded statement implicating Ramey, Officer Repka asked if Caesar previously lied to them. Ex. 42 at 2 (Caesar Statement). Caesar ***refused to answer***. *Id*.

Defense counsel should have investigated the reasons behind Ceasar's refusal to give a second statement, which could have revealed impeachment or inculpatory evidence. In addition, defense counsel could have used the recording to question Ceasar's truthfulness. Presented with this information, it is unlikely that the jury would have credited Ceasar's testimony. In addition, the jury could have believed that he was pressured or threatened by the State, particularly in combination with the other undiscovered evidence that the State manufactured or elicited false testimony from other snitches. *See Lindsey*, 769 F.2d at 1042

Kevin Childs. Childs, another jailhouse snitch, testified that Ramey admitted shooting two people with guns from a burglary. 34 RR 161:7–17. Defense counsel failed to discover, among other things, that Childs was coerced into testifying against Ramey. Ex. 30 ¶ 6 (Childs Aff.). Had defense counsel investigated, it would have learned that Childs was facing charges for assaulting a prison guard during his 2006 attempted escape from JCDC with Norman. *See, e.g.*, Ex. 43 at 9 (Childs Criminal History). These charges would have been admissible to impeach Childs by showing he had an ulterior motive for testifying: to curry favor with the State. *Collins*, 472 F.2d at 1019.

Instead, the first time Childs was interviewed by one of Ramey's attorneys was in October of 2014 when undersigned counsel's investigator met with him. Ex. 30 ¶ 12 (Childs Aff.). During that interview, Childs explained that, shortly after his attempted escape, law enforcement instructed him to cooperate and share information he learned about Ramey or Norman. *Id.* ¶¶ 4–7. Childs interpreted this as coercion: he needed to cooperate because of the escape charges. *Id.* Shortly thereafter, he was placed in a cell with Ramey. *Id.* If defense counsel had discovered this information, it could have presented it to the jury as evidence that Childs was lying to obtain a favorable resolution of his escape charges. Even without evidence of an actual *quid pro quo*, this line of inquiry would have elicited evidence of Childs' strong motive to lie—his hope of favorable treatment—which is "extremely compelling impeachment evidence." *Grant*, 709 F.3d at 236.

In addition, had defense counsel conducted a criminal history check, it would have discovered that Childs was convicted for failure to identify after he gave a false name to law enforcement. Ex. 43 at 1–7 (Childs Criminal History). Defense counsel could have impeached Child's character for truth with this conviction. Tex. R. Evid. 609. Presented with evidence of Childs' motives to lie, perceived coercion, connection to Norman, and history of deceit, the jury would likely have dismissed Childs' testimony.

Jonathan Snyder. Snyder testified that Ramey admitted shooting Roberts and discussed other details of the crime with him when they shared a cell. 34 RR 145:1–46:11. Defense counsel failed to interview or otherwise investigate Snyder and therefore failed to discover impeachment information that: (1) directly contradicted his testimony; (2) suggested Snyder was coerced into giving a statement against Ramey; (3) revealed his motive to lie; or (4) suggested a pattern of deceptive conduct.

In March 2015, Snyder told undersigned counsel's investigator that ***he "never had a 'real' conversation with Ramey about the murder case," contradicting his trial testimony***. Ex. 32 ¶ 8 (Snyder Aff.). An interview with Snyder would have revealed that he only overheard fractions of Ramey's conversations with others—calling into question the credibility of Snyder's entire testimony.

Had it investigated, defense counsel would have also learned that in June 2006, Snyder received a deferred adjudication with ten years' probation after pleading guilty to aggravated sexual assault of a child. Ex. 44 at 1–21 (Snyder Criminal History). When he testified, Snyder was incarcerated at JCDC on a parole violation. 34 RR 142:24–144:3. Snyder was, therefore, at risk of having his probation revoked and a conviction for sexual assault on a child on his record. *See* Ex. 44 at 15–21 (Snyder Criminal History). As the prosecutor on his case, Bell would decide whether to revoke Snyder's probation. *See id.* at 15. Had defense counsel presented these facts to the jury, it could have inferred that Snyder would do anything to get in Bell's good graces, including lying under oath, to avoid having a conviction for aggravated sexual assault of a child on his record.

Indeed, an interview of Snyder would have revealed that he was coerced into giving a statement against Ramey. *See* Ex. 32 ¶¶ 7, 10–11 (Snyder Aff.) ("I didn't want to testify against Ramey, but I didn't think I had a choice."). Snyder believed, based on threatening statements from law enforcement, that his probation would be revoked if he did not cooperate. *Id.* ¶ 10 This testimony would have given force to testimony about Snyder's motive to lie by suggesting that he was actually acting on that motivation to curry favor with the State.

Finally, a simple investigation would have revealed Snyder's 1999 convictions for crimes of moral turpitude—burglary and giving a false report to a police officer. Ex. 44 at 22–31 (Snyder Criminal History); *Lester*, 366 S.W.3d at 215; *Medina*, 367 S.W.3d at 475. These prior convictions were admissible to impeach Snyder's character for truth. *Medina*, 367 S.W.3d at 475; TEX. R. EVID. 609(a).

Christopher Times. Times testified about the Nairn burglary. 31 RR 37:24–49:6. ***Had defense counsel interviewed Times it would have discovered that he was not involved in the Nairn burglary, was coerced to testify against Ramey, and lied on the stand***. Ex. 34 ¶¶ 6–9, Ex. A ¶¶ 4, 6–7 (Hartley – Times Aff.). Fearing re-incarceration, Times pled guilty and accepted a deferred adjudication with ten years' probation conditioned on testifying against Ramey. *Id.* Because Times was not involved in the crime, ***he fabricated his statement and his later testimony from what he had been told by investigators***. *See id.*

Additionally, defense counsel's brief cross-examination of Times, which focused solely on the fact that Times was not testifying as part of a plea deal, 31 RR 49:10–50:25, also demonstrates that defense counsel did not carefully review the State's "open file." Had it done so, defense counsel would have been able to impeach Times on the significant factual discrepancies in his three statements. *See* Ex. 45 (Jan. 10, 2006 Statement of Christopher Times); Ex. 46 (February 16, 2006 Statement of Christopher Times); Ex. 47 (February 17, 2006 Statement of Christopher Times). Had defense counsel taken the basic step of investigating Times (or even reviewing the State's "open file"), it could have used the information described above to impeach his trial testimony, undermining the jury's view of his credibility and the State's investigation against Ramey. Significantly, had defense counsel done so, there would have been even less evidence purporting to connect Ramey to the alleged murder weapons.

Finally, had defense counsel conducted a criminal history check on Times, it would have discovered Times' prior convictions for failure to identify and misdemeanor theft, Ex. 48 at 1–11 (Times Criminal History), both of which would have been admissible to impeach his character for truth. *Lester*, 366 S.W.3d at 215.

Gerald Manzanalez. Manzanalez testified about Ramey's alleged involvement in the Nairn burglary and the guns purportedly used in the crime. 31 RR 16:9–33:8. Not only did defense counsel fail to investigate Manzanalez's motivations for testifying against Ramey, it also failed to conduct ***any*** cross-examination of Manzanalez whatsoever. *Id.* at 33:9–10. Had defense counsel investigated, it would have discovered that Manzanalez was offered a plea deal for his involvement in the Nairn burglary, giving him a significant motive to lie against Ramey, and that ***he lied about the existence of that plea deal during his direct examination***. *Compare* Ex. 31 ¶¶ 5–6 (Manzanalez Aff.) (Manzanalez stating that Bell had offered a deal in exchange for his testimony at trial) *with* 31 CR 17:25–18:4 (Manzanalez testifying that he was not getting any deal in exchange for his testimony).

Although the formal deal was inked months after Manzanalez testified against Ramey, the agreement was reached before Ramey's trial and was offered as an inducement for Manzanalez's testimony. His punishment recommendation (signed two months *after* Ramey's sentencing) states that Manzanalez's earlier testimony against Ramey was a requirement of Manzanalez's plea. *See* Ex. 49 at 5–6 (Manzanalez Court Records). ***Manzanalez told undersigned counsel's investigator that he was offered a deal before testifying against Ramey and that he "would not have testified" but for the deal***. Ex. 31 ¶¶ 5–6 (Manzanalez Aff.). And Manzanalez's attorneys' records show that the State engaged in plea negotiations with Manzanalez as early as July 5, 2006 (four months before Ramey's trial). Ex. 49 at 23 (Manzanalez Court Records).

Manzanalez's testimony went unchallenged: defense counsel did not cross him at all. 31 RR 33:9–10. Had defense counsel investigated Manzanalez, it would have uncovered his significant motive to lie to reduce his potential sentence for his pending charges. This would have significantly undermined his credibility.

If defense counsel had investigated and questioned Manzanalez with this information, the only remaining evidence presented to the jury that allegedly tied Ramey to the purported murder weapons would have been the weak testimony of Times, which, as discussed *supra*, also could have been impeached with even a minimal investigation.

c. It is reasonably probable the undiscovered evidence would have changed the outcome of Ramey's trial.

Had defense counsel discovered and presented the evidence discussed above, it is reasonably probable that the jury would not have convicted Ramey because the remaining evidence unaffected by the undiscovered evidence was insufficient to convict Ramey as either a principal or a party. To convict Ramey of capital murder as a principal, the jury had to find, beyond a reasonable doubt that Ramey (1) intentionally shot and killed at least one of the victims during the robbery or (2) shot and killed more than one person in "the same criminal transaction" or, in a different criminal transaction but "pursuant to the same scheme or course of conduct" 1 CR 172 (jury charge); *see also* Tex. Penal Code § 19.03(a)(2), (7) (capital murder statute).

To convict Ramey of capital murder as a party, the jury had to find beyond a reasonable doubt that Ramey (1) acted with the intent to promote or assist the commission of the murders and (2) solicited, encouraged, directed, aided, or attempted to aid Norman in the commission of the murders. 1 CR 172–73 (jury charge); *see also* Tex. Penal Code § 7.02(a)(2).[28]

[28] The jury charge contains two purported paths to party liability, but both of those paths require proof of Mr. Ramey's intent to promote or assist the commission of the murders. 1 CR 173 (instructing the jury that it could find Mr. Ramey guilty as a party if it found that he (1) acted "with the intent to promote or assist the commission of the murders" and "solicited, encouraged, directed, aided or attempted to aid" Mr. Norman in the commission of the murders or (2) Mr. Ramey was in the course of committing or attempting to commit Robbery or Burglary of a Habitation and "acting with intent to promote or assist the commission of the murder or murders, if any, solicited, encouraged, directed, aided or attempted to aid" [Mr.] Norman "in the commission of the murder, or murders, ...").
The second path to party liability does not match any of the subsections in Texas Penal Code § 7.02. It is possible that the State intended for the Court to charge Mr. Ramey under section 7.02(b), which would have allowed for conviction as a party without an intent to murder, if Mr. Norman committed the murders "in the attempt to carry out a conspiracy to commit" Robbery or Burglary of a Habitation, if the murders "were in furtherance of the unlawful purpose and ... should have been anticipated as a result of the carrying out of the conspiracy." But whatever the intent, that is not what the Court instructed the jury. Instead, both paths to party liability effectively covered only party liability under Tex. Penal Code § 7.02(a)(2). The jury could not

The jury could not rely on Norman's or Butler's testimony without corroborating evidence that tended to connect Ramey to the commission of the offense, *i.e.,* that tended to show Ramey killed at least one of the victims or that he assisted Norman in so doing with the intent to promote or assist in the commission of the murders. TCCP art. 38.14; *Brosky*, 915 S.W.2d at 137–38; *supra* note 28. The "unaffected" evidence does not meet these standards.

(i) The remaining evidence was insufficient to convict Ramey as a principal.

Without physical evidence connecting Ramey to the murders, *see supra* Part IV.B.3, witness testimony was the only evidence that could support Ramey's conviction as a principal. The following witnesses were the only ones who testified that Ramey shot any of the victims or confessed to doing so: Norman, Johnson, Butler, Santellana, Ceasar, Snyder, Childs, Myron Hardaway, and arguably Cortney Hardaway, who ultimately testified that Ramey did not confess to shooting anyone.

The evidence that defense counsel failed to uncover unequivocally proves that two of these witnesses (Santellana and Myron Hardaway) lied about Ramey confessing to shooting the victims and powerfully undermines the full testimony of Norman, Butler, Santellana, Ceasar, Snyder, Childs, and Cortney Hardaway, both casting doubt on their individual testimony and the full case presented by the State. *See Lindsey*, 769 F.2d at 1042. The remaining testimony that could serve as corroboration of accomplice testimony was insufficient to support conviction as a principal:

Stacey Johnson. Johnson's testimony regarding Ramey's confession to her is easily explained by witness testimony describing how Ramey and Norman

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have found Mr. Ramey guilty as a party without proof of intent to promote or assist in the commission of the murders.

omitted mention of the other in discussing the crime with their respective girlfriends. Norman noted that in an after-the-fact conversation with Ramey, he and Ramey both said that they discussed the crime with their girlfriends but omitted mention of the other entirely and that if either man “went down,” they would “[go] down” by themselves. 33 RR 157:4-19. Even if Johnson was telling the truth about what Ramey said to her, his purported statement about who shot whom is unreliable because, as Norman admitted, Ramey was attempting to avoid implicating Norman as the shooter.

This also explains why, even assuming Johnson was testifying truthfully, her testimony was inconsistent with Norman’s account of the crime, in which he admitted to shooting Peacock. 32 RR 154:1-11. But there are other reasons to doubt Johnson’s testimony. First, the State elicited her testimony about Ramey’s purported confession with leading questions, and even then, Johnson could not recall details. 31 RR 205:22–14:14. The State ultimately had to refresh her recollection with her earlier statement. *Id.* Although memories fade, it is difficult to believe that Johnson would forget the details of a purported confession to murder. And Johnson had an obvious motive to lie about that purported confession: Ramey had cheated on and dumped her, and Johnson had ongoing feud with his new girlfriend. *Id.* at 12:14–17:12. Additionally, other parts of Johnson’s testimony were inconsistent with the evidence presented. For example, Johnson claimed that she observed Ramey throw guns into a dam, but her description of those guns did not match the weapons recovered by law enforcement. *Id.* at 18:9–21:4.

Cortney Hardaway. The only other “unaffected” witness who testified that Ramey admitted to shooting anyone was Cortney Hardaway, but she ultimately recanted that testimony and admitted that Ramey told her only that the victims were shot but said he never shot any of the victims, only that they “got shot.” 34 RR 174:20–24, 177:7–25, 186:6–10, 18–23, 187:6–8. On the stand, Hardaway maintained that Ramey did not confess to shooting anyone, even in the face of Bell's implied threat of charges for aggravated perjury, which carried a sentence of up to 10 years in prison. *Id.* at 183:20–84:1.

But even setting aside Hardaway's recantation, her testimony, like Johnson's, is easily explained by Ramey and Norman's mutual understanding that they would omit the others' involvement in discussing the crime with their girlfriends. And just as with Johnson's testimony, this understanding also explains why Hardaway's prior statement to law enforcement was inconsistent with Norman's account of the murders.

In short, the only evidence supporting a finding that Ramey shot any of the victims that was unaffected by the undiscovered evidence was easily explainable, unreliable, and inconsistent with Norman's testimony (and thus could not corroborate it). In light of the weak case against Ramey, the powerful—and in some cases, undeniably discrediting—impeachment evidence defense counsel could have but did not uncover, and how that evidence would have implicated the integrity of the State's full case, it is more than reasonably probable that the jury would not have convicted Ramey of capital murder as a principal; it is highly likely that the jury would have found Ramey not guilty as a principal. *See, e.g.*, *Anderson*, 338 F.3d at 393–94; *Harrison*, 496 F.3d at 428; *Lindsey*, 769 F.2d at 1042.

(ii) The remaining evidence was insufficient to convict Ramey as a party.

If the jury had not convicted Ramey as a principal, it then needed to decide whether the State had proved that Ramey was guilty of capital murder as a party. 1 CR 172. As discussed above, *supra* n.28, Ramey could only be convicted of capital murder as a party if the jury found, among other things, that Ramey had an intent to assist or promote the murders. *See id.*; 1 CR 173. To find intent, the jury must have found evidence that Ramey had the "conscious objective or desire to engage" in assisting or promoting the murders "or desire to engage in" the assisting or promoting of the murders "or cause the result." 1 CR 169.

If the jury rejected the (scant and unreliable) evidence that Ramey shot anyone, as it would need to in order to acquit him as a principal and as it was likely to do if defense counsel had not performed deficiently, then the remaining evidence did not demonstrate any intent to assist or promote Norman's commission of the murders.

As even the jury charge recognized, Ramey's "mere presence" at the crime was insufficient to find him guilty as a party. 1 CR 170. So too was evidence that Ramey intended to commit or assist or promote the commission of robbery. *See id.* at 173 (requiring the jury to find intent to assist or promote the commission of the murders). Absent the discredited and necessarily rejected testimony of the witnesses described above, *supra* Parts IV.B.3.a, the evidence established, at most, an intent to commit armed robbery and a post-hoc intent to cover up the crime.

At best, the unaffected evidence showed that Ramey intended to commit an armed robbery. The State presented evidence of advanced planning and preparation for the robbery, but even under Norman's telling, Ramey said that "[t]he plan was [for] nobody to get hurt, period." 32 RR 144:10–18. None of the unaffected evidence of preparation demonstrates that Ramey had a specific intent to assist or promote the commission of the murders. The State presented evidence connecting Ramey to the earlier Nairn burglary and argued that the timing of that burglary showed preparation for the crime. 31 RR 55:4–17, 63:11–64:12 (testimony that fingerprints on items purportedly stolen during the Nairn burglary matched Ramey). But evidence of planning an armed robbery does not establish a specific intent to assist or promote the commission of murder. *Tippitt v. State*, 41 S.W.3d 316, 324 (Tex. App. 2001), *abrogated on other grounds by Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007) (holding appellant could not be found guilty as a party to capital murder under TCCP art. 7.02(a)(2) where the evidence demonstrated only a specific intent "to promote in aiding or attempting to aid . . . a robbery"). Likewise, Cortney Hardaway testified that before the crime, Ramey told her to say that he had been with her all night if anyone asked. 34 RR 168:3–13. This testimony establishes anticipation of criminal activity, at most, but does not identify the contemplated crime as murder, rather than robbery.

In fact, the State's evidence suggesting that Ramey stole beanies from Wal-Mart before the crime demonstrates that Ramey did not anticipate or intend any crime beyond armed robbery. 34 RR 32:14–34:10 (Freddie Edwards testimony that he picked up and dropped off Ramey at a Wal-Mart); 32 RR 101:5–104:6 (Rhonda Gerdes testimony authenticating Wal-Mart surveillance footage and register records); 32 RR 133:15–23 (Norman testimony that Ramey stole beanies from Wal-Mart); *see also* 35 RR 104:2–25 (State arguing that Wal-Mart footage and records demonstrated advanced planning to avoid record of purchasing the beanies immediately before the robbery). If Ramey did steal the beanies, he would only have done so to avoid post-crime identification by victims, suggesting that he did not intend for anyone to be harmed. *See* 32 RR 140:11–23 (Norman testimony describing how Ramey and Norman cut eye holes but not mouth holes in purportedly stolen beanies and therefore confirming that beanies covered their entire faces); *see also id.* 142:11–12 (Norman testimony confirming that Ramey had his beanie pulled down over his face during the crime).

Nor did the unaffected post-crime evidence provide proof of the necessary intent. At best, the unaffected evidence demonstrates that Ramey attempted to conceal a crime. 31 RR 192:8–205:10 (Johnson's testimony that she drove Ramey to the dam and saw him throw pistols into the water); 31 RR 211:6–13 (Johnson's testimony that Ramey told her he burnt his clothes and monitored the scene of the crime to determine if the bodies had been discovered); 31 RR 224:15–25:17 (Lyte testimony that Ramey asked him hypothetically "[i]f you was to kill somebody what would you do with the guns?" and Lyte responded he would throw them in the river); 31 RR 213:12–16; 34 RR 175:3–9 (Johnson and Cortney Hardaway testimony that Ramey threatened them if they talked to the police). This evidence, if credited, demonstrates that Ramey attempted to conceal his involvement in a crime, but it does not provide any evidence probative of Ramey's intent at the time of the murders.

Taken cumulatively, the unaffected evidence perhaps would have permitted findings that Ramey helped obtain weapons, joined a plan to rob Roberts, armed and disguised himself, was present during the crime, and took steps to conceal the crime and obtain an alibi. And perhaps under those circumstances, the State could have argued that Ramey should have foreseen that the murders may have resulted. But the jury charge did not allow for conviction as a party based on participation in a conspiracy to commit armed robbery where the murders should have been anticipated. *Supra* note 28. Had defense counsel presented the undiscovered evidence, the remaining evidence would simply have provided no basis for the jury to find that Ramey had the intent to promote or assist the murders necessary to convict Ramey as a party pursuant to the jury charge.

Because the unaffected evidence could not support Ramey's conviction as a principal or a party, it is reasonably probable that, but for defense counsel's failure to uncover and present substantial impeachment evidence, Ramey would not have been convicted at all. Ramey was therefore prejudiced by defense counsel's deficient performance.

4. Ramey satisfies article 11.071, § 5(a)(2) because no rational juror could have convicted Ramey beyond a reasonable doubt.

As explained in detail above, absent ineffective assistance of defense counsel, the evidence at trial could not support Ramey's conviction as a principal or a party. The only unaffected evidence supporting Ramey's conviction as a principal, Johnson and Cortney Hardaway's testimony regarding his purported confessions, was unreliable and easily explained by Ramey and Norman's agreement to omit the other's involvement to their girlfriends. *Supra* Part IV.B.3.c(i). Furthermore, there simply was no unaffected evidence establishing that Ramey had the necessary intent for conviction as a party. *Supra* Part IV.B.3.c(ii). No unaffected reliable evidence was legally sufficient to convict Ramey of the charges. Therefore, but for ineffective assistance of defense counsel, no reasonable juror could have convicted Ramey beyond a reasonable doubt. Ramey's claim satisfies article 11.071, § 5(a)(2), and the Court should allow it to proceed.

C. Claim 3: But for ineffectiveness of counsel in the punishment phase, no rational juror would have answered one or more of the special issues in favor of the death penalty.

Ramey also suffered from severely deficient representation during the penalty phase of his trial. In particular, Dr. Willie's failure to conduct *any* mitigation investigation, in addition to the utter failure to investigate the State's evidence of aggravating circumstances, denied Ramey his rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. *See Wiggins*, 539 U.S. at 521–23, 534–38; *Williams v. Taylor*, 529 U.S. 362, 395–98 (2000); *Strickland*, 466 U.S. at 690–91, 694–96. Consequently, the jury returned a death verdict in only ***14 minutes***. But for this egregious ineffectiveness of counsel, no rational juror would have sentenced Ramey to death.

1. Dr. Willie's representation fell far below the prevailing professional norm.

a. Dr. Willie's failure to conduct an independent mitigation investigation constituted deficient performance.

Reasonableness of trial counsel's performance is assessed by looking to "[p]revailing norms of practice as reflected in [the] American Bar Association standards," in effect during the trial at issue. *Strickland*, 466 U.S. at 688; *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Smith v. Dretke*, 422 F.3d 269, 279 (5th Cir. 2005). At the time of Ramey's trial, Dr. Willie's obligations were governed by the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 2003 ("Guidelines") and the ABA Standards for Criminal Justice (3d ed. 1993) ("Standards"). "Those Guidelines applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases and imposed ... similarly forceful directive[s]." *Rompilla*, 545 U.S. at 387 n.7 (referring to 1989 Standards).

Specifically, counsel has an obligation to conduct at every stage a "***thorough and independent investigation () relating to the issues of both guilt and penalty***."

Guidelines 10.7(A) (emphasis added). The Guidelines imposed an affirmative obligation "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case." Standards 4–4.1. Most significantly, "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." *Id.*

For the penalty phase, the Guidelines provided that counsel must investigate:

> (2) family and social history ... other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services) …
>
> (3) educational history ... [and] ...
>
> (6) prior juvenile and adult correctional experience.

Id.

Case law is consistent with the Guidelines and Standards. At the capital penalty phase, "counsel ha[s] an 'obligation to conduct a thorough investigation of the defendant's background'" to uncover available mitigating evidence. *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Such "investigations ... 'should comprise efforts to discover all reasonably available mitigating evidence.'" *Wiggins*, 539 U.S. at 524 (citing Guidelines 11.4.1(C), p. 93 (1989)). "[A] trial counsel's performance cannot be found adequate if it is supported by an unreasonably limited investigation." *Smith*, 422 F.3d at 280 (citing *Rompilla*, 545 U.S. at 394 (2005)). "In assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Thus, counsel must pursue mitigation leads or "red flags" revealed in any of his observations or initial investigations. *See Rompilla*, 545 U.S. at 390–91 & n.8. Courts cannot justify a complete failure to investigate as an objectively reasonable tactical choice. *Richards*, 566 F.3d at 564; *Mohammed*, 863 F.3d at 890; *Trevino*, 829 F.3d at 348.

Relevant mitigating evidence includes any evidence that would be "mitigating" in the sense that it "might serve 'as a basis for a sentence less than death.'" *Skipper v. S. Carolina*, 476 U.S. 1, 4–5 (1986) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). "Because the scope of mitigation evidence which may be considered by the jury in sentencing is much broader than the range of relevant information which may be considered in determining guilt or innocence, counsel is under a greater obligation to discover and evaluate potential evidence of mitigation." *United States ex rel. Emerson v. Gramley*, 883 F. Supp. 225, 243 (N.D. Ill. 1995), *aff'd*, 91 F.3d 898 (7th Cir. 1996) (internal citations omitted).

Dr. Willie first hamstrung his ability to adequately prepare for either the guilt/innocence or punishment phase of trial by signing the Open File Agreement and waiving his right to receive notice of the State's witnesses and intent to introduce prior bad act evidence. *See* 17 (Open File Agreement).

Compounding this error, Dr. Willie then blindly and erroneously relied *solely* on the open file rather than conducting any independent mitigation investigation. *See* Ex. 21 at 5:14–21 (Ake Hearing 3) (defense counsel, in response to court's inquiry about efforts to prepare a mitigation case, stating "***I'm quite satisfied that the State provided us everything out of the file to sustain the mitigation portion of our investigation***.") (emphasis added). Because Dr. Willie conducted no independent investigation, he "prepared" his punishment phase "expert" by providing him only with portions of the State's open file. *Id.* at 3:3–

4:1. By his own admission, Dr. Willie failed to conduct any independent mitigation investigation, rendering his performance constitutionally deficient. Evans likewise did not conduct any mitigation investigation. Ex. 16 ¶¶ 12–14, 16–18 (Evans Decl.).

Aside from these admissions, defense counsel's records contain no evidence that Dr. Willie performed—or hired someone else to perform—an independent mitigation investigation. *See supra* Part IV.B.2. The absence of a mitigation investigation was so glaringly obvious that the trial court expressed concerns in multiple *Ake* hearings. *See* Ex. 19 (Ake Hearing 1); Ex. 20 (Ake Hearing 2); Ex. 21 (Ake Hearing 3).

This was textbook deficient performance. Dr. Willie prejudicially and unreasonably failed to investigate, develop, and present compelling mitigation at the penalty phase, in violation of Ramey's constitutional right to effective assistance of counsel. *Taylor*, 529 U.S. at 396; *Canales v. Stephens*, 765 F.3d 551, 569 (5th Cir. 2014) (reversing dismissal of habeas petition and remanding on ineffective assistance at the punishment phase where counsel failed to conduct an independent mitigation investigation and uncover "an extensive history of physical abuse, emotional abuse, and neglect"). He made no strategic decision not to pursue potential avenues of mitigation, and his total failure to investigate cannot be construed as a reasonable tactical choice. *Wiggins*, 539 U.S. at 532; *Mohammed*, 863 F.3d at 890; *Trevino*, 829 F.3d at 348.

b. Defense Counsel's Other Failures

Defense counsel's deficient performance was not limited to the failure to conduct a mitigation investigation.

(i) Failure to Investigate the 2001 Incident

During the penalty phase, the State presented the testimony of three young boys—a victim and two witnesses—about an incident that occurred in July 2001 ("2001 Incident"). 37 RR 10–16. During this incident, Sean was wrongfully accused of sexually assaulting two young boys. He was never tried or convicted. The first young boy, the alleged victim, was seven years old at the time of the incident. 37 RR 10–11. He testified in the sentencing phase that he did not know if the sexual assault ever occurred. *Id.* at 11:23–24. After prodding by the State, the boy testified that he told the police that it happened but did not recall the actual incident itself. *Id.* at 11:25–12:4. There was no hearsay objection. *See generally id.* at 10–12. The second boy was the younger brother of the victim and supposedly a witness to the incident. *Id.* at 14–15. But critically, he was only ***five years old*** at the time of the incident. *Id.* at 14:11–12. Defense counsel offered no objection or cross-examination. *See id.* at 14–15.

The prosecution made very much of the 2001 Incident in its impassioned argument that Ramey deserved to die. *See, e.g.*, 39 RR 30:18–31:17 (Bell's closing argument stating, in reference to the 2001 Incident: "Whoever shall offend these little ones that believeth in me, it would be better for them to have a large millstone hung around their neck and to be drowned at the sea.").

Defense counsel did not make a reasonable, strategic decision not to investigate the 2001 Incident. Instead, as he later admitted to undersigned counsel, Dr. Willie ***mistakenly assumed that the records pertaining to the 2001 Incident were not admissible against Ramey.*** Failing to investigate an incident based on an unresearched and incorrect legal assumption falls well below reasonable professional performance. *Trass v. Maggio*, 731 F.2d 288, 293 (5th Cir. 1984) (holding that counsel's failure to move for a severed trial because counsel was "ignoran[t] of the applicable law" constituted deficient performance); *Vela v. Estelle*, 708 F.2d 954, 963–64 (5th Cir. 1983) (errors caused by ignorance of basic rules constituted deficient performance); *Kennedy v. Maggio*, 725 F.2d 269, 272–73 (5th Cir. 1984) (holding that ignorance of significant and relevant points of law constitutes deficient performance). Had Dr. Willie researched the issue, he would have found no reason the incident would have or should have been excluded from the sentencing phase, other than exclusion based on its prejudicial impact—but Dr. Willie never objected to evidence of the 2001 Incident on that basis. 37 RR 10–17.

Moreover, had Dr. Willie refrained from signing Bell's Open File Agreement, he would have been entitled upon request to formal notice of the State's intent to use the 2001 Incident at the punishment phase. TCCP art. 37.07, § 3(g). Receiving such notice would have—or at least should have—compelled him to research and correct his erroneous assumption that no investigation was required.

Due to Dr. Willie's failure to investigate, the jury never learned about the boys interviewed by the police at the time of the incident who claimed that Sean was ***not*** a perpetrator. *See, e.g.*, Ex. 50 ¶ 2 (Aff. of Xavier Redland). Instead, Dr. Willie assumed Ramey's involvement was true—and suggested as much to the jury. 39 RR 15:10–15. Indeed, during closing arguments of the penalty phase, defense counsel improperly intimated Sean's involvement in the 2001 Incident, and that Sean had received an "opportunity" from the system by getting probation. 39 RR 15:10–15. This comment was improper, untrue and plainly constitutes prejudicial deficient performance by trial counsel. *See, e.g.*, *People v. Hattery*, 488 N.E.2d 513, 519 (Ill. 1985).

(ii) Failure to Hire and Prepare a Qualified Future Dangerousness Expert

Dr. Willie presented only two witnesses at the punishment phase—Ramey's mother and Kunik. *Supra* Part II.D.3. Kunik was supposed to be the "future dangerousness expert" for the defense, but he was wholly unqualified. Not only was Ramey's case the first time that Kunik testified as an expert on the issue of future dangerousness, it was also ***his first exposure to the very concept***. *See* Ex. 22 ¶ 2 (Kunik Decl.).

Kunik was a psychiatrist specializing in geriatrics. *See* Ex. 23 (Kunik CV). He previously served as an expert witness in guardianship hearings ***for Dr. Willie's wife, Christine***, opining on individuals' competency to testify or manage their financial affairs, *id.*, but Ramey's case was Kunik's first and last time opining on anything in a capital murder case. Ex. 22 ¶ 3 (Kunik Decl.). Kunik had no relevant expertise and should never have been hired, much less accepted, as a future dangerousness expert—and it showed. ***Kunick never even asked Ramey if he suffered physical or emotional abuse as a child.*** Ex. 22 ¶ 11 (Kunik Decl.).

Compounding this error, Dr. Willie failed to adequately prepare Kunik. Kunik was rarely able to reach Dr. Willie. He had only one brief meeting with Dr. Willie before taking the stand at Ramey's trial. Ex. 22 ¶ 6 (Kunik Decl.). At that meeting, which occurred while Dr. Willie was on military reserve duty, Kunik met with Dr. Willie for between one and two hours. *Id.* The one- to two-hour meeting was the full extent of his preparation with Dr. Willie for giving his testimony.

Further, although Dr. Willie verbally explained the facts of the case to Kunik, he never gave Kunik a copy of the police report. *Id.* Dr. Willie never showed Kunik the jury instructions with the future dangerousness question, nor did he explain the full import of Kunik's role as a future dangerousness expert. *Id.* Dr. Willie also failed to explain the concept of attorney-client privilege to Kunik. *Id.*

Kunik tried to reach Dr. Willie to better understand what exactly he had been retained to do, but Dr. Willie was too busy to get back to him. *Id.*

Finally, because Dr. Willie failed to investigate and uncover substantial mitigation evidence, he provided no such information to Kunik. This failure rendered Kunik's report and testimony inaccurate and harmful to the defense. Deprived of critical evidence to the contrary, Kunik erroneously concluded and testified that Ramey experienced a stable upbringing free from abuse. 38 RR 132 10–12; Ex. 26 at 1, 2 (Kunik Report).

(iii) Failure to Investigate and Cross-Examine Punishment Phase Witnesses

In addition to the 2001 Incident, the State's penalty phase evidence included extensive testimony about unadjudicated alleged offenses from witnesses whose credibility was, at best, questionable. A number of these witnesses were jailhouse informants or accomplices who cut deals with the State, expected favorable treatment from the State, or were coerced by the State to testify against Ramey. Defense counsel's failure to investigate these witnesses prevented the defense from effectively impeaching them.

Defense counsel had effectively checked out during the punishment phase. When defense counsel bothered to cross-examine the State's witnesses at all, it would often ask only a few questions, at most. *See, e.g.*, 36 RR 42:21–25; 36 RR 45:6; 36 RR 48:19–49:11; 36 RR 54:20, 70:11, 75:9; 36 RR 79:4–12.

In the handful of instances where the defense cross-examined a penalty phase witness, the examination failed to undermine the damage caused by the witness's direct testimony and did not yield any positive testimony about Ramey. For example, the State's direct examination of Stacy Johnson during the penalty phase yielded testimony that painted a picture of Ramey as a violent, remorseless, career criminal. 37 RR 63:8–69:1. Rather than attempt to challenge the veracity of that testimony or inquire as to Johnson's motive for testifying as a scorned ex-girlfriend, Evans' cross examination yielded testimony that reminded the jury that Ramey purportedly visited Johnson the night of the crime. 37 RR 69:5–70:10. Evans' attempt to get Johnson to testify that Ramey had cried that night failed so miserably that the State declined to even bother with re-direct. Evans' failure was not surprising given his admission that he did not review the "open file" and did not interview any witnesses.

Similarly, Bradford Butler's penalty phase testimony was littered with unsupported accusations that Ramey had engaged in violent criminal conduct and suggested that Ramey had purportedly bragged about his role in the crime. 37 RR 106:5–108:14. Rather than undermine Butler's testimony with numerous statements—all of which were available in the State's "open file"—implicating Butler in the Nairn burglary and as an accomplice to the crime, Evans focused on Butler's knowledge of Gerald Manzanalez's role in the Nairn burglary. 37 RR 108:17–111:2. Evans did not ask about Butler's inconsistent voluntary statements, the gap in time between the statements, or why Butler was not facing any criminal charges for aiding and abetting the crime. Evans had a wealth of information that could have been used to impugn Butler's credibility at his disposal, but he was unable to use the information because he had done nothing to educate himself on the facts of the State's case against Ramey and had done no independent investigation.

Ultimately, defense counsel's failure to impeach penalty-phase witnesses—using either readily available information or information that would have been uncovered with adequate investigation—left the jury with an uncontradicted parade of misleading evidence to decide whether Mr. Ramey would live or die. Defense counsel's failure to attempt to undermine the credibility of evidentiary "sources" was objectively unreasonable and highly prejudicial.

2. Ramey was prejudiced.

A defendant is prejudiced where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Rompilla*, 545 U.S. at 390. A failure to investigate is prejudicial when evidence later uncovered "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393.

The jury's task at the punishment phase was, at bottom, to weigh the mitigation evidence against the aggravation evidence and make an individualized, moral judgment about whether that balance warranted death. *See Wiggins*, 539 U.S. at 534–38; *Tuilaepa v. California*, 512 U.S. 967, 972–73 (1994), Texas law operationalizes this balancing through special issue questions. *See Coble v. Quarterman*, 496 F.3d 430, 444–48 (5th Cir. 2007); *see also* TCCP art. 37.071 § 3(e)(1) (requiring jury to determine whether, in view of all the evidence "there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed" in applicable cases). Defense counsel's failures in Ramey's case affected both sides of the scale: counsel neither meaningfully challenged the State's aggravating evidence nor presented sufficient mitigating evidence to support a sentence less than death. Had defense counsel undercut the State's aggravating evidence and introduced the significant mitigation evidence uncovered by undersigned counsel, it is reasonably probable that the scales would have been tipped in favor of life over death.

a. Ramey was prejudiced by defense counsel's failure to investigate and present mitigation evidence.

Undersigned counsel's investigation uncovered substantial mitigation evidence that the jury never had the opportunity to consider. Had the jury heard some or all this evidence, it is reasonably probable that it would not have sentenced Ramey to death.

(i) Undiscovered and unpresented mitigation theories

Defense counsel's failure to investigate meant that the jury never heard substantial mitigation theories and evidence, including:

- Stevens' drug use during her pregnancy with Ramey;
- Ramey's upbringing in an unstable, impoverished home;
- Ramey's early exposure to drug abuse and criminal activity;
- Ramey's horrific childhood abuse;
- Ramey's emotional and developmental disorders and low IQ test results; and
- Ramey's repeated rejection and abandonment by the people who were supposed to care for and protect him the most.

See supra Part II.A.

The jury heard ***none of this evidence***. Worse, the jury was (wrongly) told ***by Ramey's own expert*** that Ramey had a stable childhood, free from abuse. This was flat wrong. The jury should have been told about the substantial amount of evidence warranting lesser punishment and weighed it in the balance. Had it done so, it is reasonably probable that Ramey would not have been sentenced to death, particularly in view of the evidence that defense counsel should have put before the jury to undercut the State's aggravating evidence.

b. Ramey was prejudiced by defense counsel's failure to investigate and undercut the State's punishment phase evidence.

On the other side of the scale, Ramey was prejudiced by defense counsel's failure to investigate and challenge the State's aggravating evidence.

First, and most significantly, defense counsel failed to uncover evidence that Sean ***was not involved*** in the 2001 Incident—a lynchpin of the State's punishment phase case. For instance, Dr. Willie failed to contact any of the boys who told police that Sean did ***not*** partake in the sexual assault or did not identify Sean as a perpetrator. *See, e.g.*, Ex. 50 ¶ 2 (Redland Aff.). That exculpatory evidence would have been available to defense counsel if it had merely requested investigation records from law enforcement. *See id.*

Had defense counsel investigated the 2001 Incident, it would have also learned that Deloris Robinson, the mother of one of the suspects in the 2001 Incident, did not believe Ramey was a part of the 2001 Incident. Ex. 5 ¶ 4 (Robinson Aff.). At the time of the 2001 Incident, Robinson spoke with her son and the relatives of the other boys involved. *See id.* Based on these conversations, it was clear to her that Sean did not participate in the 2001 Incident. *Id.* ¶ 5. Additionally, based on her personal relationships, Robinson believes the allegations made against Sean were prompted by family members of other boys involved, and Sean was falsely accused. *Id.*

Ironically, during Sean's trial, Robinson and her husband were subpoenaed by the State but were never actually called to testify at trial. *Id.* ¶ 6. If she had been called to testify about the incident, Robinson would have testified that she thoroughly investigated the 2001 Incident at the time and found that Sean did not assault any of the boys named in the police report. *Id.* She would have testified that the entire incident was a misunderstanding and Sean ended up being the scapegoat because he was the oldest boy present. *Id.* Had Dr. Willie contacted her before or during the trial, she would have offered to testify as to this belief. *Id.* Ramey's state habeas counsel never spoke with Robinson either, so his state habeas proceedings offer no guidance on why Robinson was never called. Ex. 5 (Robinson Aff.) ¶ 7.

Defense counsel's failure to investigate the 2001 Incident did more than result in the failure to undercut the State's evidence— Dr. Willie actually ***reinforced*** the evidence by implying to the jury that Ramey participated in the 2001 Incident. 39 RR 15:10–15.

Moreover, silence speaks a thousand words. After Bell's opening statement where he spent substantial time telling the jury about the 2001 Incident, 36 RR 9:14–11:7, Dr. Willie did not respond at all, and he instead waived his right to make an opening statement. 32 RR 32:16–18. Even in closing arguments, the State argued that defense counsel had conceded that Ramey engaged in a "sexual assault" without any dispute or objection. *See* 39 RR 29:21–24.

Worse, Bell focused on the unchallenged 2001 Incident in closing arguments, inflaming the jury, which had no reason to doubt the truth because defense counsel failed to present a rebuttal. Bell claimed that Ramey forced the other alleged participants to commit the 2001 Incident, portrayed the victims of the incident as mentally challenged, and told the jury that:

> [Y]ou want to know how aggravating it is? Woe it be that you do this to our children. What did Jesus have to say about this on his Sermon on the Mount? Whoever shall offend these little ones that believeth in me, it would be better for them to have a large millstone hung around their neck and to be drowned at the sea.

39 RR 30:18–31:17. Defense counsel did ***nothing*** to challenge this, despite the available evidence that Ramey did not participate in the 2001 Incident.

Taken together, defense counsel's handling of the 2001 Incident, failure to investigate and impeach the State's other punishment phase witnesses, *supra* Part IV.C.1.b(iii), and presentation of an unqualified future dangerousness expert whose testimony ***actually bolstered the State's case***, *supra* Part IV.C.1.b(ii), all but insured the scales remained decidedly tipped in favor of death.

c. But for defense counsel's deficient performance, it is reasonably likely Ramey would not have been sentenced to death.

Because of defense counsel's constitutionally deficient performance, it was all but certain that the jury would sentence Ramey to death. To sentence Ramey to death after convicting him as a principal, the jury had to unanimously find that (1) he was a future danger to society and, if they answered affirmatively, that (2) the mitigation evidence did not warrant a lesser sentence. TCCP art. 37.071 § 2(b), (e)(1). Competent representation would likely have changed the jury's answers to both of these special issues.

On one hand, the omitted mitigation evidence would have fundamentally changed the jury's understanding of Ramey. The mitigation case presented to the jury bears little resemblance to the evidence that competent counsel would have uncovered. It would have humanized Ramey, provided a coherent explanation for evidence that the State characterized as proof of an irredeemably violent character, and corrected the *defense's* affirmatively false characterization of Ramey's childhood. It would also have demonstrated how Ramey was failed by institutions and individuals that should have protected him, and how those failures contributed to the person whose life was in their hands.

On the other hand, competent representation would have substantially weakened the State's aggravation case. A reasonable investigation would have uncovered materially exculpatory evidence for the 2001 Incident, which was the center of the State's punishment case. Rather than present this evidence, defense counsel ***conceded that the 2001 Incident occurred***. 39 RR 14:10–15:15. Competent counsel would have given the jury substantial reason to doubt one of the State's most inflammatory allegations rather than validating it.

The same failure infected the evidence offered to establish future dangerousness. Counsel did not adequately investigate the State's jailhouse witnesses or expose evidence bearing on their bias, expectations of favorable treatment, coercion, and credibility. *Supra* Part IV.B.3.b.

Moreover, competent counsel would have selected and prepared a qualified future dangerousness expert who could have undercut the State's expert. Instead, the jury was left with an inexperienced, unknowledgeable gerontologist who was easily discredited and who falsely portrayed Ramey's family life and childhood as stable and unabusive. The State's future dangerousness expert's testimony went effectively unrebutted, allowing the State to argue that Ramey was ***a "killing machine" who would "kill again,"*** while ridiculing Kunik's qualifications and incomplete analysis. 39 RR 27:5–10, 49:20–51:16.

Adequate representation would have produced a materially different evidentiary balance. A qualified and properly prepared expert would have received the complete social history, the evidence undermining the alleged aggravating conduct, accurate information concerning Ramey's childhood trauma and developmental limitations, and the available evidence concerning prison classification and institutional controls. Even Kunik later acknowledged that knowledge of Ramey's abuse and related trauma could have changed his analysis and testimony. Ex. 22 ¶ 12 (Kunik Decl.). At minimum, competent counsel could have prevented the State from converting the defense's own expert into additional support for death.

A rebalancing of the true mitigating and aggravating evidence that should have been before the jury demonstrates that the outcome of the punishment phase would likely have been different had Ramey been represented by competent counsel. The omitted mitigation evidence was powerful, extensive, independently corroborated, and directly relevant to both moral culpability and future dangerousness. At the same time, competent investigation would have weakened several of the allegations the State used to portray Ramey as persistently violent, predatory, and beyond rehabilitation. Had counsel performed competently, the jury would have confronted a fundamentally different case: a substantially weakened showing of aggravation; evidence calling into question one of the State's most inflammatory allegations; credible expert testimony addressing future dangerousness on a complete factual record; and a coherent, corroborated account of a childhood marked by severe abuse, neglect, and poverty.

In view of the unpresented evidence, "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

3. But for defense counsel's ineffective assistance, no rational juror would have sentenced Ramey to death.

Ramey's ineffective assistance at the punishment phase claim does more than establish a reasonable probability of a different outcome; it alleges sufficient specific facts to make a threshold showing that absent defense counsel's ineffective assistance, no rational juror would have answered the necessary special questions to sentence Ramey to death in favor of the State. Accordingly, Ramey's claim satisfies article 11.071 § 5(a)(3) and the Court must allow it to proceed. *Ex parte Blue*, 230 S.W.3d at 153.

Ramey's ineffective assistance of counsel at the punishment phase claim clears this threshold. As explained in detail above, defense counsel's Sixth Amendment violations distorted both punishment special issues by withholding the evidence necessary to assess Ramey's moral culpability, leaving critical aggravating evidence untested, and presenting an inadequately prepared expert whose testimony strengthened the State's case. The nearly one-sided case the jury heard bears virtually no resemblance to the fundamentally different sentencing case that competent counsel would have presented.

Considering the evidence as a whole, *see Blue*, 230 S.W.3d at 162–63, clear and convincing evidence demonstrates that no rational juror would have found (1) that Ramey posed a future danger to society or (2) that the mitigation evidence did not warrant a sentence lesser than death. The omitted, corroborated evidence of severe childhood abuse, neglect, abandonment, poverty, cognitive and educational limitations, and institutional failure directly reduced Ramey's moral blameworthiness. Counsel's investigation also would have substantially weakened the State's future-dangerousness case by rebutting the 2001 Incident, impeaching jailhouse witnesses, and enabling a properly informed expert assessment. Because competent counsel would have substantially strengthened the mitigation case while correspondingly weakening the State's aggravation case, Ramey's claim satisfies the necessary threshold showing for this claim to proceed.

D. Claim 4: The State's use of materially false evidence denied Ramey due process of law.

The Due Process Clause is violated when the State uses false testimony to obtain a conviction, regardless of whether the State knew the testimony was false at the time of trial. *Ex parte Chabot*, 300 S.W.3d 768, 771–72 (Tex. Crim. App. 2009); *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012). Testimony need not be perjured; "it is sufficient that the testimony was false, and the question is whether the testimony, taken as a whole, gives the jury a false impression." *Ex parte Chavez*, 371 S.W.3d at 208 (citing *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957)). To establish a violation, an applicant must demonstrate (1) that the testimony was false, and (2) that there is a reasonable likelihood the false testimony affected the applicant's conviction or sentence. *Chavez*, 371 S.W.3d at 207; *Ghahremani*, 332 S.W.3d at 478.

Evidence is false if "taken as a whole, gives the jury a false impression." *Ex parte Weinstein*, 421 S.W.3d 656, 666 (Tex. Crim. App. 2014). And false evidence is material "if there is a 'reasonable likelihood' that it affected the judgment of the jury." *Id.* at 664. For purposes of materiality, the alleged falsehoods are addressed individually, but their cumulative impact is considered. *See Ex parte Fierro*, Nos. WR-17, 425-03, WR-17, 425-06, 2019 WL 6896993, at *4 (Tex. Crim. App. Dec. 18, 2019) (not designated for publication).

Unlike the *Napue/Giglio* framework—which requires proof that the prosecution knew the testimony was false—*Chabot* imposes no such requirement. *Chabot*, 300 S.W.3d at 771 ("[W]e see no reason for subjecting the two types of errors to different standards of harm."). Ramey need only show that the State's witnesses gave testimony that left the jury with a materially false or misleading impression regarding facts critical to its deliberations. *See id.*; *Ex parte Robbins*, 360 S.W.3d 446, 459 (Tex. Crim. App. 2011).

At Ramey's trial, the State presented the testimony of multiple witnesses who gave the jury materially false impressions concerning critical facts. Assessed cumulatively, as required, there is a reasonable likelihood that the false evidence affected Ramey's conviction and sentence.

1. Otis Santellana's testimony left the jury with a materially false impression of Ramey's involvement in the crime.

The State called Otis Santellana as a witness during the guilt-innocence phase of Ramey's capital murder trial. 34 RR 92–124. Santellana testified that he was housed in cell 111 at the JCDC, a solitary cell directly below Ramey's cell 202, and that the two communicated through vents connecting the cells. 34 RR 94:3–11.

On direct examination, Santellana denied that law enforcement had placed him near Ramey to obtain information or directed him to do so. 34 RR 93:14–25. He testified that he initiated contact with Deputy Gabrysch on his own accord, without any incentive. 34 RR 94:14–24. The jury was thus given the impression that Santellana was a spontaneous, passive listener who acted entirely on his own initiative in reporting what Ramey purportedly told him.

During his testimony, Santellana's delivered a remarkably detailed account of Ramey's purported confession, including: (a) the motive to rob for money or drugs; (b) the use of disguises, gloves, and taped shoes; (c) the identity and sequence of the shooters; (d) the precise locations of the victims when shot; (e) the absence of fingerprints, footprints, and shell casings (revolvers used); (f) the use of a police scanner; (g) the origin of the weapons in the Nairn burglary; (h) the disposal of the weapons at the dam; and (i) Ramey's incriminating reaction to a local news broadcast about the dive-team recovery. 34 RR 100:6–116:22; *see* 34 RR 101:8–102:4 (shooting sequence); 34 RR 103:25–105:7 (shooter identities)

a. Santellana's testimony was false.

Ramey's federal habeas investigation has revealed that Santellana's testimony created two materially false impressions: (1) that he acted spontaneously as a passive listener, rather than questioning Ramey at the direction of investigators; and (2) that the source of his detailed testimony regarding shooting sequence and shooter identities originated with Ramey, when it was in fact supplied to Santellana by the prosecution.

First, Santellana later admitted that Sheriff Louderback and Deputy Gabrysch directed him to question Ramey about specific subjects—including gloves, clothing, a police scanner, and the perpetrators' movements after the murders—and that he questioned Ramey and recorded the responses after receiving those instructions. Ex. 33 ¶¶ 4–6 (Hartley-Santellana Aff.). Former JCDC jailer Tracee DeLeon independently corroborated that officers met with Santellana and that, immediately afterward, he began questioning Ramey about the murders. Ex. 40 ¶¶ 10–13 (DeLeon Aff.).

Second, Santellana falsely presented details supplied by the State as if they were part of Ramey's purported confession. Santellana later admitted that Ramey never told him either the order in which the victims were shot or who shot them. Ex. 33 ¶¶ 7–8 (Hartley-Santellana Aff.). According to Santellana, prosecutor Bell reviewed the State's version of the murders with Santellana and gave him notes to study before trial. Santellana then testified in detail about the sequence of the shootings and the identity of each shooter as if he had personal knowledge. 34 RR 101:8–102:4, 103:25–105:7; Ex. 33 ¶¶ 7–8 (Hartley-Santellana Aff.).

b. Santellana's false testimony was material.

Santellana's false testimony was material because he supplied the only coherent narrative identifying Ramey as a shooter and explaining the absence of physical evidence. *See supra* Part IV.B.3.b. Had the jury known that Santellana's testimony regarding the order in which the victims were shot, and the identity of each shooter was false, it is more than likely that the information would have affected their verdict. *See id.*; *supra* Part IV.B.3.c.

2. Manzanalez's testimony was falsely presented as unbiased.

a. Manzanalez's testimony was false.

Gerald Manzanalez was the State's first witness at the guilt phase of Ramey's capital murder trial. The State called him to testify regarding Ramey's alleged involvement in the August 19, 2005, burglary of the Kenneth Nairn residence, from which .22 caliber revolvers were stolen. 31 RR 15:10–32:12. The State used Manzanalez's testimony to connect Ramey to the firearms that the prosecution contended were the murder weapons.

Shortly after Manzanalez took the stand, the prosecutor sought to bolster his credibility by eliciting testimony regarding the absence of any deal motivating his testimony:

> Q. "Manzanalez do you and I, or as far as you know, you and your — I and your attorneys have any kind of deal, or anything worked out as far as you getting something for your testimony today?"
>
> A. "No, sir."

31 RR 16:25–17:4. The defense did not cross-examine Manzanalez, leaving his denial as the jury's only impression of his motivation for testifying.

Postconviction investigation has conclusively established that Manzanalez testified with the knowledge and expectation of a specific, favorable disposition of his own pending criminal charges, a disposition that was in fact realized shortly after Ramey's death sentence.

In a 2014 sworn affidavit, Manzanalez stated that his attorneys, Todd DuPont and Patti Hutson Mays, informed him—***before Ramey's trial***—that prosecutor Bobby Bell had offered deferred adjudication and probation for the Nairn burglary charges. Ex. 31 ¶¶ 5–6 (Manzanalez Aff.). Manzanalez stated he was "sure" that he "knew of the 10 years probation and deferred adjudication before [he] testified in KerSean Ramey's trial." *Id.* ¶ 6. He further stated unequivocally: "I would not have testified against KerSean had I not understood that I would get a deal." *Id.*

Manzanalez's sworn statement is well corroborated by contemporaneous documentary evidence.

First, a time record maintained by Manzanalez's attorney, Patti Hutson Mays, contains an entry dated July 5, 2006 (approximately six months before Ramey's January 2007 trial) stating "In court-conferred with DA & rec'd rec & interviewed client & conveyed plea offers, case rest for 7-31 - 2.5." Ex. 49 at 22 (Manzanalez's Jackson County criminal history records). This contemporaneous billing entry establishes that the prosecution and Manzanalez's counsel had discussed a recommended disposition and that Manzanalez was informed of plea offers months before he testified at Ramey's trial.

Second, on March 15, 2007—just 51 days after Ramey was sentenced to death on January 23, 2007—Manzanalez pleaded guilty to one count of second-degree felony burglary of a habitation and received precisely the disposition he described: deferred adjudication of guilt with a ten year probation term. Ex. 49 at 5–14 (Manzanalez's Jackson County criminal history records). The written "Proposed Punishment Recommendation," signed by Manzanalez, his attorney, and Bell, expressly required Manzanalez to "testify truthfully against co-defendants including Williams & Ramey at any of Ramey's trials, including capital murder trial." *Id.* at 6.

The falsehood is thus directly established. Even assuming that the formal plea document was signed only after trial and that the scope of the prosecution's contemporaneous knowledge remains disputed, Manzanalez's categorical, unqualified denial that he had "any kind of deal, or anything worked out" for his testimony left the jury with the false impression that he had no promised, expected, or understood benefit motivating his testimony. *Cf. Ex parte Ghahremani*, 332 S.W.3d at 478–80 (evaluating corroboration of recanting witnesses).

b. Manzanalez's false testimony was material to both conviction and sentencing.

There is a reasonable likelihood that Manzanalez's false testimony affected both Ramey's conviction and his death sentence.

Manzanalez's testimony served a uniquely important function in the State's case, as he was the bridge connecting Ramey to the .22 caliber revolvers recovered from the dam—the weapons the State contended were used in the triple homicide. Manzanalez testified that Ramey proposed the Nairn burglary, recruited Manzanalez as a lookout, entered the residence with Times and Jeremy Williams, and emerged with duffel bags of firearms, including a shotgun and a .22 rifle that Ramey gave to Manzanalez. 31 RR 16:11–33:15. He further testified that Ramey told him he "threw two of the stolen pistols 'off the dam.'" 31 RR 30:11-31:1.

The firearms evidence was otherwise inconclusive. The DPS forensic firearms examiner was unable to establish a definitive link between the bullets recovered from the victims' bodies and the guns recovered from the dam. *See* Ex. 51 (Firearms Report Apr. 25, 2006); Ex. 52 (Am. Firearms Report May 4, 2006). No fingerprints, DNA, or other physical evidence tied Ramey to the crime scene or the weapons.

The only other witness to testify about the Nairn burglary was Times, whose testimony was profoundly compromised. He testified under the express condition of a cooperation requirement in his own lenient plea—a plea to deferred adjudication for second-degree felony burglary. *See* 31 RR 49:10-50:24. Moreover, Times later admitted to a postconviction investigator that his police statement was false and based on information that police investigators had supplied to him. Ex. 34 (Hartley-Times Aff.) Ex. A at ¶ 6.

Manzanalez, by contrast, was presented to the jury as having no deal—no motive to fabricate or shade his testimony. His false denial allowed the State to present him as independent of the inducement problems affecting other cooperating witnesses. This was not merely cumulative of Times's testimony; it was qualitatively different. Manzanalez was the State's cleanest corroborating bridge in a case otherwise dependent on accomplices, informants, associates, and inconclusive forensic evidence.

Understanding this significance, the prosecutor referred to Manzanalez and Times together to establish the Nairn burglary connection in its closing argument. 35 RR 23–27, 73–76. Therefore, there is at least a reasonable likelihood that the falsity of Manzanalez's testimony affected the jury's decision in Ramey's conviction. *See Ex parte McGregor*, No. WR-85, 833-01, 2019 WL 2439453, at *12 (Tex. Crim. App. June 12, 2019) (not designated for publication) ("Cases in which false evidence has been held material are often characterized by a lack of physical evidence linking the defendant to the crime and the tendency of the false evidence to undermine the State's other incriminating evidence.").

At punishment, Manzanalez testified about all three Nairn burglaries, describing Ramey as the initiator and organizer of repeated armed burglaries and connecting him to the theft of numerous firearms, including plans for a fourth gun burglary. The State reoffered all guilt-phase testimony at punishment. *See* 37 RR 180:9-13. Manzanalez's punishment testimony depicted Ramey as the architect of an escalating pattern of gun-related criminal activity—directly supporting the State's future-dangerousness narrative and the jury's affirmative answer to the first special issue.

Had the jury known that Manzanalez testified with the understanding of a favorable plea disposition—and that his denial of any such understanding was false—it could have viewed his vivid, escalating account of Ramey's criminality with appropriate skepticism rather than accepting it at face value from an ostensibly disinterested witness. The jury deliberated merely *fourteen* minutes before returning its death answers. 39 RR 59:10-16. The speed of that deliberation reflects the absence of any ground for skepticism about the prosecution's punishment evidence—skepticism that truthful impeachment of Manzanalez would have supplied.

3. Myron Hardaway's trial testimony was materially false.

Myron Hardaway was a friend of Ramey's co-defendant LeJames Norman, an uncle to Ramey's then girlfriend Cortney Hardaway, and Ramey's former cellmate at the JCDC. *See* 34 RR 190:8–203:12. Hardaway was incarcerated at the JCDC from approximately July 2005 through February 2006 on charges of burglary of a habitation and violation of parole, and he shared a cell with Ramey for approximately five months. 34 RR 191–92.

The State called Hardaway during the guilt-innocence phase. 34 RR 190:8. On direct examination by prosecutor Bell, Hardaway testified that Ramey made a detailed jailhouse confession to him, personally admitting his involvement in the triple homicide. Hardaway attributed to Ramey statements about taping shoes to avoid footprints, leaving no identifying evidence, obtaining and disposing of the murder weapons, and expressing no remorse. See 34 RR 193:2-6, 195:6-18, 202-03.

The breadth and detail of this testimony conveyed to the jury that Ramey had made an extensive, voluntary confession directly to Hardaway. It also presented Hardaway as a separate source who could confirm Norman's narrative from Ramey's own words, precisely the kind of testimony that could resolve the disputed question of who personally shot the victims.

On cross-examination, Hardaway acknowledged that Norman had also told him about the crimes and conceded that he had "no personal knowledge of the incident." 34 RR 203:15-18. That questioning did not tell the jury that the detailed account came exclusively from Norman. The testimony elicited on cross did not change the nature of the testimony elicited by the State on direct. It did not withdraw Hardaway's attribution of the account to a confession by Ramey. Nor did Hardaway's testimony identify which facts came from Norman or explain that Hardaway had no independent basis for any of the details. The jury was thus given the impression that Hardaway's testimony concerned two separate, corroborating confessions, one by Ramey, the other by Norman—as opposed to a simple recitation of only Norman's account. could therefore understand the testimony as two separate accounts, Norman's account and a separate confession by Ramey, rather than as one story repeated through a second witness.

Post-conviction investigation produced a sworn, categorical source recantation. Hardaway stated that ***Ramey never told him anything about the murders***. Ex. 35 ¶ 5 (Hardaway Aff.). Hardaway then confirmed that ***Norman*** was his exclusive source of the detailed narrative. *Id.* ¶ 6.

a. Hardaway's testimony was false.

Hardaway's trial testimony is directly contradicted by his post-trial affidavit. At trial, Hardaway unequivocally represented that Ramey personally confessed the details of the triple homicide, including motive, method, absence of physical evidence, source and disposal of weapons, purported lack of remorse, and the statement that he should have killed Bradford Butler. *See* 34 RR 201:3–203:5. To the contrary, in his affidavit, Hardaway states that "Sean never told [him] anything" about the murders and that the narrative came "only from what Baby James (LeJames Norman) had told [him.]" Ex. 35 ¶¶ 5–6 (Hardaway Aff.). The affidavit therefore repudiates the source, attribution, and substance of the alleged confession attributed to Ramey.

This is not a dispute over one detail or a witness's uncertainty at the margins. Hardaway disclaims the event that made his testimony probative. Even viewed in the most charitable light, Hardaway's trial testimony left a "misleading or false impression" in violation of due process. *Ex parte Ghahremani*, 332 S.W.3d at 477–78. The jury was led to believe that Hardaway supplied independent corroboration of Norman's narrative. He appeared to proffer a separate, voluntary confession by Ramey that independently tracked the crime. In reality, Hardaway's affidavit says his knowledge was entirely derivative of Norman's narrative. Ex. 35 ¶¶ 5–6 (Hardaway Aff.). Hardaway added no independent source; he falsely re-packaged Norman's account as an admission from Ramey's own mouth.

The derivative quality is reinforced by objective indicia in Hardaway's recorded statement to law enforcement. Ex. 53 (Hardaway Stmt. Tr.). The statement reflects frequent exchanges of Norman's and Ramey's names, extensive hesitation, and a retelling that favored Norman. Those features are consistent with someone relaying Norman's story rather than recounting a confession received directly from Ramey.

b. Hardaway's testimony was material.

There is at least a reasonable likelihood that Hardaway's false testimony affected the death verdict. Hardaway told the jury that Ramey confessed to shooting Roberts and supplied detailed information about the offense, including its motive, the absence of fingerprints, and the source and disposal of the guns. More notably for punishment, Hardaway portrayed Ramey as remorseless and willing to commit further violence, testifying that Ramey refused to accept responsibility because the State could not prove the murder case and said that he "should have killed Bradford too" for speaking to the jury. 34 RR 203:1–5. The misleading presentation of Ramey as remorseless and willing to murder an informant relates to the future dangerousness inquiry and cannot be dismissed as immaterial to the jury's determination that Ramey should be subject to death penalty.

4. Childs' testimony presented a false impression of Ramey's future dangerousness.

Childs shared Cell 202 at the Jackson County Detention Center with Ramey and Johnny Molina for approximately three months beginning around June 20, 2006. During the punishment phase, the State asked him about a shank later admitted as State's Exhibit 264. Childs testified that the commissary sold only black pens, that Ramey used a blue pen, and that he saw Ramey in the day room wrapping something around a pen as if making a shank. 37 RR 128:22–129:25. Molina was in the cell at the time.

On cross-examination, Childs admitted that he had never seen Ramey put a shank together and had never seen him make one. 37 RR 131:11–132:5. His testimony established only that he saw Ramey wrap something around a pen. *Id.*

On redirect, the State returned to the physical object and used it to connect Childs's observation to Exhibit 264. It elicited that the pen Childs associated with Ramey resembled the pen incorporated into the shank presented as Exhibit 264 and that the wrapping Childs described appeared to match the materials on the finished weapon. 37 RR 132:9-15. The exhibit-based questioning presented Childs's observation of Ramey wrapping a pen as an eyewitness connection between Ramey and the manufacture of Exhibit 264.

The State then presented Exhibit 264 as the finished weapon. The defense objected that no evidence tied it to any inmate in the three-person cell. Molina testified that Ramey was the only inmate with a blue pen, while also testifying that he never saw Ramey make a shank. 37 RR 134:2-12. Sheriff Louderback later asserted that it had been "proved to [him]" and that he believed the shank was Ramey's. 38 RR 22:24–23:15.

Childs's later sworn affidavit corroborates the documentary account. He stated that he repeatedly cleaned Cell 202 without seeing a shank and never saw Ramey or Molina make one. Those facts corroborate that Childs never observed Ramey manufacture a shank and independently undermine the attribution of Exhibit 264 to him. Ex. 30 ¶ (Kevin Childs Aff.).

a. Childs' testimony created a misleading, if not false, impression that Ramey had created a weapon while incarcerated.

The State's presentation conveyed that Childs had observed Ramey manufacture the very shank admitted as State's Exhibit 264, although Childs's testimony established only that he saw Ramey wrapping something around a pen. The claim therefore challenges the attribution of Exhibit 264 to Ramey, not the underlying observation that Childs saw Ramey wrap something around a pen.

Taken as a whole, the testimony and exhibit-based presentation created the false and misleading impression that Childs observed Ramey manufacture Exhibit 264. Childs admitted on cross that he never saw Ramey make a shank. His contemporaneous statement establishes that he "figured" the shank belonged to Ramey and "assume[d]" that the earlier blue-pen activity was when Ramey made it. The State's redirect and presentation of Exhibit 264 converted that assumption into an eyewitness attribution. Childs's later affidavit corroborates that he never saw Ramey make a shank. The challenged testimony was therefore false and misleading as to Childs's knowledge of the connection between Ramey and Exhibit 264.

b. There is a reasonable likelihood that Childs' testimony affected capital sentencing.

The State used Childs' testimony and Exhibit 264 to portray Ramey as having made a weapon while detained. That presentation did more than show that a dangerous object existed in a jail—it placed Ramey personally in the act of creating a homemade knife (i.e., the shank) while in custody, from which the State could infer that Ramey might use the weapon to stab someone, which is probative of future dangerousness.

On redirect, the State connected Childs' description of the pen and wrapping to the physical exhibit; Molina offered only the limited circumstance that Ramey was the sole inmate with a blue pen, while admitting that he had never seen Ramey make a shank; and Louderback asserted that the shank was Ramey's. The result was a tangible weapon coupled with the false impression that an eyewitness had identified Ramey as its maker. *See* 39 RR 43:22-45:23.

The State amplified the shank evidence with evidence concerning prison violence and inmate access to weapons. That evidence gave the weapon direct force in the future-dangerousness inquiry: the jury was invited to view Ramey not merely as an inmate exposed to weapons, but as someone who had prepared one—and might potentially use it—while confined.

Therefore, there is a reasonable likelihood that this false and misleading impression affected the jury's answer to the future dangerousness special issue and its decision to impose a death sentence.

5. Coons' "expert" testimony gave the jury a misleading, if not false, impression of the scientific validity of his methodology.

Expert testimony is false when it presents a conclusion as scientifically validated or empirically supported when, in fact, it rests on subjective clinical judgment unsupported by any identifiable methodology, error rate, or peer-reviewed literature. *In re M.P.A.*, 364 S.W.3d 277, 286–90 (Tex. 2012) (expert testimony constituted false evidence where the expert overstated the accuracy and validation of his diagnosis). Coons' testimony was based on a since-adjudicated unreliable methodology and therefore constituted false expert testimony. *Coble*, 330 S.W.3d at 277–80 (holding Coons's methodology for predicting future dangerousness scientifically unreliable under Kelly).

a. Coons' opinion was presented as medically certain even though it relied on an unvalidated method.

Coons was the State's final punishment-phase witness. He did not interview Ramey and instead based his opinion entirely on the prosecution's lengthy hypothetical scenario incorporating the sexual-assault allegation, school incidents, burglaries, the triple homicide, jail misconduct, and threats. *See* 38 RR 75:17–83:17. The prosecutor asked Coons whether, "based upon a reasonable medical certainty," "there is a probability that that hypothetical defendant will commit criminal acts of violence in the society in which he finds himself in prison that would constitute a continuing threat to that society." 38 RR 81:4-18. Coons answered yes. *Id.*

That answer, delivered under the mantle of "reasonable medical certainty," communicated to the jury that a board-certified forensic psychiatrist had applied a validated scientific methodology and reached a professional medical conclusion—one capable of being tested against established standards—that Ramey would probably commit future acts of violence. The jury received the opinion as precisely the kind of expert scientific evidence that distinguishes prediction from speculation.

But that impression was false. The *Daubert/Kelly* hearing conducted outside the jury's presence exposed the absence of any scientific foundation:

- **No supporting literature**. Dr. Coons could not identify any forensic psychiatric literature supporting the factors he relied upon—history of violence, attitude about violence, lack of conscience, and lack of remorse.

- **No error rate**. When asked about the rate of error in his predictions, Dr. Coons admitted there was no established error rate and suggested that accuracy of prediction could not even be assessed.

- **No empirical validation**. Dr. Coons had never empirically validated his methodology or retrospectively checked his predictions against actual outcomes.

- **Unfamiliarity with actuarial research**. Dr. Coons was unfamiliar with the relevant actuarial risk-assessment literature, including the work of Dr. Jonathan Sorensen, whose research provides the only empirical basis for assessing violence risk among capital inmates.

38 RR 33-36.

These admissions reveal that Coons's prediction was not the product of a scientifically reliable methodology. Rather, it was subjective clinical judgment dressed in the authoritative language of "reasonable medical certainty." Four years after Ramey's trial, the Court of Criminal Appeals confirmed as much. In *Coble*, the court examined Coons's methodology—the same factors, the same hypothetical-based approach, the same absence of empirical validation—and held that his testimony was not shown to be scientifically reliable. 330 S.W.3d at 280. The *Coble* court noted that Coons's factors have not been validated by research and that there is no evidence that his methodology has been shown to be accurate. *Id.* at 278–79.

When a court of last resort holds that an expert's methodology is not scientifically reliable, testimony previously delivered under that same methodology—in which the expert purported to state conclusions to "reasonable medical certainty"—necessarily gave the jury a false impression of scientific validity. The representation of certainty was false because no degree of certainty was scientifically attainable through the method employed. *See In re M.P.A.*, 364 S.W.3d at 288–90 (testimony that overstated the scientific support for the expert's conclusion constituted false evidence).

b. Coons' false testimony was material to the jury's sentence.

Future dangerousness was the dispositive special issue on the question of whether to impose the death penalty. Under Texas law, the jury could not impose death unless it found beyond a reasonable doubt that there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TCCP art. 37.071, § 2(b)(1). Coons was the State's only expert witness on this ultimate issue—the only witness who purported to apply medical or scientific expertise to bridge the gap between the historical facts in the hypothetical and the predictive conclusion the jury was required to find beyond a reasonable doubt.

Coons's credentials were formidable: a law degree and medical degree, psychiatry board certification, experience in over 7,000 to 8,000 or more competency evaluations, and testimony in more than 150 capital cases. 38 RR 66:9-69:21. He presented himself as a forensic psychiatrist with decades of specialized experience in precisely the question before the jury. His opinion thus carried the imprimatur of scientific authority—an imprimatur the lay witnesses and even the historical evidence could not supply. The State did not merely use Coons to reiterate the aggravating facts already before the jury; it used him to convert those facts, through the alchemy of claimed scientific expertise, into a medical conclusion that Ramey would kill again.

Moreover, the State relied heavily on Coons's opinion in closing argument. 39 RR 27:5-10 ("Coons said this guy is a killing machine and he's going to kill again and he is going to be dangerous. That's what he said.").

Admittedly, the State presented aggravation evidence of prior violence. However, that did not—and could not—independently establish the predictive medical conclusion that Ramey would commit *future* violent acts in prison. That is precisely why the State called Coons—not to repeat historical facts the jury already heard about, but to supply the only purportedly scientific bridge from those facts to the predictive finding the jury was required to make beyond a reasonable doubt. Expert testimony serves a legitimating function that historical evidence alone cannot perform.

The jury answered "yes" to the future-dangerousness special issue and "no" to the mitigation special issue, returning a death sentence. The defense case consisted of only two witnesses—Ramey's mother and Kunik—and mitigation was sparse. The brevity of the defense case and the rapid return of the verdict underscore the materiality of the State's expert testimony. When a jury deliberates on whether a man will live or die, the State's only expert witness—purporting to speak with "reasonable medical certainty"—commands outsized influence on the predictive judgment the jury must make.

The circumstances here are analogous to those in *In re M.P.A.*, where the Texas Supreme Court held that expert testimony constituted materially false evidence when the State relied on the expert's unsupported diagnosis and risk assessment in closing argument, and the opposing party lacked the tools to expose the methodology's deficiencies. 364 S.W.3d at 289–90. So too here, the State transformed Coons's opinion into the rhetorical capstone of its case for death, and the defense's minimal cross-examination left the jury without any basis to evaluate the scientific invalidity of the prediction.

6. The State presented misleading ballistics testimony in violation of Ramey's due process rights.

The State's reliance on firearms testimony as meaningful forensic support for its theories about which gun (and which shooter) fired the fatal gunshots was inherently false and misleading. First, the firearms testimony was false because the State used limited class-characteristic opinions to affirmatively assign specific shots to Ramey. Second, newly available scientific evidence disproves this unqualified testimony, including the fact that the underlying methodology lacks objective standards and carries detrimental error risks. Finally, the testimony was material because it supplied the State's only forensic support and Ramey would not have been convicted but for this testimony.

a. Crumley's expressed degree of certainty was misleading in light of subsequent developments.

Newly available scientific evidence demonstrates that the State relied on false and misleading testimony from its firearms and toolmark examiner, Ronald Crumley. Two .22 caliber revolvers, purported to be the murder weapons, were in evidence: an R.G. long barrel model with eight lands and grooves, and a Harrington & Richardson ("H&R") short barrel model with six lands and grooves. 33 RR 86–98. Crumley could not positively identify any of the twelve recovered bullets as having been fired from either revolver. *Id.* at 69–70, 91, 126–27. His analysis was limited to class characteristics—the number and width of lands and grooves—which allowed him to exclude only one weapon and declare the bullets "consistent with" with the other. *Id.* at 90–100.

Instead, the State presented Crumley's opinions as definitive: if a bullet displayed characteristics consistent with eight lands and grooves, Crumley testified "with reasonable certainty" that it was not fired by the H&R pistol, because the H&R pistol displayed characteristics consistent with six lands and grooves, and vice versa. *Id.* at 99:18–100:3. Crumley's methodology was reduced to a single question: *did the visible marks on a given bullet look more like six or eight?*

Relying on a hypothetical drawn from unreliable accomplice testimony—that Norman used the R.G. revolver, and Ramey used the H&R—Bell walked Crumley through each victim's wounds, converting each of Crumley's exclusions into an affirmative attribution.

For example, Crumley confirmed that wounds in Roberts' neck and side were consistent with shots fired from "Ramey's" H&R pistol—not "Norman's" long-barreled pistol. 33 RR 123:9–19; *see also id.* at 124:1–3. Likewise, Bell guided Crumley through a hypothetical to attribute the three gunshot wounds that killed Lopez to Ramey:

Bell:	"If you'll assume that the gun used by [] Ramey was the short-barreled H&R, are your findings consistent with that?"
Crumley:	"Yes, sir, they are."

33 RR 124:18–21.

These assertions were highly misleading as is, but are especially so considering newly available scientific evidence. At least two landmark scientific reports have since concluded that the firearms identification technique that the State relied upon lacks a demonstrated scientific foundation. In 2009, the National Research Council ("NRC Report") concluded that toolmark and firearms analysis lacked sufficient basis to be a reliable and repeatable method of firearms identification because it does not involve "a precisely defined process." Ex. 54 at 154, 155 (NRC Report).

The NRC Report criticized the Association of Firearm and Tool Mark Examiners' ("AFTE") standard for firearm identification because it does not include objective thresholds or criteria for confidence.[29] *Id.* The report called one

[29] The AFTE Journal—the forum for the field's foundational literature—"hardly can be said to meet the basic requirements of a peer-reviewed journal": its reviewers are not blind and come entirely from the firearms/toolmark profession, and the journal is neither web-accessible, indexed in major scientific databases, nor widely held by research libraries. Ex. 55, at 725 (Jennifer L. Mnookin et. al., The Need for A Research Culture in the Forensic Sciences, 58 UCLA L. Rev. 725 (2011)); *see also* Ex. 56, at 127 (William A. Tobin & Peter J. Blau, *Hypothesis Testing of the Critical Underlying Premise of Discernible Uniqueness in Firearms-Toolmarks Forensic Practice*, 53 Jurimetrics J. 121 (2013)) (noting the AFTE Theory's "vague

examiner's conclusion "a subjective decision based on unarticulated standards and no statistical foundation," *id.* at 153–54, and warned that admitting such analyses rests on no "meaningful scientific validation, determination of error rates, or reliability testing." *Id.* at 107–08.

A 2016 report from the President's Council of Advisors on Science and Technology ("PCAST Report") likewise found that firearms analysis "falls short of the scientific criteria for foundational validity," because there was only one properly designed validity-and-reliability study. Ex. 57, at 111–12 (PCAST Report).

PCAST criticized earlier firearms studies as poorly designed, warning they may have underestimated false positives "by at least 100-fold." *Id.* at 112. The only properly designed study found a false-positive rate of 1 in 66, with an upper confidence bound of 1 in 46. *Id.* at 110–11. PCAST also criticized AFTE methodology as circular because it depends on the examiner's subjective certainty, not objective criteria. *Id.* at 105. And it rejected claims of certainty as "nothing more than the individual's foundationless faith in what he believes to be true." *Id.* at 55.

Based on this, courts have increasingly recognized that unequivocal ballistic match assertions are misleading and unreliable. *State v. Adams*, 572 P.3d 291, 295–96, 313 (Or. App. 2025) (AFTE method for matching shell casing to gun is not scientifically valid or reliable); *United States v. Adams*, 444 F. Supp. 3d 1248, 1264 (D. Or. 2020) (toolmark error rate of 0.9 to 2.2% is problematic where a 2.2% error rate "would mean that 1 in 46 convictions were wrong"); *United States v. Davis*, No. 4:18-cr-00011, 2019 WL 4306971, at *7 (W.D. Va. Sept. 11, 2019) (finding "[c]oncerns" over the reliability of toolmark testimony);

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and subjective terms" and lack of "underlying protocol" means the theory lacks "two critical cornerstones of true scientific endeavor: repeatability and reproducibility.").

United States v. White, No. 17-CR-00611, 2018 WL 4565140, at *3 (S.D.N.Y. Sept. 24, 2018) (precluding expert from testifying "to any specific degree of certainty as to his conclusion that there is a ballistics match").

In *Abruquah v. State*, the Maryland Supreme Court vacated a murder conviction after concluding that the firearms-identification methodology presented to the circuit court did not reliably support the expert's unqualified opinion that the recovered bullets had been fired from the defendant's revolver. 296 A.3d 961, 997 (Md. 2023).

Here, Crumley's categorical testimony improperly conveyed a degree of scientific certainty unsupported by the limits of his firearms and toolmarks discipline or expert report.[30] On redirect, Bell asked to confirm that, for at least 10 of the 12 bullets, he could rule out one pistol as the source and deem the bullet consistent with having been fired by the other. 33 RR 130:4-15. Crumley agreed. *Id.*

The jury was never told that these exclusions rested entirely on class characteristics ***shared by every revolver of the same make and model***—not on any feature unique to the weapons in evidence. Recent scientific developments have rendered Crumley's categorical testimony materially unreliable. Had the jury known that his claimed certainty depended on a discipline since found scientifically invalid and rejected by courts, it would have had reason to question the State's asserted link between the bullets, firearms, and purported shooters. The jury instead heard a closed loop of mutual corroboration: the ballistics expert reinforced the accomplice's story, and the accomplice reinforced the expert's limited observations as definitive science.

[30] Critically, Crumley testified that he had "not missed any of the proficiency tests that [he's] taken during [his] career, creating the misleading (if not outright false) impression that his examination error rate is zero percent. *See* 33 RR 75:12-76:11. This statement lent greater credibility to his testimony than scientific evidence would support.

b. Crumley drew exclusions from damaged bullets, a scarcely tested practice.

At trial, Crumley conceded that soft, unjacketed .22 caliber bullets are "more difficult to identify" and that marks on such bullets "are often damaged or overmarked when they come to rest, when they hit a particular object." 33 RR 93–94. Where a bullet was too damaged to count all its lands and grooves, Crumley testified that he compared the width of the bearing surface of the bullet against the width of lands and grooves produced by test-fired bullets, and from that comparison reached both exclusion and consistency conclusions. *Id.* at 99–104. Two bullets were so degraded that even Crumley could not reach a conclusion. *Id.* at 112:18–113:13; *see also* Ex. 58, at 5 (Peacock Autopsy Report).

Since Ramey's trial, firearms validation studies almost exclusively use pristine bullets—firing into specialized collection tanks and discarding deformed samples—rendering the accuracy of conclusions drawn from damaged bullets scarcely tested. One recent proficiency produced a false-positive rate of nearly 20% under the AFTE method and approaching 40% under the PCAST method when using damaged bullets. *See generally* Ex. 59 (CTS 23-5262 Forensic Testing Report).

These error rates are devastating. If examiners confronting damaged bullets in *controlled testing environments* committed misidentifications 20 to 40 percent of the time, then Crumley's unqualified conclusions based on damaged bullets at trial were certainly materially misleading. The jury was never informed that conclusions drawn from damaged bullets of this type have no demonstrated basis in validated scientific research, or that the one test approximating casework conditions produced error rates incompatible with the certainty expressed by Crumley. *See* Maria Cuellar et al., *Methodological problems in every black-box study of forensic firearm comparisons*, 23 L. Prob. & Risk 1, 1 (2024) ("[E]rror rates among firearms examiners, both collectively and individually, remain unknown," and statements about the common origin of bullets based on examination of individual characteristics "do not have a scientific basis").

c. Crumley introduced unaccounted-for variables by test-firing the guns without their original cylinders.

Both revolvers in Ramey's case were recovered without their cylinders; the H&R was also missing its cylinder pin. 33 RR 100–01, 127–28. To test-fire the weapons, Crumley inserted cylinders borrowed from unrelated firearms in the DPS reference library into the evidence revolvers. *Id.* at 101-03.

Crumley testified that the borrowed cylinders "do not create" lands and grooves, but newly available scientific literature proves otherwise. *Id.* at 129:13-18. A 2023 peer-reviewed survey observed that toolmarks on fired bullets "were distinctly different from traditional rifling marks" and investigation showed they "originated from the chamber of the cylinder." Ex. 60, at 3 (Mattijssen et al., *Interpol Review of Forensic Firearm Examination 2019–2022*, 6 Forensic Sci. Int'l: Synergy (2023)). This finding directly discredits Crumley's categorical testimony to the contrary. 33 RR 129:13-18.

The same defect exists here. The original cylinders were never recovered. Crumley never fired the purported murder weapons as they were configured in August 2005 (i.e., with their original cylinders) but somehow drew conclusions about how the originally-configured weapons marked the bullets. The jury was never told that the borrowed cylinders used to test-fire the revolvers might leave their own unique marks on fired bullets, making any comparison between the test-fired bullets and recovered bullets scientifically unreliable. This omission is scientifically significant. Accordingly, the State's reliance on Crumley's false and misleading testimony violated Ramey's due process rights.

d. Crumley's false and misleading testimony was material.

Due process requires a new trial if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury." *Chavez*, 371 S.W.3d at 206–07.

In a case lacking any fingerprint, DNA, or other physical evidence, Crumley's testimony was the State's only forensic link between specific fatal gunshot wounds and Ramey.

Absent Crumley's testimony, the only evidence that Ramey fired any of the fatal gunshots was Norman's testimony. This was legally insufficient to support a conviction, as Texas law requires corroboration of accomplice testimony. *Cox v. State*, 830 S.W.2d 609, 611 (Tex. Crim. App. 1992).

The jury was denied key context: the exclusions rested only on generic class characteristics shared by all guns of the same make and model, the borrowed cylinders could have introduced their own unique toolmarks, and Crumley's "certain" conclusions relied on now-invalid science. Worse, the State lost the revolvers shortly after Ramey's trial, making independent retesting impossible and Crumley's misleading testimony incurable.

All considered, it is more likely than not that this testimony materially contributed to Ramey's conviction for capital murder. *Chabot*, 300 S.W.3d at 771–72. Ramey is entitled to relief.

7. Ramey's false-testimony claim satisfies article 11.071, § 5(a)(1).

Ramey's false testimony claim—which should be considered cumulatively but is severable if necessary or appropriate—relies on a previously unavailable legal basis, *see supra* Part IV.D, and new evidence, *supra* Part IV.D.6, and therefore must be allowed to proceed. *See supra* Part III.

In *Chabot*, the TCCA held for the first time that the Due Process Clause of the Fourteenth Amendment may be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so *knowingly or unknowingly*. 300 S.W.3d at 771–72 (emphasis added). Before *Chabot*, relief for false testimony claims required proof that the prosecution knew the testimony was false. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150, 153–54 (1972). *Chabot* eliminated that requirement as an element of the due process claim under Texas law. 300 S.W.3d at 771.

In *Chavez*, this Court recognized that *Chabot* supplied a new legal basis for relief that had not been available when prior habeas applications were filed. 371 S.W.3d at 205–08. The Court explained that, because *Chabot* newly recognized a due-process claim based on the State's unknowing use of false testimony—and because that claim was governed by standards materially more favorable than the prior *Napue*/*Giglio* framework—an applicant could satisfy article 11.071, § 5(a)(1) by showing that the *Chabot* claim's legal basis was previously unavailable. *Chavez*, 371 S.W. 3d at 205–08; *see also id.* at 207. Thus, Chavez confirms that Chabot opened a path to merits review of subsequent habeas applications presenting unknowing-use false-testimony claims under article 11.071, § 5(a)(1).

This Court has since applied *Chabot* and *Chavez* specifically to capital subsequent writ applications under article 11.071, § 5(a)(1). *See Ex parte Castillo*, No. WR-70,510-04, 2017 WL 5783355, at *1 (Tex. Crim. App. Nov. 28, 2017) (not designated for publication) (permitting review of subsequent capital application on *Chabot* new-law basis); *Ex parte Young*, No. WR-65,137-04 (Tex. Crim. App. Oct. 18, 2017) (same)*; see also Ex parte Fierro*, No. WR-23,762-04 (Tex. Crim. App. 2019) (confirming *Chavez* applies under article 11.071 and requiring prima facie showing of falsity and materiality on face of application).

Ramey's initial state habeas application was filed on May 16, 2008, before *Chabot* or *Chavez* were decided, in 2009 and 2012, respectively. The unknowing use of false evidence legal standard/basis set forth in this claim was therefore unavailable when Ramey filed his previous application. The factual basis for portions of this claim was likewise unavailable: as explained above, *supra* Part IV.D.6, the scientific evidence and case law restricting firearms and toolmark testimony did not exist at Ramey's trial or initial habeas filing.

This claim satisfies article 11.071, § 5(a)(1), and the Court must permit it to proceed .

E. Claim 5: The State falsely exaggerated Ramey's personal culpability at punishment, as illustrated by his presentation of mutually inconsistent theories at the codefendants' respective punishment hearings.

Distorting facts "likely to have an important effect on the jury's determination" violates due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 646–47 (1974); s*ee also Darden v. Wainwright*, 477 U.S. 168, 181–82 (1986) (argument that "manipulate[s] or misstate[s] the evidence" or implicates defendant's constitutional rights violated due process); *see also Renteria v. State*, 206 S.W.3d 689, 697 (Tex. Crim. App. 2006) (trial court violated due process where it blocked Renteria from correcting false impression created by the prosecutors that Renteria was not remorseful). Consequently, "the Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants." *United States v. Higgs*, 353 F.3d 281, 326 (4th Cir. 2003).

Inconsistency rises to the level of a due process violation when it strikes "at the core of the prosecutor's cases against defendants for the same crime." *Smith v. Groose*, 205 F.3d 1045, 1051–52 (8th Cir. 2000) (use of inconsistent theories renders judgments intolerably unreliable, because "[t]he state's duty to its citizens" should bar it from pursuing as many favorable outcomes as possible "without regard to fairness and the search for truth") (citations, alterations, and quotation marks omitted).

1. The State presented inconsistent theories of Ramey's culpability for the crime at Ramey's and Norman's trials.

From Ramey's trial to Norman's, the prosecution flouted its constitutional duty to give honest and consistent accounts of both men's culpability to the juries that convicted and sentenced them.

Inconsistency regarding culpability for Lopez's death. For example, it first argued to Ramey's jury that Ramey alone was guilty of causing the death of Celso Lopez. *See*, *e.g*., 39 RR 52; 25 RR 133 (Ramey "alone" was likely responsible). Having secured Ramey's death sentence based on that theory, the prosecutor two years later persuaded a different jury to condemn Norman by telling them that Norman had *ordered* Ramey to kill Lopez. *See* Ex. 61 at 1483[31] (Norman 98 RR 118) (prosecutor Bell "guarantee[s]" jurors that Norman, who was "directing everything," told Ramey to shoot Lopez); *id*. at 1488 (Norman 98 RR 100) (urging jurors not to "think for a minute" that Norman did not tell Ramey "to go in there and shoot" Lopez).

Standing alone, this conscious manipulation of the respective sentencing juries corrupted the legal process and undermined its integrity enough to warrant habeas relief under the Due Process Clause and the Eighth Amendment. But there was more.

Inconsistency regarding which defendant was the principal offender. At Ramey's trial, for instance, the prosecutor insisted that any statement by Norman that the crimes were "his idea" was "wrong," and that Ramey was "first" to propose the robbery-murder. 39 RR 27; *see also* 39 RR 46 (Ramey "planned" the killings), 39 RR 47 (same). At Norman's trial, the prosecutor made the opposite pitch, telling jurors Norman "made the plan" to "kill three people." Ex. 61 at 1471 (Norman 98 RR 51); *see id.* at 1471 (Norman 98 RR 51) (Norman "came up with

[31] Pin cites refer to pagination added to appendix exhibits.

the plan" and "made the decision" to kill the victims; their fate was "his choice"); *id.* at 1481 (Norman 98 RR 92) (Norman was the "instigator," "the mastermind," "the guy in control").

At Ramey's trial, the prosecutor also downplayed or eliminated any suggestion that Norman had directed Ramey's actions. *Compare* 39 RR 47 (Ramey took care not to leave footprints at the crime scene) *with* Ex. 61 at 1481 (Norman 98 RR 92) (Norman told Ramey to walk where he would not leave footprints). By contrast, at Norman's trial, the prosecutor portrayed Norman as clearly the more culpable actor, who gave orders to Ramey. *See* Ex. 61 at 1483 (Norman 98 RR 99) (before Norman told him to shoot Lopez, Ramey had shot Peacock and Roberts but only "because [Norman] told him to"); 119 (when Ramey reentered the scene to ensure the victims were dead by shooting them again if necessary, he was "following … commands" from Norman); Ex. 61 at 1471 (Norman 98 RR 51) ("[n]o dispute" that it was Norman, not Ramey, who fired the shot that likely killed Peacock instantly); *see also*, *e.g*., Ex. 61 at 1481 (Norman 98 RR 93) (Norman instructed Ramey to "get rid of the guns, get rid of the evidence").[32] Indeed, at Norman's trial the prosecutor argued that Norman's entire account at Ramey's trial about how Peacock was killed simply "flipped" Norman's own role with Ramey's. Ex. 61 at 1482 (Norman 98 RR 96). These examples illustrate, but do not exhaust, the ways in which the prosecution presented mutually contradictory evidence and arguments across the two trials, in violation of the Due Process Clause and the Eighth Amendment.

This Court should condemn, not endorse, such conduct. Even in a trial where a man's life is at stake, the prosecutor "may strike hard blows"—but not "foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). The maximum punishment

[32] And despite being aware of these facts, at Ramey's trial the prosecutor mocked the defense expert's view of Ramey as a "follower." *See* 39 RR 27.

may be pursued using "every legitimate means," but not "improper methods." *Id.* Using inconsistent theories, an "inherently unfair" tactic, falls in the latter category. *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring). The theory and argument upon which the State urged death for Ramey was directly refuted by what it later presented and argued against Norman. The prosecutor thereby "fail[ed] to observe that fundamental fairness essential to the very concept of justice," infecting Ramey's death sentence with such unfairness as to violate due process. *See Donnelly*, 416 U.S. at 642–43 (cleaned up); *see also Berger*, 295 U.S. at 88.

2. The State's assertion of inconsistent theories offends the Constitution and violated Ramey's due process rights.

The above-described inconsistency violates the Constitution, ethics, and the ideal of fundamental fairness, as *Stumpf v. Mitchell* illustrates. 367 F.3d 594 (6th Cir. 2004) ("*Stumpf I*"), *rev'd in part, remanded in part, Bradshaw v. Stumpf*, 545 U.S. 175 (2005) ("*Stumpf II*"). Stumpf pleaded guilty to aggravated murder and other charges arising from a home invasion by Stumpf and his codefendant Wesley, where a married couple was shot, the wife fatally. *See Stumpf v. Robinson*, 722 F.3d 739 (6th Cir. 2013) ("*Stumpf III*"). At an ensuing sentencing hearing before a three-judge panel, the prosecutor maintained that ample evidence showed Stumpf had killed the decedent, while also urging that Stumpf was also responsible for the murder as an accomplice. The judicial panel found Stumpf to have been "the principal offender" in the crime and imposed death.

At Wesley's subsequent jury trial—where the evidence included a newly available hearsay statement from Wesley's cellmate that Wesley had admitted being the shooter—the prosecutor argued that Wesley was the principal offender and deserved death. *Stumpf III*, 722 F.3d at 744–45. But Wesley took the stand and disputed the hearsay statement, saying Stumpf had shot the decedent. The jury convicted Wesley but apparently credited his testimony, sentencing him to life imprisonment. Stumpf subsequently moved for reconsideration of his sentence based on the new hearsay statement. After a hearing in which one judge stated he would review the testimony from Wesley's trial as relevant to the "principal offender" question, the panel issued a summary order overruling Stumpf's motion.

On federal habeas, Stumpf argued that both his conviction and sentence violated due process because the prosecutor had changed his position concerning who was the "principal offender" between Stumpf's sentencing hearing and Wesley's. The Sixth Circuit initially granted relief, *see supra*, but the Supreme Court granted review and reversed in part. *See Stumpf I*, 367 F.3d 594; *see also Stumpf II*, 545 U.S. 175. It overturned the grant of habeas relief as to Stumpf's conviction because under an accomplice liability theory, the shooter's identity was immaterial. *See Stumpf II*, 545 U.S. at 182–87. But the Court remanded the case for consideration of whether sentencing relief might still be appropriate. *Id.* at 187–88 (acknowledging that "[t]he prosecutor's use of allegedly inconsistent theories may have [had] a more direct effect on Stumpf's sentence [than on his conviction]," though "express[ing] no opinion" on that question).

While Stumpf ultimately did not prevail on remand, that adverse decision rested in substantial part on the Court of Appeals' conclusion that the prosecutor had done nothing that "kept the factfinder [in either of the two defendants' sentencings] from making a fully informed decision." *Stumpf III*, 722 F.3d 739 (6th Cir. 2013). Unsurprisingly, given that both the three-judge panel and the Ohio appellate courts reviewed the merits of Stumpf's sentence *de novo* and were then aware of the hearsay statement implicating Wesley as the shooter, the Court of Appeals found no due process violation. *See Stumpf III*, 722 F.3d at 745–47 (appellate courts "independently weighed" the evidence to assess the appropriateness of Stumpf's death sentence). It observed—understandably given the unusual sequence of events before it—that a prosecutor may "argu[e] a justifiable inference from a complete evidentiary record," even if it differs from the one he argued earlier based on a record not yet known to be incomplete. *Id.* at 751.[33]

Here, nothing indicates that the quantum or quality of proof in the State's hands changed between Ramey's trial and Norman's to justify any such new inference. On identical records, the prosecutor portrayed Ramey as more culpable in the first trial, and Norman as the more culpable in the second. The Supreme Court and ethics cannons make clear that under the Fourteenth Amendment, prosecutors must ensure integrity and fairness in criminal proceedings for which they are responsible. *See, e.g.*, *Berger*, 295 U.S. at 88. Ramey's sentencing hearing did not meet that standard and violated due process.

A prosecutor who argues conflicting theories of culpability in related capital trials also undermines the reliability of any resulting death sentence and creates an unacceptable risk of arbitrary or capricious infliction of the death penalty in contravention of the Eighth Amendment. "[S]ustaining a death sentence in [such] circumstances … results in a sentencing system that invites the death penalty to be ... wantonly and ... freakishly imposed." *Stumpf II*, 545 U.S. at 189–90 (Souter, J., concurring, citing *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188, (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)) (cleaned up); *see also*, *e.g.*, *Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995) (Stevens, J., dissenting from denial of stay of execution) (observing that "[t]he heightened need for reliability in capital cases only underscores the gravity" of the

[33] The court also concluded that on the record before it, any due process violation would have been harmless as to Stumpf's sentence. *Id*. at 751–52.

"serious questions … raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings").

Ramey's death sentence violates due process and the Eighth Amendment and cannot stand.

3. Ramey's inconsistency claim satisfies article 11.071, § 5(a)(3).

Absent this due process violation, no rational juror would have sentenced Ramey to death. The State's deliberate presentation of mutually inconsistent theories regarding Ramey and Norman's relative culpability infected the jury's answers to both special issues submitted at the penalty phase. *See supra* Part IV.C.2.c.

Future Dangerousness. First, but for the State's inconsistent theories between Ramey and Norman's trials, the jury would not have found that Ramey posed a future danger. In answering the future dangerousness question, a jury may consider, among other things, "the circumstances of the capital offense, including the defendant's state of mind and whether he ... was working ... with other parties," "the calculated nature of the defendant's acts," "the forethought and deliberateness exhibited by the crime's execution," and "whether the defendant was acting under duress or the domination of another at the time of ... the offense." *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987).

The State's inconsistent theories poisoned the jury's assessment of these factors. At Ramey's trial, Bell portrayed him as the sole mastermind—the one who planned the killings, who was first to propose the robbery-murder, and who was alone responsible for the death of Lopez. *Supra* Part IV.E.1. This portrait of an autonomous, calculating, and premeditated killer was the crux of the State's case on future dangerousness—to the point that the State even mocked the defense's characterization of Ramey as a follower. *Id.* This is precisely the opposite of what Bell argued at Norman's trial. *See id.*

If the jury at Ramey's trial heard the truth about Norman's rule—the very facts that the *same prosecutor* presented at Norman's trial—it would have fundamentally recast the future dangerousness calculus. Under the version of the facts presented at Norman's trial, no rational juror would have found that Ramey's conduct reflected his own autonomous violent character; rational jurors would instead have understood that Ramey was acting under Norman's control and influence. No rational juror who understood the full picture—as Bell himself would later present it—could have found beyond a reasonable doubt that Ramey would constitute a continuing threat to society.

Mitigation. The mitigation special issue required the jury to consider "all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," in determining whether sufficient mitigating evidence warranted a sentence of life imprisonment without parole. article 37.071, § 2(e)(1). Had the State presented the version of the crime it presented at Norman's trial, no rational juror would have negatively answered this special issue.

At Ramey's trial, Bell emphasized Ramey's purported role in planning the robbery and causing the victims' deaths—maximizing his moral culpability in the jury's eyes. *Supra* Part IV.E.1. But at Norman's trial, Bell portrayed Norman as the mastermind whose plans Ramey merely followed. *Id.* This is classic mitigation evidence, demonstrating that Ramey was acting under the direction of a dominant codefendant and directly reducing his personal moral culpability and reducing society's interest in retribution against him. *See Skipper*, 476 U.S. at 13. (Powell, J., concurring). Had Bell presented Ramey's jury with the version of events presented at Norman's trial, no rational juror would have answered the mitigation special issue in favor of death, even with the paltry mitigation case that Dr. Willie presented. Accordingly, Ramey's inconsistency claim satisfies article 11.071, § 5(a)(3), and the Court should allow it to proceed.

V. CONCLUSION

Serious constitutional errors pervaded Ramey's trial and rendered his conviction and sentence unreliable. Ramey cannot be executed under these circumstances. He has made the threshold showing necessary to entitle him to further proceedings on his claims, and he respectfully requests that the Court authorize those claims before it is too late.

Dated: September 9, 2026 Respectfully submitted,

By: /s/ *Janice L. Ta*
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CERTIFICATE OF COMPLIANCE

I hereby certify that this First Subsequent Application for Post-Conviction Writ of Habeas Corpus under Art. 11.071 was computer generated and is less than 37,500 words in length, as required by Tex. R. App. P. 9.4(i)(2)(A).

/s/ Janice L. Ta
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon all counsel of record via efiling on this the 9th day of September, 2026.

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VERIFICATION

STATE OF TEXAS

COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, on this day personally appeared Janice L. Ta, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas in good standing.
2. I am the duly authorized attorney for Ker'Sean O. Ramey, having the authority to prepare and to verify Mr. Ramey's First Subsequent Application for a Writ of Habeas Corpus.
3. I have prepared and read the foregoing application and I believe all allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury:

Janice L. Ta

SUBSCRIBED AND SWORN TO BEFORE ME on September 9, 2026

EMILY SEELIG
Notary Public, State of Texas
Comm. Expires 11-21-2028
Notary ID 135180499

Emily Seelig

Notary Public, State of Texas

PETITION EXHIBITS*

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1	1	Declaration of Alisha C. Burgin Authenticating Appendix Exhibits 2-61	1-14
1	2	Affidavit of Terral Stevens Dated October 6, 2015, and Attachments Concerning Ker'Sean Ramey's Childhood and Family History	15-85
2	3	Affidavit of Irvy Stroude Dated October 23, 2015	86-88
2	4	Affidavit of Ilethia Genice (Ceasar) Cephus Dated November 2, 2015	89-93
2	5	Declaration of Deloris Robinson Dated July 30, 2015	94-97
2	6	Edna Police Department Incident Report No. 2005080224 Dated August 25, 2005	98-116
2	7	Texas Department of Public Safety, Texas Ranger Division Report of Investigation II, File No. RD-2005-00370	117-128
2	8	Texas Department of Public Safety, Texas Ranger Division Report of Investigation IV, File No. RD-2005-00370	129-183
2	9	Texas Department of Public Safety, Texas Ranger Division Report of Investigation I, File No. RD-2005-00370	184-193
2	10	Texas Department of Public Safety, Texas Ranger Division Report of Investigation III, File No. RD-2005-00370	194-206
2	11	Edna Police Department Supplemental Investigation Report, Case No. 2005357, Prepared by Craig Repka	207-248
2	12	Supplemental Capital-Murder Investigation Report by Curt Gabrysch	249-251

***Please note:** Applicant submits these as exhibits, not as a formal appendix.

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2	16	Declaration of James Donald Evans III Dated July 29, 2015, Concerning His Representation of Ker'Sean Ramey	270-274
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2	23	Biographical Sketch of Dr. Mark E. Kunik	318-322
3	24	Juror Questionnaire Cards from the First Venire Panel in State v. Ker'Sean Ramey	323-392
3	25	Juror Questionnaire Cards from the Second Venire Panel in State v. Ker'Sean Ramey	393-419

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3	27	Juror Questionnaire of Cheryl Steadham-Scott	425-454
3	28	Juror Questionnaire of Marjorie Jeane	455-478
4	29	Juror Questionnaire of Carol Laza	479-502
4	30	Affidavit of Kevin Childs Dated October 4, 2014, Concerning His Confinement with LeJames Norman and Ker'Sean Ramey and Law-Enforcement Requests for Cooperation	503-506
4	31	Affidavit of Gerald Manzanalez Dated November 21, 2014, Concerning His Plea Agreement and Testimony Against Ker'Sean Ramey	507-509
4	32	Affidavit of Jonathan Daniel Snyder Dated March 17, 2015, Concerning His Incarceration with and Testimony Against Ker'Sean Ramey	510-512
4	33	Affidavit of Joseph Neil Hartley Dated September 1, 2026, Concerning His Interviews of Otis Santellana, with Attachments	513-522
4	34	Affidavit of Joseph Neil Hartley Dated November 2, 2015, Concerning His October 24, 2014 Interview of Christopher L. Times	523-529
4	35	Affidavit of Myron D. Hardaway Dated October 31, 2015, Concerning the Source of His Information About the Murders	530-532
4	36	Affidavit of Emanda Norman Dated October 31, 2015, Concerning the Prosecution's Alleged Threat to Charge Her	533-535

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4	39	Edna Police Department Voluntary Statements of Bradford Bernard Butler Dated December 9, 2005	567-576
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4	45	Voluntary Statement of Christopher Times Dated January 10, 2006 Concerning the Nairn Burglary Investigation	662-663
4	46	Reporter's Record of Christopher Times's Guilty-Plea Proceedings Dated February 16, 2006	664-678
4	47	Transcript of the February 17, 2006 Recorded Interview of Christopher Times	679-695
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4	49	Court Records Concerning Gerald Manzanalez, Including Plea and Deferred-Adjudication Records	708-731

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4	52	Texas Department of Public Safety Crime Laboratory Service Amended Firearms Report Dated May 4, 2006	737-740
4	53	Transcript of the August 17, 2006 Recorded Interview of Myron Hardaway	741-748
4	54	National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009)	749-1099
4	55	Jennifer L. Mnookin et al., The Need for a Research Culture in the Forensic Sciences, 58 UCLA Law Review 725 (2011)	1100-1139
4	56	William A. Tobin and Peter J. Blau, Hypothesis Testing of the Critical Underlying Premise of Discernible Uniqueness in Firearms-Toolmarks Forensic Practice, 53 Jurimetrics Journal 121 (2013)	1140-1157
5	57	President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (September 2016)	1158-1332
5	58	Tiffany Peacock Autopsy Report Dated August 26, 2005	1333-1346
6-8	59	Collaborative Testing Services, Inc., Firearms Examination Test No. 23-5262 Summary Report Dated July 29, 2024	1347-1437

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9	60	Erwin J.A.T. Mattijssen et al., Interpol Review of Forensic Firearm Examination 2019-2022, 6 Forensic Science International: Synergy 100305 (2023)	1438-1454
9	61	Reporter's Record Excerpts from State v. LeJames Norman, Volume 98, Dated December 10, 2008	1455-1490

APPENDIX G

Order, *Ex parte Ramey*, No. WR-74,896-02
(Tex. Crim. App. Sept. 21, 2026)
(not designated for publication)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-74,896-02

EX PARTE KER'SEAN OLAJUWA RAMEY, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 05-12-7342B IN THE 24TH DISTRICT COURT JACKSON COUNTY

Per curiam.

ORDER

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.[1]

In January 2007, a jury convicted Applicant of capital murder for the August

[1] All references to "Articles" in this order refer to the Texas Code of Criminal Procedure unless otherwise specified.

2005 murder of three people. *See* TEX. PENAL CODE § 19.03(a). Based on the jury's answers to the special issues submitted under Article 37.071, the trial court sentenced Applicant to death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Ramey v. State*, No. AP-75,678 (Tex. Crim. App. Feb. 11, 2009) (not designated for publication).

Applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court in 2008. This Court denied relief in 2012. *Ex parte Ramey*, 382 S.W.3d 396 (Tex. Crim. App. 2012).

On September 9, 2026, Applicant filed this first subsequent writ application. Therein, he raises five claims. He alleges that the State exercised a peremptory strike based on race, presented false evidence, and misrepresented his involvement in the case (Claims 1, 4, and 5). He also asserts that he received ineffective assistance of counsel at the guilt and punishment phases of trial (Claims 2 and 3).

We have reviewed the application and find that Applicant has failed to show that his allegations satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of his claims. *See* Art. 11.071 § 5(c).

IT IS SO ORDERED THIS THE 21st DAY OF SEPTEMBER, 2026.

Ramey–3

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