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

ANTHONY MEDINA,	§	
Petitioner,	§	
	§	
	§	
v.	§	
	§	**H-09-CV-3223**
	§	
LORIE DAVIS,	§	**THIS IS A CAPITAL CASE.**
Director, Texas Department of	§	
Criminal Justice, Correctional	§	
Institutions Division,	§	
Respondent.	§	

AMENDED PETITIONER'S BRIEF REGARDING EXHAUSTION AND OTHER PROCEDURAL MATTERS

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TABLE OF CONTENTS

I. Introduction.[1]

By any measure, the undisputed facts surrounding the circumstances of Petitioner Anthony Medina's defense representation at his capital trial are extraordinary. At the time that lead counsel Jerry Guerinot was appointed to represent Mr. Medina, he was simultaneously handling 174 other felony cases *and* working as a part-time prosecutor in another county. In the brief six-month period between his appointment to represent Mr. Medina and the commencement of Mr. Medina's trial, Mr. Guerinot represented three other defendants, in three separate and entirely unrelated capital trials, losing all three. In 2010, *The New York Times* published a profile of Mr. Guerinot appropriately titled "A Lawyer Best Known for Losing Capital Cases."[2] Indeed, the United States Supreme Court recently found that Mr. Guerinot had rendered constitutionally ineffective assistance of counsel in

[1] Mr. Medina files this amended brief in light of further refinement of the data discussed in Section III.B.3 of Petitioner's Brief Regarding Exhaustion and Other Procedural Matters (Docket #127). *See id*. at 37–62. In those pages, Mr. Medina reported that he had examined all 208 Harris County capital habeas proceedings since the 1995 adoption of Texas's current capital state habeas procedures in Tex. Code Crim. Proc. art. 11.071. Mr. Medina located sufficient data for 198 of those proceedings to determine whether the trial court adopted *verbatim* the prosecution's proposed findings of fact and conclusions of law. Docket #127 at 43. Mr. Medina reported that trial courts adopted the prosecution's proposed findings in 190 of the 198 cases. *Id*. Since filing the brief, Mr. Medina has acquired sufficient additional documentation to expand the data set to 199 proceedings, *see* Exhibit 1. The data analysis has also been refined to reflect the fact that the prosecution did not oppose relief in eight (8) of the 199 proceedings. In other words, there were a total 191 *contested* capital habeas proceedings in which trial courts entered findings of fact and conclusions of law. Mr. Medina has narrowed his analysis in Sec. III.B.3 to those 191 contested proceedings because the adoption of a party's proposed order in an uncontested proceeding is not indicative of potential bias. Notably, removing these proceedings from the study does not alter the troubling outcome. Other than editing Sec. III.B.3 and corresponding exhibits to reflect a focus on the 191 contested proceedings, Mr. Medina has made only minor typographical changes.

[2] Adam Liptak, *A Lawyer Best Known for Losing Capital Cases*, N.Y. TIMES, May 17, 2010 ("*Lawyer Best Known for Losing*").

another Harris County capital case tried just one year after Mr. Medina's, finding that "[n]o competent defense attorney" would have performed as Mr. Guerinot did.[3]

Additionally, Mr. Medina has discovered numerous instances of undisclosed exculpatory evidence, and is aware of much more to which he has been denied access. Mr. Medina herein documents a disturbing pattern and practice of misconduct by the Harris County District Attorney's Office ("HCDAO") in a series of cases. Texas courts have recently noted that even the most senior HCDAO prosecutors have been laboring under misconceptions of "enormous significance" about their duty to disclose exculpatory and impeachment evidence.

Yet the extraordinary, fact-intensive, extra-record claims presented in Mr. Medina's case have never been subjected to meaningful postconviction review. Instead, they were processed through a state court, as Mr. Medina documents in this brief, in which Harris County prosecutors have been accorded absolute deference with respect to *every* factual and legal issue in *every* capital postconviction case. Further, Mr. Medina reviewed every Harris County capital postconviction case since the inception of the current capital habeas corpus statute in 1995. As described below, the proceedings in Mr. Medina's case are emblematic of a countywide culture of deference to the prosecution. Not surprisingly, what emerged from the state court process was a partisan order crediting all of the prosecution's postconviction evidence, and dismissing or disregarding all of Mr. Medina's submissions.

[3] *Buck v. Davis*, 137 S. Ct. 759, 775 (2017).

The merits of Mr. Medina's claims are now before this Court. And while statutory and common law federal habeas corpus doctrines constrain federal courts in a variety of ways, none of them prevent this Court from addressing and granting relief on Mr. Medina's claims.

Before reaching the merits of Mr. Medina's claims, this Court stayed this case and directed Mr. Medina to give the Texas courts another chance to review several of his claims. Mr. Medina has done so.

Mr. Medina has previously briefed many of the issues this Court must now resolve and, with one exception related to Claim XII described *infra*, Mr. Medina stands by his prior briefing.[4] In what follows, Mr. Medina will first address the issue of exhaustion. *See* Section II. He will then supplement his prior briefing explaining why 28 U.S.C. § 2254(d) poses no bar to relief. *See* Section III. Finally, Mr. Medina will address potential procedural bars in light of the recent state court proceedings.[5]

II. Exhaustion-related issues: All but two of Mr. Medina's claims were exhausted during his initial state habeas proceedings, and the two remaining claims are now exhausted.

Pending before this Court is Mr. Medina's Second Amended Petition. Docket #53. In Respondent Stephens's Motion for Summary Judgment and Answer with Brief in Support (hereinafter "Answer") (Docket #76), the Respondent invoked an

[4] When preparing this brief, counsel faced the choice of incorporating dozens of pages of prior briefing covering exhaustion, default, and the application of 28 U.S.C. § 2254(d) into the text, or simply citing the Court back to briefing relevant to the discussion in this document. Counsel chose the latter option to reduce the volume of briefing and, to the greatest extent possible, eliminate redundancy.

[5] This Court ordered Mr. Medina's brief to be filed on January 15, 2018, which is Martin Luther King Jr.'s Birthday, a legal holiday pursuant to FRCP Rule 6(a)(6)(A). Thus, Mr. Medina's brief is timely filed if submitted by the end of the next day. FRCP Rule 6(a)(1)(C).

exhaustion defense with respect to two of Mr. Medina's claims, and with respect to fragments of several other claims. Mr. Medina replied that Respondent's claim-splitting approach, in addition to being legally improper, left him and this Court with no useful guidance as to whether she was invoking exhaustion with respect to the claims Mr. Medina actually pled. In particular, whether Respondent was alleging that Mr. Medina's guilt-phase ineffective assistance of counsel ("IATC") claim (Claim I) was unexhausted remained unclear. Before resolving any exhaustion-related disputes, this Court noted that Mr. Medina had conceded lack of exhaustion with respect to his prosecutorial misconduct claim (Claim II) and thus ordered him to exhaust any remaining state remedies. Now that Mr. Medina has done so, he offers the following additional briefing regarding the exhaustion of state court remedies and other procedural matters, including the application of 28 U.S.C. § 2254(d) and procedural default.[6]

[6] In his Reply To Respondent Stephens's Motion For Summary Judgment and Answer (hereinafter "Reply") (Docket #93), Mr. Medina addressed exhaustion and related issues at 44–56 (Respondent's impermissible claim-splitting); 100–09 (the exhaustion of Claim I); 119–27 (alternative argument if this Court finds Claim I unexhausted); 141–47 (Claim II is unexhausted); 160–63 (claim-splitting and exhaustion of Claim III); 271–74 (exhaustion status of Claim XII); 282–83 (exhaustion status of claim XIV). With the exception of Claim XII, Mr. Medina stands by the exhaustion-related briefing in his Reply. As described, *infra*, Mr. Medina withdraws his prior concession that Claim XII was unexhausted.

A. Respondent invoked exhaustion defenses against two claims pled by Mr. Medina and purported to invoke exhaustion with respect to small fragments of three other claims.

1. Respondent invoked an exhaustion defense in response to two claims pled by Mr. Medina, one of which was unexhausted.

Respondent asserted an exhaustion defense with respect to the following two claims:

> Claim XII — The judgments of conviction and sentence of death in Mr. Medina's case are void because the judicial officer who presided at his trial was without authority to preside over the trial in violation of the due process clause and the Eighth Amendment of the United States Constitution.[7]
>
> Claim XIV — Mr. Medina is innocent and his execution would constitute cruel and unusual punishment.[8]

In reply, Mr. Medina conceded that both claims were unexhausted. *See* Reply (Docket #93) at 271–72 (conceding that Claim XII is unexhausted); *id*. at 282–83 (conceding that Claim XIV is unexhausted).

Mr. Medina erred, however, in conceding nonexhaustion with respect to Claim XII. Mr. Medina's initial state postconviction review included four separate state habeas corpus applications.[9] The first application was dismissed as time-barred, the second was purportedly adjudicated on the merits, and the remaining two were

[7] Second Amended Petition (Docket # 53) at 338. Respondent invoked exhaustion with respect to this claim in her answer (Docket # 76) at 234.

[8] Second Amended Petition (Docket # 53) at 353. Respondent invoked exhaustion with respect to this claim in her answer (Docket # 76) at 239.

[9] Mr. Medina recently filed his fifth state court application in response to this Court's order to exhaust remaining state court remedies.

dismissed as abusive.[10] Mr. Medina's third state habeas application—which raised what is currently Claim XII in the Second Amended Petition—was filed in 2002 and dismissed as an abuse-of-the-writ in 2005. *See* State Habeas Vol. 3 at 685–91 (Mr. Medina's application); *Ex parte Medina*, WR–41,274–03 (Tex. Crim. App. Nov. 25, 2005) (unpublished order dismissing the application). Thus, Claim XII was exhausted during the initial state postconviction proceedings but apparently both parties overlooked the third state application. Mr. Medina regrets this error and withdraws his concession that Claim XII was unexhausted.

Assuming Respondent withdraws her exhaustion defense to Claim XII, the parties agree that Claim XIV was an entirely new claim in federal court.

2. Respondent purported to invoke exhaustion defenses with respect to small fragments of three other claims, one of which was in fact unexhausted.

In addition to asserting nonexhaustion with respect to the two claims described above, Respondent also argued that small pieces of three other claims were unexhausted. Respondent, however, failed to address the claims as Mr. Medina actually pled them or invoke an exhaustion defense in response to the claims in their entirety.

[10] *Ex parte Medina*, No. WR-41,274-05, 2017 WL 690960, at *1 (Tex. Crim. App. Jan. 25, 2017) ("This Court dismissed Applicant's initial post-conviction application for writ of habeas corpus as untimely filed. *Ex parte Medina*, WR–41,274–01 (Tex. Crim. App. April 28, 1999) (not designated for publication). This Court denied the –02 application and dismissed the –03 and –04 applications as abuses of the writ. *Ex parte Medina*, WR–41,274–02, –04 (Tex. Crim. App. Sept. 16, 2009) (not designated for publication); WR–41,274–03 (Tex. Crim. App. Nov. 25, 2005) (not designated for publication).").

Specifically, Respondent asserted that fragments of the following claims were not presented to the state court during the initial round of state habeas proceedings:

> Claim I — Trial counsel rendered ineffective assistance of counsel with respect to the guilt/innocence phase of Mr. Medina's trial, in violation of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984).[11]

With respect to the seventy-one (71) pages of evidence and argument in Claim I, Respondent asserts that three allegations—spanning a total of nine (9) pages—and related documents were not presented during the initial state habeas proceedings. Respondent characterizes the two pages discussing Shelly Amato,[12] two pages discussing trial counsel's failure to impeach prosecution witness Jamie Moore,[13] and two pages discussing trial counsel's failure to impeach prosecution witnesses Johnny Valadez and Regina Juarez[14] as unexhausted "claims." Additionally, in response to Mr. Medina's Claim IV (IATC during the pre-trial and jury selection proceedings), Respondent asserted that allegations spanning three pages of Claim I are an unexhausted "claim" that trial counsel failed to interview witnesses prior to trial.[15]

> Claim II — A Pervasive Pattern of Police and Prosecutorial Misconduct Violated Mr. Medina's Right to Due Process.[16]

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[11] Second Amended Petition (Docket #53) at 88–159.

[12] Answer (Docket #76) at 45 (identifying the allegations about Shelly Amato on pages 108–09 of the Second Amended Petition as an unexhausted "claim").

[13] Answer (Docket #76) at 58–60 (identifying the allegations about trial counsel's failure to impeach Jamie Moore on pages 129–30 of the Second Amended Petition as an unexhausted "claim").

[14] Answer (Docket #76) at 61 (identifying allegations about trial counsel's failure to impeach Johnny Valadez and Regina Juarez on pages 118–19 of the Second Amended Petition as unexhausted "claims").

[15] Answer (Docket #76) at 180–81 (arguing that Mr. Medina "failed to raise this claim in state habeas proceedings).

[16] Second Amended Petition (Docket #53) at 159–84.

Respondent argued that several aspects of Mr. Medina's second claim were unexhausted "claims," including allegations about Regina Juarez's suppressed deal with the prosecution and her false testimony.[17] Respondent characterized these and numerous other additional allegations[18] as individual claims for relief that were not previously presented to the Texas courts.

> Claim III Trial counsel rendered ineffective assistance of counsel with respect to the punishment phase of Mr. Medina's trial, in violation of the Sixth Amendment and *Strickland v.Washington*, 466 U.S. 668 (1984).[19]

Of the eighty-one (81) pages of allegations and argument about trial counsel's penalty phase ineffectiveness, Respondent argues that allegations on one (1) page of Mr. Medina's claim about trial counsel's billing records constitute an unexhausted "claim," arguing that "because Medina did not raise a billing-related ineffective-assistance claim in state court, such a claim is defaulted and federal review is barred." Answer (Docket #76) at 161–62.

[17] Answer (Docket #76) at 80.

[18] Answer (Docket #76) at 95 (additional allegation regarding suppressed evidence related to prosecution witness Dominic Holmes); *id*. at 97–98 (additional allegation regarding an eyewitness who stated that the gunman was African American); *id*. at 99 (additional allegation about suppressed statements by Dominic Holmes); *id*. at 100 (additional allegation about coercive police tactics during the investigation); *id*. at 101–02 (additional allegation about a suppressed statement by Regina Juarez); *id*. 105–06 (additional allegation about a false impression painted by the prosecutor's guilt-phase closing argument).

[19] Second Amended Petition (Docket #53) at 185–266).

B. Mr. Medina objected to Respondent's failure to answer the claims he pled and noted that her exhaustion arguments were necessarily a non sequitur response to the claims pending before this Court. Mr. Medina conceded that Claim II was unexhausted.

Despite later conceding that Mr. Medina is the "Master Of His Pleadings," Docket #105 at 2, Respondent failed to address several of the claims that Mr. Medina actually pled, including claims one through three. Instead, she subdivided these claims into multiple, smaller mini-claims and asserted exhaustion defenses with respect to mini-claims of her own invention that were never pled by Mr. Medina. Mr. Medina has established that Respondent's claim-splitting is—pursuant to decades of Supreme Court and Fifth Circuit precedent—analytically improper. *See* Reply (Docket #93) at 49–56; *id*. at 160–63. Thus, Respondent's argument that some mini-claims of her own creation are unexhausted failed to pose or answer the relevant question.

Mr. Medina nevertheless treated Respondent's arguments as an attempt to invoke an exhaustion defense with respect to claims he pled and replied accordingly. With respect to Mr. Medina's guilt-phase IATC claim (Claim I), Mr. Medina applied the relevant exhaustion test and demonstrated that the new allegations did not fundamentally alter the claim presented to the state courts, thus Claim I was properly exhausted. Reply (Docket #93) at 100–09. Additionally, Mr. Medina noted that some of the small fragments of the claim Respondent deemed new as of the federal proceedings had in fact been presented to the state courts. *Id*. at 103–04. Mr. Medina will further address this issue, *infra*.

Mr. Medina conceded that his due process claim related to police and prosecutorial misconduct (Claim II) is unexhausted. *Id*. at 141. This is so because new, significant instances of misconduct—including the suppression of prosecution deals in exchange for testimony and materially false testimony—emerged after the initial round of state postconviction proceedings. Thus the claim was materially altered in these proceedings.

Mr. Medina explained that Respondent's lone exhaustion objection with respect to the penalty-phase IATC claim (Claim III) was factually incorrect. As described, *supra*, Respondent objected to one page of this claim, asserting that Medina failed to raise "a billing-related ineffective-assistance claim in state court." Answer (Docket #76) at 161–62. In reply, Mr. Medina noted that the billing records in question—Exhibit 9 to Mr. Medina's Second Amended Petition—were in fact those of the defense investigators at trial. Reply (Docket #93) at 151–52 n.42. Additionally, Mr. Medina had in fact attached the same exhibit to his state habeas application and extensively briefed their significance to his state court IATC claims. *Id*. Hence, Respondent's only exhaustion objection with respect to Claim III was based on a clear factual mistake.

Thus, after Mr. Medina filed his reply, the parties were in apparent agreement that Claims II; XII; and XIV were unexhausted—though the parties both erred with respect to Claim XII. Further, Respondent's only exhaustion objection with respect to Claim III was clearly erroneous in light of the state postconviction record. The parties were in apparent disagreement with respect to the status of Claim I, but

Respondent had yet to recognize or respond to the guilt-phase IATC claim pled by Mr. Medina, much less address the relevant exhaustion inquiry: did any new allegations in federal court fundamentally alter the claim?

C. This Court stayed these proceedings and ordered Mr. Medina to exhaust remaining state court remedies.

After Mr. Medina filed his reply and a motion for discovery, this Court stayed these proceedings and ordered Mr. Medina to exhaust any remaining state court remedies. Order (Docket #103) at 4. The Court noted that the parties "disputed the procedural posture of several claims and whether state and federal courts can allow fact development." *Id.* at 1. After noting that Mr. Medina had conceded that his state misconduct claim (Claim II) was unexhausted, the Court observed that "the record reveals that Medina has raised other *issues* for the first time in federal court." *Id.* at 2 (emphasis added). This Court held, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), that the interests of justice would be best served by allowing the state courts to address "the unexhausted issues raised by Mr. Medina's habeas petition." *Id.* at 3.

Mr. Medina moved for clarification of the Court's order. Docket #104. Mr. Medina noted that Respondent had failed to address Claim I (guilt-phase IATC) as a whole and instead invoked exhaustion with respect to just a few fragments of the claim. Mr. Medina sought clarification regarding whether, in the Court's view, Claim I was unexhausted.[20] Respondent opposed clarification, noting that Mr. Medina is "Master Of His Pleadings" and that any doubt about which claims to exhaust could

[20] The Court noted that "issues" were presented in federal court for the first time but it did not state that any "claims" had been presented for the first time.

be resolved by presenting all fourteen claims to the Texas Court of Criminal Appeals and allowing that court to sort out which ones were new. Docket #105 at 2–3. This Court denied Mr. Medina's request, noting that it had not yet adjudicated the question of whether Mr. Medina had raised any unexhausted claims but that Mr. Medina had already conceded that at least one claim was unexhausted. Order (Docket #108) at 2. The Court also pointed to Mr. Medina's second, alternative response to the exhaustion debate over Claim I (*i.e.*, if the IATC claim is eventually deemed unexhausted, Mr. Medina would seek to excuse any related default under *Martinez v. Ryan*, 566 U.S. 1 (2012), and the Texas courts might entertain an application raising IAC of initial habeas counsel). "By acknowledging an available state remedy for [Mr. Medina's] first claim," the Court noted, Mr. Medina "presupposes noncompliance with the exhaustion doctrine." *Id.* at 3.[21] The Court thus declined to decide whether Mr. Medina had fundamentally altered his guilt-phase IATC claim. *Id.*

D. Mr. Medina filed a new state court application raising the two unexhausted claims (Claims II and XIV) and re-raising his guilt-phase IATC claim (Claim I). The Texas court refused to consider all three claims.

Mr. Medina filed a new state habeas application raising Claim II (state misconduct) and Claim XIV (innocence), both of which were unexhausted. Given the unresolved dispute over the status of Claim I (guilt-phase IATC), Mr. Medina

[21] This is of course true to the extent that the *Martinez* argument was pled in the alternative to Mr. Medina's primary argument: Claim I was properly exhausted in the initial round of state postconviction proceedings. *Martinez* comes into play *only if* this Court rules that Mr. Medina has fundamentally altered his guilt-phase IATC claim.

included that claim as well. With respect to each claim, Mr. Medina asserted all available state law arguments for review in a successive posture. The Court of Criminal Appeals dismissed the entire application pursuant to Texas's statutory abuse-of-the-writ rule. *Ex parte Medina*, No. WR-41,274-05, 2017 WL 690960, at *1 (Tex. Crim. App. Jan. 25, 2017).

Mr. Medina's only remaining state court remedy was to suggest that the Court of Criminal Appeals reconsider its decisions on its own motion. *See* Tex. R. App. P. 79.2(d) (2016). Mr. Medina filed two separate suggestions. First, he suggested that state court reopen his initial postconviction proceedings because of the increasingly overwhelming evidence of the Harris County District Attorney's Office pattern and practice of suppressing exculpatory evidence. Mr. Medina noted that developments post-dating his previous round of state proceedings required re-examination of the misconduct in his case, which fit a pattern of suppression that had emerged in other cases. Second, Mr. Medina suggested that the state court reconsider its decision to bar Mr. Medina's current state misconduct claim as pled in the 2015 application. Mr. Medina noted that the state court's decision to impose diligence requirements on the abuse-of-the-writ rule that exceed the federal *Brady*[22] standard will prioritize federal court review of *Brady* claims in many Texas cases and create a class of prosecutorial misconduct claims that are reviewable only by the federal courts. The Court of Criminal Appeals denied both suggestions without a written order on May 17, 2017.

[22] *Brady v. Maryland*, 373 U.S. 83 (1963).

As described below, the recent state court proceedings confirm that Mr. Medina's guilt-phase IATC claim was properly exhausted during the initial state habeas proceedings. Additionally, this Court can review the merits of Mr. Medina's two previously unexhausted claims.

E. All of Mr. Medina's claims are now exhausted.

1. Mr. Medina's guilt-phase IATC claim was exhausted prior to initiating federal habeas corpus proceedings, and the recent proceedings in the Court of Criminal Appeals only confirm that the claim was previously exhausted.

As Mr. Medina explained in his Reply, his guilt-phase IATC claim was exhausted prior to initiating federal habeas corpus proceedings. *See* Reply (Docket # 93) at 100–09. Because Respondent raised exhaustion issues related to a small subset of allegations supporting the claim,[23] however, and absent clarification from the Court regarding its own exhaustion determinations, Mr. Medina included the claim in his most recent state postconviction application out of an abundance of caution. Doing so does not alter the fact that the claim was properly exhausted to begin with.

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[23] In his Reply, Mr. Medina noted that Respondent's failure to address two of Mr. Medina's IATC claims—spanning nearly half of his Second Amended Petition—vested this Court with the discretion to strike Respondent's answer and direct her to respond to Mr. Medina's IATC claims. Docket #93 at 162 n.46. In the alternative, this Court should find that Respondent has waived any defenses that she could have asserted with respect to either claim, including the guilt-phase IAC claim.

Rule 5(b) of the Rules Governing 2254 Cases requires Respondent to answer the claim as pled and assert defenses with respect to those claims: "The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." *Id.* Respondent did not answer Petitioner's guilt-phase IATC claim. She treated piecemeal components as separate claims and asserted a nonexhaustion defense with respect to a few of those components. Respondent has thus failed to answer the claim, and therefore waived any affirmative defense to it, including the defense of nonexhaustion. *See also Carty v. Quarterman*, 583 F.3d. 244, 257 (5th Cir. 2009) (an assertion of nonexhaustion as to some claims constituted a waiver with respect to any claims for which an exhaustion defense was not invoked).

Mr. Medina supplements his prior briefing on this issue with an update from the state court proceedings which serve to confirm that this claim was indeed fully exhausted and is now entitled to merits review.

a. Mr. Medina did not fundamentally alter his guilt-phase IATC claim.

As Mr. Medina argued in his Reply, the guilt-phase IATC claim was pled in the initial round of state habeas corpus proceedings in as much detail as it was before this Court. Respondent's erroneous attempt to split off pieces of the claim and then argue non-exhaustion as to some of those pieces misapplies well-settled exhaustion law in the Fifth Circuit.

In the first place, Respondent is simply wrong with respect to many of her assertions that an argument or an allegation in Mr. Medina's guilt-phase IATC claim was not previously raised in state court in the first round of habeas proceedings. For example, Respondent argues that in state habeas proceedings Mr. Medina failed to allege IATC with respect to the lack of impeachment of state witness Regina Juarez. Answer (Docket #76) at 61. In fact, Mr. Medina alleged in his state postconviction application that Regina Juarez, among others, could have been critically impeached in several ways, but was not. For example, the state application asserts that Ms. Juarez could have been impeached with the testimony of witness Dallas Nacoste had trial counsel conducted an even minimally adequate pre-trial investigation. *See* State Habeas Vol. 1 at 136–39. In addition, the state application asserts that she could have been impeached with the testimony of undiscovered witness Ricardo Villanueva, had trial counsel conducted a minimal pre-trial investigation in the case. *Id.* at 141–

42. This same assertion was also made with respect to the undiscovered testimony of witness Raymundo Becerra. *Id*. at 142–44.

Respondent is also wrong in her assertion that Mr. Medina did not allege IATC with respect to trial counsel's failure to interview the primary state witnesses against him prior to trial. Answer (Docket #76) at 180–81. In fact, the state habeas application makes this very assertion. State Habeas Vol. 1 at 129–32 (arguing that neither trial counsel nor trial investigator ever interviewed any of primary state's witnesses prior to trial).

Moreover, with respect to those few additional assertions made for the first time in the Second Amended Petition in support of the guilt-phase IATC claim, they clearly do not fundamentally alter the claim. Mr. Medina's IATC claim is fundamentally grounded on defense counsel's abject failure to investigate and prepare adequately for trial. Reply (Docket #93) at 44–56. This was of course the primary theme of the guilt-phase IATC claim in the initial round of state habeas proceedings. State Habeas Vol. 1 at 71–149. It is, therefore, exhausted. Respondent's reference to a few discrete aspects of the IATC claim in the federal petition which were not covered in the state writ (some of which, as noted, are simply wrong) does not undermine exhaustion of this claim.

The law of exhaustion in the Fifth Circuit is quite clear: "[A]s a general rule dismissal is not required when evidence presented for the first time in a [federal] habeas proceeding supplements, but does not fundamentally alter, the claim presented to the state courts." *Anderson v. Johnson*, 338 F.3d 382, 386–87 (5th Cir.

2003) (internal quotations and citations omitted); *see also id*. at 388 n. 24 (citing *Vasquez v. Hillery*, 474 U.S. at 262). The Fifth Circuit's application of this principle makes plain that the allegations Respondent identified "do[] not fundamentally alter" the claim Mr. Medina presented to the state courts. Rather than repeat his exhaustion arguments here, Mr. Medina refers the Court to his Reply. Reply (Docket #93) at 100–09.

b. Texas's recent dismissal of the claim and the accompanying explanation confirm that it was previously exhausted.

As noted, owing to Respondent's erroneous assertion of nonexhaustion combined with uncertainty about the Court's view of this disputed issue, Mr. Medina re-raised his guilt-phase IATC claim in the subsequent state habeas corpus proceedings out of an abundance of caution. The Texas court dismissed this claim as an abuse-of-the-writ. The dismissal only confirms, however, that the claim was previously raised and rejected on the merits in state court. Indeed, the concurrence—the only opinion that addresses the substance of the writ—explicitly makes that point.

The CCA's concurrence relies on the express language of the statute itself, which provides, in relevant part:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues *have not been* and could not have been *presented previously* in a timely initial

> application or in a previously considered application filed under this article …

Ex parte Medina, WR-41,274-05 (Tex. Crim. App. January 25, 2017) (concurring opinion of Newell, J, joined by Keller, P.J., Yeary and Walker, JJ) at 9 (emphasis added), *quoting* Texas Code of Criminal Procedure Article 11.071, Section 5. The concurrence sets forth and compares the various aspects of the guilt-phase IATC claim raised first in the initial state writ proceedings with those contained in the subsequent applications. It concludes:

> Previous habeas counsel actually raised ineffective assistance of trial counsel, including the specific factual allegations repeated here, and supported it with most of the evidence that Medina now presents in the instant application. Medina's ineffective assistance claims were denied after thorough consideration of his initial writ because the claims lacked merit. … After comparing the applications, it is clear that Medina has repackaged the same claim of ineffective assistance that this Court has already rejected.

Id. at 19–21. As a result, the Court concluded, under the express language of section 5, "Medina is not entitled to re-litigate claims that have already been resolved on the merits." *Id.* at 2.

In short, the Texas Court of Criminal Appeals, or at least the concurring judges who signed on to the only substantive opinion addressing the issue, agree that Mr. Medina's guilt-phase IATC claim was already fully exhausted in the initial round of state court proceedings. While the question of exhaustion is a federal question, to be sure, the CCA's concurrence is at least instructive as to whether Mr. Medina did in fact exhaust this claim in the first round of state habeas corpus proceedings; the CCA declares that he did, and the record fully supports that view.

c. Federal procedural default law makes clear that Mr. Medina's re-presentation of a claim previously raised and rejected on the merits in state court does not and cannot create a procedural bar by virtue of a dismissal of that claim the second time around.

"When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Cone v. Bell*, 556 U.S. 449, 466 (2009). "A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once." *Id.* at 467; *see also Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991) (observing that "[s]ince a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing procedural default, its effect upon the availability of federal habeas is nil…"); *Bennett v. Whitley*, 41 F.3d 1581, 1583 (5th Cir. 1994), *on reh'g* (Jan. 25, 1995) (a state-court refusal to address the merits of a claim because it had previously done so "did not bar the district court from addressing the merits of" the claim).

As explained, *supra*, Mr. Medina's guilt-phase IATC claim was properly exhausted prior to initiating federal habeas corpus proceedings, and the CCA's ruling in his most recent state court proceeding affirms this. In light of the dispute surrounding the exhaustion of his guilt-phase IATC claim, however, Mr. Medina elected to re-plead it upon return to state court out of an abundance of caution; federal law makes clear that the "effect [of this choice] upon the availability of federal habeas is nil." *See Ylst,* 501 U.S. at 804, n.3. Where, as here, a state court refuses to readjudicate a claim on the ground that it has been previously presented and

considered, such a refusal clearly does not create a procedural bar to federal review; "[on] the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for federal adjudication." *Cone*, 556 U.S. at 467 (emphasis in the original). This Court is now fully empowered to hear and decide Mr. Medina's guilt-phase IATC claim.

2. Mr. Medina has exhausted state court remedies with respect to the two previously unexhausted claims.

Because Mr. Medina presented Claims II and XIV to the Texas court in his most recent state habeas application, they are now exhausted. As described below in Sec. III, Mr. Medina can overcome any procedural default Respondent may invoke.

III. For multiple independent reasons, 28 U.S.C. § 2254(d) poses no bar to relief because the state court proceedings were too fundamentally flawed to reliably resolve numerous material factual controversies. The state court process was inadequate, and demonstrably failed, to ascertain the truth about Mr. Medina's claims.

Mr. Medina has already briefed—throughout his Second Amended Petition and Reply—why 28 U.S.C. § 2254 poses no bar to relief in his case. The following supplements his prior submissions. Mr. Medina will first briefly describe how the Texas capital state postconviction process was designed to adjudicate extra-record claims. He will then address the very different manner in which the state court processed his case, and why the findings and conclusions that emerged from it are too fundamentally flawed to credit.

A. The statutory procedure governing habeas corpus applications in Texas.

When an application challenging a judgment imposing death is filed in the trial

court, the Texas Code of Criminal Procedure directs that court to determine, based on the application and the State's answer, "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist." Tex. Code Crim. Proc. art. 11.071, § 8(a). The court "shall issue a written order of the determination." *Id*.

Section 8 of Article 11.071, entitled "Findings of Fact Without Evidentiary Hearing," governs the trial court proceeding when the court determines that no controverted, previously unresolved factual issues material to the legality of confinement exist. In that circumstance, the statute directs the parties to file proposed findings of fact and conclusions of law for the court's consideration within thirty days of that determination. *Id*. § 8(b). The trial court must then make "appropriate" written findings of fact and conclusions of law. *Id*. § 8(c). Because there are no material facts in dispute, evidence is neither required nor received, and the trial court's findings and recommendations are based on the pleadings, as with a summary judgment.

Section 9 of Article 11.071, entitled "Hearing," governs the proceeding when the trial court determines that controverted, previously unresolved factual issues material to the legality of confinement exist. In that circumstance, the court's order must designate the issues of fact that are to be resolved and the manner by which those issues will be resolved. *Id*. § 9(a). To resolve the issues, the statute authorizes the court to require affidavits, depositions, and interrogatories and to hold evidentiary hearings. *Id*. A transcript of the hearing must be prepared, and the court

must order the parties to file proposed findings of fact and conclusions of law for it to consider no later than thirty days after the transcript of the hearing is filed. *Id*. § 9(d)–(e). The court must then make written findings of fact that are necessary to resolve the controverted facts and make conclusions of law based on those fact-findings. *Id*. § 9(e).

B. The partisan, summary state court processing of Mr. Medina's claims was inadequate to resolve the numerous disputes over material extra-record facts or ascertain the truth. The state trial court's record of absolute deference to the prosecution in capital postconviction cases is consistent with a countywide pattern of partisanship and reinforces Mr. Medina's showing that the error-ridden product of his state court proceedings is too unreliable and flawed to credit.

Mr. Medina's state habeas application was 284 pages in length and was accompanied by 74 exhibits, most of which were extra-record affidavits and records supporting his factual allegations. He pled numerous fact-intensive, extra-record claims, including claims of ineffective assistance of counsel, prosecutorial misconduct, and juror misconduct. The State disputed almost all of Mr. Medina's allegations and submitted affidavits contradicting many of them. As described *supra*, Article 11.071 §§ 8 & 9 compel the trial court—without a request from Mr. Medina—to identify the material factual controversies and afford a process for resolving them. Mr. Medina nonetheless submitted motions detailing areas of material factual controversy, seeking discovery, and requesting a hearing at which he could prove his allegations. State Habeas Vol. 3 at 667–83 (Applicant's [First] Motion for Discovery and Evidentiary Hearing); State Habeas Vol. 4 at 852–903 (Applicant's [Second] Motion

for Discovery and Evidentiary Hearing). The trial court never acknowledged the existence of, much less ruled on, Mr. Medina's motions. Instead, the trial court signed a proposed order drafted by the State—mentioning only evidence submitted by the State—denying the existence of any material factual disputes. State Habeas Vol. 4 at 907. The trial court subsequently signed the "Respondent's Proposed Findings of Fact, Conclusions of Law and Order." The trial court adopted the postconviction prosecutor's proposed findings *verbatim*, as submitted—without altering the title, without correcting any typographical errors or misspellings, and leaving appended to the findings *all* of the evidence submitted by the State but including none of Mr. Medina's far more voluminous submissions. At the end of the day, the only written work performed by the trial court with respect to Mr. Medina's state habeas application was to sign and date documents prepared entirely by the postconviction prosecutor.[24]

In his Reply, Mr. Medina explained why state court proceedings so bereft of procedural integrity and fundamental fairness do not qualify for the application of 28 U.S.C. § 2254(d), at least with respect to any claim that involved a disputed issue of material fact.[25] Mr. Medina, *infra*, herein supplements his Reply with additional evidence and argument regarding the inapplicability of § 2254(d). Mr. Medina

[24] State Habeas Vol. 4 at 907 (signing the prosecution-drafted order finding no controverted, unresolved issues material the case, and ordering the parties to file findings); *id*. at 913 (extending the deadline to prepare proposed findings); *id*. at 984 (signing the prosecution's proposed findings).

[25] Reply (Docket #93) at 13–22; *id*. at 109–13; *id*. at 175–78; *id*. at 219–22; *id*. at 245–48; *id*. at 264–67. Additionally, Mr. Medina has requested discovery relevant to the lack of integrity in the state court proceedings. *See, e.g.,* Motion for Discovery and Memorandum of Law in Support (hereinafter "Discovery Motion") (Docket #96) at 25–29 (seeking, *inter alia*, discovery related to the postconviction prosecutor's authorship of witness affidavits and her *ex parte* contacts with courts).

emphasizes that, although supported by pattern and practice evidence about the trial court and jurisdiction from which his case originated, his argument is that the state court process applied to *the specific circumstances of this case* was wholly inadequate and produced an obviously unreliable and flawed set of findings of fact and conclusions of law.

1. The prosecutor not only created the postconviction evidence but also authored the state court order buying it wholesale.

One person, Harris County assistant district attorney Roe Wilson, authored:

- the State's answer to Mr. Medina's habeas application;
- the three essentially case-determinative postconviction affidavits of the trial prosecutors (Steve Baldassano and Casey O'Brien) and the surviving defense lawyer (Jerry Guerinot);
- the trial court order—explicitly relying on these three affidavits—finding no material factual controversies needing resolution in state postconviction proceedings; and,
- the findings of fact and conclusions of law finding all of the State's—and none of Mr. Medina's—evidence credible, and adopting every factual and legal assertion made by the prosecutor.

It is clear that Ms. Wilson was the author of these critical witness affidavits because she misspelled the name of Mr. Medina's other trial counsel, Jack Millin, as Jack "Mullin" in both her answer to Mr. Medina's state habeas application and the proposed findings signed by the court. All three witness affidavits, which were prepared in a font and style identical to Ms. Wilson's pleadings, contain the same misspelling of Mr. Millin's name. *See* Reply (Docket #93) at 15–17.

By authoring these affidavits in 2002—six years after the trial—Ms. Wilson was able to create evidence that controverted Mr. Medina's application, even when doing so also meant contradicting the trial record. *See, e.g.*, Reply (Docket #93) at 18–21 (the affidavit Ms. Wilson drafted for Mr. Guerinot claims that he made a strategic decision to not obtain records related Mr. Medina's good behavior while incarcerated because juries are not impressed with a "no-problems" jail record; yet Mr. Guerinot delivered the "no-problems-in-jail" argument in the penalty phase closing and the trial court sustained the prosecutor's objection to the lack of evidence on this matter).

In addition to the trial record, Ms. Wilson's affidavits contradicted voluminous extra-record evidence attached to, and described in, Mr. Medina's state habeas application. For example, Mr. Medina essentially recreated trial counsel's dockets from the date of the offense in this case through the end of his trial. The evidence, which was never controverted by the State, showed that lead counsel was in the first of three back-to-back-to-back capital murder trials *in other cases* when he was appointed to this one, and was handling 174 other felony cases as well as a part-time job as a prosecutor in another jurisdiction. In all, trial counsel obtained four death verdicts in four entirely unrelated capital murder trials—while handling numerous other matters—in the space of just *six (6) months*. *See* Second Amended Petition at 27–39. Mr. Guerinot's lack of trial preparation is evident from the trial record: Most of his witness examinations began with, "Now you and I have never met before, have we?" *See, e.g.,* 15 RR 1814 (cross-examination of prosecution witness Johnny Valdez).

Mr. Medina produced evidence that Mr. Medina's family, not defense counsel or their investigator, was responsible for locating the defense witnesses at trial and getting them to the courthouse. Second Amended Petition at 33–34. Yet, despite overwhelming evidence that Mr. Guerinot—in the few weeks he had between trying other capital cases—did little to prepare for Mr. Medina's case,[26] the affidavit drafted by Ms. Wilson contained incredible assertions that Mr. Guerinot had conducted a thorough pre-trial investigation and was well-prepared for Mr. Medina's trial.

Despite Mr. Medina's pending motions for discovery and fact development to resolve numerous material controversies, such as whether trial counsel adequately investigated this case prior to trial, the prosecutor asked the trial court to sign an order finding no factual controversies and calling for proposed findings:

> The applicant's habeas claims have been thoroughly addressed in the State's Original Answer, including the affidavits of trial counsel Gerry [sic] Guerinot, prosecutor Steve Baldassano, and former prosecutor Casey O'Brien.
>
> Therefore, the State respectfully requests that the trial court issue an order . . . that no controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist.

State Habeas Record Vol. 4 at 906 (State's Motion for Trial Court to Set a Date for Parties to File Proposed Findings of Fact, Nov. 21, 2007). The State's motion made no reference to any of Mr. Medina's evidence or his pending motions identifying the outstanding factual controversies and seeking fact development. The State attached a proposed order stating:

[26] *See, e.g.,* Second Amended Petition at 24–38; *id.* at 91–120; *id.* at 209–30.

> based on the applicant's application for writ of habeas corpus, the State's original answer, including the affidavits of trial counsel Gerry [sic] Guerinot, prosecutor Steve Baldassano, and former prosecutor Casey O'Brien, the Court **FINDS** that no controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist.

Id. at 907. The order, like the State's motion, made no reference to any of Mr. Medina's evidence or his pending motions. The trial court signed it without alteration. *Id.*

Mr. Medina submitted "Applicant's Incomplete Proposed Findings of Fact and Conclusions of Law, and Order." *Id.* at 916–28. On the first page, Mr. Medina objected:

> Mr. Medina maintains that there are still controverted material facts to be resolved in his case and reurges the arguments and requests set forth in his previous filings. Mr. Medina again reurges his request for an evidentiary hearing so that this Court may make accurate findings regarding the extrarecord evidence submitted by Mr. Medina.

Id. at 916.

The State filed "Respondent's Proposed Findings of Fact, Conclusions of Law and Order." *Id.* at 929–1035. Attached to the State's proposed order were all of the exhibits the State had previously attached to its answer to Mr. Medina's application, including the cover sheets identifying each document as a "State's Exhibit." *See*, *e.g.*, *id.* at 995 (cover sheet attached to the State's proposed findings identifying the document as "State's Exhibit C").

The trial judge simply date-stamped and signed the State's proposed order without any alteration. *Id.* at 984. Thus, the trial court's findings in this case are entitled "Respondent's Proposed Findings of Fact, Conclusions of Law and Order,"

and incorporate as exhibits *all* of the evidence attached to the prosecutor's answer and *none* of the 322 pages of evidence attached as exhibits to Mr. Medina's application.[27]

2. The record indicates that the trial court, before adopting the prosecution's submission wholesale, failed to (1) review the prosecution's proposed findings closely or at all; (2) check the prosecutor's accuracy against the state court record; or (3) engage Mr. Medina's evidence in any meaningful way.

When the trial court signed the State's proposed order, it endorsed a facially partisan, inaccurate, and error-ridden document. Facially partisan because the document was titled as the State's proposed order, each of the fifteen attached exhibits was titled "State's Exhibit," and the order adopted *all* of the evidence submitted by the State. None of the evidence submitted by Mr. Medina was included with the trial court's order. One might hypothesize that the trial court reviewed the State's submission, checked it against the record, and concluded that the 254 findings of fact and conclusions of law penned by the prosecutor—and every shred of evidence she submitted—were 100% accurate and thus worthy of wholesale adoption. But as described *infra* and in Mr. Medina's Reply, the State's proposed findings contained numerous errors large and small that should have been readily apparent to anyone modestly familiar with Mr. Medina's case. Mr. Medina offers a few examples here.

[27] *See* State Habeas Vol. 1 at 334–541; *id*. at Vol. 2 at 547–662.

First, some of the typographical errors were so blatant that even a reader unfamiliar with the case would have noticed and corrected them. *See, e.g.*, State Habeas Vol. 4 at 945 (citing to a Texas case decided in the year "20002").[28]

Second, a reader with at least a superficial familiarity with the record would have noticed and corrected the misspelled names of key actors. *See, e.g., id*. at 962 (referring to Mr. Medina's trial counsel Jack Millin variously as "Mullin" or "Mullins" in the same sentence). Mr. Millin's name is misspelled throughout the trial court's findings even though his name is spelled correctly at the beginning of—and throughout—every volume of Mr. Medina's trial transcript. Notably, the state habeas judge did not preside over Mr. Medina's trial; to check any of the parties' numerous assertions about, and citations to, the trial record, he presumably would have needed to review many different volumes of the trial record. Had he done so, he should have recognized that defense counsel's name was misspelled throughout the State's proposed findings before he adopted them wholesale as the order of the court.

Third, and more problematic, are assertions about significant factual issues that are contradicted by the trial record. For example, Mr. Medina alleged that trial counsel's preparation for the penalty phase was deficient in numerous ways, including their failure to follow up on the red flag raised by Mr. Medina's stuttering

[28] Typographical errors also raise questions about the care with which the affiants—the trial prosecutors and defense counsel—reviewed the affidavits Ms. Wilson drafted for them. In each of the prosecutors' affidavits, Ms. Wilson misspelled the names of *both* defense counsel in the first paragraph. *See* State Habeas Vol. 3 at 699 (affidavit of prosecutor O'Brien referring to defense "counsel Gerri Guerinot [sic] and Jack Mullin [sic]); *id.* at 704 (affidavit of prosecutor Baldassano referring to defense counsel "[sic] Gerri Guerinot and Jack [sic] Mullin"). Mr. Guerinot's affidavit opens with a typo: "My name [sic] in Gerard Guerinot." *Id*. at 693.

as a child to see whether it was related to a mental health or other social history issue with mitigating relevance. The state court findings credit trial counsel's *post hoc* rationalization that they made "a reasonable strategic decision not to 'present a mental health expert for *so-called psychological scars from a stuttering* that was *cured and far removed from the offense*.'" State Habeas Vol. 4 at 963 (trial court findings quoting the prosecution-drafted affidavit signed by trial counsel) (emphasis added).

Counsel's rationalization for their failure to investigate and develop this issue is squarely contradicted by the trial record. In his sentencing-phase closing argument to the jury, defense counsel argued:

> [Y]ou know [Mr. Medina's] great uncle who was the first witness yesterday testified *as a child he had a speech impediment. Now, I'm not any sociologist or anything like that and I'm not trying to say that it means anything. But who knows that that might not have caused such a psychological scar* that it was healed only by his becoming, you know, respected as a gang member? I don't know. *That might be something else you can consider*, because we never know—we never know when we get down here to court we never know why people do anything, truly. And who knows *but something back in the past that nobody knows, that nobody testified to, put Tony on the road to where he ended up basically*? And who knows but it might be something that we might consider small like that.

20 RR 2551–52 (emphasis added). As this excerpt demonstrates, trial counsel introduced testimony about Mr. Medina's childhood stuttering during the penalty phase and then argued to the jury that, even though it was far removed from the offense, it *might* have caused a significant psychological scar or be otherwise mitigating. Trial counsel obviously sensed this fact was potentially significant—and thus introduced it at trial and argued that it might be mitigating. But, as he candidly

acknowledged in his argument, without an expert, counsel could not explain its significance to the jury.[29]

Mr. Medina reproduced the above-quoted record excerpt in the body of his state habeas application and directed the trial court to the page in the trial record from which it was taken. State Habeas Vol. 1 at 165. The state habeas judge either believed that trial counsel's six-years-after-the-fact affidavit excusing their own deficient performance was more reliable than the actual transcript of the trial, never consulted the record when faced with the parties' conflicting factual allegations, or failed to review the pleadings closely enough to appreciate the controverted issues in the case. Regardless, the trial court adopted findings that are irreconcilable with the trial record.

Mr. Medina's allegations of deficient performance—which focus on trial counsel's deficient pre-trial investigation of the case—were not extracted from thin air. They are based on the red flags that trial counsel actually encountered signaling issues in this case, such as the prosecution's guilt-phase witnesses contradicting their prior sworn statements,[30] Mr. Medina's non-dangerousness while incarcerated,[31] or his childhood stuttering.[32] Mr. Medina's allegations were supported by the trial record and voluminous extra-record evidence accompanying his state habeas application. Trial counsel's *post hoc* alleged strategic reasons for not investigating

[29] As Mr. Medina has demonstrated, his childhood stuttering—in context—has mitigating significance. Second Amended Petition at 243–45.

[30] *See* Second Amended Petition at 109–20.

[31] *See* Second Amended Petition at 223–27.

[32] *See* Second Amended Petition at 217–19.

these issues are contradicted by a trial record in which they lamely attempted to raise unsubstantiated mitigation themes they would later disavow in a self-interested postconviction affidavit. Contrary to the state court findings, the demonstrably false claims of strategy in the prosecution-authored trial counsel affidavit should have rendered it *in*credible. Yet, by Mr. Medina's count, the state court findings rely on the prosecution-authored "credible affidavit" of trial counsel Guerinot at least twenty-five (25) times. Not only did the trial court repeatedly find trial counsel credible—including when claiming strategic reasons for not documenting Mr. Medina's non-dangerousness or investigating his stuttering—it explicitly relied on trial counsel's affidavit to find no controverted material facts whatsoever about their performance.

Fourth, and equally disturbing, the trial court adopted findings relying on evidence that is not in the record and to which Mr. Medina requested access but has never seen. Mr. Medina has never been granted access to the grand jury testimony in his case, though he twice requested it in his state court discovery motions. State Habeas Vol. 3 at 679–80 (first state court motion for discovery and an evidentiary hearing); State Habeas Vol. 4 at 859 (second state court motion for discovery and an evidentiary hearing). He specifically requested access to any grand jury testimony containing exculpatory testimony. *Id*. at 680.

Both Scharlene Pooran and Veronica Ponce are alleged[33] to have testified before the grand jury—consistent with Mr. Medina's defensive theory at trial—that

[33] Mr. Medina has a good faith basis for believing that Ms. Pooran and Ms. Ponce testified in a manner that exculpated him based on their subsequent prosecutions for perjury. Until Mr. Medina has access to the grand jury testimony, he cannot verify its content.

Dominic "Flaco" Holmes, not Mr. Medina, was the assailant in this case or admitted to being the assailant. This is contrary to statements they gave to the police shortly after the crime, and contrary to a statement signed by Veronica Ponce after the grand jury proceedings. *See* Second Amended Petition at 22–24. At trial, Mr. Medina requested immunity for these two witnesses so he could secure their testimony but the court denied the request. 16 RR 2003–04.

To date, Mr. Medina has never seen the grand jury testimony of these two witnesses. Nonetheless, the trial court adopted a finding relying on the prosecutor's statement at trial that he had "no information that either Ponce or Pooran would testify that 'Flaco' said he committed the offense." State Habeas Vol. 4 at 951 (FF #122). The trial court found, "*based on the differing sworn statements of Ponce and Pooran*, that the pending aggravated perjury charges against Ponce and Pooran were prosecutions in a proper case and not an abuse of the immunity power." *Id*. at 952 (FFCL #124) (emphasis added).

Mr. Medina has been provided with only one statement from Scharlene Pooran: the inculpatory written statement she provided to the police shortly after the crime in January of 1996. Ms. Pooran's grand jury testimony, which is allegedly exculpatory of Mr. Medina, is the only other "sworn statement" by Ms. Pooran of which Mr. Medina is aware. Mr. Medina has never seen Ms. Pooran's, or Ms. Ponce's, exculpatory grand jury testimony. The prosecutor explicitly relied on this evidence—to which Mr. Medina has been denied access—when drafting the state court findings.

Id. (referring to "the differing sworn statements of Ponce and Pooran"). Thus the resolution of his case involved reliance on evidence Mr. Medina has never seen.

Finally, and most fundamentally, it is clear that the trial court failed to engage or credit Mr. Medina's evidence—even when it was uncontroverted. For example, as noted *supra*, the findings repeatedly deem Mr. Guerinot credible in reference to the 2002 affidavit he signed for the postconviction prosecutor. Notably, Mr. Guerinot previously submitted an affidavit in support of Mr. Medina's application. *See* State Habeas Vol. 2 at 410–11. This affidavit, in contrast to the one authored for him by the prosecution, bears significant indicia of credibility. For example, in his first affidavit, Mr. Guerinot was able to correctly spell the name of his co-counsel, with whom he had tried several capital cases, and he acknowledged a significant omission that "was not the result of any trial strategy." *Id*. at 410. Though the prosecution-authored state court findings cite and rely on the prosecution-authored "credible affidavit" of trial counsel Guerinot at least twenty-five (25) times, the affidavit he signed admitting to a significant omission was never even acknowledged by the trial court in its findings. Nor did the trial court discuss or address Mr. Guerinot's admitted omission, which failed to preserve clear reversible error under Texas law and is part of Mr. Medina's guilt-phase IATC claim. *See* Second Amended Petition at 120–38. Thus, even when the parties submitted affidavits from the *same witness*, only the prosecution's submission counted.

Likewise, in support of his penalty-phase IATC claim, Mr. Medina submitted the affidavit of an expert who diagnosed Mr. Medina with Post-Traumatic Stress

Disorder ("PTSD"). The expert interviewed Mr. Medina, administered numerous psychological tests (including several that measure symptoms associated with childhood trauma), and reviewed extensive materials about his background and history. *See* Second Amended Petition at Exhibit 57.

The postconviction prosecutor introduced no testimony—expert or otherwise—controverting Mr. Medina's expert evidence. Instead, she simply penned a finding wholly dismissing it:

> The Court finds unpersuasive the postconviction assertion of Dr. Paula Lundberg-Love that the applicant suffered from post-traumatic stress syndrome based on "significant trauma suffered during childhood" in light of extensive evidence that the applicant was a good kid who lived in a rough neighborhood and went wrong after he joined a gang at the age of thirteen.

State Habeas Vol. 4 at 966 (FF #200).[34] The Supreme Court has deemed a state court's wholesale dismissal of a postconviction defense mental health expert "not reasonable." *Porter v. McCollum*, 558 U.S. 30, 43 (2009) ("While the State's experts identified perceived problems with the tests that [the defense's postconviction mental health expert] used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge."). The state court's wholesale dismissal of Porter's expert evidence was unreasonable even though both parties proffered expert testimony. In Mr. Medina's case, the state court acted all the more unreasonably when it "discount[ed] entirely" Dr. Lundberg-Love's opinion because she provided the

[34] Not only is the prosecutor-authored rationale for wholly dismissing the proffer of Mr. Medina's expert based solely on her opinion as a layperson, it makes no sense. Mr. Medina's trauma partially *explains*, and is not all inconsistent with, a personality change and his joining a gang.

only expert evidence about Mr. Medina's PTSD and mental health, and thus it was uncontroverted.

Mr. Medina was not required to *prove* the claims in his state habeas application, he needed only to plead allegations which, if true, would entitle him to relief. *See Ex parte Medina*, 361 S.W.3d 633, 639 (Tex. Crim. App. 2011) (there is no requirement that a habeas applicant "plead evidence"). He nonetheless attached hundreds of pages of extra-record evidence supporting the detailed allegations in his claims. The trial court's mandatory statutory duty was to review the parties' submissions, identify any material controversies of fact, and provide an adequate process for resolving them. As noted, Mr. Medina filed motions identifying numerous material factual controversies and requesting the fact development necessary to resolve them. His pleadings were ignored. Nevertheless, the trial court adopted the prosecution-authored proposed findings repeatedly faulting Mr. Medina for failing to prove his allegations and resolving all factual controversies against him without any opportunity for fact development. *See, e.g.,* State Habeas Vol. 4 at 976 (COL #29) ("The applicant fails to show that the pending perjury charges against Ponce and Pooran were an abuse of immunity power . . . ."); *id*. at 980 (COL #42 itemizing numerous allegations related to Mr. Medina's IATC claims that he failed to prove).

In short, the circumstances of this case reveal a record in which the postconviction prosecutor was given carte blanche to shape the facts—even when they contradicted the record—and fashion court orders relying exclusively on her submissions. Evidence and entire pleadings submitted by Mr. Medina were ignored,

but the postconviction judge signed off on every proposed order the prosecutor placed before him. All facts were resolved against Mr. Medina based on a wholesale adoption of the State's evidence without any opportunity—such as discovery or a hearing—for fact development. The result was a fictional evidentiary landscape devoid of material controversy about the facts. The state court process in this case was thus inadequate for resolving the numerous legitimate factual disputes and ascertaining the truth.

For several independent reasons, described *infra*, these facts alone should defeat the application of 28 U.S.C. § 2254(d) to claims, such as Mr. Medina's IATC claims, involving extra-record factual disputes purportedly resolved by the prosecution-authored findings and conclusions. However, when assessing the actions of the state court in Mr. Medina's case—and deciding whether a non-partisan judicial officer meaningfully engaged both parties' evidence and arguments, and whether the process was adequate for ascertaining the truth—this Court can and should consider pattern and practice evidence strengthening the inference that the judicial function was essentially delegated to the postconviction prosecutor.

3. Pattern and practice evidence supports the conclusion that the adoption of the prosecution's findings in Mr. Medina's case was predetermined.

Examining the trial court's conduct in other cases, as well as the entrenched practices and culture with respect to capital postconviction cases in the Harris County courthouse, substantiates the conclusion that the trial court disposed of Mr. Medina's state habeas application in a summary, partisan process without engaging his evidence and arguments. Mr. Medina does not suggest that this additional evidence

proves that the trial court wholly delegated its authority to the postconviction prosecutor in his case. But, just as evidence that a district attorney's office engaged in a pattern and practice of "bias against African-Americans in jury selection" does not prove racial discrimination by a prosecutor in any particular case, the "evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in [a] petitioner's case." *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003); *see also Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) ("If anything more is needed for an undeniable explanation of what was going on, history supplies it."). The following "evidence, of course, is relevant" to assessing the trial court's actions in Mr. Medina's case and supports an "undeniable explanation" for the deeply flawed state court process and decision.

Article 11.071, as described *supra*, was enacted in 1995 and mandated for the first time that both parties to a capital habeas proceeding submit proposed findings of fact and conclusions of law. Mr. Medina has attempted to collect data with respect to every post-11.071 case from Harris County, Texas, to ascertain how the courts treat the parties' proposed findings. Mr. Medina identified 208 discrete sets of findings of fact and conclusions of law entered in Harris County cases;[35] however the data collection was hampered in certain respects by a culture of casual *ex parte* contacts between the postconviction prosecutors, the district clerk's office, and the courts.

[35] In some cases, there are more than one set of findings and conclusions because either the applicant filed more than one application that was reviewed by the trial court, or the trial court entered multiple sets of findings with respect to the same application.

For example, Article 11.071 requires that both parties file proposed findings, and that the trial court subsequently issue appropriate findings. *See supra*. Assuming compliance with the statute, the district clerk's file in every case should contain the applicant's proposed findings and the prosecutor's proposed findings. These should be pleadings, filed in the court, bearing counsel's signature and a certificate of service. There should be a separate docket entry, and a separate document, for the trial court's findings. In an alarming number of cases, however, we found only the applicant's proposed findings and a copy of the State's proposed findings bearing the judge's signature. Often in such cases, there were not separate docket entries for the filing of the prosecution's proposed findings and the filing of the trial court's findings—they were simply one in the same. Our research suggests that in such cases, the prosecutor apparently skipped the step of filing her pleadings in the district clerk's office and transmitted them directly to the judge. Thus, in a significant number of cases, we were unable to ascertain basic information about the process, such as the time interval—if any—between the submission of the State's findings and the judge signing them. However, because Harris County trial court judges often sign the prosecutor's pleading without bothering to change the title of the document, there is often little doubt about whether they have adopted the State's proposed findings *verbatim*.

Two significant findings emerged from our research. First, the trial court that processed Mr. Medina's application has adopted *100%* of the prosecution's proposed findings of fact and conclusions of law in *every* capital case since the inception of the

current state habeas scheme in 1995. Second, the trial court's record of absolute deference to Harris County postconviction prosecutors is consistent with a countywide pattern and practice of judicial deference to the State.

a. The trial court in this case has adopted *verbatim every* finding of fact and conclusion of law proposed by the prosecution in *every* contested capital habeas corpus case since the enactment of Texas's current capital state postconviction statute in 1995.

The 228th Judicial District Court—from which Mr. Medina's case arises—has entered twelve (12) sets of findings of fact and conclusions of law in contested capital habeas corpus cases since the passage of Article 11.071.[36] Judge Marc Carter—who presided over Mr. Medina's habeas proceedings—signed seven (7) sets of findings, Judge Ted Poe signed four (4), and visiting Judge Doug Shaver signed one (1). In all, the prosecution has proposed 1,466 findings of fact and conclusions of law in contested cases, and the 228th Judicial District Court has adopted every syllable. *See* Figure 1.

[36] In addition, the 228th Judicial District Court entered findings in William Mason's case, in which the prosecution recommended that the CCA "review" the claim at issue but did not oppose relief. *Ex parte* William Mason, No. 620024-B (228th Dist. Ct., Harris County, Tex., Nov. 6, 2012) (43 findings of fact and conclusions of law recommending review of a *Penry* claim). *See* Exhibit 1 at line 103.

Last Name	Recommendation	Judge	State's Proposed FOFCL File Date	Trial Court FOFCL Signed	Total State Proposed FOFCL	Total Trial Court FOFCL	State's Proposed Adopted Verbatim
McWilliams, Frederick	Deny	Poe	Unknown	12/11/00	43	43	43
Shannon, Willie	Deny	Poe	Unknown	01/20/01	45	45	45
Wesbrook, Coy	Deny	Shaver	03/04/02	03/14/02	122	122	122
Greer, Randolph	Deny	Poe	10/19/01	08/02/02	207	207	207
Rivers, Warren	Deny	Poe	08/12/02	08/14/02	163	163	163
Greer, Randolph	Deny	Carter	10/10/06	10/10/06	27	27	27
Rivers, Warren	Deny	Carter	12/15/06	01/03/07	91	91	91
Wesbrook, Coy	Deny	Carter	01/24/07	01/26/07	119	119	119
Rivers, Warren	Deny	Carter	05/18/07	05/22/07	145	146	145
Medina, Anthony	Deny	Carter	04/25/08	05/26/09	254	254	254
Mason, William	Deny	Carter	10/25/05	12/28/09	92	92	92
Wesbrook, Coy	Deny	Carter	06/27/14	09/05/14	158	158	158
				TOTAL	**1466**	**1467**	**1466**

Figure 1. Findings of fact and conclusions of law entered by the 228th Judicial District Court in contested cases since the 1995 passage of Article 11.071.

Judge Carter, who presided over Mr. Medina's case, has adopted *verbatim* 100% of the prosecution's 886 proposed findings of fact and conclusions of law. *Id.*

The idea that no death-sentenced applicant seeking habeas corpus relief in the 228th Judicial District Court has ever produced a single finding of fact or conclusion of law worthy of the court's endorsement is simply incredible and cannot explain the court's complete deference to the prosecution in every case.[37] And, as Mr. Medina demonstrates in his case, the trial court will adopt a prosecutor's proposed order *verbatim* even when it (1) contains obvious typographical errors; (2) is compromised by factual assertions squarely contradicted by the trial record; (3) is predicated on incredible witness affidavits; *and*, (4) is so facially partisan as to summarily disregard even the applicant's *uncontroverted* evidence. The trial court's record of total

[37] If it is in fact true that no defense counsel in a capital postconviction case—given more than 1000 chances—has correctly articulated a single fact or single point of law in any case during the last two decades, then the 228th District Court is systematically appointing wholly incompetent counsel in capital postconviction cases.

deference to the prosecution is thus not explained by the accuracy or reliability of the prosecution's proposed orders. And the trial court's apparent failure to review the parties' proposed orders for even facially obvious errors or the accuracy of the content has not resulted in the adoption of erroneous findings and conclusions from both parties in equal measure. The undeniable explanation for the trial court's record is partisanship: the prosecution is, quite literally, always right in capital postconviction proceedings before the 228th Judicial District Court.

A finding that the 228th Judicial District Court is uncritically partial to the prosecution is supported by data demonstrating a culture of partisanship throughout the Harris County capital postconviction courts.

b. The trial court's absolute deference to the prosecution in Mr. Medina's case—and all others—is consistent with a countywide culture in capital habeas corpus cases.

Since the inception of Article 11.071 in 1995, at least 47 Harris County district court judges have entered 208 sets of findings of fact and conclusions of law in capital habeas corpus cases. *See* Exhibit 2. Most of these judges were Harris County prosecutors before taking the bench and have since adopted *verbatim* 100% of the prosecution's proposed findings of fact and conclusions of law in *every* capital postconviction case to come before them. *See* Figure 4. Mr. Medina does not have the resources to sift through the evidence and trial records of the other cases in which Harris County courts adopted the prosecution's proposed orders to ascertain whether those orders were as inaccurate and flawed as the State's order in his case. But all available objective indicators reinforce the conclusion that Harris County courts are

not subjecting the State's proposed order to meaningful review or engaging with the applicants' submissions. These conclusions were further reinforced by our review of hundreds of files in the Harris County courthouse and county archives. We encountered a culture of casual *ex parte* contacts between prosecutors, the district clerk's office, and judges, in which even the courthouse staff involved in these cases assume the judge will simply sign off on the prosecution's proposed orders.

Mr. Medina has established that the trial court signed off on a deeply flawed, partisan order in his case, and has accorded the prosecution complete deference on all factual and legal matters in every other capital postconviction case. The trial court's actions in Mr. Medina's case and others is consistent with an entrenched pro-prosecution cultural bias in the Harris County courthouse. This evidence is relevant and probative because it further undermines the impartiality of the judicial officer responsible for Mr. Medina's postconviction case.

i. A pattern and practice of deference to the prosecution: Harris County judges adopted 100% of the Harris County prosecutors' proposed FFCL *verbatim* in 96% of the capital postconviction orders they entered.

As noted, forty-seven (47) Harris County judges have entered 208 sets of findings and conclusions in capital postconviction cases since 1995. We were able to obtain documentation sufficient to ascertain whether the trial court adopted the prosecution's findings in 199 of the 208 sets of findings. Exhibit 1. Of those 199 fact-findings, 191 sets were contested, *i.e.* instances in which Harris County prosecutors filed proposed findings of fact and conclusions of law recommending that habeas

corpus relief be denied. *Id.* Because judges were not required to take a side in the eight (8) uncontested instances, our review focuses on the 191 instances in which the outcome was disputed.

Of the 191 contested sets of FFCL for which we have complete information, the trial court simply signed off on 167 of the prosecutor's pleadings without changing even the heading of the document identifying it as the Respondent's proposed order. Additionally, the judges changed only the title of the document—or made other formatting changes without altering the text—in another 16 sets of FFCL. Thus, Harris County courts adopted 100% of the prosecutor's proposed FFCL *verbatim* in 183 of 191 (or 96%) instances. *See* Figure 2, *infra*.

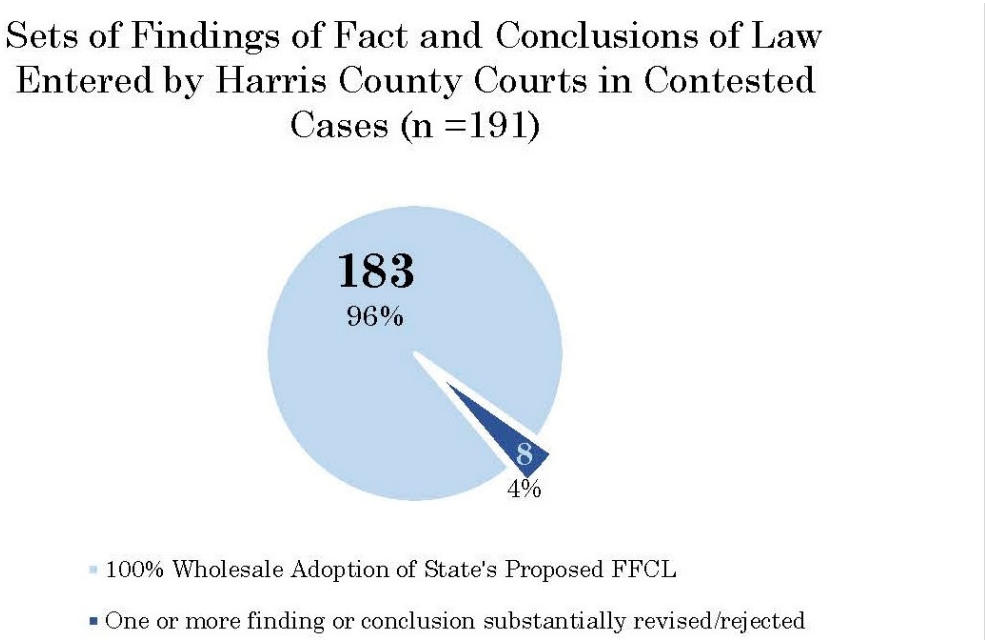


Figure 2. Number of sets of FFCL entered by Harris County judges in contested cases and the percentage of which are a *verbatim* adoption of the prosecution's proposed order.

In these 191 filings, Harris County prosecutors proposed a total of 21,275 findings of fact and conclusions of law and the trial courts adopted verbatim 20,261, or 95%. *See* Figure 3.

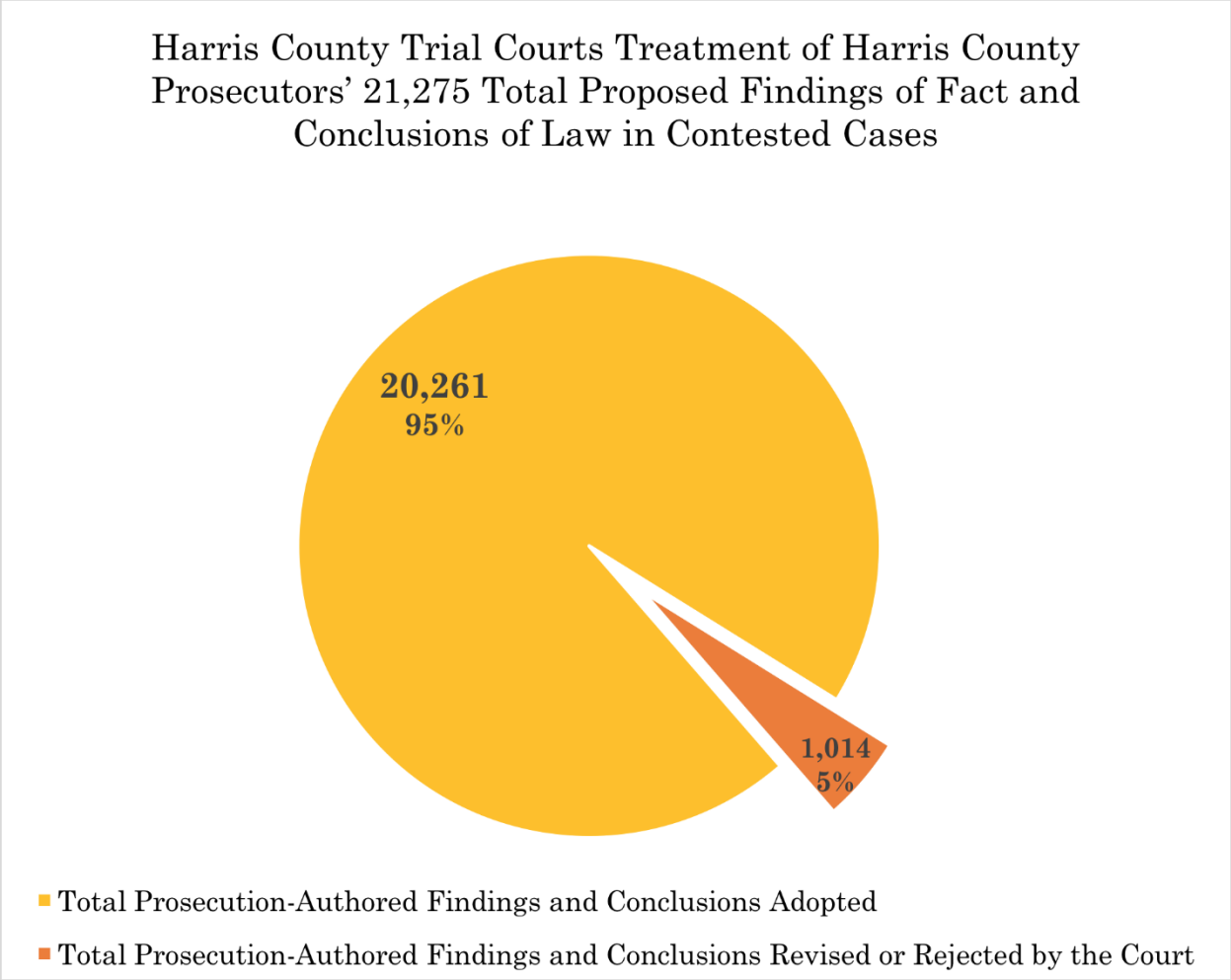


Figure 3. Number and percentage of prosecution-authored proposed findings of fact and conclusions of law adopted *verbatim* by Harris County trial courts in contested cases since the 1995 passage of Article 11.071.

Additionally, we were able to locate the documents necessary to ascertain the rate at which each judge adopted the State's proposed FFCL *verbatim* for forty (40)

of the forty-seven (47) judges who entered findings.[38] *See* Figure 4, *infra*. Thirty-four (34) of forty (40) judges—or *85%* of Harris County judges—adopted *every* finding of fact and conclusion of law proposed by the prosecution in *every* case. *Id*. Two more judges adopted 99% and 93% of all prosecution-authored findings when disposing of capital postconviction cases. *Id*. Thus, thirty-six (36) of forty (40), or 90%, of Harris County judges for whom we have complete data, rubberstamped the prosecution's proposed findings at a rate of 93% or higher. Together, these judges disposed of 146 of the 153, or 96%, sets of FFCL. *See* Figure 4.

[38] To ascertain frequency with which a judge adopts the prosecution's proposed FFCL, we examined the prosecution-authored FFCL and court's FFCL in every case in which the judge was involved. In some instances we were unable to obtain the prosecution's proposed findings from the district clerk, the courts, or the relevant archives. When the trial court signed the prosecutor's findings without altering the title, we included the findings in our calculations because the judge's adoption of the State's findings was clear from the face of the document. In some instances, the judge changed the heading but nothing else about the prosecutor's proposed findings. If we could not obtain the prosecutor's proposed FFCL for comparison purposes, we excluded the judge from the category of judges for whom we can calculate the rate at which they adopt the prosecution's proposed FFCL. We could calculate the rates for 40 of the 47 judges.

	Habeas Judge	Sets of Findings Signed	Total State's Proposed	Total Adopted Verbatim	Adoption Rate	Former HCADA?
1	Hill	15	1388	1388	100%	Yes
2	McSpadden	9	1109	1109	100%	Yes
3	Keel	8	905	905	100%	Yes
4	Carter	7	886	886	100%	Yes
5	Collins	6	346	346	100%	No
6	Cosper	6	500	500	100%	Yes
7	Krocker	6	514	514	100%	Yes
8	Anderson	5	541	541	100%	Yes
9	Rains	5	262	262	100%	Yes
10	Wallace	5	419	419	100%	No
11	Alcala	4	302	302	100%	Yes
12	Barr	4	695	695	100%	Yes
13	Poe	4	458	458	100%	Yes
14	Bacon	3	312	312	100%	No
15	Davies	3	213	213	100%	Yes
16	Guiney	3	463	463	100%	Yes
17	Shaver	3	380	380	100%	Yes
18	Wilkinson	3	177	177	100%	Yes
19	Bond	2	398	398	100%	Yes
20	Bridgewater	2	341	341	100%	Yes
21	Brown, M.	2	369	369	100%	Yes
22	Magee	2	260	260	100%	Yes
23	Evans	2	208	208	100%	Yes
24	Velasquez	2	219	219	100%	Yes
25	Burdette	1	87	87	100%	Yes
26	Campbell, C.	1	66	66	100%	Yes
27	Guerrero	1	211	211	100%	No
28	Huffman	1	69	69	100%	Yes
29	Jackson	1	168	168	100%	No
30	Powell	1	243	243	100%	No
31	Ritchie	1	188	188	100%	No
32	Robertson	1	111	111	100%	Yes
33	Bradley	1	92	92	100%	Yes
34	Denson	1	29	29	100%	No
35	Harmon	10	694	684	99%	Yes
36	Brown, S.	15	2067	1922	93%	Yes
37	Campbell, J.	4	443	329	79%	Yes
38	Garner	1	191	97	51%	No
39	Price	1	119	0	0%	Yes
40	Reagin	1	363	0	0%	No
	Total	153	16806	15961		

Figure 4. Rate at which Harris County District Judges adopt *verbatim* the prosecution's proposed findings.

For each of four additional judges—Judge Debbie Stricklin, Judge Brock Thomas, Judge Brad Hart, and Judge George Godwin—we were unable to locate just one set of the State's proposed FFCL. Judge Thomas entered five (5) sets of findings and, in all four cases for which we have the State's proposed findings, Judge Thomas adopted 100% of them *verbatim*. Judge Stricklin has entered six (6) sets of findings and, in all five cases for which we have the State's proposed findings, Judge Stricklin adopted 100% of them *verbatim*. Judge Hart adopted 99% of the State's proposed findings *verbatim* in six (6) out of seven (7) sets of FFCL. Likewise, Judge Godwin adopted 99% of the State's proposed findings *verbatim* in eight (8) out of nine (9) sets of FFCL.[39] Assuming the rate of adoption does not change for these four judges, then thirty-nine (39) of forty-four (44), or 88.6%, of Harris County judges have adopted the State's proposed FFCL *verbatim* at a rate of *99% or higher*.

The inference of judicial partisanship is strengthened by the fact that thirty-seven (37) of the forty-seven (47) judges who entered FFCLs (or 79%) were Harris County prosecutors before taking the bench. At least one judge, Judge Belinda Hill, went from the Harris County District Attorney's Office to the bench, and then resigned from the bench to resume her career as a prosecutor. *See* https://ballotpedia.org/Belinda_Hill (last checked Jan. 12, 2018). While on the bench, Judge Hill adopted *verbatim* 100% of the proposed findings and conclusions in all fifteen (15) sets of FFCL submitted by the prosecution. *See* Figure 4. In all, before

[39] Mr. Medina will continue his data collection efforts and update this information if more documents are located.

returning to the Harris County District Attorney's Office, Judge Hill rubberstamped 1,388 prosecution-authored findings and conclusions and declined to adopt a single finding or conclusion submitted by the defense. *Id.*

In all instances in which habeas relief was contested, Harris County judges adopted *verbatim* the prosecutors' proposed order in *183 out of 191 (96%)* instances, without even bothering to remove "Respondent's Proposed" from the heading in 167 cases. Even in cases in which a judge finds no merit in the applicant's claims, it begs credulity to suggest that applicant's counsel—all of whom are allegedly pre-certified to handle these complex cases—were unable to pen just one accurate finding of fact or conclusion of law. This suggests that Harris County judges are routinely rubberstamping all of the prosecution's findings and conclusions indiscriminately to achieve the desired outcome.

ii. All objective data indicate that, as in Mr. Medina's case, Harris County courts are not subjecting the prosecutor's proposed orders to careful scrutiny before signing them.

The inference that pro-prosecution partisanship is responsible for the *verbatim* adoption of 96% of prosecution-authored findings in contested cases is reinforced by evidence revealing that Harris County judges are not carefully reviewing the prosecutors' proposed orders, and wholly fail to read the applicants' proposed orders before signing the State's.

Reviewing the prosecutor's proposed orders, and checking them against the often voluminous records in capital cases, would require Harris County trial judges—who lack the resources of their federal counterparts, like term clerks and specialized

death penalty staff attorneys—to review thousands of pages of trial transcripts and documents. Yet, Harris County judges have often disposed of these document-intensive cases with remarkable speed. Even more revealing are the casual procedural mistakes of Harris County judges, such as signing the prosecutor's proposed findings and conclusions before receiving the applicant's. One judge mistakenly signed the prosecution's findings even though she was not presiding over the case. Together, this evidence reveals that Harris County judges are not carefully reviewing the prosecutor's proposed orders—and are not reading the applicant's submission—before adopting them *in toto*.

Speedy Adoption of Prosecutors' Proposed Orders

Capital postconviction records, as in this case, are often voluminous. And the parties' proposed orders, as in this case, often contain numerous citations to the trial record. Thus, reviewing an entire set of proposed findings and conclusions for accuracy frequently involves wading through thousands of pages of documents, particularly when the habeas judge did not preside over the trial. Yet, Harris County trial judges—without the support of term clerks or specialized death penalty staff attorneys—often adopt the State's findings with remarkable speed. For example, Judge McSpadden has certified that a prosecutor's 110 proposed findings and conclusions were 100% accurate just three (3) days after they were filed. Exhibit 1 at line 14. Judge Krocker adopted 152 prosecution-authored findings just two (2) days after they were filed. *Id*. at line 33. Judge Anderson adopted 105 findings and conclusions one (1) day after submission. *Id*. at line 64. Rapid, *verbatim* adoption of

the prosecutor's proposed findings is a common phenomenon. *See id.* at line 46 (adopting 158 findings and conclusions two (2) days after submission); *id.* at line 101 (adopting 88 findings and conclusions three (3) days after submission); *id.* at line 109 (adopting 106 findings and conclusions two (2) days after submission); *id.* at line 149 (adopting 145 findings and conclusions four (4) days after submission); *id.* at line 150 (adopting 163 findings and conclusions two (2) days after submission); *id.* at line 157 (adopting 92 findings and conclusions the day after submission); *id.* at line 185 (adopting 86 findings and conclusions two (2) days after submission); *id.* at line 186 (adopting 119 findings and conclusions two (2) days after submission).

Even more efficient Harris County judges, however, can certify that the prosecution's proposed orders—describing numerous facts and resolving multiple legal issues spanning a voluminous record—are 100% accurate on the *same day* they are filed. For example, before Judge Mary Bacon retired at the end of the 2006, she adopted *verbatim* 169 findings and conclusions, spanning 42 pages, disposing of John Matamoros's claim that he was intellectually disabled and therefore ineligible for the death penalty. *Id.* at line 105. These fact-intensive FFCL addressed numerous scientific issues and were purportedly based on a review of—and numerous citations to—a voluminous trial record as well as transcripts of a four-day postconviction hearing.[40] Despite the complexity of the issues, the size of the record, and the highly detailed nature of the prosecution's FFCL, Judge Bacon certified them as 100% accurate on the same day they were filed. Judge Bacon is not alone; other Harris

[40] *Ex parte Matamoros*, No. 643410-B (180th Judicial District Ct., Harris Cty Tex., Dec. 18, 2006).

County judges treat the prosecutors' proposed FFCL to same-day service. *See id.* at line 85 (adopting 29 findings and conclusions on the day of submission); *id.* at line 87 (adopting 61 findings on the day of submission); *id.* at line 172 (adopting 38 findings and conclusions on the day of submission).

The most efficient judge, however, was Judge Charles Campbell. Judge Campbell signed off on the prosecutor's proposed FFCL in Roger McGowen's case on May 19, 2006. However, the prosecutor's proposed FFCL were not filed until May 25, 2006, six days *after* the judge adopted them.[41] *Id.* at line 115.

Harris County judges are particularly prone to adopting the prosecution's proposed findings in an expedited fashion at the end of the year—especially after having lost an election or on the eve of retirement. *See* Figure 5, *infra*.

	Applicant	CCA Writ No.	Recommendation	Habeas Judge	State's Proposed FOFCL File Date	Trial Court's FOFCL Signed	Total State Proposed FOFCL	Total Trial Ct FOFCL	State's Proposed Adopted Verbatim
1	Coulson, Robert	WR-40,437-01	Deny	Robertson	12/14/98	01/05/99	111	111	111
2	Richard, Michael	WR-47,911-02	Deny	Bacon	12/02/06	12/28/06	143	143	143
3	Rivers, Warren	WR-53,608-02	Deny	Carter	12/15/06	01/03/07	91	91	91
4	Matamoros, John	WR-50,791-02	Deny	Bacon	12/18/06	12/18/06	169	169	169
5	Burton, Arthur	WR- 64,360-01	Deny	Thomas	12/05/08	12/31/08	47	47	47
6	Francois, Anthony	WR-71,345-01	Deny	Cosper	12/15/08	12/30/08	30	30	30
7	Sorto, Walter	WR-71,381-01	Deny	Krocker	12/18/08	12/29/08	64	64	64
8	Soffar, Max	WR-29,980-03	Deny	Keel	12/16/11	01/05/12	315	315	315
9	Freeney, Ray	WR-78,109-01	Deny	Ritchie	11/28/12	12/05/12	188	188	188
10	Harper, Garland	WR-81,576-01	Deny	Barr	11/25/14	12/11/14	315	315	315
11	Cruz-Garcia, Obel	WR-85,051-02	Deny	Magee	12/21/16	12/29/16	192	192	192
12	Prevost, Jeffery	WR-84,068-01	Deny	Powell	12/22/16	01/03/17	243	243	243

Figure 5. Year-end *verbatim* adoption of prosecutors' proposed findings in contested cases.

[41] The unsigned copy of State's proposed findings is file-stamped May 25, 2006, and the Harris County electronic docketing system reflects they were filed on that date.

One judge signed off on the prosecutor's proposed findings—in a case raising numerous, controverted extra-record claims—just *two (2) days after being sworn into office*. Judge George Powell was elected to the bench in November of 2016 and began his tenure on January 1, 2017. Two days later, he adopted *verbatim* the prosecutor's 243 proposed findings of fact and conclusions of law. *Id*. at line 135.

The speed with which Harris County judges sign off on the prosecutor's proposed FFCL is another reason to doubt that they are actually ascertaining whether the FFCL are supported by the trial and postconviction records.

Careless Procedural Mistakes

Procedural mistakes by Harris County judges further expose the lack of scrutiny applied in capital postconviction cases, and reveal that judges do not necessarily review the applicant's submissions before rubberstamping the State's.

In Ray Freeney's case, for example, the CCA remanded the application for further factual development and the trial court ordered additional affidavits from several witnesses, including trial counsel. The trial court then issued an order directing the parties to file proposed findings of facts and conclusions of law within twenty-one days of receipt of trial counsel's affidavits. Order, *Ex parte Ray Freeney,* No. 909843-A (337th Dist. Ct., Harris Cty. Tex., Jul. 12, 2013). Trial counsel's responsive affidavit was filed on December 2, 2013, triggering a deadline of December 23, 2013, for the parties' proposed supplemental findings. Nonetheless, Judge Renee Magee signed the prosecutor's proposed findings on December 10, 2013, thirteen days before the due date and *before* Freeney had even submitted his supplemental

findings. *See* Clerk's Record, *Ex parte Freeney,* No. 909843-A (337th Dist. Ct., Harris Cty. Tex., Dec. 10, 2013).

On February 2, 2011, three days after the postconviction prosecutors filed their proposed findings and conclusions in Damon Matthews's case, Judge Vanessa Velasquez adopted the state's proposed findings and ordered the case transmitted to the CCA. Findings of Fact, Conclusions of Law, and Order, *Ex parte Damon Matthews,* No. 941608-A (183rd Dist. Ct., Harris Cty. Tex., Feb. 2, 2011). On February 10, Judge Velasquez made a handwritten notation on the findings indicating that she had "signed in error"; Matthews then filed his proposed findings on February 18. *See* Docket, *Ex parte Matthews,* No. 941608-A (183rd Dist. Ct., Harris Cty. Tex., February 18, 2011). Judge Velasquez then re-signed the State's proposed findings on March 11, 2011. Findings of Fact, Conclusions of Law, and Order, *Ex parte Damon Matthews,* No. 941608-A (183rd Dist. Ct., Harris Cty. Tex., March 11, 2011).

In Charles Thompson's case, the State filed its proposed FFCL on February 7, 2013. Judge Denise Bradley signed them on February 8, 2013, and the order adopting the State's proposed FFCL was entered in the Harris County docket. Findings of Fact and Conclusions of Law, *Ex parte Charles Thompson,* No. 782657-A (262nd Dist. Ct., Harris Cty. Tex., Feb. 8, 2013). After Thompson filed his proposed findings and conclusions on February 18, 2013, a different judge—Judge Doug Shaver—again signed and adopted the prosecutor's proposed FFCL on February 22, 2013. Findings of Fact and Conclusions of Law, *Ex parte Thompson,* No. 782657-A (262nd Dist. Ct.,

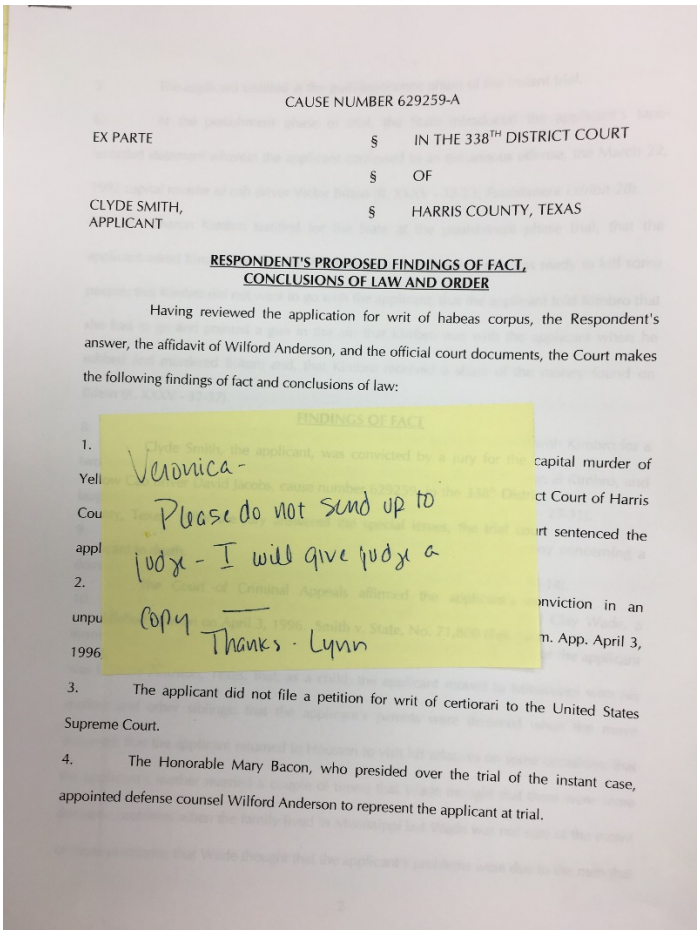
Harris Cty. Tex., Feb. 22, 2013). On February 25, 2013, Judge Bradley issued an order recognizing that she was not even presiding over the case and rescinding her findings, which were "signed in error." Order, *Ex parte Thompson,* No. 782657-A (262nd Dist. Ct., Harris Cty. Tex., Feb. 25, 2013).

Judges carefully weighing the submissions of *both* parties in capital postconviction case would require (1) the submissions of *both* parties; and, (2) time to review them in light of the entire record. Mr. Medina's review reveals one or both of these elements is frequently missing in Harris County cases.

iii. The Harris County courthouse culture of *ex parte* contacts between judges and postconviction prosecutors reflects the shared expectation that judges will sign off on the prosecution's proposed order.

An additional type of evidence illuminates the relationship between Harris County judges and the Harris County postconviction prosecutors. Mr. Medina's review of numerous files uncovered notes between Harris County postconviction prosecutors and the judges, or the clerks, which reflect a culture of *ex parte* communications and the belief that the judges' adoption of the prosecution findings is not much more than a ministerial act.

The following note, Figure 6, was discovered in the Harris County District Clerk's file in *Ex parte Clyde Smith*, No. 629259-A (338th Dist. Ct., Harris Cty. Tex., Apr. 21, 1999).



CAUSE NUMBER 629259-A

EX PARTE § IN THE 338TH DISTRICT COURT

§ OF

CLYDE SMITH, APPLICANT § HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having reviewed the application for writ of habeas corpus, the Respondent's answer, the affidavit of Wilford Anderson, and the official court documents, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Clyde Smith, the applicant, was convicted by a jury for the capital murder of Yeli... Court of Harris Cou... ...rt sentenced the appl...

2. ...nviction in an unpu... ...m. App. April 3, 1996...

Veronica - Please do not send up to judge - I will give judge a copy — Thanks - Lynn

3. The applicant did not file a petition for writ of certiorari to the United States Supreme Court.

4. The Honorable Mary Bacon, who presided over the trial of the instant case, appointed defense counsel Wilford Anderson to represent the applicant at trial.

Figure 6. Note from Harris County Assistant District Attorney Lynn Hardaway to the clerk's office in *Ex parte Clyde Smith*: "Veronica – Please do not send up to judge – I will give judge a copy — Thanks, Lynn."

In the note, the prosecutor instructs the clerk to refrain from providing the judge with a copy of her proposed findings so that she can personally present them to the judge. The judge subsequently adopted the prosecutor's proposed FFCL *verbatim*. Exhibit 1 at line 166.

Other notes document *ex parte* communications between the prosecutor and the judge, such as the one found in the district clerk's file for *Ex parte Thacker*, No. 661866-A (338th Dist. Ct., Harris Cty. Tex., July 11, 2000). *See* Figure 7.

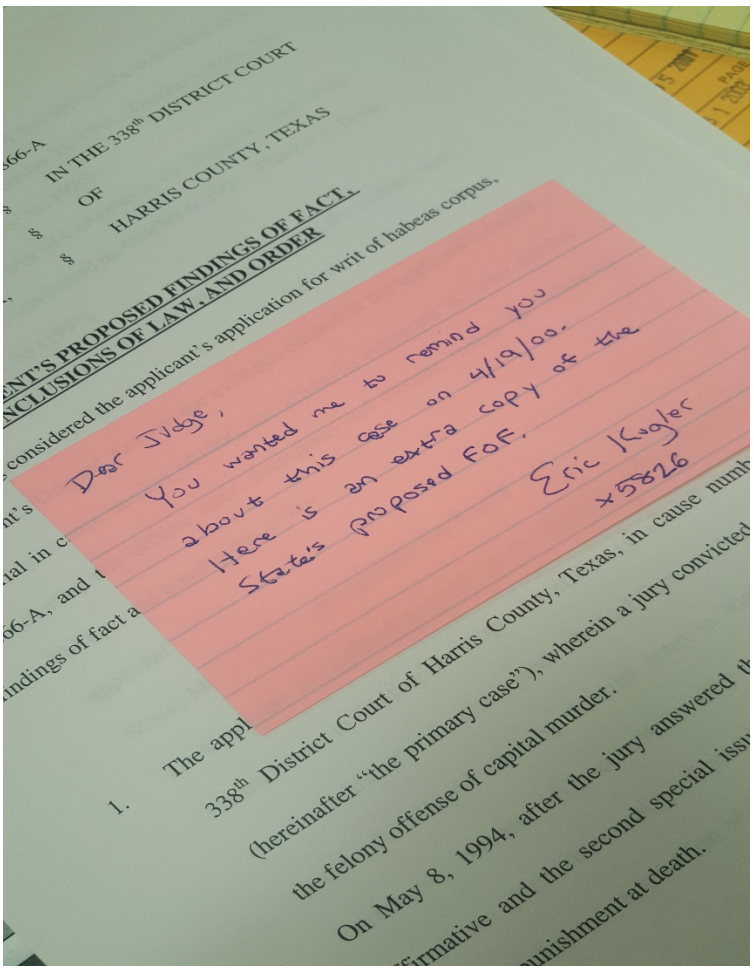


Figure 7. Note from Harris County Assistant District Attorney Eric Kugler to the judge in *Ex parte Charles Thacker*: "Dear Judge, You wanted me to remind you about this case on 4/19/00. Here is an extra copy of the State's proposed FOF. Eric Kugler x5826."

The note in *Thacker* reflects that the prosecutor and judge communicated previously about the case, and the judge asked the prosecutor "to remind [her] about this" case on April 19, 2000, and to give the judge an extra copy of the State's proposed FFCL. *See* Figure 7. After the prosecutor complied with the judge's request, the judge adopted the prosecutor's findings *verbatim*. *See* Exhibit 1 at line 176.

The communications between the judge and prosecutor in *Thacker* were not unique:

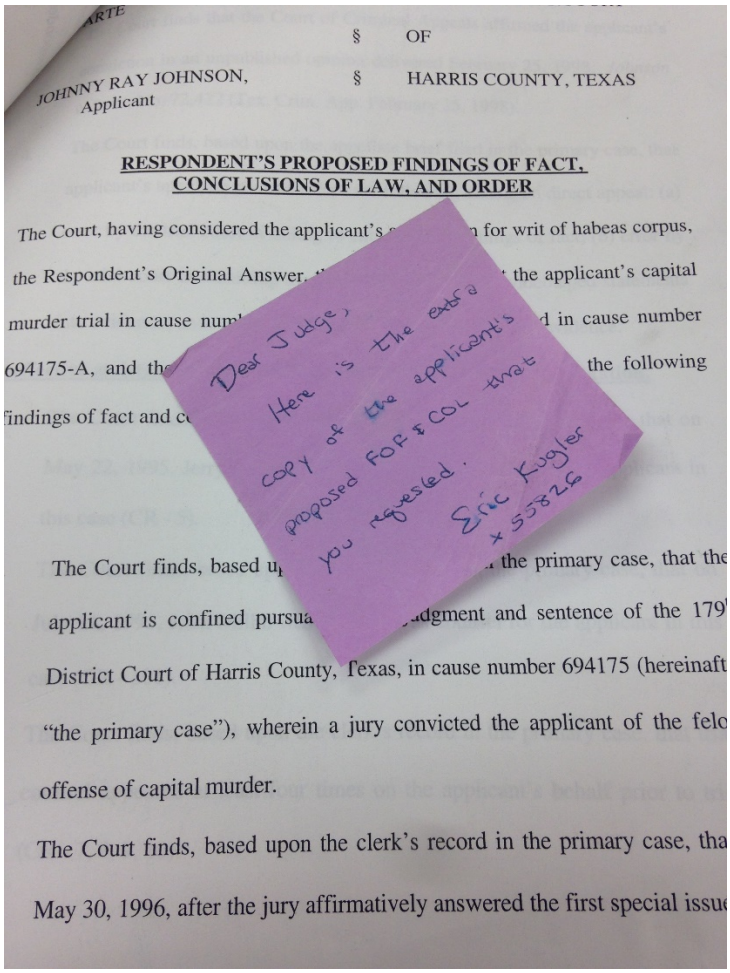
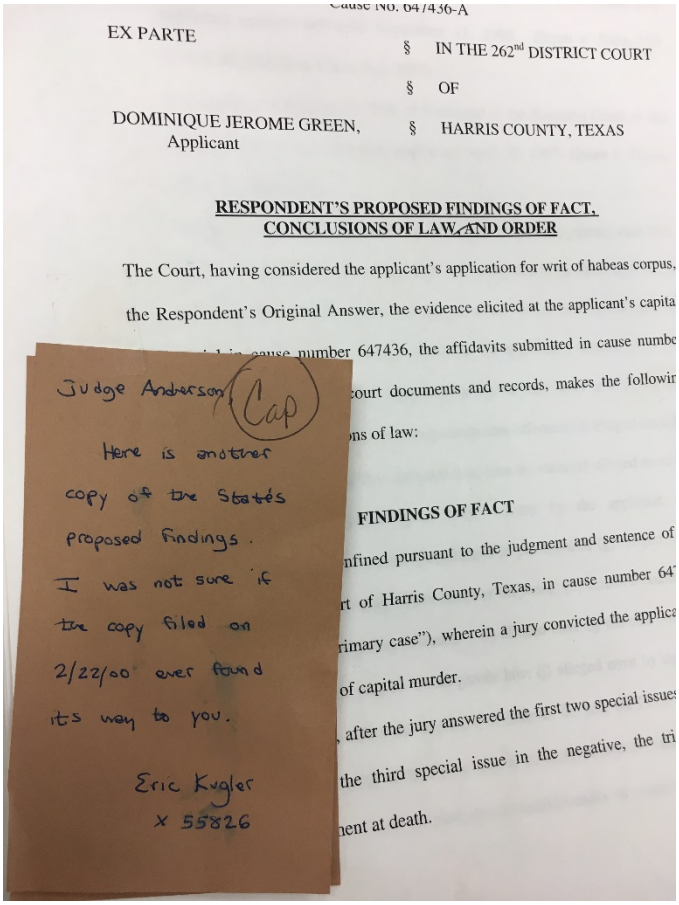


Figure 8. Note from Harris County Assistant District Attorney Eric Kugler to the judge about *Ex parte Johnny Ray Johnson*: "Dear Judge, Here is the extra copy of the [sic] applicant's proposed FOF & COL that you requested. Eric Kugler X55826."

In *Ex parte Johnny Ray Johnson*, No. 694175-A (179th Dist. Ct., Harris Cty. Tex., Aug. 30, 2000), the same prosecutor wrote a note to the judge documenting a prior conversation about the case, and the judge's need for an extra copy of the prosecutor's proposed findings.[42] *See* Figure 8. The judge subsequently adopted the prosecutor's proposed FFCL *verbatim*. See Exhibit 1 at line 88.

[42] The prosecutor's note refers to an extra copy of the "applicant's" proposed FFCL, but it is attached to a copy of the prosecutor's proposed order.

The judges' requests for extra copies of the prosecutor's proposed FFCL—Mr. Medina found no similar requests for extra copies of the applicant's findings—suggests that they expected to sign the State's proposed orders. The prosecutors shared this expectation, as reflected in Figure 9, *infra*.



Cause No. 647436-A

EX PARTE § IN THE 262nd DISTRICT COURT

§ OF

DOMINIQUE JEROME GREEN, § HARRIS COUNTY, TEXAS
Applicant

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's Original Answer, the evidence elicited at the applicant's capita
number 647436, the affidavits submitted in cause numbe
court documents and records, makes the followir
ns of law:

FINDINGS OF FACT

nfined pursuant to the judgment and sentence of
rt of Harris County, Texas, in cause number 64
rimary case"), wherein a jury convicted the applica
of capital murder.
after the jury answered the first two special issues
the third special issue in the negative, the tri
nent at death.

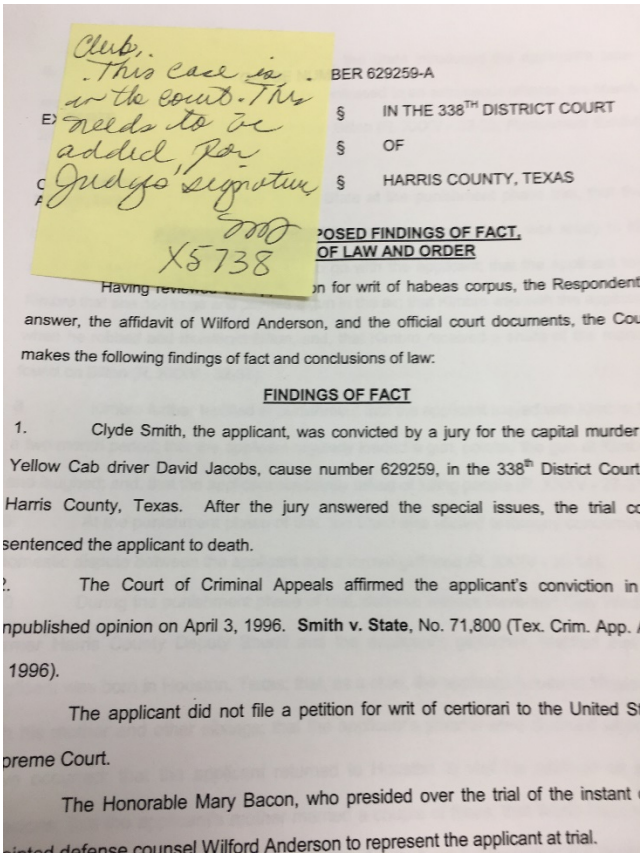
Judge Anderson, (Cap)
Here is another copy of the States proposed findings. I was not sure if the copy filed on 2/22/00 ever found its way to you.
Eric Kugler
x 55826

Figure 9. Note from Harris County Assistant District Attorney Eric Kugler to the judge in *Ex parte Dominique Green*: "Judge Anderson, Here is another copy of the State's proposed findings. I was not sure if the copy filed on 2/22/00 ever found its way to you. Eric Kugler x 55826."

The note in Figure 9 was discovered in the District Clerk's file for *Ex parte Dominique Green*, No. 647436-A (262nd Dist. Ct., Harris Cty. Tex., Feb. 25, 2000). The prosecutor expresses uncertainty about whether the proposed FFCL he filed on February 22, 2000 "found [their] way to" the judge. On February 25, 2000, three days

after the prosecutor filed his proposed FFCL, Judge Anderson adopted *verbatim* the 194 proposed findings and conclusions by adding his signature to the prosecutor's fifty-four-page proposed order. *See* Exhibit 1 at line 67.

As evidenced by the note in Figure 10, *infra*, found attached to the State's proposed FFCL in the District Clerk's file in *Ex parte Clyde Smith*, *supra*, even the District Clerk's staff expected the judges to sign off on the prosecutor's proposed FFCL:


Clerk, This case is in the court. This needs to be added, for Judge's signature. MJ X5738

BER 629259-A

§ IN THE 338TH DISTRICT COURT

§ OF

§ HARRIS COUNTY, TEXAS

POSED FINDINGS OF FACT, OF LAW AND ORDER

n for writ of habeas corpus, the Respondent answer, the affidavit of Wilford Anderson, and the official court documents, the Cou makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Clyde Smith, the applicant, was convicted by a jury for the capital murder Yellow Cab driver David Jacobs, cause number 629259, in the 338th District Court Harris County, Texas. After the jury answered the special issues, the trial c sentenced the applicant to death.

2. The Court of Criminal Appeals affirmed the applicant's conviction in npublished opinion on April 3, 1996. **Smith v. State**, No. 71,800 (Tex. Crim. App. 1996).

The applicant did not file a petition for writ of certiorari to the United S preme Court.

The Honorable Mary Bacon, who presided over the trial of the instant defense counsel Wilford Anderson to represent the applicant at trial.

Figure 10. Note from clerk in *Ex parte Clyde Smith*, "This case is in the court. This needs to be added, for Judge's signature. MJ X5738."

Collectively, these notes reveal *ex parte* communications between Harris County trial judges and postconviction prosecutors and a shared expectation that

judges will ultimately need a copy of the State's proposed FFCL to sign. This alone does not prove a pro-prosecution bias on the part of the Harris County judiciary, but the evidence is consistent with an overwhelming number of circumstances that all point to the same undeniable explanation: judicial partisanship.

* * * *

Mr. Medina has provided this Court with facts establishing that, in his case, the state court process and product is unworthy of confidence, including:

- Evidence that the postconviction prosecutor created unreliable affidavits for trial counsel;
- Evidence that the trial court failed to review and correct the prosecutor's proposed order—which was riddled with what should have been obvious errors—or check it against the trial and postconviction records before signing it;
- Evidence that the trial court, by adopting the prosecutor's proposed FFCL, relied on evidence that has been withheld from Mr. Medina; and,
- Evidence that the trial court failed to engage Mr. Medina's evidence and argument supporting relief, and the court *ignored* (i.e., failed to acknowledge or rule on) every motion Mr. Medina filed and granted all of the State's.

The state court deprived Mr. Medina of any opportunity to develop his case or challenge the prosecution's postconviction evidence before its wholesale adoption of the State's proposed FFCL. These facts alone establish that the State court process was fundamentally inadequate to reliably resolve his claims.

But, "[i]f anything more is needed for an undeniable explanation of what was going on, history supplies it." *Miller-El v. Dretke*, 545 U.S. at 266. Mr. Medina has

further reinforced his argument with pattern and practice evidence, establishing that:

- In every contested capital habeas proceeding dating back to the inception of Texas's capital post-conviction scheme in 1995, the state court that processed Mr. Medina's case—the 228th Judicial District Court—has adopted *verbatim* 100% of the prosecution's 1466 proposed factual findings and legal conclusions;

- Harris County judges—most of whom are former Harris County prosecutors—have collectively adopted *verbatim* 100% of the State's proposed FFCL in 183 out of 191 (or 96%) sets of findings in contested proceedings;

- The impossible speed, and the procedural missteps, of the Harris County judges demonstrate a widespread failure to carefully compare the prosecutor's proposed FFCL with the record, and pervasive disregard for the applicant's submissions;

- A Harris County culture in which postconviction judges and prosecutors engage in *ex parte* communications and appear to share the expectation that judges will ultimately sign the State's proposed order.

For the reasons that follow, in light of the totality of these circumstances, 28 U.S.C. § 2254(d) cannot attach to Mr. Medina's claims.

C. For multiple independent reasons, and based on the totality of the specific circumstances of this case, 28 U.S.C. § 2254(d) does not preclude relief.

Mr. Medina pled claims in the Texas courts raising ineffective assistance of counsel, prosecutorial misconduct, jury misconduct, and other extra-record issues. His allegations were supported by hundreds of pages of evidence, including witness affidavits and documents. In response, the State denied Mr. Medina's allegations and submitted evidence controverting his allegations. The trial court was required by state statute to independently review the record and identify any controverted

facts material to Mr. Medina's claims. Mr. Medina filed motions seeking fact development and a hearing in which he detailed numerous material facts in controversy. The trial court ignored Mr. Medina's motions and never ruled on them. Instead, despite the conflicting allegations and evidence before the court, the trial court signed off on a prosecution-authored order relying on prosecution-created witness affidavits to conclude there were no material facts in controversy. The state court—consistent with its pattern and practice in every capital postconviction case it has disposed of before or after Mr. Medina's—then rubberstamped a set of findings of fact and conclusions of law prepared by the prosecutor.

It is clear that the court did not carefully review the document before signing it and he did not check the prosecutor's numerous factual assertions against the trial record—even though he had not presided over Mr. Medina's trial. The prosecution-authored findings failed to meaningfully engage Mr. Medina's evidence and allegations. Instead, Mr. Medina's evidence—even when uncontroverted or plainly validated by the trial record—was summarily dismissed or ignored. The state court signed off on findings directly contradicting even the portions of the record that Mr. Medina directly quoted from, and cited to. Only inattention or indifference explains the wholesale adoption of an order riddled with obvious mistakes that would have been readily apparent to anyone familiar with the record.

The proceeding was also facially, procedurally, and substantively partisan. The state court order is captioned as the State's proposed findings and conclusions. The order wholly incorporates—and places primary reliance on—*every page* of the

prosecutor's evidentiary proffers, including the affidavits she wrote for the trial prosecutors and defense counsel. The trial court ignored Mr. Medina's requests for an opportunity challenge any of this evidence and cross-examine the prosecution's witnesses. Indeed, the trial court order relied on evidence to which Mr. Medina has never been granted access—grand jury testimony—to resolve his claims against him. Against the backdrop of the court's adoption of 100% of the prosecutor's FFCL in 100% of the cases before it, the outcome in Mr. Medina's case—*i.e.* the wholesale adoption of the prosecution's error-ridden proposed order—was predetermined.

Mr. Medina has previously briefed why, given the particular circumstances of his case, 28 U.S.C. § 2254(d) does not bar relief on his claims requiring more from the state court than adding its signature to any document prepared by the prosecutor. *See* Reply (Docket #93) at 9–23; *id*. at 109–13; *id*. at 175–78; *id*. at 219–22; *id*. at 245–48. The following supplements, but mostly refers back to, Mr. Medina's previous legal briefing on the matter.

1. With respect to claims involving disputes over material extra-record facts, the totality of numerous circumstances confirms that the state court process failed to satisfy the Supreme Court's definition of an "adjudication on the merits" for purposes of 28 U.S.C. § 2254(d).

The § 2254(d) relitigation bar applies—with three significant exceptions—to claims that were "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). The Supreme Court's decision in *Harrington v. Richter* created a presumption that claims properly presented in an unsuccessful state postconviction application are, for § 2254 purposes, adjudicated on the merits. 562 U.S. 86, 98–99 (2011). *Richter*'s

"presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id*. at 99–100.

Mr. Medina has previously briefed the minimum requirements for an adjudication on the merits:

> to qualify as an "adjudication on the merits" under § 2254(d), there must be a state court process for hearing and evaluating the evidence and arguments regarding the intrinsic rights and wrongs of the case; the qualifying process must be "[]adequate for the ascertainment of the truth"; and, it must afford the petitioner with due process of law.

Reply (Docket #93) at 10 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). As the evidence described above and in Mr. Medina's Reply demonstrates, the state court process fell well short of the mark. The state court failed to consider and evaluate Mr. Medina's evidence and relied instead exclusively on the prosecution's submissions. Further, Mr. Medina—despite numerous requests and in violation of Article 11.071—was denied an opportunity to challenge any of the prosecution's evidence controverting his allegations. And these proceedings were held in a court in which the prosecution has been afforded *absolute* deference on *every* factual and legal question in *every* case before and after Mr. Medina's. Given the totality of the circumstances, the state court proceedings were not an adjudication of the merits of Mr. Medina's claims.

2. The state court process was an unreasonable method for determining facts and thus the § 2254(d)(2) exception applies.

As Mr. Medina has also previously briefed, 28 U.S.C. § 2254(d)(2) excepts unreasonable determinations of fact from the § 2254(d) relitigation bar. Reply (Docket #93) at 34–41. Section 2254(d)(2) applies to both unreasonable factual conclusions as well as unreasonably incomplete or unreliable processes for

determining fact. *Id.* Applying the § 2254(d)(2)-related authorities and argument to the totality of circumstances present in this case, Mr. Medina has established that the state court's summary resolution of his case was an unreasonable method for determining the facts dispositive of his claims.

3. The state court proceedings violated Mr. Medina's right to due process.

Additionally, the state court proceedings described above violated Mr. Medina's right to due process. Even if a state is not constitutionally required to entertain collateral challenges to criminal judgments in its own judicial forums, if it chooses to do so the procedures it uses must comport with due process. While the fact that "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man," *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009), means that "[t]he State . . . has more flexibility in deciding what procedures are needed in the context of postconviction relief," *id.* at 69, a state is nevertheless not free to disregard the "fundamental requisite of due process of law [that] is the opportunity to be heard." *Ford v. Wainwright*, 477 U.S. 399, 413 (1986); *see also id.* at 424. Whenever the judiciary acts, the relevant question is not *whether* process is due, but *what* process is due.

The availability of habeas corpus relief "presupposes the opportunity to be heard, to argue and present evidence." *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Moreover, "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Id.* Resolutions of disputed factual questions made by a judicial body must be based on evidence that is admitted at a

hearing. *Morgan v. United States*, 298 U.S. 468, 480–81 (1936). *See also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

A hearing in the criminal post-conviction context may be less formal than a trial. *Ford*, 477 U.S. at 427 (Powell, J., concurring). It need not even require live testimony. But a "hearing" at least requires that there be a formal process for admitting, objecting to, and challenging the substance of evidence offered by the opposing party. *See Goldberg*, 397 U.S. at 267 ("The hearing must be 'at a meaningful time *and in a meaningful manner*'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (emphasis added)). As well, it requires that the parties are given notice that a hearing is occurring, notice as to which disputes the hearing is intended to resolve, and an opportunity to confront adverse witnesses or evidence offered against a party. *See id.* at 258 ("rudimentary due process" requires "an effective opportunity" to present one's case, including "by confronting adverse witnesses"); *see also* 28 U.S.C. § 2246 ("On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.").

For all of the reasons described above, the fact-finding procedure employed by the state court violated due process and was not adequate for reaching reasonably correct results concerning Mr. Medina's fact-intensive, extra-record claims.

D. Alternatively, even if the state court proceedings were adequate to protect Mr. Medina's rights and qualify as an "adjudication on the merits," unreasonable material legal and factual determinations in the prosecution-authored findings satisfy the exceptions to the § 2254(d) relitigation bar.

Even if this Court concludes that Mr. Medina's state court proceedings qualified as an adjudication on the merits, were a reasonable process for determining dispositive facts, and afforded Mr. Medina due process, there is still no bar to granting relief on the merits of his claims. As Mr. Medina has already briefed—in both his Second Amended Petition and Reply—with respect to each of his claims, the § 2254(d)(1) and (d)(2) exceptions apply.

IV. Mr. Medina will be able to overcome any procedural default potentially asserted by Respondent with respect to his recently exhausted claims.

A. Nonexhaustion is no longer a bar to granting relief on any of Mr. Medina's current claims.

Two of Mr. Medina's claims—Claim II (state misconduct) and Claim XIV innocence)—were not presented, or fully presented, in Mr. Medina's initial round of state postconviction litigation. Both claims were included in his recently filed state application but the Texas Court of Criminal Appeals (hereinafter "CCA") invoked Texas's statutory abuse-of-the-writ rule and dismissed the application. *See Ex parte Medina*, 2017 WL 690960, at *1. Additionally, as described, *supra*, the parties mistakenly agreed that Claim XII (that the trial judge lacked authority to preside over Mr. Medina's trial) was unexhausted. Claim XII was raised and dismissed as

an abuse of the writ during Mr. Medina's initial state postconviction proceedings. Thus, all of Mr. Medina's claims are now technically exhausted.

Procedural default is an affirmative defense to be invoked by the Respondent; Mr. Medina assumes that she will do so with respect to some or all three of these claims. For the sake of efficiency, Mr. Medina also demonstrates that he will be able to show cause and prejudice if Respondent argues, and this Court finds, that his claims are procedurally defaulted.

B. Should Respondent assert, and this Court find, that Mr. Medina's state misconduct claim (Claim II) is procedurally defaulted, he can demonstrate cause and prejudice to excuse the default.

Mr. Medina preemptively asserted the ability to show cause and prejudice for any potential procedural default with respect to Claim II. Reply (Docket #93) at 145–47. He supplements his argument here with the following relevant developments which largely post-date this Court's stay of these proceedings.

Federal courts may not review a procedurally defaulted claim unless the petitioner can establish cause and prejudice for the default. Pursuant to the Supreme Court's habeas corpus doctrine:

> the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that "some interference by officials" . . . made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted).

When the defaulted claim involves the suppression of exculpatory evidence by the State, these "factors . . . ordinarily establish the existence of cause for a procedural default." *Strickler v. Greene*, 527 U.S. 263, 283 (1999). Additionally, if

> it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable. Indeed, in *Murray* we expressly noted that "the standard for cause should not vary depending on the timing of a procedural default."

Strickler v. Greene, 527 U.S. 263, 283–84 (1999) (citation omitted).

Mr. Medina alleged a due process claim based on state misconduct in his initial round of state postconviction litigation. While his case was pending before this Court, more evidence of prosecutorial misconduct emerged. For example, one of the prosecution's key witnesses—Regina Juarez—revealed for the first time that (1) she testified against Mr. Medina in exchange for a deal to avoid prosecution; and (2) a key element of her testimony—which explained away the presence of the alternate suspect's palm prints on the packaging in which the murder weapon was hidden after the crime—was false and based on information provided to her by the prosecution. *See* Second Amended Petition at 164–68; *id.* at 63–64 (describing Ms. Juarez's conflicting stories about the murder weapon).[43] Respondent argued that this and

[43] The full scope of the State's misconduct in Mr. Medina's case is discussed in Claim II of the Second Amended Petition (Docket #53) at 159–84, and Mr. Medina's Reply (Docket #93) at 130–48. Mr. Medina will not reprise his full claim here. This discussion is limited primarily to the *Brady* evidence that emerged after his initial round of state postconviction proceedings and the evidence of which he is aware that is still in the exclusive possession of the State. However, because the prosecution's

other allegations supporting Claim II were unexhausted, would be barred in successive state court proceedings, and thus should be deemed procedurally defaulted. *See* Answer (Docket #76) at 80; *id*. at 95; *id*. at 97; *id.* at 99–101.

Interference by state officials and other objective factors external to the defense have obstructed Mr. Medina's ability to plead his state misconduct claim, and—absent intervention by this Court—they will continue to do so.

1. Despite Mr. Medina's diligent pursuit of *Brady* evidence and discovery before his trial and throughout state postconviction proceedings, the State successfully suppressed *Brady* evidence until the conclusion of both. Mr. Medina's access to information in possession of the State has been restricted to the prosecution's "open file" and one box of documents selectively produced in response to Public Information Act requests.

Even though the State was constitutionally required to affirmatively disclose *Brady* information, Mr. Medina nonetheless filed a pre-trial discovery motion requesting, *inter alia*:

> 11. All evidence tending to be exculpatory on the issue of guilt or innocence or which might be favorable to the Defendant.
>
> * * * *
>
> 13. Statements of all witnesses, and information as to their full name and whereabouts, who gave information to the investigating law enforcement agencies, or the Grand Jury investigating this case, *in whatever form*.
>
> * * * *
>
> 24. Any and all physical descriptions given to any law enforcement agents by any witness herein.
>
> * * * *

misconduct must be evaluated cumulatively, this Court cannot decide the issue until all relevant information has been disclosed and pled.

> 30. Any "deals," *whether expressly written or implied*, to any individual who agrees to testify for the State in this case.

CR at 32 (emphases added). Indeed, when rejecting Mr. Medina's claim that trial counsel's pre-trial preparation was deficient, the Texas courts relied in part on this motion for discovery as evidence of their diligence. State Habeas Vol. 4 at 955 ("The Court, based on the credible affidavit of trial counsel Guerinot and the appellate record, finds that counsel's caseload did not hinder preparation or investigation in the applicant's case *where trial counsel prepared and filed pre-trial motions, . . . obtained discovery from the State, reviewed the State's file . . . .*") (emphasis added).

The trial court granted all of the above discovery requests. CR at 34. In response to the discovery requests and the court order granting them, the prosecution wrote:

> 11. All exculpatory evidence will be made available in the state's open file, including exculpatory grand jury testimony.
>
> * * * *
>
> 13. Statements of all witnesses, and information as to their full name and whereabouts, who gave information to law enforcement or the grand jury is available in the state's open file.
>
> * * * *
>
> 24. Available in the HPD report and written statements in the state's open file.
>
> * * * *
>
> 30. There have been no "deals" made to witnesses to testify for the State.

State's Response to Defendant's Motion for Discovery and Court Order at ¶¶ 11, 13, 24, 30 (June 25, 1996).

Prior to filing his second state habeas application, Mr. Medina sought access to the State's file through the Open Records Act. Exhibit 3. The HCDAO produced one box of documents.[44] After filing his second state habeas application, Mr. Medina filed two separate motions seeking discovery and an evidentiary hearing. In May of 2002, Mr. Medina filed "Applicant's Motion for Discovery and Evidentiary Hearing" (hereinafter "First Discovery Motion"). Mr. Medina noted that although

> he ha[d] made a good faith effort to procure the information by attempting to interview witnesses, using the Open Records Act, and reviewing public records maintained by state and federal governmental agencies, he ha[d] not been able to provide to this Court all the information necessary to the full and fair consideration of the fact-based claims in his application.

State Habeas Vol. 3 at 677. Mr. Medina requested "[a]ny and all evidence of agreements, deals, promises of leniency or other inducement to testify made between the prosecution or law enforcement and" several witnesses, including Regina Juarez. *Id*. at 676.[45] Mr. Medina also sought "all previous statements and/or contact with the prosecution and/or law enforcement . . . and the content of the conversations" with critical prosecution witnesses. *Id*. at 677.

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[44] Undersigned counsel also filed a Public Information Act (hereinafter "PIA") request in 2015 and was similarly shown one box of documents. Exhibit 4. Before allowing counsel to review the file, an assistant district attorney looked through the file—while Mr. Medina's counsel looked on—and removed a stack of papers approximately six to eight inches tall that included yellow legal pads, folders, and word-processed documents. Counsel were informed that these materials were "work product" and would not be disclosed. *See* Exhibit 4 (letter from HCDAO to Jim Marcus, acknowledging that "[c]ertain information believed to be confidential under State or Federal law or otherwise excepted from disclosure under the Texas Public Information Act has been withheld or redacted from this production").

[45] The witnesses named in the motion included other prosecution witnesses who were criminally liable for their involvement in the crime, obstructing the investigation and prosecution, and/or perjury, including Dominique "Flaco" Holmes, Johnny Valadez, and Jamie Moore. First Motion for Discovery at 10.

After the State answered Mr. Medina's application for habeas relief, in which it denied the existence of any *Brady* violations or other prosecutorial wrongdoing, Mr. Medina filed a second discovery motion, also entitled "Applicant's Motion for Discovery and Evidentiary Hearing" (hereinafter "Second Discovery Motion"). Mr. Medina requested additional discovery and "renew[ed] his previous requests for discovery [of] . . . all *Brady* material." State Habeas Vol. 4 at 859.

As described *supra*, the trial court signed the prosecution's findings without acknowledging or ruling on Mr. Medina's pending discovery motions.

Thus, to date, access to materials in the prosecution's possession has been restricted to the contents of its "open file" at trial and one box of documents produced in response to Public Information Act requests—from which the prosecution removed any documents it deemed "work product."

2. Recent court proceedings confirm that (1) Harris County prosecutors' idiosyncratic *Brady* practices amount to non-compliance and even senior prosecutors do not understand their *Brady* obligations; (2) materials in their "open files" are incomplete at best; and (3) without court-ordered discovery and / or a hearing, avenues such as the Texas Public Information Act are insufficient to cure the resulting *Brady* violations.

Two emerging trends further confirm that "objective factor[s] external to [Mr. Medina] impeded counsel's efforts to" fully present his prosecutorial misconduct-related claims in state court because "the factual . . . basis for [the] claim was not reasonably available to counsel" due to "interference by officials." *Murray*, 477 U.S. at 488. First, the testimony of senior Harris County prosecutors in recent post-conviction proceedings reveals that they either do not adequately understand their

Brady obligations or limit disclosure in ways that violate *Brady*. Thus, *Brady* information is often not in the "open" portion of the HCDAO's files. Collectively, the prosecutors' testimony establishes HCDAO's officewide culture and practice of defying *Brady* contemporaneous with Mr. Medina's trial and postconviction proceedings. Second, PIA requests—even those that identify a specific document known to be in the possession of the HCDAO—are an insufficient recourse because the HCDAO will deny the existence of documents unless and until properly motivated by a habeas court to conduct a "spring cleaning" or a more thorough review of its case files. These patterns and practices of the HCDAO are external impediments to pleading *Brady* claims, and demonstrate that the diligent efforts of trial and habeas counsel alone are insufficient to overcome them.

a. Based on "enormous" "misconceptions" about its *Brady* obligations, the Harris County District Attorney's Office often fails to include *Brady* material in its "open file."

A string of recent decisions involving veteran Harris County prosecutors has shed light on the *Brady* practices of the HCDAO. Mere happenstance cannot account for the shared characteristics of these cases. Senior Harris County prosecutors have testified with alarming consistency that exculpatory or impeachment material does not necessarily end up in the "open file" available to defense counsel. Instead, prosecutors make their own subjective judgments about what evidence to disclose. These cases demonstrate that Harris County's "open file" policy does not mean that everything in the prosecution's possession—including witness statements, deals in exchange for testimony, and more—will be available to defense counsel. Instead, the

prosecution's "open file" is a curated portion of the prosecution's file reflecting the individual prosecutor's judgment about the credibility and materiality of potentially exculpatory evidence. However, as illustrated below, courts have recently concluded that the judgment of even the most senior prosecutors with respect to *Brady* obligations is significantly impaired.

On November 23, 2016, the CCA granted habeas corpus relief to David Temple—who had been sentenced to life for the murder of his wife—pursuant to *Brady v. Maryland*. As in Mr. Medina's case, the senior HCDAO prosecutor who tried the case, Ms. Kelly Siegler, "maintained that she timely gave the defense all of the *Brady* evidence they were entitled to get." *Ex Parte Temple,* No. WR-78,545-02, 2016 WL 6903758, *3 (Tex. Crim. App. Nov. 23, 2016). Ms. Siegler joined the HCDAO in 1987, nine years before Mr. Medina's case, and left in 2008. *See* http://www.kellysieglerlaw.com/ bio.html (last visited Mar. 30, 2017). During her two decades in the HCDAO, she tried twenty death penalty cases and secured death sentences in nineteen of them. *Id*.

Reviewing Ms. Siegler's 2014 testimony, the Texas Court of Criminal Appeals found that—after twenty-seven (27) years of law practice, including two decades as a Harris County prosecutor—she did not understand *Brady* or, if she did, she had grafted on limitations that eviscerated the rule:

> The prosecutor believed, as evidenced by her testimony at the writ hearing, that she was not required to turn over favorable evidence if she did not believe it to be relevant, inconsistent, or credible. She testified that she did not have an obligation to turn over evidence that was, based on her assessment, "ridiculous." She claimed that, when it came to what constituted *Brady* evidence, her opinion is what mattered. The

> prosecutor stated, when asked, that if information does not amount to anything, the defense is not entitled to it.

Ex parte Temple, 2016 WL 6903758, *3. "The habeas judge found, and [the CCA] agree[d], that this *prosecutor's misconception regarding her duty under Brady was 'of enormous significance.'*" *Id*. (emphasis added); *id*. ("We find that the method of 'disclosure' utilized by the prosecution did not satisfy the State's duty under *Brady*."). Nearly half of Ms. Siegler's career as a HCDAO prosecutor pre-dated Mr. Medina's July 1996 trial.

This senior Harris County prosecutor's "enormous[ly] significant" misconceptions regarding *Brady* are compounded by her ignorance about the work product doctrine. A Southern District of Texas District Court recently ordered depositions of Ms. Siegler, her co-counsel Vic Wisner, and HCDAO investigator Johnny Bonds[46] regarding the HCDAO's failure to comply with *Brady* in the capital prosecution of Ronald Prible. The *Brady* evidence withheld in *Prible* included HCDAO notes on several prison informants. In 2002, Prible's attorney requested pretrial disclosure of the prosecutor's notes pertaining to any conversations Ms. Siegler had with a testifying informant; she responded that "any notes that either myself or Johnny Bonds made when we went to visit [the informant] is work product." *See* Petitioner's Reply in Support of Renewed Motion to Compel at 2, *Prible v. Davis*, No. 4:09-01896 (S.D. Tex.) (Doc. #166, filed Nov. 30, 2017) (record citations omitted).

[46] Investigator Bonds—who also investigated Mr. Medina's case—worked closely with Ms. Siegler for years in the HCDAO, and is featured on her network television show *Cold Justice*. *See* "Johnny Bonds," http://www.oxygen.com/people/johnny-bonds (last visited Jan. 10, 2018).

In her 2017 deposition, however, Ms. Siegler denied withholding any "work product" from the file, and *testified that she does not even know what the phrase "work product" means*. Exhibit 5 (Deposition of Kelly Siegler ("Siegler Deposition"), *Prible v. Davis*, Civil Action No. 4:09-01896 (S.D. Tex. Oct. 17, 2017) at 147–48). In contrast, her co-counsel, Mr. Wisner, testified that despite HCDAO's "open file" policy, "it would not include [] personal notes." Exhibit 6 (Deposition of Vic Wisner at 9–10, *Prible v. Davis*, No. 4:09-01896 (S.D. Tex. Sept. 20, 2017)). Mr. Bonds testified that Ms. Siegler "didn't give up anything she didn't have to give up . . . [S]he never gave anything away . . . [S]he made the defense earn what they got." Exhibit 7 (Deposition of Johnny Bonds at 97, *Prible v. Davis*, Civil Action No. 4:09-01896 (S.D. Tex. Sept. 19, 2017)).

Prible confirms that Harris County's "work product" withholdings include *Brady* evidence. After Mr. Prible's counsel requested "any and all material . . . withheld from the defense on the basis that it is work product" from the prosecutor's files, the HCDAO withheld 487 pages of notes that it claimed constituted protected work product. *See* Petitioner's Renewed Motion to Compel Production of Harris County District Attorney's "Work Product Files and "Work Product" E-mails in Light of Prosecutor Kelly Siegler's Deposition Testimony at 7–8, *Prible v. Davis*, No. 4:09-01896 (S.D. Tex.) (Doc. #164, filed Nov. 3, 2017). After *in camera* review, the federal district court determined that some of the notes possibly contained exculpatory information and must be produced. *See* Order, *Prible v. Davis*, No. 4:09-01896 (S.D. Tex.) (Doc. #154, filed May 12, 2017).

This Court cannot assume that these "enormous[ly] significan[t]" misconceptions about *Brady*—and the related assumption that work product privileges overrides *Brady* obligations—were confined to the one veteran HCDAO prosecutor in *Temple* and *Prible*. First, Ms. Siegler testified that she trained younger prosecutors in the office, taught at "baby prosecutor school," and was in charge of the office mentor program. Post-Conviction Writ Hearing, *Ex parte Temple*, 1008763-A (178th Judicial Dist. Ct., Harris Co., Texas) (Dec. 22, 2014), at 96–97 (testimony of Kelly Siegler). *See also* http://www.kellysieglerlaw.com/bio.html (last visited Mar. 30, 2017) (Ms. Siegler is "sought out as a speaker and expert in effective courtroom advocacy. She has lectured all over the country on topics such as, 'Final Arguments,' 'Jury Presentation,' 'Arguing Effectively for a Death Sentence,' and "How to Pick a Jury.'"). Thus, Ms. Siegler's testimony in *Temple* reflects not only her practices but the practices taught officewide.

Second, in the rare instances that other veteran HCDAO prosecutors have been subject to cross-examination about their understanding of their *Brady* obligations,[47] they have revealed the *same* enormous misconceptions about *Brady* that Ms. Siegler demonstrated in *Temple*. For example, Ms. Connie Spence had served as a Harris County prosecutor for twenty-seven (27) years when called to testify in 2016 about *Brady* issues in her 2002 capital prosecution of Linda Carty. Like Ms. Siegler, she was a contemporary of Mr. Medina's prosecutors and worked in

[47] Evidentiary hearings in Harris County habeas corpus cases are exceedingly rare. Thus, it is rare that HCDAO prosecutors are subject to cross-examination about their understanding of *Brady*.

the HCDAO when Mr. Medina was tried. After hearing her testimony, the state habeas judge found that Ms. Spence did not understand *Brady* and failed to include many *Brady* items in her "open file." The following is a representative sample, but not all, of the trial court's findings regarding non-disclosure:

> 102. *The State was operating under a misunderstanding of Brady* at the time of the Carty trial.
>
> 103. At the time of the Carty trial, whether impeachment evidence constituted *Brady* evidence was determined on a "casebycase" [sic] basis and was resolved with a "judgment call" based on "gut instinct."
>
> 104. At the time of the Carty trial, the Harris County District Attorney's Office did not believe that impeachment or exculpatory evidence needed to be disclosed if the prosecutor did not find the testimony credible. (IV W.H. at 156, lines 26 (regarding whether to disclose prior inconsistent statements by a witness) *("Q. So, in your mind in that instance there is a judgment call on your part about whether they're telling you the truth? A. In 2002, that was a judgment call. Today it's not even a judgment call. It's automatic notification."*)
>
> 105. Spence herself decided the credibility and materiality of evidence. (V W.H. at 33, lines 12 (acknowledging that she would not turn over exculpatory evidence she did not feel was true: *"That's kind of why I'm a lawyer, is to make those judgments."*)
>
> 106. The State claims to have had an "open file" in the Carty case, available to defense counsel for review.
>
> 107. Spence did not include what the State considered work product in the "open file."
>
> 108. Prior to trial, the only statements (written, audio-taped or videotaped) the State provided to defense counsel were the statements of Carty.
>
> 109. Other than the statements of Carty, the State did not disclose the contents or substance of any statements in its possession prior to the Carty trial.

* * * *

112. None of [a key prosecution witness's] statements were contained in the "open file."

113. None of [the key witness's] statements (or the content therein) were produced to defense counsel prior to the Carty trial.

* * * *

121. The State should have known that each of the prior statements of [the key prosecution witness] could be used to impeach him at trial.

122. The State failed to disclose that [the key witness] had previously provided two consistent statements that conflicted with and were inconsistent with what they represented to Carty's counsel would be his trial testimony (and what was, in fact, his trial testimony).

123. Carty's defense counsel was surprised by the contents of [the key witness's] videotaped statement that was produced during trial.

124. Carty's counsel was unaware that [the key witness] previously provided two consistent statements that conflicted with and were inconsistent with what the State had represented would be his trial testimony (and what was, in fact, his trial testimony)

125. The State met with [a second key prosecution witness] on multiple occasions prior to the Carty trial.

126. In meetings with Spence and [HCDAO prosecutor Craig] Goodhart, [the second key witness] was promised that he would not get prison time if Carty received the death penalty.

127. There is no evidence that the State disclosed to defense counsel the details of a deal with [the second key witness].

* * * *

[Conclusion of Law] No. 3. The Court finds that the State withheld or failed to disclose witnesses' statements and information that were exculpatory or could be used for impeachment purposes in violation of the obligations placed upon the State pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

Findings of Fact, Conclusions of Law, *Ex parte Linda Carty*, Cause No. 877592-B (177th Judicial Dist. Ct. Harris Co., Texas) (Sept. 1, 2016) (hereinafter "Carty Findings of Fact") (record citations omitted).

The *Carty* and *Temple* cases are particularly reliable assessments of the HCDAO culture with respect to *Brady*. As described *supra*, the vast majority of Harris County judges were alumni of the HCDAO and thus presumably share the HCDAO's understanding of *Brady* and work product. The postconviction judges in both *Carty* and *Temple* were experienced senior visiting judges from Galveston and Jefferson Counties, respectively.[48] Their assessments of HCDAO's *Brady* practices were untainted by either HCDAO training and practice or a relationship with former colleagues whose *Brady* practices were at issue. The fact that both visiting judges independently concluded that two senior HCDAO prosecutors—each with decades of HCDAO experience—did not understand *Brady* points to a longstanding, officewide problem.

Carty and *Prible* are not the only Harris County death penalty cases in which exculpatory evidence failed to show up in the prosecution's "open file." In *Ex parte Brown*, the CCA held "[b]ased on the habeas court's findings and conclusions and our own review, . . . that the [Harris County District Attorney's Office] withheld evidence that was both favorable and material to applicant's case in violation of *Brady*." No. WR-68,876-01, 2014 WL 5745499, at *1 (Tex. Crim. App. Nov. 5, 2014). Brown was

[48] Judge David Brian Garner presided over the *Carty* hearing. *See* http://www.mctx.org/GARNER__DAVID_3_1_13.pdf (last visited Jan. 13, 2018) (Judge Garner is a Senior District Judge from Galveston). Judge Larry Gist presided over the *Temple* hearing. *See* https://www.txdirectory.com/online/person/?id=41004 (last visited Jan. 13, 2018).

sentenced to death for the April 3, 2003, murder of a Houston police officer and a store clerk during a robbery. On April 21, 2003, Brown's girlfriend initially told the grand jury that Brown had called from her house to where she was working at the time, a fact that meant Brown could not have been present at the crime. Agreed Findings of Fact, Conclusions of Law and Order at 2, *adopted in Ex parte Brown*, *supra* (hereinafter "*Brown* Findings"). But the Harris County prosecutor, Dan Rizzo, did not believe her and participated in threatening her in order to change her testimony before Mr. Brown's 2005 trial. Lisa Falkenberg, *A Disturbing Glimpse Into the Shrouded World of the Texas Grand Jury System*, Houston Chronicle, July 16, 2014.

Three days later, on April 24, 2003, Mr. Rizzo successfully requested a subpoena for the girlfriend's April 3, 2003, phone records. *Brown* Findings at 7. The phone records *confirmed* Brown's alibi. *Id*. Nonetheless, Dan Rizzo did not provide the phone records to defense counsel before Brown's 2005 trial, and the exculpatory phone records were not contained in the "open file" Dan Rizzo made available to defense counsel. *Id*. at 7; Affidavit of Robert A. Morrow at 1, *Ex parte Brown*, *supra* (Brown's defense counsel engaged in an extensive review of the prosecution's "open file."). The exculpatory phone records were discovered years after Mr. Brown was sentenced to death, in the private residence of the Houston police officer who helped investigate the case. *Brown* Findings at 6–7.

Dan Rizzo was a career Harris County prosecutor, first licensed to practice in Texas in 1983 (thirteen years before Mr. Medina's trial). *See* https://www.

texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=184478 (last checked Mar. 30, 2017). Like other Harris County veteran prosecutors, he apparently failed to understand his *Brady* obligations even after decades of experience in the Harris County District Attorney's Office.

A Southern District of Texas court recently held an evidentiary hearing in another Harris County capital case on a *Brady* claim involving a jailhouse informant. *Tong v. Davis,* Civil Action No. 4:10-2355, 2016 WL 5661698 (S.D. Tex. Sept. 30, 2016). Two veteran Harris County prosecutors, Lyn McClellan and Julian Ramirez, secured Tong's death sentence in 1998. The federal court found sufficient evidence to raise an inference that these prosecutors made undisclosed deals with its witnesses.[49] *Id*. Mr. McClellan joined the HCDAO in 1981 and "was the head of the office's trial bureau, overseeing dozens of prosecutors." Brian Rogers, *Longtime Prosecutor McClellan Praised for His Service*, Houston Chronicle, Nov. 27, 2008 (describing McClellan's twenty-seven-year career as a prosecutor). Mr. Ramirez—like his fellow HCDAO prosecutors McClellan, Rizzo, Spence, Goodhart, and Siegler—has been licensed to practice law since the 1980s.[50]

Non-disclosure of *Brady* evidence remains a problem among newer prosecutors, who were presumably trained by some of the above-named senior

[49] The court also noted that "Tong's failure to fully develop this claim in state court appears to be the result of suppression of relevant evidence by the state." *See Tong*, 2016 WL 5661698 at *18.

[50] *See* https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=183632.

lawyers, all of whom were contemporaries of Mr. Medina's prosecutors. For example, in *Ex parte McGregor*, No. 09-DCR-053051 HC1 (434th Judicial Dist. Ct., Fort Bend Co. Nov. 7, 2016), Harris County prosecutor Elizabeth Shipley Exley (referred to as "Shipley" in the state court findings) testified about her understanding of *Brady*. Findings of Fact, Conclusions of Law at 6, *Ex parte McGregor*, *supra*. Ms. Shipley testified that she was not required to disclose the fact that, in exchange for testimony for the State, she was going to assist a cooperating witness with getting a lighter sentence in the witness's own case. *Id*. ("Shipley testified that if it was her intent to reduce a witness's sentence from thirty years to seven years, after they [sic] testified for the state, she was not required to disclose that fact."). Although Shipley testified that she did not have a deal with another cooperating witness because she had not "promised" to help the witness, she had confirmed in a previous email to her supervisor that she had made an agreement to help the witness. *Id*. at 8.

The trial court found that Shipley had made *three* deals with cooperating witnesses, none of which were disclosed to the defense. *Id*. at 17. Further, all three witnesses testified falsely—and without correction from the prosecutors—that they had no understanding with the State regarding benefits in exchange for their testimony. *Id*. By the State's own admission, all three witnesses were "critical" to the State's case. *Id*. Notably, as in Mr. Medina's case, the defense had filed a pre-trial *Brady* motion asking for the disclosure of any consideration given to any witness, and the prosecution responded that no consideration was given to any witness. *Id*. at 6. The trial court recommended granting relief based on the suppressed deals and

false testimony. *Id.* at 19. In September 2017, the State Bar of Texas filed a disciplinary suit against Shipley for her misconduct in *McGregor*.[51]

In *Ex parte Headley*, No. WR-78,731-01, slip op. at 2 (Tex. Crim. App. Nov. 2, 2016), the CCA adopted the recommendation of the trial court and granted relief from a murder conviction resulting in a life sentence. Harris County prosecutor Rob Freyer made an undisclosed plea agreement with the sole eyewitness in the case. *Id.*

Veteran prosecutors who joined the Harris County District Attorney's office in the 1980s—and served before, during, and after Mr. Medina's trial—all shared the same "misunderstandings" or "misconceptions" about their *Brady* obligations. During this period, the "open files" available for defense counsel's inspection would, at best, contain evidence that satisfied the prosecutor's subjective, misconceived notions of *Brady*. Recent cases confirm that these same *Brady* practices have continued. These cases also reveal that prosecutors routinely failed to disclose deals with witnesses.

When denying Mr. Medina's application for state habeas relief without permitting the requested discovery or hearing, the state court relied on the prosecutor's assurances that they had "open files" at trial. This is undoubtedly true. But based on the relatively recent testimony of their peers, we now know this should not—as it did in this case—end the inquiry into *Brady* compliance. The question is

[51] *See* John Council, Texas Bar Files Disciplinary Case Against Ex-Prosecutor Over Jailhouse Informant Testimony, *Texas Lawyer*, Sept. 25, 2017. http://www.law.com/texaslawyer/sites/texaslawyer/2017/09/25/texas-bar-files-disciplinary-case-against-ex-prosecutor-over-jailhouse-informant-testimony/ (last visited Jan. 10, 2018).

not whether there was an "open file," but what materials did the prosecutors fail to include in it. Without court-ordered fact development, that question remains unanswered. Given HCDAO's "enormous" misconceptions about *Brady*—including their apparent confusion over whether the work product doctrine excuses them from their *Brady* obligations—this Court can have no confidence that Harris County prosecutors faithfully applied these concepts when deciding to withhold the "work product" portions of Mr. Medina's file from defense counsel.

Mr. Medina is not responsible for the fact that a deal with one of the key prosecution witnesses emerged only after his first round state postconviction proceedings, or the timing of the revelation that she testified falsely in exchange for her deal. *See* Second Amended Petition at 164–68. As the above discussion demonstrates, recent developments in multiple cases establish a culture in which Harris County prosecutors—who were contemporaries of Mr. Medina's prosecutors or were trained by them—withheld from the "open files" exculpatory information, including deals with prosecution witnesses.

b. The Harris County District Attorney's Office's non-responsiveness to Public Information Act requests poses an additional obstacle to diligent habeas litigants.

The HCDAO's non-responsiveness to PIA requests places an additional obstacle to documenting *Brady* violations in Harris County. Recent experience in capital cases demonstrates that PIA requests for even *specific documents known to be in the HCDAO's possession* are often unsuccessful. HCDAO has been "unable" to produce such documents unless and until judicial intervention motivates HCDAO

staff to engage in some "spring cleaning" or simply look in their files. The following examples illustrate the HCDAO's failure to produce its complete file in response to PIA requests.

i. Alfred Brown: A "spring cleaning" reveals exculpatory documents that were not contained in the prosecution's "open file" during trial and not released to habeas counsel pursuant to Public Information Act requests.

As described *supra*, Alfred Brown was convicted of shooting a police officer who responded to a check-cashing store robbery. Days after hearing Mr. Brown's girlfriend testify to his alibi before the grand jury, the prosecutor subpoenaed phone records that confirmed the alibi. The phone records provided to the prosecutor were dated April 23, 2003, two days after the grand jury proceedings. *Brown* Findings at 6–7. The exculpatory records were not turned over before Mr. Brown's 2005 trial.

Mr. Brown's state habeas lawyers starting looking for the phone records in 2007. Lisa Falkenberg, *Wheels of Justice Grind Slowly On Death Row*, Houston Chronicle, May 14, 2014 ("*Wheels Grind Slowly*"). In July of 2007, Mr. Brown's state habeas corpus counsel filed a PIA request, Exhibit 8, but the records were not among the items disclosed to counsel. "Brown's [state habeas] attorneys looked everywhere for phone records. District attorneys said they didn't have them. The phone company said they'd been destroyed. The search went on. For six years." *Wheels Grind Slowly*, *supra*.

On April 4, 2013, the trial court entered an order designating the issues for a post-conviction evidentiary hearing. Among the issues to be heard was the State's

failure to turn over phone records. In advance of the April 2013 hearing, and apparently for the first time, "the State asked the HPD officer who conducted the original phone records investigation to search for any documents relating to the case." *Brown* Findings at 6–7. The officer found the materials "at his residence" on or about April 9, 2013. *Id*. at 7; *Wheels Grind Slowly*, *supra* ("[L]ast spring, Brown's attorneys got word from Lynn Hardaway, chief of the DA's post-conviction writs division, that a homicide investigator in the case had found some old records while cleaning out his garage.").

Had it not been for an imminent hearing regarding the phone records, nobody from the HCDAO would have prompted the HPD officer to clean out his garage, and Mr. Brown would have been executed or still on death row, instead of free. Mr. Brown's PIA request filed six years earlier, along with requests for these specific records, were insufficient to dislodge the records or even prompt the State to search beyond its central file on the case.

ii. Bernardo Tercero: A "spring cleaning" reveals witness files that were not released pursuant to Public Information Act requests.

Mr. Bernardo Tercero was sentenced to death for his role in a 1997 robbery of a dry cleaning establishment. He and Robert Berger, a 38-year-old high school teacher who was also at the dry cleaners' store that day, physically struggled, and the gun went off and killed Berger in front of his 3-year-old daughter. *Tercero v. Stephens*, 738 F.3d 141, 143 (5th Cir. 2013). After the completion of state and federal habeas proceedings, Mr. Tercero was scheduled to be executed on August 26, 2015.

The CCA stayed Mr. Tercero's execution to consider an allegation that a key State's witness, Silvia Cotera, had testified falsely at trial. *Ex parte Tercero*, WR-62,593-04 (Tex. Crim. App. Aug. 25, 2015).

Documents related to Ms. Cotera proved elusive. Mr. Tercero's habeas counsel filed a PIA request on July 2, 2015, requesting all documents associated with the case from the HCDAO. Petitioner's Motion to Adjourn Hearing at 2, *Ex parte Tercero*, No. 762351-C (232nd Dist. Ct., Harris County, Tex. Dec. 28, 2015). In response, prosecutors—after withholding "work product"—released 510 pages of documents and two videos. *Id.* at 3. There was no witness file for Ms. Cotera, the key witness, despite the fact that Ms. Cotera testified that when she spoke to three HCDAO employees they "wrot[e] down what it was [she] was saying." *Id.*

Mr. Tercero subsequently moved for discovery. The State objected to Mr. Tercero's request for discovery, arguing *inter alia* there was "abundant discovery" through defense counsel's submission of PIA requests. *Id.* at 5. The State also claimed that the only two files that related to Silvia Cotera were privileged "work product." *Id.* The Court denied the motion for discovery, as well as requests to depose the prosecutors and investigators about the files. *Id.* at 6.

The trial court scheduled an evidentiary hearing about Ms. Cotera's testimony for January 19, 2016. *Id.* at 2. In advance of the hearing, the HCDAO investigator who worked the *Tercero* case discovered *hundreds of pages* of Tercero records—including notes on the interview with Ms. Cotera—at her home during a "spring cleaning." *Id.*

As in *Brown*, Mr. Tercero diligently requested documents in a variety of ways—including PIA requests, motions for discovery, and proposed depositions—but did not receive the documents until a chance "spring cleaning" on the eve of an evidentiary hearing ultimately revealed documents in the home of an HCDAO employee.

iii. Christopher Jackson: After court-ordered discovery, the post-conviction prosecutor discovers previously "lost" documents—in her own files.

Christopher Jackson was sentenced to death for stealing a SUV and fatally shooting the driver. *Jackson v. State*, No. AP-75,707, 2010 WL 114409, at *1 (Tex. Crim. App. Jan. 13, 2010). Mr. Jackson's mental illness was the primary issue during the punishment phase. The State told the jury that Mr. Jackson was faking mental illness in the hope of avoiding a death sentence. Petitioner's Motion for Leave to Discover Documents at 2, *Jackson v. Stephens,* No. 4:15-cv-00208 (S.D. Tex. Nov. 9, 2015) (Docket #30). The State based its malingering argument on testimony from Dr. Willard Gold, one of four physicians who treated Mr. Jackson while he was in the Harris County Jail awaiting trial. *Id.* However, Dr. Gold—who had treated Mr. Jackson for just three weeks—was the only medical professional in the jail who held this belief; the other three doctors disagreed. *Id.*

Mr. Jackson's federal habeas counsel sought the Harris County Jail medical records, but the jail had destroyed them. *Id.* at 8. Habeas counsel knew the HCDAO had them because prosecutors subpoenaed the records and used a portion of them to create a State's exhibit marked for identification at trial but never admitted into evidence (meaning the court clerk did not have a copy). *Id.* at 7.

Mr. Jackson's counsel submitted a PIA request to the HCDAO on February 6, 2015, but there were no medical records in the files released to them. *Id.* "The District Attorney's Office General Counsel Scott Durfee . . . said in response to a follow-up inquiry that the medical records cannot be found." *Id.*

On November 15, 2015, Mr. Jackson sought court-ordered discovery. The State opposed this motion, in part because "based on the emails provided by Jackson, it does not appear that the district attorney has the documents in question."[52]

On December 23, 2015, the District Court granted the discovery request.[53] On January 5, 2016—less than two weeks after the order was issued, but almost a year after the defense made their initial request for the medical records—the HCDAO located the missing medical records. In a January 5, 2016, letter, prosecutor Roe Wilson—the same prosecutor who handled Mr. Medina's post-conviction proceedings—explained that "[i]n response to the federal district court's" discovery order, she reviewed the State's files to locate the missing medical records." Exhibit 9. Ms. Wilson found them in *her own* post-conviction files on Mr. Jackson's case. *Id.* She attached the records to her letter "to comply with the federal district court's order." *Id.* As her letter demonstrates, the Harris County post-conviction prosecutor who handled Mr. Jackson's case did not bother to open her filing cabinet until prodded to do so by a court; a PIA request from the Mr. Jackson's lawyer was insufficient motivation.

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[52] Response in Opposition to Petitioner's Motion for Leave to Discover Documents at 15, *Jackson v. Stephens,* No. 4:15-cv-00208 (S.D. Tex. Nov. 30, 2015) (Docket #32).

[53] Order, *Jackson v. Stephens,* No. 4:15-cv-00208 (S.D. Tex. Dec. 23, 2015) (Docket #36).

iv. Linda Carty: During an evidentiary hearing on the concealment and non-disclosure of evidence and statements, evidence and statements remain undisclosed.

Even during active litigation, HCDAO has refused to produce relevant and potentially exculpatory evidence. In Linda Carty's case, *supra*, post-conviction counsel submitted numerous requests for disclosure of a specific unflattering letter from a judge concerning trial prosecutor Spence in anticipation of the evidentiary hearing. *See* Applicant's Brief in Support of and Objection to Certain Findings of Fact and Conclusions of Law at 53–54, *Ex parte Carty*, Cause No. 877592-B (177th Judicial Dist. Ct. Harris Co., Texas) (Jan. 20, 2017) (record citations omitted). HCDAO not only repeatedly refused to disclose the letter, but denied its very existence. However, when the habeas judge ordered production of the letter during the hearing, postconviction prosecutors produced the letter within the hour. *Id* at 54.

Harris County prosecutors also took recorded statements of key witnesses in advance of Ms. Carty's evidentiary hearing but refused to produce them to her, claiming work product protection. *Id.* The presiding judge was forced to listen to the recorded statements during the hearing; after reviewing the material, the judge ordered the production of the recordings the night before the witnesses testified. *Id.*

* * * *

These cases illustrate that the HCDAO will not search beyond their central files to comply with a PIA request. Files maintained in the homes—or even the offices—of individual employees are deemed "lost," at least until a court orders fact development in the case. Thus, PIA requests to the HCDAO are unlikely to unearth

documents that the prosecutor withheld from the "open file" at trial. They also reinforce the conclusion that HCDAO prosecutors prioritize any perceived "work product" protection ahead of *Brady*, and HCDAO—as it did in Mr. Medina's case—routinely invokes "work product" exceptions in response to PIA requests.

3. To this day, the Harris County District Attorney's Office continues to interfere with Mr. Medina's ability to fully plead his state misconduct claim. Mr. Medina has identified material that was not in the State's "open file" at trial or disclosed in response to his Public Information Act requests.

What distinguishes Mr. Medina from the cases described above is that no court has ordered discovery or a hearing; thus, the impediments to fully pleading his misconduct claim remain in place. There is no reason to conclude that the State's "open file" and PIA disclosures in this case are more *Brady*-compliant or robust than those in *Temple*, *Carty*, *Brown*, *Tercero*, or any of the other cases described above. To the contrary, Mr. Medina has already identified materials that the HCDAO has never disclosed. What follows is a representative but non-exhaustive list.[54]

a. Deals with prosecution witnesses.

As demonstrated, *supra*, HCDAO prosecutors routinely withhold from defense counsel deals they make with their witnesses, even when trial courts order them to be disclosed. This happened in Mr. Medina's case. One of the State's key witnesses, Regina Juarez, only relatively recently came forward and disclosed that she testified pursuant to a deal to avoid prosecution. *See* Second Amended Petition at 164–68.

[54] Mr. Medina's Motion for Discovery (Docket #96) remains pending.

Ms. Juarez was criminally liable in several respects, including obstructing the investigation, tampering with evidence, and perjury for her irreconcilable sworn statements about the disposition of the murder weapon after the crime. *Id*. at 64.

Notably, and by contrast, Veronica Ponce and Sharlene Pooran—two teenaged girls whose grand jury testimony deviated from their prior police statements in a way that *supported* Mr. Medina's defense—were prosecuted for perjury and sent to prison for three years. The State's witnesses who committed perjury, obstructed the investigation, and tampered with evidence, but eventually provided *prosecution-friendly* accounts of relevant facts, walked away without any criminal liability. Regina Juarez has informed undersigned counsel that she testified for the State pursuant to a deal to avoid prosecution. Ms. Juarez, despite counsel's numerous attempts, has been reluctant to continue discussing the case with Mr. Medina's counsel.

Other cooperating prosecution witnesses were exposed to considerable criminal liability and walked away scot-free. One of the few facts that all witnesses agreed about in this case was that Jamie Moore was the driver of the car used in the drive-by shooting. Johnny Valadez, one of the prosecution's critical alleged eyewitnesses, testified that Jamie Moore pulled over just before the shooting. Two people got out of the car and retrieved an assault rifle from Jamie Moore's trunk. The shooter took up position in the car and Moore drove them by the victims' house. Second Amended Petition at 56. Moore, who testified for the prosecution that Mr. Medina was the shooter, was not charged with any crime for his role in the drive-by

shooting.

The State conceded at trial—out of the presence of the jury—that, at minimum, Dominic "Flaco" Holmes was guilty of tampering with evidence. The defense argued that the court should instruct the jury to consider whether Holmes was an accomplice as a matter of law based on his "obstruction of justice" when "cover[ing] up the crime." 17 RR 2263. The prosecution argued against the instruction, stating "*I think that makes [Holmes] guilty of tampering, Judge*. It does not make him an accomplice as that term is now defined." 17 RR 2264 (emphasis added). The State did not prosecute Holmes—who testified for the prosecution—for his tampering or perjury. Holmes testified at trial that he buried the murder weapon after the crime, and he had done so before he was questioned by the police who, among other things, were searching for the weapon. Second Amended Application at 59–60.

The prosecution's witnesses were thus guilty of serious crimes related to a capital murder but were never prosecuted. Cases like *Carty*, *Tong*, *McGregor*, and *Headley*, *supra*, illustrate that the HCDAO does not, as a matter of course, disclose deals exchanging leniency for testimony. Regina Juarez reports that she had such a deal in this case. The facts presented in the Second Amended Petition, as well as the new information presented here regarding the pattern and practice within the HCDAO, make clear there is sufficient reason to believe she was not the only one.

b. Exculpatory or impeaching grand jury testimony.

As noted above, two witnesses—Ponce and Pooran—purportedly[55] testified to the grand jury that Dominic Holmes admitted to the crime. This testimony is indisputably exculpatory, but it has never been disclosed to Mr. Medina.

Additionally, Mr. Medina is aware that many of the prosecution's witnesses testified before the grand jury. Indeed, the prosecutors used grand jury testimony to refresh the recollections of some witnesses at trial. *See, e.g.,* 16 RR 1948 (prosecutor asks Regina Juarez, "Regina, I'm going to show you what's—do you remember testifying in front of the Grand Jury? Will this help refresh your recollection about what he told you?"). These same witnesses changed their stories about the disposition of the murder weapon in the five-month period between the time they were initially questioned by the police in January of 1996 and their July 1996 trial testimony. *See* Second Amended Petition at 50–65. Mr. Medina does not know, however, whether the witnesses' grand jury testimony was consistent with their police statements or whether they changed their stories after the grand jury proceedings but before trial. Either way, their grand jury testimony will be evidence that they lied—to the police or at trial. If prosecution witnesses changed their stories *after* their grand jury proceedings, then their grand jury testimony will be evidence that (1) they committed perjury, either before the grand jury or during trial; and, (2) that the State selectively

[55] Despite its exculpatory nature and the state postconviction court's reliance on it, described *supra*, Mr. Medina has never seen this evidence.

prosecuted perjury cases only against those witnesses who would have benefited the defense at trial.

A third possibility is that witnesses were browbeaten into changing their stories *during* the grand jury proceedings, as in Alfred Brown's case, described *supra*.[56] Regardless, the grand jury testimony of the prosecution witnesses—because it will either demonstrate that they lied to the police during the investigation or on the stand during Mr. Medina's trial—is *Brady* evidence.

As noted, *supra*, the trial court granted Mr. Medina's pre-trial request for "[s]tatements of all witnesses, and information as to their full name and whereabouts, who gave information to the investigating law enforcement agencies, or the Grand Jury investigating this case, in whatever form." The State responded that it would all be in its "open file." There was no grand jury testimony whatsoever in the "open file" produced to undersigned counsel, and Mr. Medina has yet to receive it.

c. Eyewitnesses who reported to HPD that "black males" were involved in this incident *before* the investigating officers were aware of the identities and race of the LRZ gang members.

On January 2, 1996, the day after the shooting and before the police knew that the defendant at trial would not be African American, the lead detectives on the

[56] *See, e.g.,* Radley Balko, *Texas Death Row Inmate Alfred Dewayne Brown is Released from Prison*, Washington Post, 2015 WLNR 17100167 (June 10, 2015) ("Brown had an alibi for the crime for which he was convicted—an armed robbery that resulted in the death of a police officer. Brown said he was staying at his girlfriend's apartment at the time of the robbery. But after a browbeating from a Houston cop who inexplicably served as foreman on the grand jury that indicted Brown, the woman changed her testimony. Grand jury transcripts would later show that during her testimony, the cop/foreman threatened to indict Brown's girlfriend for perjury and threatened to take away her children.").

case—Glen Novak and Henry Chisolm—informed another HPD officer that "information had also been received that some black males may also be involved in this incident." Second Amended Petition, Exhibit 1 at 127. Additionally, the officers who interrogated Dallas Nacoste said that an eyewitness reported that the shooter was African American. Second Amended Petition at Exhibit 18 (Affidavit of Dallas Nacoste). This information is exculpatory because the defense theory was that Dominic Holmes (who is African American) and not Mr. Medina (who is Hispanic and light-skinned) was the assailant.

As noted, *supra*, the trial court granted Mr. Medina's pre-trial discovery request for "[a]ny and all physical descriptions given to any law enforcement agents by any witness herein," as well as the "[s]tatements of all witnesses, and information as to their full name and whereabouts, who gave information to the investigating law enforcement agencies . . . investigating this case, *in whatever form*." CR at 32 (emphasis added). The State responded that all of this information would be found in its "open file." The State has never produced any information about the eyewitness who saw African American assailants.

This is merely a representative, non-exhaustive list of exculpatory evidence that has yet to be produced. There is more, and much of it consistent with the type of evidence senior HCDAO prosecutors withheld in other cases. For example, as in *Tercero*, the record is clear that Mr. Medina's prosecutors had many meetings with critical witnesses, but no notes from these meetings were in the "open file" or have ever been included in subsequent PIA disclosures. It is during these meetings that

witnesses must have come up with the new stories—differing from, and conflicting with, their statements to the police—elicited by the prosecution at trial. *See* Second Amended Petition at 58–64.

This Court should not speculate that the evidence was not disclosed because it does not exist. First, some of it undoubtedly exists. Second, the aforementioned recent *Brady* litigation from Harris County proves that Harris County prosecutors do not feel obligated to turn over exculpatory or impeachment evidence that—based on their subjective opinion—is not "credible" or fails to satisfy some other idiosyncratic limitation on their *Brady* obligation. Even deals with prosecution witnesses may be withheld. As the Texas courts have recognized of late, the most senior, experienced Harris County prosecutors are laboring under "misconception[s]" of "enormous significance"[57] or "operating under a misunderstanding of *Brady*." Carty Findings of Fact, *supra*. These misconceptions, and the invocation of "work product," have thwarted discovery of *Brady* material despite litigants' diligent efforts to obtain it from HCDAO's open files or through the Public Information Act.

* * * *

The Harris County District Attorney's Office has obstructed full development of Mr. Medina's state misconduct claim, and continues to do so. Thus, Mr. Medina can show cause for a procedural default.

[57] *Ex parte Temple,* 2016 WL 6903758, *3.

4. This Court can and should exercise its authority to grant fact development with respect to the issue of cause and prejudice.

Mr. Medina has requested discovery related to, *inter alia*, the State's ongoing withholding of evidence as well as the recently discovered instances of suppressed evidence. *See* Motion for Discovery (Docket #96). As demonstrated above, the full breadth of the State's misconduct cannot be ascertained without judicial assistance because only a court order will motivate the HCDAO to look for and produce documents known to exist and be within the State's possession. Disturbingly, this was true even when the document in question could—and eventually did—prevent the execution of an innocent man like Alfred Brown. When the "issue of cause cannot be adequately resolved on the record before" the Court, the Fifth Circuit has held that it is "necessary to remand th[e] case to the district court with instructions to conduct an evidentiary hearing on the issue of cause." *Barrientes v. Johnson*, 221 F.3d 741, 768 (5th Cir. 2000). Mr. Medina respectfully urges this Court to allow fact development on this issue to proceed.

C. Mr. Medina's innocence claim is reviewable under the miscarriage of justice standard.

Mr. Medina's claim of factual innocence, Claim XIV, is also now exhausted. As noted, it was raised in the successive state exhaustion proceedings and the CCA dismissed it, like the other claims, as an abuse of the writ. Should Respondent argue, and this Court hold, that the claim is procedurally defaulted, this Court can still review the merits of the claim. Mr. Medina's claim is subject to the miscarriage of justice exception to any procedural bar.

A procedural default is excused where a federal habeas corpus petitioner can establish a fundamental miscarriage of justice by showing that he is actually innocent of the crime of which he was convicted. *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *see also Finley v. Johnson*, 243 F.3d 215, 221 (5th Cir. 2001) (the "purpose of the exception is to prevent a miscarriage of justice by the conviction of someone who is entitled to be acquitted because he did not commit the crime of conviction"). Innocence, in this context, applies to both guilt and sentencing phases of the trial. For the guilt phase, innocence is defined as a showing that, "in light of the new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536–37 (2006) (*quoting Schlup*, 513 U.S. at 327). For the sentencing phase, default-excusing innocence is established when a petitioner can show "by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under [state] law." *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992).

Here, merits and procedural arguments for Mr. Medina's innocence claim collapse into one underlying and fundamental point: Mr. Medina did not commit this offense, *i.e.*, the evidence does not support his conviction, and therefore he is both innocent of the crime and "innocent of the death penalty" as those terms are defined in the context of miscarriage of justice jurisprudence. Any viable innocence claim on the merits satisfies, by definition, the "miscarriage of justice" exception to the

imposition of a procedural default for either or both phases of his trial. Thus, this Court may review the merits of Mr. Medina's innocence claim.

D. This Court can review the merits of Mr. Medina's lack of judicial authority claim (Claim XII) because he can show cause and prejudice for any application of a valid state procedural default; alternatively, the state rule as applied in this case is not an adequate and independent state ground.

Mr. Medina's claim that the judge at his trial was not properly authorized to preside was, as previously noted, dismissed in his initial state habeas proceedings as an abuse of the writ. Although Mr. Medina incorrectly conceded in his Reply that it had not been previously exhausted when in fact it was, the CCA dismissed this claim as an abuse of the writ under section 5 in the earlier state habeas proceeding. This Court should nevertheless review this claim on the merits for the reasons previously argued. Reply (Docket #93) at 272–73 (addressing cause and prejudice).

In short, the factual basis for this claim was unavailable until after the time for filing the initial state habeas corpus petition. *Compare* State Habeas Corpus Application, *Ex parte Medina*, Writ No. 726088-B, *with* Carol Christian, *Execution Set for Man Who Killed 5 Relatives*, Hous. Chron., Feb. 13, 2002, at A42. Mr. Medina filed his third state habeas application raising this claim shortly after learning of the issue from this media report. Under these circumstances, cause for any procedural default arising from the CCA's dismissal of this claim is established, and this Court can address the claim on its merits.

In *(Michael) Williams v. Taylor*, 529 U.S. 420, 440 (2000), the Supreme Court held that the petitioner had exercised due diligence with regard to his prosecutorial

misconduct claim that was presented for the first time in the federal courts. In *Williams*, a juror remained silent when asked during voir dire whether she knew any people on a list of participants in the trial, including the prosecutor and one of the sheriff's deputies who investigated the case, thus indicating that her answer was "no." *Id.* at 440. In fact, the juror had been married to the sheriff's deputy, and the prosecutor had represented her during the divorce. *Id.* Thus, the prosecutor obviously knew her silence was deceptive. The Supreme Court reversed the Fourth Circuit's determination that Taylor's state habeas counsel had not exercised due diligence because he failed to check the public records of the juror's divorce, which is where federal habeas counsel had discovered the information. *Id.* at 443. The Court reasoned that "[state habeas counsel] had no reason to believe [the juror] had been married to [the sheriff's deputy] or been represented by [the prosecutor]." *Id.* The Court expressly rejected the Fourth Circuit's reasoning that, because federal habeas counsel happened to examine the marriage records of the juror, that state habeas counsel should have done so as well. Instead, the Court attributed the default to the deceit of the juror and the prosecutor: "The underdevelopment of these matters was attributable to [the juror] and [the prosecutor], if anyone." *Id.* Because the prosecutor's misconduct concealed the juror's deception, diligent counsel had no reason to investigate the juror's marital history. *Id.*

Likewise here, Mr. Medina had no reason to believe that the sitting trial judge in this case was not authorized to preside over his trial. Reasonably diligent litigants are not required to check whether the trial judge has authority to preside. Just as a

criminal defendant is authorized to assume that prosecutors act within the bounds of their constitutional disclosure duties, *see Strickler v. Greene,* 527 U.S. 263, 283 (1999), so too here a criminal defendant has every right to assume that the sitting trial judge in his case is in fact an authorized judicial officer. The fact that he was not is precisely the kind of "objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." As such it "cannot fairly be attributed to" Mr. Medina. *Murray*, 477 U. S. at 478; *see also Coleman v. Thompson*, 501 U.S. 722 (1991). Merits review by this Court is thus available for this claim.

Alternatively, the bar erected by the CCA's abuse finding on this claim, under these circumstances, is not an adequate state ground, and therefore the default should not be honored by this Court. Texas habeas law ordinarily allows state habeas petitioners to proceed on successive applications based on legal claims the facts of which only come to the attention of a habeas petitioner exercising due diligence after the filing of a previous habeas application. *See* Tex. Code. Crim. Proc. art. 11.071 § 5(a)(1) (authorizing state court consideration of subsequently raised claims where the factual or legal basis was not reasonably available through the exercise of due diligence when the first state application was filed). If through the exercise of due diligence the petitioner cannot be expected to have learned of the facts underlying the claim, by statute the claim should have been provided merits treatment by the state courts.

Here, the CCA's failure to apply this section 5 rule exception is a clear aberration from its state procedural rule; as such, there is no valid federal procedural

default for this claim. If the state rule applied is not being "strictly followed," it cannot be the basis for a default. *See Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (holding state procedural rules "not strictly or regularly followed" may not bar federal review); *Amos v. Scott*, 61 F.3d 333, 339 (5th Cir. 1995) ("The Supreme Court has further defined this concept of adequacy . . . to include a state procedural ground that is strictly or regularly applied evenhandedly to the vast majority of similar claims.").

Conclusion

For the foregoing reasons, Mr. Medina's claims are ripe for review in this Court.

Respectfully Submitted,

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Certificate of Service

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This 8h day of March, 2018.

/s/ James Marcus

Exhibit 1

	Applicant	CCA Writ No.	Recommendation	Habeas Judge	State's Proposed FOFCL File Date	Trial Court's FOFCL Signed	Total State Proposed FOFCL	Total Trial Ct FOFCL	State's Proposed Adopted Verbatim
1	Adams, Timothy	WR-65,698-01	Deny	Barr	6/23/2006	8/17/2006	122	122	122
2	Alexander, Guy	WR-57,156-01	Deny	Thomas	4/14/2003	9/4/2003	94	94	94
3	Alexander, Guy	WR-57,156-02	Grant	Jones	7/28/2011	5/4/2012	138	67	0
4	Alix, Franklin	WR-50,786-01	Deny	Godwin	Unknown	10/8/2001	59	59	59
5	Allen, Kerry	WR-73,586-01	Deny	Ellis	4/25/2008	3/2/2009	126	126	126
6	Alvarez, Juan	WR-62,426-01	Deny	Thomas	2/7/2008	5/23/2008	92	92	92
7	Ayestas, Carlos	WR-69,674-01	Deny	Hill	1/17/2008	2/18/2008	113	113	113
8	Basso, Suzanne	WR-63,672-01	Deny	Keel	9/27/2005	11/28/2005	127	127	127
9	Batiste, Tedderick	WR-81,570-01	Deny	Guerrero	12/15/2014	1/21/2015	211	211	211
10	Bernal, Johnnie	WR-54,854-01	Deny	Burdette	4/24/2002	6/21/2002	87	87	87
11	Bible, Danny	WR 76,122-01	Deny	Ellis	3/30/2009	6/24/2011	127	127	127
12	Brown, Alfred	WR-68,786-01	Grant	Ellis	5/22/2013	5/28/2013	40	40	40
13	Brown, Arthur	WR-26,178-02	Deny	Ellis	6/30/2006	8/31/2007	86	86	86
14	Broxton, Eugene	WR-42,781-02	Deny	McSpadden	7/28/2009	7/31/2009	110	110	110
15	Broxton, Eugene	WR-42,781-01	Deny	McSpadden	Unknown	9/3/1999	71	71	71
16	Buck, Duane	WR-57,004-01	Deny	Collins	7/11/2003	7/23/2003	33	33	33
17	Buntion, Carl	WR-22,548-04	Deny	Mendoza	8/30/2016	12/28/2016	168	168	164
18	Burton, Arthur	WR- 64,360-01	Deny	Thomas	9/15/2005	3/10/2006	51	51	51
19	Burton, Arthur	WR- 64,360-01	Deny	Thomas	12/5/2008	12/31/2008	47	47	47
20	Butler, Steven	WR-41,121-02	Deny	Brown, S.	3/5/2007	3/30/2007	175	175	175
21	Butler, Steven	WR-41,121-01	Deny	Brown, S.	2/10/1999	3/12/1999	30	30	30
22	Butler, Steven	WR-41,121-02	Deny	Brown, S.	2/20/2012	2/28/2012	183	183	183
23	Butler, Steven	WR-41,121-01	Deny	Brown, S.	Unknown	12/2/1998	28	28	28
24	Campbell, Robert	WR-44,551-01	Deny	Keel	Unknown	11/11/1999	44	44	44
25	Cantu, Peter	WR-65,334-01	Deny	Harmon	11/29/2005	6/7/2006	80	80	80
26	Capetillo, Edward	WR-49,239-01	Deny	Harmon	Unknown	3/15/2001	44	44	44
27	Carr, Darrell	WR-55,033-02	Grant	Rains	12/22/2006	12/20/2006	42	42	42
28	Carr, Darrell	WR-55,033-01	Deny	Rains	Unknown	1/29/2003	85	85	85
29	Carty, Linda	WR-61,055-01	Deny	Davies	11/1/2004	12/2/2004	93	93	93
30	Carty, Linda	WR-61,055-02	Deny	Garner	8/29/2016	9/1/2016	191	140	97
31	Cathey, Eric	WR-55,161-01	Deny	Rains	10/1/2002	1/29/2003	35	35	35
32	Cathey, Eric	WR-55,161-02	Grant*	Reagin	2/21/2011	12/31/2012	363	215	0
33	Charles, Derrick	WR-67,717-01	Deny	Krocker	4/23/2007	4/25/2007	152	152	152
34	Clay, Keith	WR-43,906-01	Deny	Godwin	Unknown	10/13/1999	25	25	25
35	Cole, Jaime	WR-84,322-01	Deny	Hart	6/3/2016	6/14/2016	141	141	141
36	Coleman,Christopher	WR-48,523-01	Deny	McSpadden	Unknown	11/7/2000	97	97	97
37	Conner, Johnny	WR-50,268-01	Deny	Godwin	Unknown	8/16/2001	20	20	20
38	Cotton, Marcus	WR-45,499-01	Deny	McSpadden	Unknown	4/17/2000?	83	83	83
39	Coulson, Robert	WR-40,437-01	Deny	Robertson	12/14/1998	1/5/1999	111	111	111
40	Cruz-Garcia, Obel	WR-85,051-02	Deny	Magee	12/21/2016	12/29/2016	192	192	192
41	Cubas, Edgardo	WR-71,259-01	Deny	Bridgewater	11/7/2008	11/13/2008	135	135	135
42	Davis, Brian	WR-40,339-05	Deny	Hart	3/25/2005	7/25/2005	141	159	138
43	Davis, Brian	WR-40,339-07, 08	Deny	Hart	2/12/2015	1/7/2016	233	233	233
44	Davis, Brian	WR-40,339-01	Deny	Hill	2/3/1999	2/4/1999	15	15	15
45	Demery, Gregory	WR-52,238-01	Deny	Alcala	Unknown	5/13/2002	58	58	58
46	Dennes, Reinaldo	WR-34,627-02	Deny	Wallace	8/19/2013	8/21/2013	158	158	158
47	Draughon, Martin	WR-27,511-02	Deny	Alcala	Unknown	6/28/2000	161	161	161
48	Dudley, Marion	WR-46,854-01 & -02	Deny	Stricklin	Unknown	7/28/2000	42	42	42
49	Duncan, Richard	WR-46,927-01	Deny	Hill	Unknown	7/13/2000	102	102	102
50	Eldridge, Gerald	WR-46,854-02	Deny	Harmon	9/14/2004	9/24/2004	77	77	76
51	Elizalde, Jr., Jaime	WR-48,957-01	Deny	Ellis	Unknown	3/9/2001	56	56	56
52	Escobedo, Joel	WR-56,818-01	Deny	Keel	12/21/2006	3/9/2007	113	113	113
53	Escobedo, Joel	WR-56,818-02	Deny	Keel	4/1/2008	10/28/2008	112	112	112
54	Escobedo, Joel	WR-56,818-01	Deny	Keel	8/21/2012	9/26/2012	127	127	127
55	Estrada, Larry	WR-53,499-01	Deny	Anderson	8/16/2002	8/26/2002	32	32	32
56	Francois, Anthony	WR-71,345-01	Deny	Cosper	12/15/2008	12/30/2008	30	30	30
57	Fratta, Robert	WR-31,536-04	Deny	Hart	11/18/2013	12/18/2013	160	160	160
58	Fratta, Robert	WR-31,536-02	Deny	Hill	3/31/2004	6/29/2004	128	128	128
59	Freeney, Ray	WR-78,109-01	Deny	Magee	Unknown	12/10/13	68	68	68
60	Freeney, Ray	WR-78,109-01	Deny	Ritchie	11/28/2012	12/5/2012	188	188	188
61	Fuentes, Anthony	WR - 45,719-01	Deny	Anderson	Unknown	5/1/2000	146	146	146
62	Gallo, Tomas	WR-40,339-01	Deny	Barr	6/18/2012	6/25/2012	206	206	206
63	Garcia, Juan	WR-67,096-01	Deny	Brown, S.	2/27/2007	3/5/2007	133	133	133
64	Gates, Bill	WR-69,637-01	Deny	Anderson	3/18/2008	3/19/2008	105	105	105
65	Goynes, Theodore	WR-52,481-03	Dismiss	Krocker	8/22/2011	8/30/2011	14	14	14

	Applicant	CCA Writ No.	Recommendation	Habeas Judge	State's Proposed FOFCL File Date	Trial Court's FOFCL Signed	Total State Proposed FOFCL	Total Trial Ct FOFCL	State's Proposed Adopted Verbatim
66	Goynes, Theodore	WR-52,481-01	Deny	Krocker	Unknown	5/6/2002	92	92	92
67	Green, Dominque	WR-45,219-01	Deny	Anderson	2/22/2000	2/25/2000	194	194	194
68	Green, Travis	WR-48,019-02	Deny	McSpadden	8/31/2012	9/12/2012	94	94	94
69	Greer, Randolph	WR-53,836-02	Deny	Carter	Unknown	10/10/2006	27	27	27
70	Greer, Randolph	WR-53,836-01	Deny	Poe	10/19/200(1?)	8/2/2002	207	207	207
71	Griffith, Michael	WR-56,987-01	Deny	Keel	1/14/2003	7/23/2003	14	14	14
72	Guevara, Gilmar	WR-63,926-01	Deny	Stricklin	8/1/2005	1/19/2006	120	120	120
73	Guidry, Howard	WR-47,417-02	Deny	Hill	7/28/2011	3/14/2012	180	180	180
74	Guidry, Howard	WR-47,417-01	Deny	Hill	Unknown	7/14/2000	90	90	90
75	Hamilton, Ronald	WR-87,114-01	Deny	Evans	8/12/2014	11/25/2014	116	116	116
76	Harper, Garland	WR-81,576-01	Deny	Barr	11/25/2014	12/11/2014	315	315	315
77	Haynes, Anthony	WR-59,929-01	Deny	Wallace	8/3/2004	8/5/2004	50	50	50
78	Hughes, Preston	WR-45-876-01	Deny	Godwin	Unknown	5/19/2000	155	155	155
79	Hunter, Calvin	WR-69,291-01	Deny	Hill	8/20/2007	1/14/2008	97	97	97
80	Irvan, William	WR-75,428-01	Deny	Brown,M.	12/15/2010	1/14/2011	227	227	227
81	Jackson, Christopher	WR-78-121-01	Deny	Hart	6/24/2013	12/2/2013	193	193	193
82	Jackson, Derrick	WR-60,124-01	Deny	Hill	7/6/2004	9/1/2004	74	74	74
83	Jackson, Donell	WR-52-532-01	Deny	Davies	3/25/2002	5/15/2002	45	45	45
84	Jackson, James	WR-52,904-01	Deny	Harmon	2/21/2002	6/20/2002	36	36	36
85	Janecka, Allen	WR-24,976-02	Deny	Densen	9/13/1999	9/13/1999	29	29	29
86	Jean, Joseph	WR-84,327-01	Deny	Hart	7/8/2016	7/21/2016	326	326	326
87	Johnson, Dexter	WR-73,600-01	Deny	Collins	2/24/2010	2/24/2010	61	61	61
88	Johnson, Johnny	WR-57,854-01	Deny	Wilkinson	2/16/2000	8/30/2000	63	63	63
89	Johnson, Lonnie	WR-56,197-01	Deny	Huffman	2/5/2002	5/22/2003	69	69	69
90	Jones, Shelton	WR-62,589-03	Deny	Campbell, J.	7/20/2007	12/18/2007	79	79	79
91	Jones, Shelton	WR-62,589-01	Deny	Campbell, J.	1/15/2003	7/5/2005	106	106	106
92	Joubert, Elijah	WR-78,119-01	Deny	Ellis	4/8/2013	4/18/2013	130	130	130
93	Kincy, Kevin	WR-50,266-01	Deny	McSpadden	6/12/2000?	4/18/2001	99	99	99
94	Landor, III, Mabry	WR-81,579-01	Deny	McSpadden	10/15/2014	2/12/2016	161	161	161
95	Maldonado, Virgilio	WR, 51,612-02	Grant	Jones	11/30/2012	12/12/2012	161	195	0
96	Maldonado, Virgilio	WR-51,612-01	Deny	Bacon	Unknown	7/11/2001	40	40	40
97	Mamou, Jr., Charles	WR-78,122-01,-02, -03	Deny	Guiney	11/6/2013	11/13/2013	55	55	55
98	Marshall, Gerald	WR-17,752-02, - 03	Deny	Evans	3/18/2014	7/18/2014	92	92	92
99	Martinez, Alexander	WR-61,844-01	Dismiss	Brown, S.	Unknown	3/31/2005	10	10	10
100	Martinez, Raymond	WR-42,341-01	Deny	(illegible)	Unknown	7/9/1999	41	41	41
101	Martinez, Raymond	WR-42,341-03	Deny	Krocker	10/1/2012	10/4/2012	88	88	88
102	Mason, William	WR-73,408-01, -02, 03	Deny	Carter	10/25/2005	12/28/2009	92	92	92
103	Mason, William	AP-76,997	Review-	Carter	10/15/2012	11/6/2012	43	43	43
104	Masterson, Richard	WR-59,481-01	Deny	Rains	2/18/2008	3/13/2008	62	62	62
105	Matamoros, John	WR-50,791-02	Deny	Bacon	12/18/2006	12/18/2006	169	169	169
106	Matamoros, John	WR-50,791-02	Deny	Brown, M.	3/5/2012	3/30/2012	142	142	142
107	Matamoros, John	WR-50,791-01	Deny	Stricklin	10/11/2001	11/1/2001	107	107	107
108	Matchett, Farley	WR-31,797-02	Deny	Harmon	Unknown	1/30/1999	92	92	92
109	Matthews, Damon	WR-75,919-01	Deny	Velasquez	1/31/2011	2/2/2011	106	106	106
110	Mays, Rex	WR-42,831-01	Deny	Rains	Unknown	9/3/1999	33	33	33
111	McCoskey, Jamie	WR-56,820-01	Deny	Brown, S.	12/21/2006	1/26/2007	131	131	131
112	McCoskey, Jamie	WR-56,820-02	Deny	Brown, S.	4/15/2008	6/23/2008	161	161	161
113	McCullum, Demarco	WR-52,642-01	Deny	Cosper	Unknown	5/29/2002	32	32	32
114	McFarland, George	WR-59,337-01	Deny	Godwin	10/1/2003	6/8/2004	175	173	173
115	McGowen, Roger	WR-64,992-01	Deny	Campbell, C.	5/25/2006	5/19/2006	66	66	66
116	McWilliams, Frederick	WR-48,282-01	Deny	Poe	Unknown	12/11/2000	43	43	43
117	Medellin, Jose	WR-50,191-01	Deny	Cosper	Unknown	1/22/2001	81	81	81
118	Medina, Anthony	WR-41,274-02	Deny	Carter	4/25/2008	5/26/2009	254	254	254
119	Moody, Stephen	WR-42,832-01	Deny	Anderson	8/11/1999	8/19/1999	64	64	64
120	Moore, Bobby	WR-13,374-05	Grant*	Brown, S.	1/23/2014	2/6/2014	544	577	409
121	Morris, Kenneth	WR-43,550-01	Deny	Cosper	Unknown	9/28/1999	106	106	106
122	Morris, Lorenzo	WR-45,156-01	Deny	Wilkinson	Unknown	4/11/2000	76	76	76
123	Nelson, Marlin	WR-53,148-01	Deny	Harmon	Unknown	7/8/2002	111	111	111
124	Nenno, Eric	WR-50,598-01	Deny	Collins	Unknown	9/27/2001	12	12	12
125	Newton, Frances	WR-47,025-01	Deny	Wallace	Unknown	6/5/2000	160	160	160
126	Nichols, Joseph	WR-21,253-02	Deny	Harmon	Unknown	4/9/2001	122	117	112
127	Norris, Michael	WR-72,835-02	Deny	Ellis	1/18/2012	8/22/2012	108	108	108
128	O'Brien, Derrick	WR-51,264-01	Deny	Krocker	11/9/2001	11/13/2001	104	104	104
129	Ogan, Craig	WR-41,220-01	Deny	Hill	2/4/1999	3/11/1999	57	57	57
130	Perez, Efrain	WR-48,614-01	Deny	Wallace	Unknown	1/26/2001	28	28	28

	Applicant	CCA Writ No.	Recommendation	Habeas Judge	State's Proposed FOFCL File Date	Trial Court's FOFCL Signed	Total State Proposed FOFCL	Total Trial Ct FOFCL	State's Proposed Adopted Verbatim
131	Pierce, Anthony	WR-15,859-04	Deny	Godwin	12/1/2006	1/12/2007	104	104	104
132	Pippin, Roy	WR-50,613-01,02	Deny	McSpadden	Unknown	9/26/2001	268	268	268
133	Plata, Daniel	WR-46,749-02	Grant	Ellis	3/9/2007	9/28/2007	175	287	175
134	Plata, Daniel	WR-46,749-01	Deny	Ellis	Unknown	6/27/2000	48	48	48
135	Prevost, Jeffery	WR-84,068-01	Deny	Powell	12/22/2016	1/3/2017	243	243	243
136	Prible, Jr., Ronald	WR-69,328-01	Deny	Ellis	1/4/2008	1/25/2008	76	76	76
137	Prystash, Joseph	WR-58,537-01	Deny	Hill	11/17/2003	2/25/2004	84	84	84
138	Prystash, Joseph	WR-58,537-02	Deny	Hill	12/2/2011	9/25/2012	125	125	125
139	Raby, Charles	WR-48,131-01	Deny	Campbell, J.	Unknown	11/14/2000	44	44	44
140	Rachal, Rodney	WR-60,394-01	Deny	Rains	7/23/2004	10/4/2004	47	47	47
141	Resendiz, Angel	WR 58,172-01	Deny	Harmon	1/15/2004	1/21/2004	23	23	23
142	Reynosa, Juan	WR 66,260-01	Extend¨	Wallace	5/4/2007	5/4/2007	29	29	29
143	Reynosa, Juan	WR 66,260-01	Deny	Wallace	10/5/2006	10/11/2006	23	23	23
144	Rhoades, Rick	WR-78,124-01	Deny	Guiney	10/26/2013	5/21/2014	228	232	228
145	Richard, Michael	WR-47,911-02	Deny	Bacon	12/2/2006	12/28/2006	143	143	143
146	Richard, Michael	WR-47,911-01	Deny	Barr	2/29/2000	11/7/2000	42	42	42
147	Ripkowski, Britt	WR-65,238-01	Deny	Campbell, J.	12/9/2005	5/2/2006	93	93	93
148	Rivers, Warren	WR-53,608-02	Deny	Carter	12/15/2006	1/3/2007	91	91	91
149	Rivers, Warren	WR-53,608-02	Deny	Carter	5/18/2007	5/22/2007	145	146	145
150	Rivers, Warren	WR-53,608-01	Deny	Poe	8/12/2002	8/14/2002	163	163	163
151	Robinson, William	WR-57,207-01	Deny	Price	2/9/2007	3/13/2007	119	0	0
152	Rocha, Felix	WR-52,515-01	Deny	Harmon	10/24/2001	11/1/2001	67	67	67
153	Rodriguez, Lionell	WR-50,773-01	Deny	Brown, S.	Unknown	10/8/2001	187	187	187
154	Rosales, Mariano	WR-16,180-03	Deny	Hill	5/31/2002	6/5/2002	49	49	49
155	Rousseau, Anibal	WR-43,534-01	Deny	Brown, S.	Unknown	10/5/1999	13	13	13
156	Rowell, Robert	WR-52,673-01	Deny	Hill	Unknown	5/29/2002	59	59	59
157	Russell, Jr., Pete	WR-78,128-01	Deny	Bradley	10/8/2012	10/9/2012	92	92	92
158	Sales, Tarus	WR-78,131-01	Deny	Guiney	5/1/2013	8/15/2014	180	180	180
159	Shannon, Willie	WR-50,117-01	Deny	Poe	Unknown	1/20/2001	45	45	45
160	Sheppard, Erica	WR-78,132-01	Grant*	Brown, S.	10/4/2011	8/24/2012	240	244	230
161	Shore, Anthony	WR-78,133-01	Deny	Jackson	9/4/2012	9/11/2012	168	168	168
162	Slater, Paul	WR-78,134-01	Deny	Bond	10/1/2012	2/13/2014	197	202	200
163	Slater, Paul	WR-78,134-01	Deny	Bond	10/9/2013	3/5/2015	201	202	200
164	Smith, Demetrius	WR-70,593-01	Deny	Velasquez	7/18/2014	9/26/2014	113	113	113
165	Smith, Jack	WR-8,315-07	Deny	Hill	10/14/2011	12/28/2012	114	114	114
166	Smith, Jr., Clyde	WR-48,130-01	Deny	Alcala	8/10/1998	4/21/1999	29	29	29
167	Smith, Robert	WR-40,874-01	Deny	Ellis	12/17/1998	3/11/1998	123	123	123
168	Smith, Robert	WR-40,874-02	Grant	Ellis	2/10/2004	2/10/2004	13	13	13
169	Smith, Roosevelt	WR-77,646-01	Grant	Wallace	4/10/2012	4/10/2012	29	29	29
170	Smith, Roy	WR-42,801-01	Deny	Collins	Unknown	8/24/1999	42	42	42
171	Soffar, Max	WR-29,980-03	Deny	Keel	12/16/2011	1/5/2012	315	315	315
172	Sonnier, Derrick	WR-57,256-01	Deny	Wilkinson	7/31/2003	7/31/2003	38	38	38
173	Sorto, Walter	WR-71,381-01	Deny	Krocker	12/18/2008	12/29/2008	64	64	64
174	Tamayo, Edgar	WR-55,690-01	Deny	McSpadden	2/27/2003	3/28/2003	126	126	126
175	Tercero, Bernardo	WR-62,593-01	Deny	Keel	12/1/2004	6/10/2005	53	53	53
176	Thacker, Charles	WR-48,092-01	Deny	Alcala	Unknown	7/11/2000	54	54	54
177	Thomas, Daniel	WR-15,153-07	Deny	Stricklin	Unknown	9/3/2004	342	342	342
178	Thomas, Shannon	WR-51,306-01	Deny	Stricklin	Unknown	5/22/2001	39	39	39
179	Thompson, Charles	WR-78,135-01, -02	Deny	Shaver	2/7/2013	2/22/2013	166	166	166
180	Thompson, Robert	WR-61,379-01	Deny	Ellis	Unknown	1/25/2005	76	76	76
181	Tong, Chuong	WR-71,377-01	Deny	Bridgewater	6/20/2008	11/10/2008	206	206	206
182	Trottie, Willie	WR-70,302-01	Deny	Shaver	6/6/2008	7/10/2008	92	92	92
183	Valle, Yosvanis	WR-63,068-01	Deny	Godwin	9/1/2005	9/13/2005	73	73	73
184	Villanueva, Jorge	WR-49,591-01	Deny	Collins	Unknown	5/17/2001	149	149	149
185	Washington, Willie	WR-35,410-02, -03	Deny	Brown, S.	9/26/2006	9/28/2006	86	86	86
186	Wesbrook, Coy	WR-52,120-02	Deny	Carter	1/24/2007	1/26/2007	119	119	119
187	Wesbrook, Coy	WR-52,120-02	Deny	Carter	6/27/2014	9/5/2014	158	158	158
188	Wesbrook, Coy	WR-52,120-01	Deny	Shaver	3/4/2002	3/14/2002	122	122	122
189	Wheatfall, Daryl	WR-81,585-01	Review¯	Mendoza	7/9/2014	9/7/2014	49	49	49
190	Whitaker, II, George	WR-54,762-01, -02	Deny	Cosper	8/19/2002	11/18/2002	108	108	108
191	Will, II, Robert	WR-63,590-01	Deny	Brown, S.	9/1/2005	11/15/2005	26	26	26
192	Will, II, Robert	WR-63,590-03	Deny	Brown, S.	12/31/2014	1/26/2015	120	120	120
193	Williams, Arthur	WR-71,404-01, -02	Deny	Collins	6/1/2010	6/30/2010	49	49	49
194	Williams, Jeffrey	WR-50,662-01	Deny	Davies	Unknown	2/20/2003	75	75	75
195	Williams, Nanon	WR-46,736-02	Grant*	Campbell, J.	Unknown	5/3/2001	227	207	113

	Applicant	CCA Writ No.	Recommendation	Habeas Judge	State's Proposed FOFCL File Date	Trial Court's FOFCL Signed	Total State Proposed FOFCL	Total Trial Ct FOFCL	State's Proposed Adopted Verbatim
196	Williams, Perry	WR-63,237-01	Deny	Harmon	8/23/2005	8/26/2005	42	42	42
197	Williams, Richard	WR-43,907-01	Deny	Godwin	Unknown	10/13/1999	93	93	93
198	Wilson, Geno	WR-55,545-01	Deny	Hill	Unknown	3/26/2003	101	101	101
199	Woodard, Robert	WR-46,501-02	Deny	Cosper	8/14/2006	9/19/2006	143	143	143
			***CCA overrode recommendation**			**TOTAL**	**21658**	**21454**	**20506**
			¯ Trial court made no recommendation						
			¨Remanded to consider attorney abandonment/default, court recommended extending filing period						

Exhibit 2

	Habeas Judge	Sets of Findings Signed	Total State's Proposed	Total Adopted Verbatim	Adoption Rate	Former HCADA?
1	Alcala	4	302	302	100%	Yes
2	Anderson	5	541	541	100%	Yes
3	Bacon	3	312	312	100%	No
4	Barr	4	685	685	100%	Yes
5	Bond	2	398	398	100%	Yes
6	Bradley	1	92	92	100%	Yes
7	Bridgewater	2	341	341	100%	Yes
8	Brown, M.	2	369	369	100%	Yes
9	Brown, S.	15	2067	1922	93%	Yes
10	Burdette	1	87	87	100%	Yes
11	Campbell, C.	1	66	66	100%	Yes
12	Campbell, J.	5	549	435	79%	Yes
13	Carter	7	886	886	100%	Yes
14	Collins	6	346	396	100%	No
15	Cosper	6	500	500	100%	Yes
16	Davies	3	213	213	100%	Yes
17	Denson	1	29	29	100%	No
18	Ellis*	11	1131*	956	85%	Yes
19	Evans	2	208	208	100%	Yes
20	Garner	1	191	97	51%	No
21	Godwin*	8	704*	702	99%	Yes
22	Guerrero	1	211	211	100%	No
23	Guiney	3	463	463	100%	Yes
24	Harmon	10	694	684	99%	Yes
25	Hart*	6	1194*	1191	99%	Yes
26	Hill	15	1388	1388	100%	Yes
27	Huffman	1	69	69	100%	Yes
28	Jackson	1	168	168	100%	No
29	Jones*	2	299	0	0%	Yes
30	Keel	8	905	905	100%	Yes
31	Krocker	6	514	514	100%	Yes
32	Magee	2	260	260	100%	Yes
33	McSpadden	9	1109	1109	100%	Yes
34	Mendoza*	1	168*	168*	99%	Yes
35	Poe	4	458	458	100%	Yes
36	Powell	1	243	243	100%	No
37	Price	1	119	Written	0%	Yes
38	Rains	5	262	262	100%	Yes
39	Reagin	1	363	0	0%	No
40	Ritchie	2	188	188	100%	No

41	Robertson	1	111	111	100%	Yes
42	Shaver	3	380	380	100%	Yes
43	Stricklin*	5	650*	650	100%	Yes
44	Thomas*	4	284	284	100%	Yes
45	Velasquez	2	219	219	100%	Yes
46	Wallace	5	419	419	100%	No
47	Wilkinson	3	177	177	100%	Yes

*** indicates missing a one set of state's proposed FFCL to compare**

Exhibit 3

BERT GRAHAM
FIRST ASSISTANT

DISTRICT ATTORNEY'S BUILDING
1201 FRANKLIN, SUITE 600
HOUSTON, TEXAS 77002-1923

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

June 8, 2001

Texas Defender Service
Attn: Morris Moon
412 Main, Suite 1150
Houston, Texas 77002

Dear Mr. Moon

I am in receipt of your check for $159 made payable to "Harris County, Texas" which you delivered as payment for copies on the Anthony Shawn Medina capital murder file. I have delivered the copies to your assistant Anjali. I have also received two blank audio cassettes, which we will use to copy the audio tapes in our file. There will be no charge for copying the audiotapes.

Please let me know if you need anything further.

Sincerely,

Brian L. Rose

Brian L. Rose

blr

Exhibit 4

Belinda Hill
First Assistant

Criminal Justice Center
1201 Franklin, Suite 600
Houston, Texas 77002-1901

HARRIS COUNTY DISTRICT ATTORNEY

DEVON ANDERSON

March 11, 2015

Capital Punishment Clinic
ATTN: Jim Marcus
727 East Dean Keeton Street
Austin, Texas 78705

RE: Public Information Act Request Concerning *State of Texas v. Anthony Shawn Medina*, Cause No. 0726088

Dear Mr. Marcus,

You recently requested from this office the State's files relating to the matter of *State of Texas v. Anthony Shawn Medina*, Cause No. 0726088. Enclosed with this letter please find a copy of the requested information, totaling 1155 pages and 1 CD. Please submit a check to this office, made payable to "Harris County, Texas" for the amount $304.80 (948 black and white pages @ $0.10 each, 207 color pages @ $1.00 each, 1 CD @ $3.00 each).

Certain information believed to be confidential under State or Federal law or otherwise excepted from disclosure under the Texas Public Information Act has been withheld or redacted from this production.

Should you have any questions, I may be reached by phone at 713-755-5816, or by email at scott_meagan@dao.hctx.net.

Sincerely,

Meagan T. Scott
Assistant District Attorney

Exhibit 5

J0659784 eb

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

RONALD JEFFREY PRIBLE, JR. Plaintiff	*	
VS.	*	CIVIL ACTION NO.
	*	4:09-cv-01896
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIV. Defendants	*	

VIDEOTAPED DEPOSITION OF KELLY SIEGLER

Date — Edith A. Boggs, CSR

10-17-17 — HOUSTON, TEXAS

DEPOSITION OF KELLY SIEGLER

DEPOSITION AND ANSWERS of KELLY SIEGLER, taken before Edith A. Boggs, a certified shorthand reporter in Harris County for the State of Texas, taken at the law offices of Hilder & Associates, 819 Lovett Boulevard, Houston, Texas, on the 17th day of October, 2017, between the hours of 9:05 a.m. and 6:23 p.m.

MS. MIRANDA: Okay. And if you -- before we do that, if you could just give me a few minutes to consult with them, then maybe we can come to -- I can figure that out.

MS. SCARDINO: That's fine.

MS. MIRANDA: Okay.

THE VIDEOGRAPHER: The time is 12:25. We're off the record.

(Lunch recess.)

THE VIDEOGRAPHER: This is the beginning of file 5. The time is 1:20. We are on the record.

Q. (BY MS. SCARDINO) Okay. Ms. Siegler, earlier we were talking about the open file policy that you said the DA's office had during this time period that Mr. Prible was prosecuted, and in that -- when a defense attorney came in to view the file, would they be able to take notes of what they were reading?

A. Yes.

Q. But they would not be able to make copies of the documents in the file; is that right?

A. Correct.

Q. And you testified that you had no work product file that you kept as such, correct?

A. Not per se, not necessarily, no.

Q. Okay. And that is because all of your work

product would have been reviewable by the defense, right?

A. I'm trying to think of what work product might have come up in Prible early on. I can't think of what it would have been.

Q. Okay.

A. But my notes I wouldn't have considered work product.

Q. Okay. All notes -- any notes that you took working on this case would have been available to defense attorneys to see; is that right?

A. Yes.

Q. Okay. And how do you define work product? What's your understanding of that definition? The legal definition of work product.

A. We tried to keep most things not work product just because it was simpler.

Q. Okay. Do you -- do you know what the term "work product" -- how it's defined under the law?

A. Tell me.

Q. No, I'm asking you if you -- if you know?

A. No, I don't know the criminal definition of it.

THE VIDEOGRAPHER: I'm sorry, Ms. Scardino, can you put on the microphone.

MS. SCARDINO: I'm sorry.

Exhibit 6

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

RONALD JEFFREY PRIBLE, JR., Plaintiff,	*	
VS.	*	C.A. NO. 4:09-cv-01896
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Defendant.	*	

****

ORAL AND VIDEOTAPED DEPOSITION OF VICTOR WISNER

VOLUME 1

SEPTEMBER 20, 2017

****

ORAL AND VIDEOTAPED DEPOSITION of VICTOR WISNER, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on September 20, 2017, from 9:03 a.m. to 11:26 a.m., before Carol Jenkins, CSR, RPR, CRR, in and for the State of Texas, reported by machine shorthand, at the offices of Hilder & Associates, 819 Lovett Boulevard, Houston, Texas 77006, pursuant to subpoena and the Federal Rules of Civil Procedure.

A P P E A R A N C E S:

know, the Michael Morton fiasco.

Q. Right. Do a prosecutor's obligations under Brady depend on whether the witness to whom the evidence relates is testifying or nontestifying?

A. No.

Q. Okay. It's the same across the board?

A. Yes.

Q. Okay. And when must Brady evidence be disclosed?

A. As soon as possible.

Q. Okay. So what was the procedure -- so the -- excuse me, the burden is not on the defense, in other words, to request the evidence? The onus is on the prosecutor to produce it as -- as soon as possible?

A. Yes.

Q. Okay. What was the procedure at the DA's office concerning the disclosing of evidence from the case file to the defense?

A. We would always have an open file policy unless there was some extraordinary need not to, but it would not include our personal notes in preparation for trial.

Q. Work product as --

A. Right.

Q. -- as that is defined under the law?

A. Yes, ma'am.

Q. Work product, okay.

And how would the procedure go if a -- in other words, you're saying you disclosed the whole file? You had an open file policy other than work product?

A. (Witness nods head.)

Exhibit 7

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

RONALD JEFFREY PRIBLE, JR.,	*	
Plaintiff,	*	
VS.	*	C.A. NO. 4:09-cv-01896
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,	*	
Defendant.	*	

****

ORAL AND VIDEOTAPED DEPOSITION OF JOHNNY BONDS

VOLUME 1

SEPTEMBER 19, 2017

****

ORAL AND VIDEOTAPED DEPOSITION of JOHNNY BONDS, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on September 19, 2017, from 8:53 a.m. to 2:54 p.m., before Carol Jenkins, CSR, RPR, CRR, in and for the State of Texas, reported by machine shorthand, at the offices of Hilder & Associates, 819 Lovett Boulevard, Houston, Texas 77006, pursuant to subpoena and the Federal Rules of Civil Procedure.

the warrant was issued, it would go to the sheriff's department. And basically, that's their -- their deal. We don't have anything to do with it. Once we file it, the actual moving the inmates back to Harris County for trial, it's not our responsibility.

Q. Okay.

A. I have no idea how they do it.

Q. Okay. Was that request -- would you normally request that the defendant be moved immediately or would they wait?

A. I don't have any idea.

Q. Don't know?

A. No.

Q. Okay. You don't know what the case was in this -- in Mr. Prible's case?

A. No, I have no idea.

Q. Okay. In the Temple case, Ms. Siegler testified that her practice was to withhold witness statements from the defense until after the witness testified. And then the defense could -- would have to read them during a break in the trial.

Do you recall what the situation was in Mr. Prible's case if witness statements were provided to the defense?

A. I have no idea.
Q. Or when they were provided to the defense?
A. I don't know.
Q. Okay. So you don't -- you couldn't deny that they were withheld? You don't know if they were withheld either -- either way?
A. I don't -- I don't have any idea one --
Q. Okay.
A. -- way or the other.
Q. Do you recall this being her practice?
A. I know that Kelly didn't give up anything she didn't have to give up. I know she followed the law. I never saw her do anything that was -- was in violation of the rules, so...
Q. Okay.
A. But I know she never gave anything away. She made -- she made them -- she made the defense earn what they got.
Q. Okay. Do you know if the rules about disclosing witness statements changed depending on whether that was a testifying witness or not?
A. I know there were some changes after I retired.

Exhibit 8

K&L|GATES

Kirkpatrick & Lockhart Preston Gates Ellis LLP
1601 K Street NW
Washington, DC 20006-1600
T 202.778.9000 www.klgates.com

July 17, 2007

BY FACSIMILE AND REGULAR MAIL

Brian W. Stolarz
(202) 778-9446
(202) 778-9100
brian.stolarz@klgates.com

Scott Durfee
General Counsel
Harris County District Attorney's Office
1201 Franklin Street
Suite 600
Houston, Texas 77002

Re: State v. Alfred Dewayne Brown, Cause No. 1035159 (Judge Mark Kent Ellis)
Open Records Request

Dear Mr. Durfee:

Pursuant to our discussion today, please accept this as a formal open records request to your office regarding the above-captioned matter. We are not requesting access to District Attorney Work Product or any document related to other matters confidential by law.

As discussed, we will review the file in your office at a mutually convenient time. We would like to schedule an appointment to review the documents on August 2-3, 2007 if possible.

Please do not hesitate to contact me at (202) 778-9446 if you have any questions regarding this request.

Sincerely,

Brian W. Stolarz

cc: Lin Medlin, Esq.

Exhibit 9

Belinda Hill
First Assistant

Criminal Justice Center
1201 Franklin, Suite 600
Houston, Texas 77002-1901

HARRIS COUNTY DISTRICT ATTORNEY

DEVON ANDERSON

January 5, 2016

Mr. Stephen Hoffman
Office of Attorney General
Postconviction Litigation Division
300 W. 15TH St., 8TH Floor
Austin, Tx 78701

Re: *Ex parte Christopher Devon Jackson,* cause no. 1056372, 230TH District Court

Dear Steve,

In response to the federal district court's December 23, 2015 order in the above-styled case, I reviewed the State's files to locate Christopher Jackson's medical records while incarcerated in the Harris County Jail awaiting trial.

On April 18, 2013, I represented the State in a short writ evidentiary hearing in the defendant's case. The hearing had originally been scheduled for October, 2012. However, I was diagnosed with breast cancer and had a bilateral mastectomy in October, 2012, so the hearing was postponed until April. Apparently, I placed Jackson's jail medical records in the writ file for review prior to my surgery and did not return them to the trial file, although I have no recollection of doing this. I am sending the records to you by fed ex to comply with the federal district court's order.

I am also enclosing the transcript of the April 18, 2013 writ hearing that indicates that trial counsel was aware of Jackson's jail medical records. Further, I spoke with prosecutor Caroline Dozier who confirmed that trial counsel was allowed to the view the State's trial file that contained Jackson's jail medical records.

Sincerely,

Roe Wilson

ROE WILSON
(713) 274-5990
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enc.