No.

In The
Supreme Court of the United States

SCOTT ARTHUR GARDNER,
Petitioner,

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Divisions,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert Sirianni
BROWNSTONE, P.A.
400 North New York Avenue
Suite 215
Winter Park, Florida 32789
(407) 388-1900
* *Counsel of Record*

October 10, 2013

QUESTIONS PRESENTED

1. Does Due Process of Law Require the Prosecution to Furnish a Criminal Defendant with Information that Negates an Indispensable Element of the Crime Charged, But Does Not Fully Exculpate Him from All Criminal Activity And Instead Establishes Only a Lesser Offense?

2. Does the Sixth Amendment Guarantee of Effective Assistance of Counsel Require a Criminal Defense Attorney to Conduct a Reasonable Investigation of a Case Using an Investigator With An Undivided Duty of Loyalty, Free of Conflicts of Interest?

3. Does Due Process of Law and the Constitutional Prohibition Against Cruel and Unusual Punishments Bar the Conviction of a Legally or Factually Innocent Person, and If So, Is Actual Innocence a Freestanding Constitutional Violation Cognizable On Federal Habeas Review?

4. Is Due Process Violated Where a Person is Represented By an Attorney Who is Disbarred or Suspended From the Practice of Law and Fails to Inform Their Client and the Court That the Attorney Is Legally Ineligible to Represent That Client?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit. Rule 14.1(b) of the Supreme Court Rules.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

Table of Authorities

CONSTITUTIONAL PROVISION STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Scott Arthur Gardner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on August 2, 2013.

DECISIONS BELOW

The August 2, 2013 opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is not reported, and is reprinted in the separate Appendix to this Petition, page App. 25. The prior opinion of the United States District Court for the Northern District of Texas (Dallas Division), entered February 20, 2013, (Docket # 3:11-cv-02562-P), is reported at Slip Copy, 2012 WL 7170401, Slip Copy, 2013 WL 646267 (February 20, 2013) and is reprinted in the separate Appendix to this Petition, page App. 15.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit to be reviewed was entered August 2, 2013. The instant Petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

The Texas Statutes involved are as follows:

Texas Penal Code § 22.021

Tex. Code of Crim. Proc. Article 42.12, § 4

Tex. Code of Crim. Proc. Article 11.07

STATEMENT OF THE CASE

Petitioner was charged in two separate indictments filed in the 292nd District Court of Dallas County, Texas Cause # F02-45405-SV (as to Brienna Gardner) and Cause # F02-45407-SV (as to Samantha Gardner) with the offenses of aggravated sexual assault of a child, in violation of Texas Penal Code § 22.021(a)(1)(B)(i), alleging Petitioner "intentionally and knowingly cause[d] the

penetration" of his two daughters' sexual organs "by . . . the fingers of the defendant."

Petitioner retained a local criminal defense attorney to represent him in the trial court and defend him upon the indictments, who in turn brought in a second attorney to assist him with the case. Trial counsel retained two child abuse therapists to provide "counseling" to both complainants. Trial counsel did not, however, retain the services of an investigator to interview the complainants, gather evidence, take statements, or otherwise investigate. Neither of the two attorneys made an attempt to interview the complainants, apparently out of concern that they would be subjected to a possible witness tampering accusation.

Petitioner pled guilty to both charges on March 29, 2004, without a promised sentence, and elected to request a jury to assess punishment only, a procedure available to him under Texas state law. On April 4, 2004, a jury was empanelled to decide punishment. In that proceeding, Petitioner testified that he was a blackout drinker and did not remember the acts alleged in the indictments. Petitioner's trial counsel argued to the jury that he should receive a sentence of probation, permitted under Texas law if a jury so decides. Tex. Code of Crim. Proc. Article 42.12, § 4. The jury, however, elected to sentence Petitioner to 12 years imprisonment on each count for an aggregate sentence of 24 years in state prison and $20,000.00 in fines.

Petitioner perfected an appeal to the Court of Appeals of Texas, Fifth District, Dallas. That court affirmed his conviction in an unpublished decision on July 15, 2005. Gardner v. State, 2005 WL 1654590 (July 15, 2005).

Through new counsel, Petitioner filed two state petitions for writs of habeas corpus pursuant to Texas Code of Criminal Procedure Article 11.07 on August 11, 2006, which were subsequently amended and supplemented. The petitions raised several issues: ineffective assistance of counsel, actual innocence, and deprivation of Due Process in the form of a Brady v. Maryland violation. The state habeas court conducted a hearing upon the petitions from January 18, 2011 through January 20, 2011. At the hearing, both of Petitioner's daughters testified as witnesses on his behalf.

At the start of the habeas hearing, the prosecution provided Petitioner's new counsel with notes made by the assigned Assistant District Attorney of an interview with Brienna Gardner, reflecting that she told the Assistant District Attorney that no vaginal penetration had occurred, contrary to her prior statements and contrary to the allegations in the indictment. The notes also reflected that this interview had taken place and was documented prior to the Petitioner's guilty plea hearing.

Samantha Gardner testified that after Petitioner's guilty plea hearing, she first saw the indictment containing allegations that Petitioner had anally penetrated her. She further testified that she

immediately told the Assistant District Attorney that those allegations were false and incorrect, and expected the Assistant District Attorney to take appropriate remedial measures.

After being given a forceful perjury admonition by the habeas court, Brienna Gardner testified persistently that Petitioner had never penetrated her vaginally. Both Samantha and Brienna Gardner testified that had trial counsel spoken with them, they would have told the truth about the alleged offenses.

Both of Petitioner's original trial attorneys also testified at the habeas hearing they never received these notes prior to the plea hearing, that they considered the notes to be exculpatory and material to the case, and therefore affected the advice given to Petitioner as to whether to plead guilty or proceed to trial.

The assigned Assistant District Attorney also testified at the habeas hearing and admitted to documenting the interview with Brienna Gardner in which she retracted the allegations of vaginal penetration. She admitted to withholding the notes from Petitioner and his trial counsel because in her opinion, the notes were not exculpatory.

The state habeas court made several findings at the conclusion of the hearing, specifically that trial counsel's concerns that they would be subjected to witness tampering accusations was a reasonable trial strategy and therefore not ineffective; that despite the complainants' testimony that no penetration had

occurred, Petitioner failed to establish actual innocence; and that no Brady violation had occurred. As a result, Petitioner's petitions for state habeas relief were denied.

Following the denial of his habeas petitions, Petitioner appealed to the Texas Court of Criminal Appeals. In an unpublished opinion, the Texas Court of Criminal Appeals affirmed the denial of habeas relief on September 28, 2011. Ex Parte Gardner, 2011 WL 4485421 (September 28, 2011).

On September 29, 2011, Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, Northern District of Texas. Petitioner was now represented by a new attorney, John D. Nation, Esq., a lawyer whom was retained, without Petitioner's knowledge or consent, by the law firm Petitioner actually hired to prosecute the habeas petition. Unbeknownst to Petitioner, the Respondent, or the District Court, John D. Nation, Esq., was suspended from the practice of law by the Texas State Bar from March 1, 2012 through February 28, 2014, for misconduct - specifically, neglect in representing a client in a post-conviction proceeding. He was ordered by the Texas state court to notify all courts and clients of the suspension in which he was counsel in pending matters. The District Court was not notified.

On April 10, 2012, the District Court issued the Findings and Recommendation of the United States Magistrate Judge, recommending denial of the petition and denial of the issuance of a certificate

of appealability. Petitioner filed timely objections to the Magistrate's findings and recommendation, but the District Court adopted the Magistrate's report, entering judgment against Petitioner on February 20, 2013.

Petitioner timely noticed an appeal to the United States Court of Appeals for the Fifth Circuit, and filed a motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). The Respondent did not file any opposition. During the pendency of that motion, this Court decided McQuiggin v. Perkins, ___ U.S. ___, 133 S.Ct. 1924 (2013). Petitioner also discovered records from the Texas State Bar, establishing that John D. Nation, Esq., was actually suspended from the practice of law during the pendency of the petition in the District Court, and failed to so notify the District Court. The records also established several prior suspensions and disciplinary actions against the same attorney – all for neglect of post-conviction matters. Petitioner promptly supplemented his motion for a certificate of appealability with this new information as well as the decision in *McQuiggin.* Thereafter, on August 2, 2013, the Court of Appeals (Honorable Carolyn Dineen King) denied Petitioner's motion for a certificate of appealability in a written decision.

This timely Petition followed.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO CLARIFY THIS COURT'S HOLDING IN BRADY v. MARYLAND, BECAUSE DUE PROCESS OF LAW, PUBLIC POLICY AND FUNDAMENTAL FAIRNESS REQUIRE THAT PROSECUTORS FURNISH TO DEFENDANTS EVIDENCE WHICH NEGATES A SPECIFIC ELEMENT OF THE CHARGED OFFENSE DOWN-GRADING THE CRIME TO A LESSER INCLUDED OFFENSE.

In Brady v. Maryland, 373 U.S. 83 (1963), this Court held that Constitutional Due Process requires a prosecutor to furnish any exculpatory material in his possession to a defendant upon request. Specifically, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. This Court extended the holding of Brady, finding that the prosecution has the duty to provide the defendant with exculpatory evidence even if there has been no request from the accused. United States v. Agurs, 427 U.S. 97 (1976). That holding was again expanded in Kyles v. Whitley, 514 U.S. 419 (1995), where this Court held that in order to comply with Brady, the prosecution has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police.

In Strickler v. Greene, 527 U.S. 263 (1999), this Court summarized the three elements of a prima facie case of a Brady violation: (1) the material at

issue must be favorable to the defense, (2) the prosecution willfully or inadvertently fails to turn over the material to the defense, and (3) prejudice to the defendant occurs as a result. Id. The type of evidence encompassed by the Brady rule must be material as defined by this Court. Evidence is material, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." See Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

The majority of this Court's rulings in a line of cases following Brady essentially focus on three basic types of evidence: (1) evidence that tends to exonerate the accused, either by showing that someone else potentially committed the crime, or that no crime was committed at all; (2) evidence that directly or indirectly impeaches a prosecution witness on a material issue; and (3) mitigating evidence employed at the sentencing phase, especially in death sentences. See Smith v. Cain, 132 S.Ct. 627 (2012) (holding that evidence of an eyewitness statement contradicting her testimony is plainly material, and the State's failure to disclose such statements is a Brady violation); Wetzel v. Lambert, 132 S.Ct. 1195 (2012) (vacating and remanding the Third Circuit's decision for failing to address the ambiguous nature of petitioner's Brady claims); Cone v. Bell, 556 U.S. 449 (2009) (remanding for a full review of the effect of improperly suppressed evidence regarding the seriousness of defendant's drug problem on his sentence); United States v. Bagley, 473 U.S. 667 (1985) (holding that a

court must make a determination of whether the outcome of the case would have been different when deciding whether to vacate a sentence on the grounds that impeachment evidence was not provided to the defense); Giglio v. United States, 405 U.S. 150 (1972) (holding that an undisclosed promise of leniency to a witness in exchange for that witness' testimony and cooperation violates due process); but see, Williams v. Taylor, 529 U.S. 420 (2000) (holding that petitioner was not entitled to an evidentiary hearing on his claim that prosecution's failure to disclose a co-defendant's psychiatric report violated Brady).

This Court has not extended the Brady rule to evidence which downgrades a crime to a lesser offense than that for which the accused is charged or convicted. However, Due Process is violated where the prosecution is in possession of material evidence that negates an essential element of a charged offense but suppresses that information and moves forward with the prosecution. If the evidence is insufficient to establish the elements of the original charge, but establishes a prima facie case of a lesser included offense, it should be required that the prosecutor turn this evidence over to the defense and amend the filed charges to reflect the available evidence. It is undisputed that more serious offenses carry more severe penalties. Here, the difference between the first degree felony and the second degree felony was profound.

Under Texas law, the maximum permissible sentence for a first degree felony is 99 years imprisonment, with a minimum of 5 years imprisonment. Texas Penal Code § 12.32. However,

the sentencing range for a second degree felony is a minimum of 2 years imprisonment, and a maximum of 20 years imprisonment – 4 years less than the sentence Petitioner actually received. Texas Penal Code § 12.33. Any conviction is violative of Due Process where the prosecution suppressed evidence which negated an essential element of the original crime charged.

The Fifth Circuit has held that there is no Brady claim when the information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence. See Pippin v. Dretke, 434 F.3d 782, 790 (5th Cir. 2005) (quoting United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980)). The Pippin court reasoned that the district court's resolution of the Brady claim was not debatable among jurists of reason because the defense expert had full access to the ballistics evidence and an opportunity to conduct his own tests before trial. Id, at 189. This reasoning does not apply to the present facts because the evidence here is testimonial instead of physical. Physical evidence, like the DNA evidence in Pippin, can be examined by both sides independently without uneven positions of credibility. Testimonial evidence is different because it presents uneven positions of credibility depending on the source of the testimony and circumstances of its utterance.

Here, victims told the prosecutor prior to trial that their father's actions did not constitute the elements of the crime charged. Here, in meetings with the prosecutor where the victims were safe and protected by the state, with no incentive or pressure

to recant their accusations, the victims told the prosecutors that their father only performed acts sufficient to meet the elements of a lesser included offense. This evidence carries a perception of credibility higher than evidence procured from a defense attorney or investigator. The prosecutor here failed to turn-over this material evidence and continued the prosecution under the theory of the more serious offense. Then, when the victim clarified the factual basis for the crime charged, which eliminated a crucial element of the original charge, the prosecutor neglected to provide this evidence to Petitioner.

This is a situation where an over-zealous prosecutor knew that the factual basis supporting his theory of the case relied heavily on the testimony of the victim. Even though the factual basis still supported a lesser-included offense after the key witness recanted, the Prosecutor moved forward with the original charge and unreasonably neglected to amend the charges to reflect the evidence which now supported only a lesser-included offense.

In Breakiron v. Horn, 642 F.3d 126 (3rd Cir. 2011), the jury found Breakiron guilty of first-degree murder and robbery at trial and recommended a death sentence at the penalty phase. The trial court sentenced Breakiron to death on the murder conviction plus five to ten years of imprisonment on the robbery conviction. Id. at 130. Breakiron then instituted a federal habeas proceeding ultimately raising eighteen claims. Id. Among them were claims that the prosecution withheld evidence in violation of Brady that he could have used to impeach a key witness for the prosecution and that

defense counsel was ineffective for failing to request a special jury instruction including the lesser included offenses of theft and second degree murder. Id. The District Court issued findings of fact on the Brady claims and granted relief on three of those claims invalidating the murder conviction. Id. The District Court also concluded that Breakiron's Brady claims, and his two claims of ineffective assistance of counsel, whether considered alone or cumulatively, required vacatur of the robbery conviction. Id. The District Court concluded that the prosecution's suppression of impeachment evidence undermines the confidence in the murder conviction because the key witnesses supported the prosecution's theory that Breakiron intended to kill the victim and that he intended to steal at the time he attacked her. Id. In assessing the materiality of undisclosed impeachment evidence, the Fifth Circuit has held that a court "must consider the nature of the impeachment evidence improperly withheld and the additional evidence of the defendant's guilt independent of the disputed testimony." Wilson v. Whitley, 28 F.3d 433, 439 (5th Cir. 1994), quoting United States v. Weintraub, 871 F.2d 1257, 1262 (5th Cir. 1989).

Here, the prosecutor's theory relied heavily, if not entirely, on the testimony of the victims. Like in Breakiron, the prosecutor here withheld evidence that should have been available to impeach the key testimony of the victims. The undisclosed impeachment evidence went to the heart of the case. This case rested almost entirely upon the testimony of Petitioner's two minor daughters, one of whom recanted and denied essential elements of the

charged crime to the prosecutor (who documented the same) before Petitioner entered a guilty plea. There was no corroborating evidence other than the testimony of the two complainants. At the state habeas hearing, the other complainant denied the charges altogether, after being forcefully warned by the habeas court as to the potential consequences for perjury. In light of the prosecution's lack of other evidence, the victim testimony constituted the bedrock of the State's case. Thus, impeachment evidence of that testimony was clearly material.

Instead of recognizing and providing Petitioner with this Brady evidence, the Prosecutor intentionally failed to turn over this evidence. Petitioner did not learn that the prosecution had this evidence until about two years later in state habeas proceedings. At that point, robbed of this critical information, Petitioner could not go back in time and make an informed decision about whether or not to plead guilty or proceed to trial. Matthew v. Johnson, 201 F.3d 353, 364 n. 15 (5th Cir. 2000) (suggesting that, "[e]ven if the nondisclosure is not a Brady [v. Maryland] violation," there may be situations in which the prosecution's failure to disclose evidence makes it "impossible for [a defendant] to enter a knowing and intelligent plea"). Other circuits have likewise held that the withholding of Brady material renders a guilty plea unknowing and involuntary. See Miller v. Angliker, 848 F.2d 1312 (2d Cir. 1988); Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995); United States v. Wright, 43 F.3d 491 (10th Cir. 1994); Tate v. Wood, 963 F.2d 20 (2d Cir. 1992); White v. United States, 858 F.2d 416 (8th Cir. 1988), cert. denied, 489 U.S. 1029, 109 S.Ct. 1163, 103

L.Ed.2d 221 (1989); Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985), cert. denied sub nom.; Campbell v. Morris, 475 U.S. 1048 (1986).

Neither Texas state courts nor the District Court applied this standard. In this case, the District Court ruled that Appellant's guilty plea waived all non-jurisdictional defects, including his Brady claim. The District Court held that this "is decidedly the rule in the Fifth Circuit and the one that this Court is bound to apply." This was a misapplication of established post-Brady Supreme Court precedent requiring that clearly material evidence must be available in order to make a fully informed and knowing decision to change his plea. McCarthy v. United States, 394 U.S. 459, 466 (1969).

Furthermore, in Cone v. Bell, 556 U.S. 449 (2009), this Court addressed a situation where all of the documents suppressed by the state shared a common feature of strengthening the inference that Cone was impaired by his use drugs around the time his crimes were committed. The evidence could also have been used to impeach witnesses whose trial testimony cast doubt on the defendant's drug addiction. Here, Petitioner admitted to the jury during the penalty phase that he was a "black-out drinker" and did not remember the details of his involvement, but that he pled guilty because he did not want to call his daughters liars. At this stage, having the improperly withheld Brady evidence would have been tremendously useful mitigation evidence to Gardner because it would tend to prove that he was only guilty of a lessor-included offense. Thus, this evidence could have been used as

exculpatory, impeachment, and mitigation evidence making it both highly material and highly prejudicial because it was not available for any of these purposes. By suppressing this evidence, the prosecution prevented Petitioner from using this material evidence for any purpose.

It is important for this Court to now extend Brady to curb over-zealous prosecutors from charging defendants with crimes unsupported by the evidence. When a prosecutor learns of material evidence which negates an element of the crime charged, the Brady rule applies and requires the prosecutor to disclose this evidence. This Court should now specifically hold that this duty extends to evidence which down-grades an offense to a lesser-included crime. This will coincide with the Special Responsibilities of a Prosecutor as promulgated by Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct. Rule 3.8(a) instructs prosecutors to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. Prosecutors determine what charges to pursue based on the evidence available to them, but Due Process is violated when a Prosecutor selects to ignore a piece of material evidence available to them especially when that evidence negates an essential element of a charged offense.

II. REVIEW IS NECESSARY TO GIVE IMPORT TO THIS COURT'S DECISION IN STRICKLAND V. WASHINGTON AND ITS PROGENY, AND GENERALLY THAT THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES DEFENSE COUNSEL TO INVESTIGATE THE CASE, AND TO SETTLE THE DIFFERING INTERPRETATIONS THAT STATE COURTS OF LAST RESORT AND THE UNITED STATES COURTS HAVE GIVEN TO THIS COURT'S HOLDING IN STRICKLAND V. WASHINGTON AND ITS PROGENY.

The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

This Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, supra at 690.

In following this Court's mandate in Strickland, Federal and State courts have held that a lawyer who fails to adequately investigate the facts of the case, and introduce evidence of innocence or raise sufficient doubt as to his guilt, renders their performance Constitutionally-deficient. Davis v. Alabama, 596 F.2d 1214 (5th Cir.1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980) (defense attorneys who were on notice of their client's mental history, but failed to investigate or pursue an insanity defense, did not provide effective assistance of counsel); Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir.1984), cert. denied, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) ("Effective representation hinges on adequate investigation and pre-trial preparation.... [A]s a general rule an attorney must investigate a case in order to provide minimally competent professional representation."); House v. Balkcom, 725 F.2d 608, 617–18 (11th Cir. 1984), cert. denied, 469 U.S. 870, 105 S.Ct. 218, 83

L.Ed.2d 148 (1984). ("Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation"); Pavel v. Hollins, 261 F.3d 210, 223 (2d. Cir. 2001) (counsel is ineffective where, based upon insufficient investigation of a client's defense, he fails to consult with and to call an appropriate expert witness); See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding "the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial"); Scott v. Wainwright, 698 F.2d 427, 429–30 (11th Cir. 1983) (defense counsel's failure to familiarize himself with the facts and relevant law made him so ineffective that the petitioner's guilty plea was involuntarily entered); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel); Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982) (where counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims, counsel fails to provide service within the expected range of competency).

The courts below correctly held that an attorney, in carrying out his Constitutional duty to fully investigate a case and possible avenues of defense, may delegate the duty to an investigator. Gardner v. Thaler, 3:11-CV-2562-P, 2013 WL 646267

at 1 (N.D. Tex. 2013) (citing Flores v. State, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978) (holding that trial counsel does not have to personally interview witnesses in order to investigate the facts), see also Callahan v. State, 24 S.W.3d 483, 486 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd); Cano v. State, No. 14-06-003 77 -CR, 2007 WL 2872418 at 5 (Tex. App. -- Houston [14th Dist.], Oct. 4, 2007, pet. refd); Thomas v. State, No. 05-91-00267-CR, 1993 WL 609 at 5 (Tex. App. --Dallas, Jan. 5, 1993, pet refd).

However, if that duty is delegated, the investigator becomes an extension of the attorney, and subject to the same ethical considerations of undivided loyalty, confidentiality, and zealous advocacy in finding information and evidence favorable to the defense. When an attorney delegates the critical duty of investigation to a third party that does not have an undivided loyalty to the client, and is not singularly-minded in protecting the interests of an accused, the attorney renders Constitutionally-deficient assistance.

Here, instead of interviewing the complainants directly or having a trained defense investigator interview the complainants, trial counsel instead had two therapists speak with the complainants to provide "counseling" services for them. The record establishes that these therapists were not tasked with testing the accounts of the complainants, searching for and developing inconsistencies, exploring motives to fabricate, exploring any effects of undue suggestion by any other parties, or finding leads to other exculpatory evidence – all tasks that are the function of a

partisan defense investigator with the same single-minded devotion to a client's cause as defense counsel.

It must be noted that as mental health professionals, the counselors operated under a hopelessly irreconcilable conflict of interest. On the one hand, the counselors had a duty to their patients – the complainants – to be their confidant, to assist them in identifying the cause of their mental angst, to maintain their confidences, and to provide reasonably prudent guidance for further treatment. Additionally, the same therapists were under a legal obligation to the State to notify authorities if the children were sexually abused, and violate the complainants' confidences if necessary, and further implicate the Petitioner. On the other hand, the therapists owed a duty to the defense attorneys to provide them with information that would conceivably be used at trial to destroy the credibility of their own patients.

The record further establishes that trial counsels' primary motivation in sending therapists to provide "counseling" to the complainants was the unfounded and unreasonable belief that such conduct would somehow subject them to potential prosecution or at least an allegation of witness tampering.

The Sixth Amendment guarantees a criminal defendant the right to present witnesses to establish his defense without fear of retaliation against the witness by the government," and "the Fifth Amendment protects the defendant from improper governmental interference with his defense." United

States v. Bieganowski, 313 F.3d 264, 291 (5th Cir.2002) (internal quotation marks and citations omitted). "[A]s a general rule, witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.'" United States v. Soape, 169 F.3d 257, 270 (5th Cir.1999) (quoting Gregory v. United States, 369 F.2d 185, 188 (D.C.Cir.1966)). As the Eleventh Circuit Court of Appeals has explained, "…so called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." Hardwick v. Crosby, 320 F.3d 1127, 1186 (11th Cir. 2003) (citations omitted).

Accordingly, it was not reasonable for counsel to forego an investigation that might uncover more damaging evidence, possibly inflame the witnesses to press charges, or any other plausible reason. It was motivated by selfish concerns which were wholly unreasonable and without any sound basis in fact or law. As such, the Petitioner received ineffective assistance of counsel. Based on the foregoing, it was an unreasonable application of clearly established federal law for the Texas courts and the courts below to deny Petitioner's claims of ineffective assistance. Review of this case is necessary to further define the contours of the Sixth Amendment right to effective assistance of counsel.

III. REVIEW IS NECESSARY TO GIVE IMPORT TO THIS COURT'S RECENT HOLDING IN MCQUIGGIN V. PERKINS AND GENERALLY THAT A CONVICTION OF A FACTUALLY AND LEGALLY INNOCENT PERSON VIOLATES DUE PROCESS OF LAW AND THE EIGHTH AMENDMENT'S PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT AND TO SETTLE THE DIFFERING INTERPRETATIONS THAT THE UNITED STATES COURTS HAVE GIVEN TO THIS COUR"S HOLDING IN MCQUIGGIN V. PERKINS.

Actual innocence is the absence of facts that are prerequisites for the sentence given to a defendant. Black's Law Dictionary (9th ed. 2009), available at Westlaw BLACKS. As independent grounds for federal habeas relief, its utility remains unclear. In both the capital and noncapital contexts, actual innocence is shown "when the habeas applicant can demonstrate that [an] alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense." Gibbs v. United States, 655 F.3d 473, 478 (6th Cir. 2011) cert. denied, 132 S. Ct. 1909 (2012) (citing Bousley v. United States, 523 U.S. 614, 623 (1998) (noncapital); Schlup v. Delo, 513 U.S. 298, 327-28 (1995) (capital)). The petitioner does not need to prove he has committed no offense at all; simply that the facts show he did not commit the offense for which he was actually convicted. Bousley, 513 U.S. at 623 ("actual innocence…means *factual* innocence…")(emphasis added).

To prove constitutional error, the petitioner must present new reliable evidence—whether it be exculpatory, scientific evidence, trustworthy eyewitness accounts or critical physical evidence—that was not presented at trial. Schlup, 513 U.S. at 324. Whether requiring "newly discovered evidence" or merely "newly presented evidence" (see Wright v. Quarterman, 470 F.3d 581, 591 (5th Cir. 2006), the Court has firmly stated that even a compelling actual innocence claim is only cognizable where the petitioner also shows there is an independent constitutional violation. Herrera v. Collins, 506 U.S. 390, 391 (1993). In the extraordinary case where the constitutional safeguards of the judicial system fail and an actually innocent person is convicted, the Court placed great faith in the executive clemency of state governors to be a "'fail safe' remedy." Id. at 391-92 (Scalia, J., concurring).

There is a clear divide within the federal courts as to the existence of a freestanding claim of actual innocence cognizable on federal habeas review. See Albrecht v. Horn, 485 F.3d 103 (3d Cir. 2007); Araujo v. Chandler, 435 F.3d 678 (7th Cir. 2005); Hunt v. McDade, 205 F.3d 1333 (4th Cir. 2000); Jones v. Johnson, 212 F.3d 595 (5th Cir. 2000); Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir. 1998), cert. denied, 525 U.S. 1024 (1998). The claims themselves have been variously grounded in due process (convicting and incarcerating the innocent violates their due process interest in their own liberty) as well as the prohibition of cruel and unusual punishment (it is cruel to punish the innocent). Cunningham v. Dist. Attorney's Office for

Escambia Cnty., 592 F.3d 1237, 1260 (11th Cir. 2010) (due process); McKithen v. Brown, 626 F.3d 143, 155 (2d Cir. 2010) (cruel and unusual punishment).

This debate is fueled by a well-documented fact: notwithstanding the arsenal of rights and protections available to a criminal defendant under the Constitution, defendants may still be convicted and punished for an underlying offense for which they are actually innocent. See, e.g., Perry v. New Hampshire, 132 S.Ct. 716, 737–39 (2012) (Sotomayor, J., dissenting) ("Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures." (internal citations omitted)); J.D.B. v. N. Carolina, 131 S. Ct. 2394 (2011) ("[T]he pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.'"). See generally The Innocence Project, DNA Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (statistical data highlighting, inter alia, the leading causes of wrongful convictions, including false confessions).

The question is whether a habeas petitioner who suffered no violation of a constitutional right

and received a fair trial could remain incarcerated where he claims to be actually innocent. Thus far, this Court has not expressly recognized a convicted defendant's freestanding claim of actual innocence, even where he presents competent, newly discovered evidence. See Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 71 (2009). This Court's recent decision in McQuiggin v. Perkins, 133 S. Ct. 1924 (2013), highlighted the growing import of such a claim.

In McQuiggin, this Court held that actual innocence serves as a gateway through which a petitioner may pass to overcome a technical impediment to federal habeas review, whether it was a procedural bar or the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations. 133 S. Ct. at 1926. Where actual innocence has been reliably shown—i.e., where it is more likely than not that no reasonable juror would have convicted him in light of the new evidence—a lengthy delay in bringing the claim, by itself, is not sufficient to bar it from consideration. Id. Punishing the innocent infringes on the defendant's interest in his own liberty, protected by the Due Process Clauses, even in a post-conviction setting. Osborne, 557 U.S. at 53. The requirement of due process has been held to ban cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238, 241 (1972). There are few examples of more acute violence to the individual than to imprison him for a crime he did not commit, particularly where he has no avenue for emancipatory relief. See Souter v. Jones, 395 F.3d 577, 602 (6th Cir. 2005) ("It 'may violate the Eighth Amendment to imprison someone who is actually

innocent,' and therefore, recourse to the judicial system would be required.") (citing Herrera, 506 U.S. at 432 n.2 (Blackmun, J., dissenting)). See generally Caroline Livett, 28 U.S.C. S 2254(j): Freestanding Innocence As A Ground for Habeas Relief: Time for Congress to Answer the Court's Embarrassing Question, 14 Lewis & Clark L. Rev. 1649, 1661 (2010) ("Clemency Is Not a Sufficient 'Fail Safe' for the Wrongfully Convicted.").

Still, this Court has declined thus far to take the next step: it has not decoupled actual innocence claims on federal habeas review from other constitutional violations. McQuiggin, 133 S. Ct. at 1931-32. This Court clearly recognizes the unique primacy of actual innocence claims to all others for relief, consistent with the Court's prior concern with the terrible evil presented by the conviction and continued imprisonment of the innocent. There is no basis to arbitrarily couple an actual innocence claim with an unrelated claim of constitutional violation in order to allow a federal habeas petitioner to present the former. The Constitution demands a truly innocent petitioner must be provided a realistic avenue for relief to demonstrate his innocence. Moreover, the uncertainty has produced a split among the Circuits as to the cognizability of such a claim.

The Ninth Circuit Court of Appeals, "while refraining from recognizing actual innocence" has come "exceedingly close to doing so" since its holding in Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997). Pringle v. Runnels, 07-CV-1960-LAB POR, 2010 WL 5582945 at *8 (S.D. Cal. June 22, 2010). In Carriger,

the Ninth Circuit examined Herrera v. Collins, where a majority of this Court "assumed, without deciding" that the execution of an innocent person would violate the Constitution. A different majority of the Justices would have explicitly held so, the court explained. Id. Adopting the latter view, the court still found the Carriger petitioner had not met the high burden of proof it crafted. Id.

There, the Carriger petitioner had been convicted of murder. But, in a successive habeas petition, he was able to present new evidence that another person had confessed in open court to committing the offense. Id. While the court agreed this evidence cast "a vast shadow of doubt over the reliability of his conviction," it did not affirmatively prove the petitioner was innocent. Id. Examples of such convincing evidence included alibi evidence or new and reliable physical evidence that would preclude any possibility of guilt. Id. The new confession, while compelling, [fell] short of affirmatively proving the petitioner more likely than not is innocent. Id. However, in light of the court's reaching the merits of the actual innocence claim, the Ninth Circuit implicitly, if not expressly, recognizes a "well established *assumption*, but not established law, 'that a freestanding innocence claim will be cognizable in federal court.'" Pringle, 2010 WL 5582945 at *7. But because the habeas petitioner's burden is so "extraordinarily high," rarely has sufficient evidence been presented which resulted in a successful actual innocence claim. See, e.g., Boyde v. Brown, 404 F.3d 1159, 1168 (9th Cir. 2005); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th

Cir. 2000). Notably, in both Boyde and Jackson, the application of Carriger was not governed by AEDPA.

There is a similar trend within the Second Circuit with regard to freestanding actual innocence claims. In DiMattina v. United States, 13-CV-1273, 2013 WL 2632570 at *27-28 (E.D. N.Y. June 13, 2013), the District Court explained that while the Second Circuit had not ruled on whether a claim of actual innocence is cognizable innocence . . . [it] has come close." In Ortega v. Duncan, 333 F.3d 102 (2d Cir. 2003), the Second Circuit permitted habeas relief upon a finding that, without the prosecutor's knowledge, critical trial testimony was perjured. Id. at *28. The perjured testimony was the primary evidentiary basis for the petitioner's conviction. Id. Later, on review, the court conceded that "a showing of perjury at trial does not in itself establish a violation of due process warranting habeas relief." Id. (citation omitted). But, the court concluded that "false testimony presented without the government's knowledge may nonetheless support an independent violation of due process 'if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'" Id. (citation omitted). The DiMattina court clarified that "[a] more forthright analysis" of the holding in Ortega "might have admitted that habeas relief was granted in [the case] based on freestanding innocence demonstrated after trial." Id.

Further, the DiMattina court explained that the unwillingness of other federal courts to explicitly acknowledge freestanding claims of actual innocence

does not mean that such claims are never accepted. Id. The DiMattina court, citing Second Circuit precedent and a "sound" national trend, assumed that a freestanding actual innocence claim is cognizable, even in a non-capital context. See id. For a standard of review, the court settled on an "admittedly nebulous . . . 'shocks the conscience' standard." Id. at *30-31. Applying it to the case facts, the court determined relief was not warranted. Id. at *32.

In stark contrast, the Fifth Circuit has declined to recognize a freestanding claim of actual innocence on federal habeas review. Jones v. Johnson, 212 F.3d 595 (5th Cir. 2000). The Fifth Circuit recognized that the Carriger court read Herrera to allow claims of actual innocence as an independent ground for relief. However, the Fifth declined to alter its existing precedent, explaining it had to follow such precedent "absent its reversal by statute, the Supreme Court or an en banc panel of [the] court." Id. Accord Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir. 1998), cert. denied, 525 U.S. 1024 (1998) (holding that a free-standing actual innocence claim is not a basis for obtaining a writ of habeas corpus). Moreover certain Circuits are internally divided as to the existence and nature of a freestanding actual innocence claim. Compare Gonzales v. Warren, 03-CV-74266-DT, 2005 WL 1348701 (E.D. Mich. Apr. 14, 2005) with Noling v. Bradshaw, 5:04 CV 1232, 2008 WL 320531 at *24 (N.D. Ohio Jan. 31, 2008); compare also Enoch v. Gramley, 861 F. Supp. 718, 730 (C.D. Ill. 1994) aff'd, 70 F.3d 1490 (7th Cir. 1995) with Morrison v. Gaetz,

06-CV-0183-MJR, 2010 WL 380747 at *11-12 (S.D. Ill. Jan. 28, 2010).

The evident split among and within the Circuit Courts of Appeals, as well as the implications of this Court's decision in McQuiggin, begs this Court pronounce judgment on whether due process and the Eighth Amendment to the Constitution ensure a freestanding actual innocence claim is cognizable claim on federal habeas review. The instant petition presents such an opportunity.

Here, either in conjunction with the constitutional violations alleged above or as a freestanding claim, the Petitioner's actual innocence of the offense to which he pled is evident. The Fifth Circuit's error in denying his federal habeas petition is likewise evident. Innocent of the offense to which he pled, his continued imprisonment offends both due process and the Eighth Amendment's bar on cruel and unusual punishment. Accordingly, this court should reverse and remand.

IV. REVIEW IS NECESSARY TO PROVIDE A CLEAR STATEMENT THAT WHERE COUNSEL, WHETHER APPOINTED OR RETAINED, IS NOT LICENSED TO PRACTICE LAW AND COUNSEL FAILS TO INFORM HIS CLIENT, DEFENDANT'S FUNDAMENTAL DUE PROCESS RIGHTS ARE VIOLATED.

Whether by chance or by choice, every case that has come for hearing before this Court discussing either "effective assistance of counsel" or

"competent counsel" assumes the definition of "competence" is understood. There has yet to be a case discussing exactly what "competent" means. State courts of last resort within each state are empowered to set the rules and regulations governing the practice of law in their specific jurisdictions. Each state determines for itself the procedures and pre-requisites for admission, practice and discipline. Each state, therefore, establishes its own criteria for "competent" as it applies to cases where there is a challenge for ineffective assistance of counsel.

When this Court has reviewed ineffective assistance claims, the claims typically involve indigent petitioners with appointed counsel. The discussion turns on whether the lawyer's performance fell below reasonable professional standards. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Regardless of whether or not the lawyer is assigned or privately retained, it is assumed the lawyer is licensed to practice law, is admitted to practice before the tribunal in question, and is otherwise competent through experience or some other representation to the Court. It is assumed also that most counsel "whether retained or appointed, will protect the rights of an accused." Cuyler v. Sullivan, 446 U.S. 335, 344-45, 10 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980).

But what if Petitioner's privately-retained counsel was suspended from the practice of law or had been disbarred? And what if privately-retained

counsel never told the client, opposing counsel, or the Court despite an order to do so? More important than a potential claim of ineffective assistance is the denial of fundamental due process protections that inure to the Petitioner both at the time of trial and during the pendency of post-conviction relief.

In the instant case, Petitioner originally engaged Knox Fitzpatrick, Esq., to represent him. Mr. Fitzpatrick then turned the case over to John D. Nation, Esq., without the knowledge or consent of Petitioner. Mr. Nation filed Petitioner's 28 U.S.C. § 2254 petition in the United States District Court for the Northern District of Texas. During the pendency of the petition, Mr. Nation was suspended from the practice of law by the Texas State Bar but never informed Petitioner, opposing counsel, or the Court. As a result, Petitioner was represented by an unlicensed attorney he did not hire or consent to represent him.

Mr. Nation had been sanctioned by the Texas State Bar pursuant to a June 28, 2010, order in Cause No. 09-03308, District Court of Dallas County, 191st Judicial District, for misconduct in neglecting to represent a client in a post-conviction proceeding. He was subject to a second suspension for the same misconduct pursuant to a February 22, 2012, order in Cause No. 11-05448-J, District Court of Dallas County, 191st Judicial District. The Order required Mr. Nation to notify all courts in which he had matters pending as well as his clients of his suspension.

Mr. Nation never notified anyone at any time. The District Court's docket sheet reflects Mr. Nation as the lead attorney in the matter. Petitioner could not have made the kind of informed knowing decision to retain a particular lawyer that would then act in his best interest absent this very basic information.

It is also clear Petitioner was denied the fundamental benefit of his purchased right to counsel at the time his § 2254 habeas petition was pending. "The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection." Cuyler, 446 U.S. at 344.

The instant petition then begs the question: Can a criminal defendant, having purchased the right to counsel of his own choosing, really be said to have received the benefit of his bargain when counsel fails to inform him that he has been disciplined and suspended from practice? Can it really be said that an unlicensed or suspended attorney could provide his client minimally adequate representation so as not to render a trial, or in the instant case during post-conviction relief proceedings, so fundamentally unfair as to violate the Fourteenth Amendment and require habeas relief?

This Court has previously held that a defendant who retains his own lawyer is entitled to no fewer protections than are defendants for whom the state appoints counsel. Cuyler, 446 U.S. at 344. This implies, at least, that petitioner is entitled to reasonably effective assistance at all critical stages of

a criminal proceeding. Id., at 344. And while Cuyler involved a challenge to the conduct of a private attorney during the trial, and the instant petition involves a challenge to the post-trial conduct of a private attorney, "post-trial proceedings are an integral part of the criminal process." Wainwright v. Torna, 455 U.S. 586, 588, 102 S.Ct. 1300, 1301, 71 L.Ed.2d 475 (1982) (Marshall, J., dissenting).

Here, Petitioner's privately-retained lawyer was no lawyer at all. Petitioner was not only denied the benefit of his contractual bargain, this denial fundamentally undermined his right to due process. Petitioner never consented to Mr. Nation's representation in large measure because Petitioner was never told about it. Further, Petitioner was also never informed that Mr. Nation had been suspended from the practice of law not once, but twice, within a short period of time including during a large portion of the pendency of the §2254 petition.

Beyond the claim of ineffective assistance of counsel that could be brought, the Petitioner argues that his fundamental right to due process, even with privately retained counsel, was violated. The issue is basic competency, in this case, a law license and a recognized permission to engage in the practice of law. Certainly, had Petitioner known that retained counsel was suspended from the practice of law in the State of Texas, he could have sought to end the representation and retain other counsel, the very type of "informed decision to retain a particular lawyer" implied in Cuyler.

In Wainwright, petitioner hired his own attorney who promised that he would seek review of his criminal conviction by way of discretionary writ to the Florida Supreme Court but failed to meet the court's deadlines. The Florida Supreme Court ultimately denied the late-filed petition as untimely.

The Wainwright majority never reached the fundamental due process question and instead posited a bright line rule that in post-conviction discretionary review, where there is no right to assigned counsel, petitioner cannot raise an ineffective assistance claim based upon the failings of privately-retained counsel. The Cuyler majority appeared ready to abandon the absolute bright line and leave open for further review the fundamental due process implications when a petitioner argues equal justice was denied because of the failings of privately-retained counsel. ("We see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." Cuyler, 446 U.S. at 344).

Equal justice and fundamental fairness are not rights reserved only to indigent defendants afforded competent assistance from appointed counsel. These rights also extend to the defendant who has the ability to retain a lawyer of his own choosing, a decision that is made upon full disclosure and careful consideration. When Petitioner was never told that the law firm he thought he had engaged retained, without Petitioner's knowledge or consent, another lawyer and that lawyer was subsequently suspended from the practice of law for

negligence in post-conviction proceedings, Petitioner was left with no lawyer at all.

More than a zealous advocate for his client, a lawyer is an officer of the legal system. He is a guardian of the law and fulfilling this role requires an understanding by the lawyer of his relationship with and function in the legal system. When a lawyer hides from his client something as basic as the status of his license to practice, his dishonesty not only impugns the integrity of the legal system, but more fundamentally, he places the unknowing client at substantial risk of being denied basic equal justice and fundamental fairness. Petitioner here was never given vital information upon which he could make the most basic of decisions to contract with a zealous advocate of his choosing. The one person retained to be his zealous advocate could not even stand at the Bar.

There is no reasonable understanding of "competent" that excludes the basic requirement that the lawyer actually be permitted to practice the craft for which Petitioner engaged. Fundamental fairness and due process demand that any counsel, whether appointed or privately-retained, at least meets the basic qualifications and absent this, the proceedings cannot be deemed so fundamentally unfair as to violate the Fourteenth Amendment and therefore require habeas relief.

CONCLUSION

For the reasons described herein, the Petitioner respectfully requests that this Court grant

their petition for a writ of certiorari, and review the proceedings below.

Respectfully submitted on this 14th day of October, 2013.

Patrick Michael Megaro, Esq.
Counsel of Record
Daniel De Paz
Benjamin C. Haynes
Mark McCulloch
Ryan C. Morris
Justin K. York
BROWNSTONE, P.A.
400 North New York Avenue
Suite 215
Winter Park, Florida 32789
(407) 388-1900
Patrick@brownstonelaw.com

APPENDIX

APPENDIX

TABEL OF CONTENTS

APPENDIX A

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

Scott Arthur Gardner	§	
	§	
Petitioner,	§	
	§	
VS.	§	No. 3-11-CV-2562-P-BD
	§	
Rick Thaler, Director	§	(Consolidated With:
Texas Department of	§	No. 3-11-CV-2572-P-BD)
Criminal Justice,	§	
Correctional Institutions	§	
Division,	§	
	§	
Respondent.	§	

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Scott Arthur Gardner, a Texas prisoner, has filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated herein, the application should be denied.

Petitioner was charged in separate indictments with the aggravated sexual assault of his two daughters, both of whom were under 14 years of age. After consulting with defense counsel, petitioner elected to plead guilty to both charges and ask the jury for probation.[1] However, the jury declined to recommend probation and sentenced petitioner to 12 years confinement in each case. His convictions and sentences were affirmed on direct appeal. *Gardner v. State,* Nos. 05-04-00587-CR & 05-04-00588-CR, 2005 WL 1654590 (Tex. App. -- Dallas, Jul. 15, 2005, no pet.). Petitioner also challenged his convictions in separate applications for state post-conviction relief. Both applications were denied. *Ex parte Gardner,* Nos. WR-75,825-0 1 & WR-75,825-02, 2011 WL 4485421 (Tex. Crim. App. Sept. 28, 2011). Petitioner then filed this action in federal district court.

II.

In four grounds for relief, petitioner contends that: (1) his guilty plea was involuntary; (2) he received ineffective assistance of counsel; (3) the prosecutor withheld exculpatory evidence; and (4) newly discovered evidence establishes that he is guilty only of the lesser-included offense of indecency with a child.

---

[1] Under Texas law, only a jury can recommend probation upon conviction for aggravated sexual assault of a child. *See* TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 4 (Vernon 2004).

A.

Petitioner contends that his guilty plea was involuntary because he did not know at the time that the victims had partially recanted their allegations.[2]

1.

It is axiomatic that a guilty plea is valid only if entered voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences." *Bradshaw v. Stumpf,* 545 U.S. 175, 183, 125 S.Ct. 2398,2405, 162 L.Ed.2d 143 (2005), *quoting Brady v. United States,* 397 U.S. 742, 748,90 S.Ct. 1463, 1469,25 L.Ed.2d 747 (1970). A plea is intelligently made when the defendant has "real notice of the true nature of the charge against him[.]" *Sousley v. United States,* 523 U.S. 614, 618, 118 S.Ct. 1604, 1609, 140 L.Ed.2d 828 (1998), *quoting Smith v. O'Grady,* 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941). A plea is "voluntary" if it does not result from force, threats, improper promises, misrepresentations, or coercion. *See United States v. Amaya,* 111 F.3d 386, 389 (5th Cir. 1997). The Fifth Circuit has identified three core concerns in a guilty plea proceeding: (1) the absence of coercion; (2) a full understanding of the charges;

---

[2] As part of his answer, respondent argues that this claim is unexhausted and procedurally barred from federal habeas review. *(See* Resp. Ans. at 8-12). However, "[a]n application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

and (3) a realistic appreciation of the consequences of the plea. *See United States v. Gracia,* 983 F.2d 625, 627-28 (5th Cir. 1993), *citing United States v. Dayton,* 604 F.2d 931 (5th Cir. 1979), *cert. denied,* 100 S.Ct. 1080 (1980). These core concerns are addressed by the admonishments contained in Tex. Code Crim. Proc. Ann. art. 26.13. *See Davis v. Quarterman,* No. 3-08-CV-2145-L, 2009 WL 1058059 at *2 (N.D. Tex. Apr. 17, 2009).[3]

2.

Petitioner was charged with sexually assaulting his then 12 year-old daughter by penetration of the female sexual organ, and sexually assaulting his then 11 year-old daughter by contact and penetration of the anus. *See Ex parte Gardner,* WR-75,825 01, Tr. at 159 & WR-75,825-02, Tr. At 184. Rather than challenge the evidence against him, including his own written confession admitting to one of the assaults, petitioner decided to plead guilty to both charges and ask the jury for probation. Before accepting his plea, the trial judge informed petitioner that the range of punishment for each offense was not less than five years nor more than 99 years or life imprisonment and a $10,000 fine. (SF-II at 3). The judge also advised petitioner of his right to plead not

[3] The Fifth Circuit has held that the admonishments under Fed. R. Crim. P. 11 provide "prophylactic protection for the constitutional rights involved in the entry of guilty pleas." *Gracia,* 983 F .2d at 627. Because the requirements of Rule 11 and Tex. R. Crim. Proc. Ann. art. 26.13 are substantially similar, *compare* FED. R. CRIM. P. 11 *and* TEX. CODE CRIM. PROC. ANN. art. 26.13, it follows that the same "prophylactic protection" attaches to the admonishments under article 26.13. *See Davis,* 2009 WL 1058059 at *2 n.1.

guilty and require the state to prove the elements of each offense beyond a reasonable doubt. *(Id.).* Petitioner said that he understood those rights, but wanted to plead guilty. *(Id.* at 2-3). After a jury was empaneled, petitioner pled guilty in open court. *(Id.* at 98-99). When asked why he pled guilty, petitioner stated, "Because I'm guilty. I abused my kids, molested them." *(See* SF-Vat 53). This sworn testimony carries a strong presumption of verity in a subsequent post-conviction proceeding. *See Blackledge v. Allison,* 431 U.S. 63, 73-74, 97 S.Ct. 1621 , 1629,52 L.Ed.2d 136 (1977); *United States v. Cothran,* 302 F.3d 279, 283-84 (5th Cir. 2002).

On state collateral review, petitioner argued that his plea was involuntary because he was unaware at the time that both victims had recanted or modified some of their earlier allegations. In rejecting this argument, the state habeas court found:

> Applicant chose to enter a plead *[sic]* of guilty before the jury in an effort to receive probation, that he did so after being fully advised as to the possible consequences of his plea, and that his decision to do so was knowing and voluntary. This Court finds that Applicant made it clear to his counsel that he did not want to be seen as calling his children liars and that this was a motivating factor is *[sic]* his decision to plead guilty to the offense as charged.

Ex Parte Gardner, WR-75,825-01 , Tr. at 95, ~~ 62-63 & WR-75,825-02, Tr. at 97, ~~ 62-63. That determination is conclusive in a subsequent federal habeas proceeding unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Petitioner does not come close to meeting this heavy burden. Nowhere does petitioner allege, much less prove, that he pled guilty without a full understanding of the nature of the charges and a realistic appreciation of the consequences of his plea. Rather, petitioner argues that he would not have pled guilty to aggravated sexual assault had he known that his daughters recanted or modified some of their accusations. Even if petitioner was unaware of these developments, it does not invalidate his guilty plea. *See Matthew v. Johnson,* 201 F.3d 353,368-69 (5th Cir.), *cert. denied,* 121 S.Ct. 291 (2000), *citing McMann v. Richardson,* 397 U.S. 759,769,90 S.Ct. 1441 , 1448,25 L.Ed.2d 763 (1970) (decision whether to plead guilty or go to trial is often made on the basis of incomplete and inaccurate information). This ground for relief should be overruled.

B.

In a related ground, petitioner contends that he received ineffective assistance of counsel because his lawyers failed to interview the victims before advising him to plead guilty. Had the victims been interviewed by counsel, petitioner argues that he would have learned that they partially recanted or modified their accusations, thereby rendering his guilty plea involuntary.

1.

The Sixth Amendment to the United States Constitution guarantees a defendant reasonably effective assistance of counsel at all critical stages of a criminal proceeding. *See Cuyler v. Sullivan,* 446 U.S. 335, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). To prevail on an ineffective assistance of counsel claim, a habeas petitioner must satisfy the two-prong test established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the petitioner must demonstrate that the performance of his attorney fell below an objective standard of reasonableness. *Id.,* 104 S.Ct. at 2064. Second, the petitioner must prove that he was prejudiced by his attorney's substandard performance. *Id.* at 2067.

Where, as here, a state court has already rejected a claim of ineffective assistance of counsel, a federal court may grant habeas relief only if the state court adjudication:

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

28 U.S.C. § 2254(d). A state court decision is "contrary" to clearly established federal law if "it

relies on legal rules that directly conflict with prior holdings of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts." *Busby v. Dretke,* 359 F.3d 708, 713 (5th Cir.), *cert. denied,* 124 S.Ct. 2812 (2004), *citing Williams v. Taylor,* 529 U.S. 362,405-06, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000). A decision constitutes an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 120 S.Ct. at 1523; *see also Gardner v. Johnson,* 247 F.3d 551, 560 (5th Cir. 2001). Factual determinations made by the state court are presumed to be correct and are unreasonable only where the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(l); *see also Threadgill v. Quarterman,* No. 3-05-CV- 221 7 -D, 2009 WL 2448499 at* 5 (N.D. Tex. Aug. 10, 2009) (citing cases), *affd,* 425 Fed.Appx. 298, 2011 WL 1812764 (5th Cir. May 12, 2011), *cert. denied,* 132 S.Ct. 1095 (2012). This presumption applies not only to explicit findings of fact, but "it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Id, quoting Valdez v. Cockrell,* 274 F.3d 941,948 n. 11 (5th Cir. 2001), *cert. denied,* 123 S.Ct. 106 (2002); *see also Harrington v. Richter,* _ U.S._, 131 S.Ct. 770, 784, 178 L.Ed.2d 624 (2011)("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not

require that there be an opinion from the state court explaining the state court's reasoning.").

2.

Petitioner was represented at trial by Douglas Skemp and Lynne Corsi. At an evidentiary hearing on petitioner's state writ, both Skemp and Corsi explained that they made a tactical decision not to personally interview the victims or their mother, Sherry Gardner, to avoid any suggestion of trying to manipulate their testimony. *(See* SF-Writ. Hrg. at 175-76, 205-06). Instead, counsel hired two experienced child abuse therapists, Gail Inman and Peggy Nash, to conduct those interviews. Inman and Nash allowed defense counsel to suggest interview questions and provided counsel with notes from therapy sessions. *(Id.* at 176-79, 207-10). Based on information obtained during the interviews, defense counsel knew that the victims had recanted or modified some of their earlier accusations.[4] Skemp and Corsi shared that information with petitioner prior to his guilty plea. *(Id.* at 182, 189-90, 209 12). Despite knowing that one of the victims had recanted her allegation of penetration, counsel recommended to petitioner that he enter an open plea of guilty in order to seek a probated sentence, rather than contest penetration in hopes of being found guilty of a lesser-included offense. That recommendation was

[4] One victim told the interviewers that sexual contact occurred fewer times than she originally claimed, *(see* SF-Writ Hrg. at 177, 21 0), while the other victim recanted her statement that penetration had occurred. *(See id* at 176-77, 182, 211).

based on the results of a focus group study performed by Jan DeLipsey, a jury consultant, who found that 70 percent of the group would believe the initial outcry of a hypothetical sexual assault victim who later recants a claim of penetration. *(!d.* at 159- 63). After considering the testimony of Skemp and Corsi, the state habeas court found:

> [D]efense counsel had access to the complainant[s] through [their] sessions with Gail Inman and Peggy Nash and was aware of any changes in [their] recollection of the sexual abuse as a result. This Court finds that counsel was aware that Mrs. Gardner had changed her opinion regarding Applicant over the course of the two years between the initial outcry and trial and counsel was sensitive to any actions that might create an inference that counsel was attempting to influence the testimony of Mrs. Gardner or either of the complainants in favor of the defense. This Court finds that counsel's decision not to personally interview the complainant[s] was made after discussion between Mr. Skemp, Ms. Corsi, Dr. DeLipsey, and Applicant. This Court finds that the counsel made the decision not to interview the complainant[s] personally after a great deal of consideration and discussion of the facts at issue. This Court finds that counsel's decision not to personally interview the complainant[s] was reasonable trial strategy under the facts of this case.

Ex parte Gardner, WR-75,825-01, Tr. at 96-97, ~~72-76 & WR-75,825-02, Tr. at 98-99, ~~73-77.

The *Strickland* standard is highly deferential to strategic choices made by trial counsel. "So long as counsel made an adequate investigation, any strategic decisions made as a result of that investigation fall within the wide range of objectively reasonable professional assistance." *Cotton v. Cockrell,* 343 F.3d 746,752 (5th Cir. 2003), *cert. denied,* 124 S.Ct. 1417 (2004). A conscious and informed decision on trial tactics cannot form the basis of an ineffective assistance of counsel claim "unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Id.* at 753, *quoting United States v. Jones,* 287 F.3d 325,331 (5th Cir.), *cert. denied,* 123 S.Ct. 549 (2002). As authority for the proposition that defense counsel must personally interview witnesses and cannot delegate that task to an investigator, petitioner relies on two Texas cases -- *Flores v. State,* 576 S. W.2d 632 (Tex. Crim. App. 1978), and *Butler v. State,* 716 S. W.2d 48 (Tex. Crim. App. 1986). In *Flores,* defense counsel conducted no factual investigation, spoke to no witnesses, and was unable to contact his investigator to learn about the facts of the case. *See Flores,* 576 S.W.2d at 633-34. The *Flores* court did not hold that trial counsel must personally interview witnesses in order to investigate the facts. *See, e.g. Cano v. State,* No. 14-06-003 77 -CR, 2007 WL 2872418 at * 5 (Tex. App. -- Houston [14th Dist.], Oct. 4, 2007, pet. refd) (holding that counsel is not required to personally investigate the facts of a case and may delegate the

investigation to an investigator); *Thomas v. State,* No. 05-91-00267-CR, 1993 WL 609 at *5 (Tex. App. -- Dallas, Jan. 5, 1993, pet refd) (same). Similarly, in *Butler,* the court held only that "the duty to investigate the facts may not be sloughed off to an associate. If counsel does so he must be held constructively aware of the information his associate learns." *Butler,* 716 S.W.2d at 55.

Here, petitioner has not shown that the strategy employed by defense counsel was in any way deficient. To the contrary, the decision to have the victims interviewed by two experienced child abuse therapists was manifestly reasonable. Based on the results of those interviews and a focus group study performed by a jury consultant, which results were shared with petitioner before his guilty plea, counsel determined that the best course of action was for petitioner to enter an open plea of guilty and ask the jury for probation. Petitioner had full knowledge of all relevant facts in making that decision. There simply is no basis for concluding that petitioner received ineffective assistance of counsel.

C.

Petitioner also accuses the prosecutor of withholding notes of an interview with one of the victims wherein she denied having been digitally penetrated. A voluntary guilty plea waives all non-jurisdictional defects in a criminal proceeding. *See Tollettv. Henderson,* 411 U.S. 258,265,93 S.Ct. 1602, 1607, 36 L.Ed.2d 235 (1973); *United States v. Jennings,* 891 F.2d 93, 95 (5th Cir. 1989). This

includes claims involving the failure to disclose exculpatory evidence. *See Matthew,* 201 F.3d at 366-70. Even if this claim is not waived, the state habeas court found that the interview notes at issue did not reflect that the victim had recanted or denied being digitally penetrated. *See Ex parte Gardner,* WR-75,825-01, Tr. at 103, ~~101-03 & WR-75,825-02, Tr. at 105-06, ~~105-07. This ground for relief should be overruled.

D.

Finally, petitioner contends that newly discovered evidence establishes that he is guilty only of the lesser-included offense of indecency with a child. This argument is akin to a claim of actual innocence which, absent evidence of an independent constitutional violation, is insufficient to merit federal habeas relief. *See Dowthitt v. Johnson,* 230 F.3d 733,741 (5th Cir. 2000), *cert. denied,* 121 S.Ct. 1250 (2001), *quoting Herrera v. Collins,* 506 U.S. 390,400, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993). No such evidence exists here.

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be denied.

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: April 10, 2012.

/S/ JEFF KAPLAN
JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

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

Scott Arthur Gardner,	§	
	§	
Petitioner,	§	
	§	No. 3:11-CV-2562-P
V.	§	
	§	(Consolidated With:
Rick Thaler, Director	§	No. 3:11-CV-2672-P)
Texas Department of	§	
Criminal Justice,	§	
Correctional Institutions	§	
Division,	§	
	§	
Respondent.	§	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, AND DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions and a recommendation in this case. An objection was filed by petitioner. The District Court reviewed *de novo* those portions of the proposed findings, conclusions and recommendation to which objection was made, and reviewed the

remaining proposed findings, conclusions and recommendation for plain error.

Petitioner first objects to the Magistrate Judge's finding that Petitioner failed to rebut the state habeas court's determination that his guilty plea was knowing and voluntary. See Dkt. No. 15 at 3-4. Petitioner claims that, under Texas case law, a guilty plea is rendered involuntary by "a defendant's lack of knowledge that a complainant would recant her inculpatory testimony or statements[.]" See Dkt. No.16 at 2. Whether or not *Ex parte Zapata*, 235 S.W.3d 794 (Tex. Crim. App. 2007) was wrongly applied by the state habeas court, Petitioner has failed to establish that he is entitled to federal habeas relief. That is, Petitioner has not established that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law, nor that the state court's conclusion that the plea was knowing and voluntary was "an unreasonable determination of the facts in light of the evidence presented[.]" 28 U.S.C. §§ 2254(d)(1) & (2).

Petitioner next claims that the Magistrate Judge erred in denying his claim of ineffective assistance of counsel due to his attorneys' failure to personally interview the victims or their mother. See Dkt. No. 15 at 4-5. However, Petitioner has failed to rebut the state habeas court's findings that counsel hired two experienced child abuse therapists to conduct those interviews under their direction, and that counsels' decision not to personally interview

the witnesses was "reasonable trial strategy under the facts of this case." Although Petitioner points to two Texas cases to stand for the proposition that an attorney may not delegate the duty to investigate to another individual, he points to no "clearly established Federal law" that was misapplied. To the contrary, the Court is unaware of any precedent for the proposition that counsel is ineffective for failing to *personally* interview prospective witnesses. See, e,g,, Downs v. Quarterman, No. 7:05-CV-82-R, 2OO7 WL 2325575 at *5 (N.D. Tex. Aug. 14,2007) (denying ineffective assistance of counsel claim where counsel failed to personally interview codefendant and instead relied upon information from an investigator) (citing Williams v. Beto, 354 F.2d 698, 703 (5th Cir. 1965). In fact, the two Texas cases cited by Petitioner, *Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App. 1978) and *Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986), do not stand for the proposition that a defense attorney must personally interview witnesses and may not delegate such task to an investigator. In *Flores*, the defense attorney conducted no factual investigation, spoke to no witnesses, and was wholly unable to contact the court-appointed investigator to learn about the facts of the case. Flores, 576 S.W.2d at 634. "The [Flores] court did not hold that trial counsel must personally interview witnesses in order to investigate the facts." *Thomas v. State*, No. 05-91-00267-CR, 1993 WL 609 at *5 (Tex. App.- Dallas, Jan. 5, 1993, pet ref'd); *see also Cano v. State*, No. 14-06-00377-CR, 2007 WL 2872418 at *5 (Tex. App.- Houston [14 Dist.] Oct. 4, 2007, pet. refd) ("counsel is not required to

investigate the facts of the case personally and may delegate the investigation to an investigator.").

Petitioner's next objection, that the Magistrate Judge incorrectly determined his Brady claim is foreclosed. As Petitioner implicitly recognizes, a voluntary guilty plea waives all non-jurisdictional defects in a criminal proceeding, including claims involving the failure to disclose exculpatory evidence. *Matthew v. Johnson*, 201 F.3d 353, 369-70 (5th Cir. 2000). Although Petitioner urges that this "is not the universal rule in federal courts," *see* Dkt. No. 16 at 6, it is decidedly the rule in the Fifth Circuit and the one that this Court is bound to apply.

Finally, Petitioner faults the Magistrate Judge for failing to consider the merits of his claim of actual innocence. *See* Dkt. No. 16 at 7. Again, however, Petitioner concedes that such claim is not cognizable absent evidence of an independent constitutional violation. See Dowthitt u. Johnson, 230 F.3d 733, 741 (5th Cir. 2000) (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993). That Petitioner believes that his claim "should be considered[,]" does not satisfy his burden to prove error under 28 U.S.C. § 2254(d).

Accordingly, Petitioner's objections are OVERRULED and the Court ACCEPTS the Findings, Conclusions and Recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and

2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions and Recommendation filed in this case in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).[5]

In the event the petitioner will file a notice of appeal, the court notes that

---

[5] Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December l, 2009, reads as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

( ) the petitioner will proceed *in forma pauperis* on appeal.

(X) the petitioner will need to pay the $455.00 appellate filing fee or submit a motion to proceed *in forma pauperis.*

SO ORDERED this 20th day of February, 2013.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

Scott Arthur Gardner,	§	
	§	
Petitioner,	§	
	§	No. 3:11-CV-2562-P
V.	§	
	§	(Consolidated With:
Rick Thaler, Director	§	No. 3:11-CV-2672-P)
Texas Department of	§	
Criminal Justice,	§	
Correctional Institutions	§	
Division,	§	
	§	
Respondent.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

1. Petitioner's application for writ of habeas corpus is denied.

2. The Clerk shall transmit a true copy of this Judgment and the Order adopting the Findings and Recommendation of the United States Magistrate Judge to Petitioner.

SIGNED this 20th day of February, 2013.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court
Northern District of Texas
Dallas Division

Scott Arthur Gardner,	Docket # 3:11-CV-2562-P (Consolidated With)
Petitioner, -against-	Docket # 3:11-CV-2572-P
Rick Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Petitioner, Scott Arthur Gardner, hereby appeals to the United States Court of Appeals for the Fifth Circuit from a Judgment and Order of this Court, the Hon. Jorge A. Solis, entered on February 20, 2013, denying his petition for a writ of habeas corpus pursuant to 28 U.S.C . § 2254. (Exhibit A and Exhibit B Attach hereto)

Dated: Winter Park, Florida
March 12, 2013

/s/ Robert L. Sirianni. Jr. Esq.
Robert L. Sirianni, Jr. Esq.
Florida Bar No: 684716
BROWNSTONE, P.A.
Attorneys for Defendant
400 North New York Avenue, Suite 215
Winter Park, Florida 32789
(o) 407-388-1900
(f) 407-622-1511
robert@brownstonelaw.com

To:

Clerk of the Court
United States District Court
Northern District of Texas
VIA ECF

Melissa L. Hargis, Esq.
Office of the Attorney General, State of Texas
VIA ECF AND EMAIL
Melissa.hargis@oag.state.tx.us

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-10294
USDC No. 3:11-CV-2562
USDC No. 3:11-CV-2572

SCOTT ARTHUR GARDNER,
Petitioner-Appellant
v.
WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent-Appellee

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

O R D E R:

Scott Arthur Gardner, Texas prisoner # 1228546, seeks a certificate of appealability (COA) to appeal the denial of his consolidated 28 U.S.C. § 2254 petitions challenging his guilty plea convictions and sentences for aggravated sexual assault of a child. He argues that the prosecution deliberately withheld

exculpatory evidence and that his attorneys advised him to plead guilty without conducting an adequate investigation. He alleges that, if counsel had personally interviewed the complainants, they would have discovered that he is innocent of the charged offenses because he did not penetrate the sexual organs of the victims. Gardner alleges that the combination of these errors renders his guilty plea involuntary. He contends that he is actually innocent, and he seeks also relief based on the Supreme Court's recent decision in *McQuiggin v. Perkins,* 133 S. Ct. 1924 (2013) and on new evidence allegedly showing that his state habeas counsel was suspended from the practice of law while Gardner's state habeas petition was pending. The district court determined that all of Gardner's constitutional claims were meritless and that certain of his claims were also procedurally barred.

In order to obtain a COA, Gardner must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). With regard to claims rejected on the merits, he must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. With regard to claims that were denied on procedural grounds, he must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of

reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As he has not made the requisite showing, the motion for a COA is DENIED.

/s/ CAROLYN DINEEN KING
CAROLYN DINEEN KING
UNITED STATES CIRCUIT JUDGE