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.	§	

REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR DISCOVERY AND AN EVIDENTIARY HEARING, AND MEMORANDUM OF LAW IN SUPPORT

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INTRODUCTION

Respondent's Response to Petitioner's Motion for Discovery and an Evidentiary Hearing (ECF #151) (hereinafter "Response") is premised on numerous misstatements of law, many of which Mr. Medina has debunked in his Reply to Respondent's Response to Petitioner's Brief Regarding Exhaustion and Other Procedural Matters (ECF #143) (hereinafter "Reply on Procedural Matters"). Respondent continues to muddle the differences between the 28 U.S.C. § 2254(a) question (whether a claim is meritorious), the § 2254(b) question (whether a claim is exhausted), the § 2254(d) question (whether relief is precluded by the relitigation bar), and the § 2254(e)(2) question (whether a federal court may order a hearing). Failing to observe the distinct scope and role of each statutory provision, Respondent frequently and erroneously imports jurisprudence from one inquiry into the others. This leads her to novel and legally unsound conclusions, such as declaring that *Cullen v. Pinholster*[1]—a case governing the scope of the § 2254*(d)* relitigation bar inquiry—has: (1) ended all fact development for claims adjudicated on the merits (*i.e.* restricted the scope of the § 2254(a) inquiry); (2) silently overruled over three decades of Supreme Court exhaustion jurisprudence and eliminated the *Vasquez v. Hillery*[2] approach to assessing whether new evidence renders a claim unexhausted (*i.e.* radically altered the § 2254(b) inquiry); and, (3) "provide[d] a limitation on

[1] 563 U.S. 170 (2011).

[2] 474 U.S. 254 (1986).

evidentiary hearings" (*i.e.* altered the § 2254(e)(2) inquiry). *Pinholster* has done none of these things.

Mr. Medina will not reproduce below arguments from his Reply on Procedural Matters (ECF #143), and other briefing unpacking all of Respondent's flawed assertions regarding the relevant procedure applicable to this case. However, the numerous defects in Respondent's statements regarding federal habeas corpus procedure are relevant here because they inevitably lead her to declare that all fact development is essentially dead in federal habeas corpus proceedings—even though the very cases on which she relies, such as *Pinholster*, hold to the contrary. Mr. Medina therefore urges this Court to revisit his Reply on Procedural Matters (ECF #143) before resolving the current dispute over factual development. In order to minimize redundant briefing, Mr. Medina will herein focus on Respondent's new arguments and refer the Court back to relevant briefing in his prior pleadings.

Respondent also misreads the Supreme Court's habeas corpus discovery cases to require—as a *pre-condition* to discovery—that petitioners: (1) prove that the responding party has actual possession of documents or information that substantiate the petitioner's claim; and, (2) prove their claims with admissible evidence *before* receiving discovery. Adhering to Respondent's misreading of Rule 6 of the Rules Governing § 2254 Cases in Federal Court, and misapplication of the Supreme Court cases construing Rule 6, would limit discovery to only those cases in which its unnecessary. As described below, Mr. Medina substantiated his discovery

requests to the same, or greater, degree than the petitioners in cases like *Bracy v. Gramley*,[3] in which the Court has held that discovery was appropriate.

Finally, Respondent and—more importantly—a court in this District, have recently endorsed essentially the same approach to adjudicating claims described in Mr. Medina's Reply on Procedural Matters at 3–30. An intermediate step in this approach, before applying the traditional discovery standards to a petitioner's claims, is to assess whether relief is barred by 28 U.S.C. § 2254(d). Mr. Medina has briefed throughout this matter why § 2254(d) does not constrain this Court's ability to grant relief. However, if this Court harbors any doubt about its ability to grant relief on any claim,[4] it should as a preliminary matter order the requested discovery relevant to the § 2254(d) question of whether (1) there was an adjudication on the merits of Mr. Medina's claims, and if so, (2) whether the state court process unreasonably determined all facts against Mr. Medina. *See* 28 U.S.C. § 2254(d)(2).

Mr. Medina will first briefly address Respondent's procedural arguments before responding to her discussion of the appropriate discovery rules.

I. The Respondent's report on the death of fact development in federal habeas corpus proceedings at the hand of *Pinholster* is an exaggeration.

Taking a quote out of context, the Respondent declares: "*Federal habeas review* 'is limited to the record that was before the state court that adjudicated the claim on

[3] 520 U.S. 899 (1997).

[4] The § 2254(d) relitigation bar has no potential application to Mr. Medina's claims, such as his prosecutorial misconduct claim (Claim II in the Second Amended Petition), that were not exhausted in his initial round of state habeas proceedings.

the merits.'" Response at 3 (quoting *Pinholster*, 563 U.S. at 181) (emphasis added). What *Pinholster* actually held was that, when assessing whether a state court adjudication was unreasonable for § 2254(d) purposes, review is limited to the state record. As Mr. Medina has repeatedly explained, he does not (and could not) take issue with *Pinholster* and, if necessary,[5] he has demonstrated the unreasonableness of the state court's purported adjudication of his claims based on the state court record. *See e.g.* ECF #143 at 20–29. But, as Mr. Medina has previously briefed, the Supreme Court has never held—in *Pinholster* or another case—that *all federal habeas review* is limited to the state court record. To the contrary, *Pinholster* itself and numerous decisions from the Fifth Circuit and elsewhere have held that fact development is permissible, and sometimes required, in post-AEDPA habeas corpus cases. *See e.g.* ECF #143 at 23 (citing cases).

Respondent repeatedly opposes discovery and a hearing based on the false premise that *Pinholster* bars record expansion, full stop, for all claims adjudicated on the merits in state court. But, in a footnote, she takes it all back and concedes that her arguments are contrary to the Fifth Circuit's interpretation of *Pinholster*: "In any event, 'the Fifth Circuit's interpretation of *Pinholster* suggests that the better practice is first to decide whether an inmate has exhausted a claim in state court and whether he has met the requirements of § 2254(d)(1) *before applying traditional standards to*

[5] Mr. Medina has also argued that, with respect to some claims, the state court process does not qualify as an adjudication on the merits, in which case he would not need to demonstrate an exception to the § 2254(d)(1) litigation bar.

decide whether discovery is appropriate.'" ECF #151 at 5 n.3 (quoting *Cole v. Davis*, 2018 WL 6019165 (S.D. Tex. Nov. 16, 2018)) (emphasis added).

The Southern District's approach is nearly identical to the analytical framework for deciding claims that Mr. Medina described in his Reply on Procedural Matters. *See* ECF #143 at 3–31. Mr. Medina does not object to the suggestion that this Court address, in order, the (1) exhaustion requirement, (2) the § 2254(d) relitigation bar, and then (3) the application of traditional discovery standards to the case—except to the extent that Mr. Medina has sought discovery relevant to application of the relitigation bar to his case.[6] Mr. Medina objects, however, to the Respondent's repeated erroneous assertions that *Pinholster*'s admonition to review only the evidence before the state court applies before or after the second step in the above analysis. It does not: once a "district court appropriately and correctly conclude[s] that the state court had unreasonably applied [clearly established federal law] under section 2254(d)(1) based solely on the state court record, *Pinholster* is inapplicable." *Smith v. Cain*, 708 F.3d 628, 635 (5th Cir. 2013); *id.* at 634–35 ("[T]he district court did what section 2254(d)(1) allows, and what *Pinholster* does not forbid" when it declared the state court decision unreasonable based on the state court record and then held an evidentiary hearing on the merits of petitioner's claim).

Thus, all of Respondent's statements in opposition to discovery based on the fallacious argument that *Pinholster* has cabined all federal habeas corpus review to

[6] As Mr. Medina explains below, his discovery requests related to procedural arguments are not subject to the exhaustion requirement or the § 2254(d) relitigation bar. Thus, the Court may and should grant them now as they are relevant to the second step in the process suggested by another Court in this District and endorsed by Respondent herein.

the state court record and bars record expansion are simply wrong. *See e.g.* ECF #151 at 8 (*Pinholster* bars record expansion of Mr. Medina's prosecutorial misconduct claim); *id.* at 9 n.7 (same); *id.* at 15 (same); *id.* at 20 (same); *id.* at 22 (record expansion of Mr. Medina's IATC claims is barred by *Pinholster*); *id.* at 27 (record expansion of Mr. Medina's right-to-be-present claim is "*Pinholster*-barred"); *id.* at 28 (arguing against a hearing because "record expansion is barred by *Pinholster*"). Stripped of these arguments, there is not much left to Respondent's Response.

II. Section 2254(e)(2) governs evidentiary hearings and does not bar Mr. Medina's discovery requests.

Respondent asserts in one sentence, without explanation, that "to any extent *Pinholster* does not bar new evidence, § 2254(e)(2) does . . . . Thus, discovery is not warranted." ECF #151 at 22. Respondent invokes 28 U.S.C. § 2254(e)(2)—a provision that governs evidentiary hearings in federal habeas proceedings—twenty-three times in her pleading, but only twice in opposition to Mr. Medina's request for a hearing. In support of her arguments that § 2254(e)(2) bars discovery, Respondent fails to identify a single case that applies § 2254(e)(2) to discovery requests. Respondent misconstrues the purpose and timing of federal habeas discovery. The purpose of habeas discovery is to make sure that the court and the parties have available all facts relevant to the claims at issue. The possibility that Respondent may have a defense to a particular use of the facts is not a basis for denying discovery. As Respondent fails, in opposition to either discovery or a hearing, to apply the relevant standard to the relevant portions of the record in this case, her suggestion that § 2254(e)(2) precludes discovery in this case is without merit.

Even if § 2254(e)(2), and not Rule 6, somehow governed Mr. Medina's discovery requests, the Respondent's arguments are still meritless because Mr. Medina did not fail to develop the facts of his claims in state court. As Mr. Medina explained in his motion for fact development, an evidentiary hearing is only barred in federal court if the petitioner failed in state court "to develop the factual basis" for his claim. 28 U.S.C. § 2254(e)(2). "A failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). But if the petitioner develops the factual basis for a claim in state court, "or sufficiently attempts to do so," then subsection (e)(2) does not bar an evidentiary hearing in federal court. *Guidry v. Dretke*, 397 F.3d 306, 322 (5th Cir. 2005). The petitioner's attempt to develop facts in state court need only be "reasonable" in light of the information available at the time. *Harrison v. Quarterman*, 496 F.3d 419, 429 (5th Cir. 2007).

With respect to claims exhausted in the first round of Mr. Medina's state habeas proceedings, Respondent understandably fails to address the only question that matters: did Mr. Medina sufficiently attempt to develop the factual basis for his claims, which requires "that the prisoner, at a minimum, request an evidentiary hearing in the manner prescribed by state law." *Williams v. Taylor*, 529 U.S. at 437.[7] As explained in his Motion for Discovery (ECF #148) at 35–38, Mr. Medina filed two

[7] Respondent's confusion about *Pinholster*, described *supra*, infects her § 2254(e)(2) analysis. Respondent repeatedly objects to Mr. Medina pointing to any evidence outside of the state court record in support of his request for discovery and a hearing. ECF #151, *passim*. As explained above, *Pinholster* constrains *only* the § 2254(d)(1) and (d)(2) inquires to the state court record. Nothing prevents this Court from considering additional evidence when deciding to grant discovery under Rule 6 or grant a hearing; *Pinholster* is inapplicable to both inquiries.

separate motions for discovery and an evidentiary hearing identifying for the state court disputes over material facts and explaining why fact development was necessary to resolve them. *Id*. When the trial court ordered the filing of proposed findings without acknowledging Mr. Medina's pending motions for fact development, Mr. Medina objected that there were "still controverted material facts to be resolved" and again requested an evidentiary hearing.[8] *Id*. at 38.

Mr. Medina has asserted that he "took every action available to him to develop the factual basis of his claims in state court and was denied or ignored at every step." Motion for Discovery at 39. Respondent does not dispute this assertion or point to a state court fact-development procedure left untried. Notwithstanding her summary, unexplained assertions that § 2254(e)(2) bars a hearing on the claims Mr. Medina exhausted in his initial state habeas proceedings,[9] Mr. Medina did not "fail to develop" his claims. Thus, even if § 2254(e)(2) governed discovery, there is no bar to discovery or a hearing.

III. 28 U.S.C. § 2254(e)(2) cannot bar fact development for procedurally defaulted claims when a petitioner establishes cause for the default.

Respondent also argues that § 2254(e)(2) applies to "all of [Mr.] Medina's claims." ECF #151 at 5. And she purports to invoke § 2254(e)(2) with respect to Mr.

[8] Filing a motion for discovery or a hearing is not necessary under Texas law because every habeas court has a mandatory duty to review the case and fashion appropriate procedures for resolving disputed issues of material fact. TEX. CODE CRIM. PROC. art. 11.071 § 8; §9. Mr. Medina's multiple state court filings attempting to train the court's attention on the need for fact development—all of which were ignored and never ruled on—went above and beyond the fact development procedures prescribed by state law.

[9] *See* ECF #151 at 22–23 (opposing discovery related to Mr. Medina's IATC claims); *id*. at 26 (opposing discovery related to Mr. Medina's juror misconduct claim); *id*. at 27–29 (summarily arguing against a hearing in this matter).

Medina's misconduct claim, which relies on evidence that was successfully suppressed throughout trial and state postconviction proceedings until Regina Juarez admitted that she testified falsely in exchange for a deal.[10] Respondent's arguments are foreclosed by Fifth Circuit precedent.

In *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000), the court held that a petitioner who "establishes cause for overcoming his procedural default" may introduce new evidence to support his claim for relief because the inmate "did not 'fail to develop' the record" under § 2254(e)(2). *Id.* at 771. Under *Barrientes*, if a "district court determines that [the petitioner] has established cause and prejudice for his procedural default, it should proceed to conduct an evidentiary hearing on any claim for which cause and prejudice exists [and] then revisit the merits of any such claim anew." *Id.*; *see also Canales v. Stephens*, 765 F.3d 551, 571 n.2 (5th Cir. 2014) ("Texas argues that if we decide to remand any claims to the district court, we should deny Canales the opportunity to have an evidentiary hearing. We decline to take this step . . . ."); *Tong v. Davis*, No. CV 4:10-2355, 2016 WL 5661698, at *18 (S.D. Tex. Sept. 30, 2016) ("Tong's failure to fully develop this claim in state court appears to be the result of suppression of relevant evidence by the state. As such, Tong's failure to fully

[10] Respondent continues to fault Mr. Medina for the fact that the State made a deal with its witness and failed to disclose it even though (1) the State was constitutionally required to disclose it before trial; and, (2) the trial court ordered the prosecutors to disclose all deals with its witnesses and the prosecutors filed a written response denying the existence of deals. Respondent blames Mr. Medina for not doing more to learn that the prosecutors' written submissions to the trial court and defense counsel were not forthright. ECF #151 at 16–17. As Mr. Medina has already noted, the Supreme Court rejected Respondent's hide-and-seek approach to *Brady* evidence fifteen years ago in *Banks v. Dretke*, 540 U.S. 668 (2004).

develop this claim in state court did not result from a lack of diligence on Tong's part, and he is entitled to an evidentiary hearing on this claim.").[11]

Other courts of appeals have expressly affirmed the principle animating *Barrientes*—that a petitioner who does not inexcusably default a claim has not "failed to develop" that claim within the meaning of § 2254(e)(2). *See*, *e.g.*, *Wilson v. Beard*, 426 F.3d 653, 665–66 (3d Cir. 2005) (holding that, because procedural default and § 2254(e)(2) are "analytically linked," a petitioner who does not procedurally default a claim is not barred by § 2254(e)(2) from introducing new evidence). This Court should decline Respondent's invitation to disregard the law of our Circuit and others.

IV. The state court dismissal of Mr. Medina's *Brady* claim does not give rise to a 28 U.S.C. § 2254(e)(1) presumption of correctness with respect to any factfinding, implicit or otherwise, allegedly relevant to whether Mr. Medina can show cause for a procedural default because the Texas decision was not based on an application of federal habeas corpus procedure.

Respondent maintains that, by dismissing Mr. Medina's *Brady* claim pursuant to Texas's statutory abuse-of-the-writ rule, the CCA necessarily found that the claim was available to Mr. Medina when he filed his initial state habeas application. From there, Respondent leaps to the conclusion that the state court necessarily found that state habeas counsel was not diligent in pursuit of the prosecution's misconduct in

[11] Federal district courts in Texas regularly authorize hearings on the merits of similarly-postured claims. *See*, *e.g.*, *Carpenter v. Davis*, No. 3:02-CV-1145-B-BK, 2017 WL 2021415, at *3 (N.D. Tex. May 12, 2017) ("In other words, this hearing should be considered the parties' one and only opportunity to prove or disprove both the exceptions to procedural bar and the merits of each of these claims."); *Balentine v. Stephens*, No. 2:03-CV-00039, 2016 WL 1322435, at *4 (N.D. Tex. Apr. 1, 2016) (same); *Murphy v. Stephens*, No. 3:09-CV-1368-L-BN, 2014 WL 4771859, at *2 (N.D. Tex. Sept. 25, 2014) (rejecting the Director's argument and ordering a hearing because "to construe the *Martinez* exception as limited to a review of an undeveloped record that is insufficient to properly consider these claims would defeat these stated purposes").

Mr. Medina's case as defined by *federal* habeas corpus jurisprudence. ECF #151 at 7 n.4; 9 n.6. Further, Respondent argues that this Court must now apply the 28 U.S.C. § 2254(e)(1) presumption of correctness to factual statements in the *concurring opinion* that accompanied the CCA's dismissal. Application of § 2254(e)(1) to the state court *concurring* opinion's discussion of a *state* statutory rule, according to Respondent, requires a finding that Mr. Medina was not diligent under the relevant *federal* standard and thus he cannot show cause to overcome any procedural default applicable to his state misconduct claim. *Id*. at 10; 12 n.9; 15–16.

Respondent's arguments are fatally flawed in several respects. Initially, "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965) (holding that a state court ruling that a Confrontation Clause objection was waived under state law did not preclude the federal court from considering the issue); *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (holding that it "is not within the State's prerogative finally to decide" whether federal review of federal questions is barred); *Barrientes v. Johnson*, 221 F.3d at 763 (same).[12] Whether Mr. Medina can show cause to overcome a procedural

[12] Notably, in a prior pleading, Respondent relied on this principle with respect to a different claim, seeking to avoid factual determinations detrimental to her position in the same concurring state court opinion she invokes with respect to Mr. Medina's *Brady* claim. Respondent asserted that, when determining whether Mr. Medina's guilt-innocence IATC claim is exhausted, this Court's analysis is *not* affected by the concurring judges' factual determination that Mr. Medina presented essentially the same guilt-phase IATC claim in both his initial and second round of state habeas proceedings: "[T]he concurring justices did not—nor could they—purport to hold whether Medina's federal claims have been fully exhausted. *See Douglas v. Alabama*, 380 U.S. 415, 422 (1965) ('[T]he adequacy of state procedural bars to the assertion of federal questions is itself a federal question.')." ECF # 136 at 9–10 n.11. Respondent provides no basis for applying § 2254(e)(1) to the concurrence's factual findings relevant to barring Mr. Medina's *Brady* claim but ignoring the fact findings relevant to barring the IATC claim (the latter of which support a finding that Mr. Medina properly exhausted his IATC claims). Both "cause" for overcoming a procedural default and exhaustion of state court remedies are

default is a federal question, and the answer requires application of the due diligence standards articulated in *Williams v. Taylor*[13] and *Strickler v. Greene*.[14] Even if factual determinations by the concurring judges could be imputed to the CCA majority, Respondent does not attempt to—and cannot—argue that the CCA interprets Texas's statutory abuse-of-the-writ rule consistent with the Supreme Court's cause-and-prejudice federal habeas corpus jurisprudence. Moreover, to the extent that the concurring judges' analysis reflects the Texas rule, the state court gateway for filing successive applications based on new evidence is indisputably less forgiving than the Supreme Court's standard for showing "cause" for overcoming a procedural bar to a state misconduct claim. The CCA's application of the state abuse-of-the-writ rule to Mr. Medina's prosecutorial misconduct claim illustrates this point. Finally, federal courts have rejected Respondent's argument in other Texas cases and found cause for a defaulted *Brady* claim after the CCA barred review pursuant to the abuse-of-the-writ rule.

A. Federal courts apply the § 2254(e)(1) presumption of correctness only when the state court applied the appropriate standard to the same set of facts.

A federal court may defer to a state court's findings only when the state court looked at the evidence under "essentially the same standard" that the federal court applies. *See Reed v. Stephens*, 739 F.3d 753, 768 (5th Cir. 2014) (quoting *Sharpe v.*

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federal habeas corpus procedural questions, neither of which were addressed by the majority or the concurring opinions in the most recent state court proceedings.

[13] 529 U.S. 420 (2000).

[14] 527 U.S. 263 (1999).

Bell, 593 F.3d 372, 379 (4th Cir. 2010)); *Evans v. Sec'y Pennsylvania Dept. of Corr.*, 645 F.3d 650, 657–58 (3d Cir. 2011) (holding petitioner's claim was not procedurally defaulted when state court dismissed the successive state habeas petition for lack of "due diligence" but facts demonstrated petitioner could not have brought the claim sooner). Respondent ignores this prerequisite to deferring to state court factfindings because she cannot satisfy it.

B. The federal diligence standard governing "cause" for a procedural default incorporates reliance by state habeas counsel on prosecutors' explicit and implicit representations that they have complied with their *Brady* obligations.

The federal diligence standard for determining whether there is cause for a procedurally defaulted *Brady* claim is clear. Both trial *and state habeas counsel* may reasonably rely on the prosecutor's explicit and implicit representations that all exculpatory material has been disclosed. *Strickler v. Greene*, 527 U.S. 263, 284 (1999). In *Strickler*, the petitioner discovered exculpatory material in the prosecution's files only after the federal district court ordered discovery, despite the prosecution's earlier assertions that all material had been disclosed and that it maintained an open file. *Id.* at 278. The State argued, just as Respondent does here, that state habeas counsel's lack of diligence in failing to interview witnesses or seek the relevant discovery in state habeas proceedings precluded a finding of cause for the default. *Id.* at 284–85. The Supreme Court explicitly rejected these arguments. *Id.* at 284–86. The Court held that

> [i]f 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." *Id.* at 491, 106 S. Ct. 2639.

Id. at 284. *See also Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."). Thus, under the federal standard, after trial prosecutors make explicit, or even implicit, representations that all *Brady* disclosures have been made or are in the "open file," diligent state habeas counsel is not required to presume the opposite and investigate whether the prosecutor lied or was mistaken. *Id*. at 286–87 ("The presumption, well established by 'tradition and experience,' that prosecutors have fully 'discharged their official duties,' . . . is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.") (quoting *United States v. Mezzanatto,* 513 U.S. 196, 210 (1995)) (internal quotation marks omitted).

C. The Texas courts are not applying federal law because they impose on state habeas counsel the same heightened standard of diligence explicitly rejected by the Supreme Court.

Although Respondent attempts to invoke the § 2254(e)(1) presumption based on the Texas court's application of the state abuse-of-the-writ rule, she points to no decision of the Texas court—or any federal court—establishing that the Texas procedural rule incorporates the federal standard articulated in *Strickler* and other

cases. To the contrary, to the extent it is a representative application of the Texas procedural rule, the four-judge concurring opinion in this case demonstrates that the CCA imposes the heightened diligence standard expressly rejected in *Strickler* and *Banks*. This explains why other federal courts have rejected the very same arguments Respondent makes here and found cause for defaulted *Brady* claims after CCA dismissal as "abusive" pursuant to the Texas rule.

For example, the CCA dismissed Mr. Medina's allegation that the prosecution failed to disclose its deal with Regina Juarez, a State's witness who ultimately informed Mr. Medina's federal habeas counsel that she testified to avoid going to jail herself. *See Ex Parte Medina*, WR-41,274-05, 2017 WL 690960, at *2 (Tex. Crim. App. Jan. 25, 2017). Mr. Medina's diligence with respect to any deals for cooperating prosecution witnesses was above and beyond what *Strickler* requires. First, though no request is necessary to trigger the State's obligation to disclose such information,[15] Mr. Medina's trial counsel filed a pre-trial discovery request for all deals made with prosecution witnesses. In response to the court's order to disclose any such deals, the State responded in writing that there was none. CR at 32, 34. Under *Strickler*, Mr. Medina met his diligence requirement at that point and the State's failure to disclose qualifies as cause to overcome a procedural default. *See Strickler*, 527 U.S. at 284. Mr. Medina, however, showed even greater diligence than required by *Strickler* when, in his initial state habeas proceedings, he again requested discovery of all evidence

[15] *United States v. Agurs*, 427 U.S. 97, 107 (1976), *holding modified by United States v. Bagley*, 473 U.S. 667 (1985).

of "agreements, deals, promises of leniency or other inducement to testify made between the prosecution or law enforcement and . . . Regina Juarez." SHR III: 676. Having requested and received a court order for disclosure of all deals, and the prosecutor's written assurance there were none, and then again seeking discovery of this information in state habeas proceedings, Mr. Medina was more than diligent in pursuing evidence of deals between the prosecutors and their cooperating witnesses. No reasonable reading of *Strickler* and *Williams* requires more.

Yet, the concurring CCA judges opined that Mr. Medina had not shown sufficient diligence to satisfy an exception to Texas's statutory rule presumptively barring successive habeas applications. Apparently, even after a defendant secures a written response to a discovery request in which the prosecutor denies any deals with witnesses, Texas state habeas counsel must independently interview every prosecution witness to learn whether the trial prosecutor's response to court-ordered discovery was untruthful. *Ex Parte Medina*, 2017 WL 690960, at *7 (Newell, J., concurring) ("Defense attorneys were aware of these witnesses' young ages, and had access to their statements to police and their criminal histories, at the time of trial. Through the exercise of reasonable diligence, trial counsel and previous habeas counsel could have developed evidence in support of an argument that these witnesses' statements were false and involuntary due to their young ages and coercive police misconduct."); *see also* ECF #151 at 16–17 (complaining that Mr. Medina has failed to establish that the evidence could not have been tracked down

during state habeas proceedings).[16] The concurring judges blamed Mr. Medina's counsel for not finding the hidden deal with Regina Juarez sooner, but federal courts must apply a different standard when assessing cause for a claim based on evidence concealed by the state through trial and state postconviction proceedings:

> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to ... discover the evidence," Tr. of Oral Arg. 35, so long as the "potential existence" of a prosecutorial misconduct claim might have been detected, *id.,* at 36. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.

Banks v. Dretke, 540 U.S. 668, 696 (2004); *see also id.* at 698 (finding cause for Banks's claim based on *Brady* evidence that emerged during federal proceedings). Because the Texas court—if the concurrence is an accurate indication—applied the hide-and-seek approach rejected in *Banks* and *Strickler*, its application of the Texas statutory procedural rule does not create a factfinding relevant to this Court's cause analysis.

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[16] Respondent mistakenly assumes that Mr. Medina's counsel did not interview Regina Juarez before filing his state habeas application, and that Ms. Juarez readily disclosed her hidden deal with the prosecution during her first discussion with Mr. Medina's counsel. ECF #151 at 16–17. Respondent is wrong on both counts. Counsel for Mr. Medina have had multiple conversations with Ms. Juarez, including at least one before filing the state habeas application. Ms. Juarez did not immediately volunteer her hidden deal with the State. And, after she disclosed the deal, she declined to meet with counsel again to discuss the matter further.

As Mr. Medina has explained, there was a clear pattern in this case: people who helped the State walked free even though they faced serious criminal liability, while witnesses—even a young, pregnant teenager—who supported the defense were sent to prison for years. *See* ECF #053 at 22–23. Under these circumstances, Ms. Juarez, like many witnesses in this case, has been reluctant to get involved.

Respondent—who represents the State of Texas here—is unhappy about new evidence emerging in these federal proceedings. It was the State that suppressed evidence and intimidated witnesses (and, as Mr. Medina has demonstrated, the prosecuting agency in this case has a clear pattern and practice of this behavior, *see* ECF #133 at 74–94). Mr. Medina is not the party at fault for the lack of full factual development to date. To the contrary, he has diligently requested factual development at every stage of the postconviction proceedings, but requires the Court's assistance to fully develop his claims. Mr. Medina stands ready to prove that he has cause for not raising this issue any sooner.

D. Respondent's argument is contrary to controlling Fifth Circuit precedent.

Finally, Respondent's argument is squarely foreclosed by Fifth Circuit precedent. In *Barrientes v. Johnson*, the petitioner—like Mr. Medina—was sent back to the Texas courts to exhaust prosecutorial misconduct claims that emerged after his first state habeas proceedings. 221 F.3d at 750. The CCA, as it did in this case, barred Barrientes's successive habeas application as an abuse of the writ pursuant to Tex. Code Crim. Proc. art. 11.071 § 5. *Id.* at 761. After Barrientes returned to federal court, the Fifth Circuit held:

> "[T]he resolution of 'when and how defaults in compliance with state procedural rules can preclude [federal court] consideration of a federal question is itself a federal question.'" *Fairman v. Anderson,* 188 F.3d 635, 641 (5th Cir.1999) (alteration in original) (quoting *Johnson v. Mississippi,* 486 U.S. 578, 587, 108 S. Ct. 1981, 100 L.Ed.2d 575 (1988)). To the extent, therefore, that the Texas Court of Criminal Appeals decided issues of cause and prejudice in dismissing Barrientes's Second State Petition, *we are not bound by its decision*.

Id. at 763 (emphasis added). Because *Barrientes* involved the application of the same procedural rule (Texas's statutory abuse-of-the-writ rule) to prosecutorial misconduct claims, it controls here.

Respondent fails to mention or distinguish this controlling circuit precedent. Instead, she relies on two entirely distinguishable Fifth Circuit decisions, *Reed v. Stephens* and *Valdez v. Cockrell*, to suggest that the state court dismissal of Mr. Medina's *Brady* claim activates the § 2254(e)(1) presumption of correctness with respect to his diligence when determining whether there is cause for the procedural default. ECF #151 at 7 n. 4. But in *Reed*, the CCA applied a federal rule when dismissing a subsequent writ. In his federal petition, Reed sought review of his

dismissed actual innocence claim under the Supreme Court's *Schlup* standard. *Reed v. Stephens*, 739 F.3d 753, 767 (5th Cir. 2014). In deferring to the CCA's dismissal under Texas Code of Criminal Procedure Article 11.071 § 5(a)(2), the Fifth Circuit noted that § 5(a)(2) was enacted by the Texas Legislature in response to *Schlup* and the CCA thus applied the federal standard in reviewing those claims. *Id.* at 767–68.

Valdez is likewise inapplicable. *Valdez* did not involve an application of Texas's abuse-of-the-writ rule. In *Valdez*, the Fifth Circuit held that § 2254(e)(1) deference was owed to implied findings of fact in the state court's merits resolution of an ineffective assistance of counsel claim for failure to investigate mitigating evidence—a constitutional claim for relief. *Valdez v. Cockrell*, 274 F.3d 941, 948 (5th Cir. 2001). In that instance, the state and federal courts were applying the same rule—*Strickland v. Washington*—to the claim, thus the federal court may defer to the state court's findings. *See id.*; *see also Ford v. Davis*, 910 F.3d 232 (5th Cir. 2018) (holding that the federal court owed deference to the state court's implicit credibility finding against the petitioner on his ineffective assistance of counsel claim for failing to convey a plea offer, the same credibility question the federal court would consider when determining whether there was cause for the procedurally defaulted claim).

Neither of Respondent's cases address the issue here; this Court must follow *Barrientes*. The Court must necessarily decide whether Mr. Medina has shown cause for any default *de novo* because no other court has addressed this federal habeas procedural question.

V. Record expansion is appropriate and necessary to resolve disputed questions of federal habeas corpus procedure, such as whether Mr. Medina can establish cause to overcome any procedural default or the reasonableness of the state court procedures for resolving factual disputes.

A. Record expansion is necessary and appropriate to show "cause" for any defaulted claims.

Respondent opposes discovery with respect to the prosecution's misconduct in this case because, she alleges, Mr. Medina has yet to establish cause to overcome any applicable default. ECF #151 at 7–9. Respondent thus starts at what she hopes will be the end of these proceedings (a finding that Mr. Medina cannot show cause) and from there argues backwards to the position that the discovery necessary to prove cause is unwarranted and impermissible. Respondent's arguments are premature.

Discovery and hearings are appropriate in habeas proceedings if necessary to determine the validity of a procedural defense. *See Holloway v. Horn*, 355 F.3d 707, 716 (3d Cir. 2004) ("it is within a district court's authority to grant a hearing on a petitioner's ability to establish cause to excuse a procedural default, and therefore § 2254(e)(2) is inapplicable to those hearings"); *Henry v. Warden, Georgia Diagnostic Prison*, 750 F.3d 1226, 1231–32 (11th Cir. 2014) ("When a petitioner asks for an evidentiary hearing on cause and prejudice, neither section 2254(e)(2) nor the standard of cause and prejudice that it replaced apply."). *See also*, *e.g.*, *Carpenter v. Davis*, No. 3:02-CV-1145-B-BK, 2017 WL 2021415, at *3 (N.D. Tex. May 12, 2017) ("In other words, this hearing should be considered the parties' one and only opportunity to prove or disprove both the exceptions to procedural bar and the merits of each of these claims."); *Balentine v. Stephens*, No. 2:03-CV-00039, 2016 WL 1322435, at *4 (N.D.

Tex. Apr. 1, 2016) (same); *see also* Hertz & Liebman, Federal Habeas Corpus Practice and Procedure, § 20.1[c] (7th Ed.) ("The need for an evidentiary hearings extends not only to the factual issues presented by the petitioner's claims but also to those presented by the many prerequisites and exceptions to the state's procedural defenses, including failure to exhaust remedies, waiver and procedural default . . . .").

Thus, federal courts have granted fact development to petitioners similarly situated to Mr. Medina. For example, the CCA dismissed Ronald Prible's successive application raising, *inter alia*, *Brady* and *Giglio* claims on the same basis as Mr. Medina's. *Ex parte Ronald Jeffrey Prible, Jr.*, WR-69,328-04 (Tex. Crim. App. 2011) (finding that Prible's "allegations fail[ed] to satisfy the requirements of Article 11.071, § 5(a)" and dismissing as an abuse of the writ). Prible subsequently filed a second amended federal petition raising his now putatively-defaulted *Brady* and *Giglio* claims. *Prible v. Thaler*, No. 4:09-cv-01896, ECF #47 (S.D. Tex. Aug. 17, 2012). He also sought discovery. Opposed Second Motion for Discovery, *Prible*, No. 4:09-cv-01896, ECF #48 (S.D. Tex. Sept. 14, 2012).

Respondent moved for summary judgement and argued, *inter alia*, that Prible's *Brady* claim was defaulted in light of the CCA's dismissal pursuant to the abuse-of-the-writ rule and, "because Prible d[id] not show a *Brady* violation, he d[id] not show cause and prejudice sufficient to excuse default." Motion for Summary Judgment and Amended Answer, *Prible*, No. 4:09-cv-01896, ECF #56 at 56-57 (S.D. Tex. Dec. 17, 2012). The District Court nevertheless granted fact development to

allow Prible to prove his claim and establish cause. *See Prible, id.,* ECF #69 (granting discovery "[p]ursuant to Rule 6(a)").

Based on this newly developed evidence, Prible was granted leave to file a Third Amended Petition and to expand the record with additional evidence, including facts developed in federal habeas proceedings. *Prible,* No. 4:09-cv-01896, ECF #98 (S.D. Tex. Sept. 22, 2015) (observing that Prible sought amendment "to incorporate new legal argument and factual material," granting leave to amend, and denying Respondent's Motion for Summary Judgment in the same order). The district court has since granted multiple additional rounds of discovery over Respondent's objection. *Prible,* No. 4:09-cv-01896, ECF ## 104, 134 (orders granting various discovery requests). The case is still in active litigation.

Mr. Medina accepts responsibility for proving his claims and cause for any default, but he must afforded an opportunity to do so.

B. Record expansion is necessary and appropriate to show that the state court process was too flawed to qualify as an "adjudication" or "on the merits" of Mr. Medina's claims, as well as to show that, pursuant to 28 U.S.C. § 2254(d)(2), the state court process for determining facts was unreasonable.

Throughout these proceedings, Mr. Medina has raised multiple, independent arguments against applying 28 U.S.C. § 2254(d) to preclude relief on his claims. Generally, these arguments may be divided into two categories. First, Mr. Medina argues that, with respect to his fact-bound, extra-record claims, the state court adjudication did not qualify for the application of § 2254(d) because the claims were not subject to an "adjudication" and, even if they were, the adjudications were not "on

the merits."[17] Second, Mr. Medina has explained throughout that even if the state court process qualified as an adjudication on the merits of all claims, he can demonstrate that one or more statutory exceptions to the § 2254(d) relitigation bar are present with respect to each claim.

Mr. Medina has collected a mass of evidence—both about the conduct in his case and Harris County's pattern and practice of processing capital habeas cases—in support of his arguments that the state courts failed to adjudicate his claims on the merits, 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 that the court *ignored* (i.e., failed to acknowledge or rule on) every motion Mr. Medina filed and granted all of the State's.
- 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

[17] *See e.g.*, ECF #93 at 9–22; *id*. at 109–113; *id*. at 175–78; ECF# 133 at 22–68; ECF #143 at 8–19.

proposed FFCL in 185 out of 195 (or 95%) 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.

See ECF#133 at 20–65.

Mr. Medina proffered this evidence to rebut the *Johnson v. Williams*, 568 U.S. 289 (2013), presumption that his claims were adjudicated on the merits. In *Johnson*, the Court held that a

> judgment is normally said to have been rendered "on the merits" only if it was "delivered after the court ... heard and *evaluated* the evidence and the parties' substantive arguments." Black's Law Dictionary 1199 (9th ed. 2009) (emphasis added). And as used in this context, the word "merits" is defined as "*[t]he intrinsic rights and wrongs of a case* as determined by *matters of substance,* in distinction from matters of form." Webster's New International Dictionary 1540 (2d ed. 1954) (emphasis added); *see also*, *e.g.,* 9 Oxford English Dictionary 634 (2d ed. 1989) ("*the intrinsic 'rights and wrongs' of the matter,* in contradistinction to extraneous points such as the competence of the tribunal or the like" (emphasis added)); Random House Dictionary of the English Language 897 (1967) ("the *intrinsic right and wrong of a matter,* as a law case, unobscured by procedural details, technicalities, personal feelings, etc." (emphasis added)).

Id. at 302 (emphasis in the original). As Justice Scalia's concurrence to the unanimous opinion noted, the other eight Justices read "on the merits" as "[d]ecided after due consideration," *id*. at 307 (Scalia, J., concurring), and "suggest[ing] a line

between a *considered* rejection of a claim and an *unconsidered*, *inadequately considered*, or *inadvertent* rejection." *Id.* at 308 (emphasis in the original).

There is no question that if, for example, the petitioner proved that the state court decided the case solely by flipping a coin, the decision would not be "on the merits" for *Johnson* purposes because it was not based on the evidence and arguments of the parties.

Mr. Medina has proffered a raft of evidence that his case was likewise not decided "on the merits" but instead based on a rule of complete deference—on all matters of fact and law—to the prosecution. He has supported his argument with proof that the trial court in his case has signed 100% of the prosecution-drafted findings and conclusions put before it, even when those findings are squarely contradicted by the record. The trial court's practice, moreover, is part of a larger culture of deference in Harris County. Judges sign the prosecutor's findings before petitioners file theirs. The deference to the prosecutors is so reflexive and ingrained that one judge even signed the prosecutor's order in a case that was not before her. *See* ECF#133 at 20–65.

In short, Mr. Medina has amassed significant proof that his case was decided not on the evidence or arguments, but on the principle that the prosecution is always right. There can be no doubt that, if true, this process is not an adjudication on the merits under *Johnson*. Likewise, a rule of absolute deference to the prosecution on all factual matters is an unreasonable method for determining facts, thus this same body of evidence supports a finding that the 28 U.S.C. § 2254(d)(2) exception is

satisfied.[18] Respondent has not challenged the accuracy of Mr. Medina's data. She has, however, objected to it based on hearsay and other evidentiary matters. ECF 136 at 48–49.

Mr. Medina bears the burden of rebutting the *Johnson* presumption that the state court proceedings were an adjudication on the merits and establishing a § 2254(d)(2) exception. Discovery and a hearing are indispensable to this Court's *de novo* consideration of these matters of federal habeas corpus procedure.

VI. Mr. Medina is entitled to discovery and hearing on his claims for relief.

Respondent repeatedly mischaracterizes Mr. Medina's fact-specific claims as "speculative"[19] and his discovery requests as "fishing expeditions." ECF #153 at 11, 22, 28. But Respondent plainly misapprehends the relevant discovery standard. Even if Mr. Medina's allegations could be described as speculative, the Supreme Court has held that federal courts should authorize discovery for "speculative" claims if proving the allegations would lead to relief. Thus, arguing claims are "speculative" misses the point and does not address whether the petitioner is entitled to discovery. Moreover,

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[18] Mr. Medina notes that, in a recent unpublished decision, the Fifth Circuit stated that *Johnson* did not address the quality of the state court process when discussing how petitioners may rebut the presumption of an adjudication on the merits. *Freeney v. Davis*, 737 Fed.Appx. 198, 205 (5th Cir. Aug. 13, 2018) (unpublished). Respondent understandably did not invoke *Freeney* in her recent opposition to discovery. First, it is an unpublished decision and thus not binding authority. Second, Freeney's argument was of a different nature than Mr. Medina's and *Freeney* did not address the question of whether a prosecutor-always-wins rule is "on the merits" for § 2254(d) purposes. Even if, however, *Freeney* could be read to foreclose Mr. Medina's argument rebutting the *Johnson* presumption (it does not), Mr. Medina would still require discovery and a hearing to develop the same evidence in support of his § 2254(d)(2) argument.

[19] Mr. Medina "concentrates on the 'fact-specific nature' of his claims…That does not mean his claims are not speculative or conclusory as to the ultimate legal issues; nor does it entitle him to discovery." ECF #151 at 2, n.1; *see also id.* at 13.

Mr. Medina's requests are not speculative or "fishing expeditions." Mr. Medina has identified and requested specific documents relevant to his fact-specific claims for relief, and explained how the requested material substantiates or supports his allegations. *See* ECF #148 (Motion for Discovery and an Evidentiary Hearing) at 10, 15–17, 18, 19, 21–24, 27–30.

Respondent also opposes discovery because Mr. Medina cannot already prove his allegations with admissible evidence. *See e.g.* ECF #151 at 17 (the conversation in which a star prosecution witness admitted she had an undisclosed deal "is not competent evidence" and Mr. Medina's briefing "provides no evidence of an undisclosed deal."). Of course, the purpose of discovery is to permit the litigant to prove his allegations. Those allegations, as described below, may be properly based on newspaper articles, hearsay, and other information that—alone—would be insufficient to prove a claim. Under Respondent's proposed approach to discovery, it would be available only to those who do not need it.

In *Harris v. Nelson*, the Supreme Court explained that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." 394 U.S. 286, 300 (1969); *see also Bracy v. Gramley*, 520 U.S. 899, 908–909 (1997) (same). Habeas Corpus Rule 6 is meant to be "consistent" with *Harris*. Advisory Committee's Note on Habeas Corpus Rule 6, 28 U.S.C., p. 479.

Measured against this standard, Mr. Medina has made the requisite showing

for discovery. In *Bracy*, the petitioner sought discovery to substantiate claims of judicial bias after his trial judge (Maloney) was convicted of accepting bribes from criminal defendants in exchange for reduced charges or outright acquittals. *See United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995) (upholding Maloney's federal conviction on racketeering, extortion, and obstruction of justice charges). Although no party alleged a bribe was offered in Bracy's case, he argued that Maloney's actions in other cases, as well as his defense attorney's prior partnership with Maloney and familiarity with Maloney's longtime involvement in judicial bribes *may* have led to a "compensatory" bias against Bracy. *See Bracy*, 520 U.S. at 905, 907–08. Bracy theorized that Maloney had incentive to ensure Bracy's quick conviction to deflect suspicion for acquittals and other verdicts occurring both before and immediately after Bracy's trial. *Id.*

The district court denied discovery and relief. The Seventh Circuit affirmed, pointing out that Bracy's judicial bias claim itself was "quite speculative." *Bracy*, 520 U.S. at 905. The Supreme Court reversed. *Bracy*, 520 U.S. at 910. Though the "compensatory bias" theory might be speculative, the Supreme Court pointed out that, "*if it could be proved*, such compensatory…bias…in petitioner's own case would violate the Due Process Clause of the Fourteenth Amendment." *Id.* at 905 (emphasis added). Satisfied that Bracy had pled a valid claim for relief, the Supreme Court turned its attention to whether there was good cause for discovery. *Bracy*, 520 U.S. at 906.

In the lower court, Bracy requested discovery of (1) the sealed transcript of

Maloney's trial; (2) reasonable access to the prosecution's materials in Maloney's case; (3) the opportunity to depose persons associated with Maloney; and, (4) a chance to search Maloney's rulings for a pattern of pro-prosecution bias. *Bracy*, 520 U.S. at 902. Bracy supported his discovery requests with (1) a copy of the Maloney's federal indictment; (2) a newspaper article discussing additional uncharged allegations of fixing on Maloney's part; (3) a co-defendant's supplementary discovery motion asserting that Bracy's lawyer was a former law partner of Maloney; and, (4) the federal government's proffer, attached to the co-defendant's motion, delineating additional aggravating evidence against Maloney. *Bracy*, 520 U.S. at 902.

To support his claim of compensatory bias, Bracy offered a supplementary theory: the specific factual allegation that "that his trial attorney, a former associate of Maloney's in a law practice that was familiar and comfortable with corruption, may have agreed to take this capital case to trial quickly so that petitioner's conviction would deflect any suspicion the rigged [prior and subsequent] cases might attract." *Bracy*, 520 U.S. at 908. While acknowledging that the allegation was "of course, *only a theory at this point [and] not supported by any solid evidence* of petitioner's trial lawyer's participation," the Supreme Court held that "good cause" for discovery was shown. *Bracy*, 520 U.S. at 909 (emphasis added). This was so because, in addition to the pattern and practice evidence of Maloney's corruption before and after Bracy's trial, he also made specific factual allegations of judicial bias in Bracy's own case. *See Bracy*, 520 U.S. at 909.

Thus, *Bracy* instructs that a court should first determine whether the petitioner has alleged the elements of the claim he wishes to prove, then determine whether he has made any "specific allegations" that support the particular discovery request. If the petitioner has properly alleged the claim with specificity and asked for probative evidence, he has shown "good cause" for discovery and the court has a duty to permit it. *See Murphy v. Johnson*, 205 F.3d 809, 813–14 (5th Cir. 2000) ("where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he [is] entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry"); *East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995) (although a "district court generally has discretion to grant or deny discovery requests under Rule 6, a court's blanket denial of discovery is an abuse of discretion if discovery is indispensable to a fair, rounded, development of the material facts") (citations omitted).

A. Mr. Medina's prosecutorial misconduct claim.

Mr. Medina has shown good cause for discovery with respect to his prosecutorial misconduct claim. He has pled specific allegations of prosecutorial misconduct, including deals with testifying witnesses, suppression of witnesses who saw African American assailants, information about the disposal of the murder weapon and the evolving stories of State's witnesses on this point, the criminal history of a witness about whom the prosecutor told the jury "she's never been in trouble," and more. *See* ECF #53 at 159–82; ECF #93 at 130–47. Mr. Medina has thus

alleged specific instances of misconduct in his case. If these facts are fully developed, and Mr. Medina can demonstrate that the exculpatory evidence withheld was material at trial, he is entitled to relief. *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963). And in support of his specific allegations of due process violations, Mr. Medina points to concrete evidence of similar (or greater) strength than the evidence found sufficient by the Supreme Court in *Bracy*. "Good cause for discovery was established in *Bracy* based primarily upon the specific nature of the allegations and the concrete nature of the evidence proffered to support Bracy's theory." *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000). The same is true here.

1. Undisclosed deals with testifying witnesses

To substantiate his claim that the State failed to disclose deals with its witnesses, Mr. Medina points to, *inter alia*, (1) the Harris County District Attorney's Office's ("HCDAO") pattern and practice of failing to disclose deals with its witnesses in other cases; (2) the HCDAO's pattern and culture of failing to turn over *Brady* material based on individual prosecutors' idiosyncratic definitions of "exculpatory" and "material";[20] (3) the stark pattern in Mr. Medina's case in which, of all the

[20] *See* ECF #133 at 74–87. Respondent here posits yet another idiosyncratic and incorrect theory about *Brady* evidence. Respondent, for the first time in this litigation, acknowledges that prosecution witnesses "may not have initially been entirely forthright in admitting their involvement in the disposal of the [murder] weapon." Response at 19. Thus, Respondent now abandons her position in her answer to Mr. Medina's Second Amended Petition that the irreconcilable statements of prosecution witnesses—under oath—about the murder weapon could somehow be read as consistent. *See* ECF #76 at 62–63 (attempting reconcile Regina Juarez's sworn statement to the police that she last saw the murder weapon when it was thrown into the bayou with her trial testimony that she last saw the weapon when she and Dominic "Flaco" Holmes buried it). Even though star prosecution witnesses gave conflicting sworn statements before and during trial—and one witness has informed undersigned counsel that it was her trial testimony that was false—Respondent argues that evidence that the prosecution witnesses lied under oath is nonetheless immaterial because it was only about the disposal of the murder weapon and not about what happened on the night of the crime. ECF #151 at 19. As

numerous witnesses exposed to serious criminal liability, the cooperating witnesses escaped all liability and those who failed to testify for the state went to prison; and, (4) one of the cooperating witnesses who tampered with evidence and subsequently lied about it under oath has informed counsel that she testified (falsely) in exchange for a deal. This evidence far exceeds that pled in support of Bracy's allegation of judicial bias and demonstrates good cause for discovery.

2. Grand jury testimony.

Respondent devotes only a footnote to Mr. Medina's request for grand jury transcripts related to Mr. Medina's case. *See* ECF #151 at 15, n.12; *cf*. ECF #148 at 15–17 (requesting discovery of grand jury testimony and HCDAO policies regarding grand jury witnesses and their testimony). Respondent dismisses as speculative Mr. Medina's "assertion that there is exculpatory information in the grand jury testimony because two witnesses, Veronica Ponce and Scharlene Pooran, were prosecuted for lying to Medina's grand jury." ECF #151 at 15, n. 12. But, as the Supreme Court has held, a petitioner's "speculative" theory that is not *yet* "supported by solid evidence" may still warrant discovery if, upon proof, would entitle the petitioner to relief. *Bracy*, 520 U.S. at 905, 908–09. Respondent fails to acknowledge the entirety of Mr. Medina's case for discovery of the grand jury evidence.

Mr. Medina's requests for grand jury evidence are supported by more than just

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Respondent implicitly acknowledges, the witnesses who were not "entirely forthright in admitting their involvement"—*i.e.* who lied under oath either before or during trial—were critical prosecution witnesses. Demonstrating that they were lying about their role in covering up the crime and tampering with evidence would have obviously undermined their credibility and hence the prosecution's whole case.

the prosecutions of Ms. Ponce and Ms. Pooran (whose grand jury testimony, though exculpatory, has never been provided to Mr. Medina). Mr. Medina has (1) pled specific allegations supporting his claim of misconduct, (2) relied on an instance of similar misconduct by the same prosecuting agency in another capital murder case in which a witness with exculpatory information was bullied and coerced into changing her story, and (3) provided several examples witnesses changing their stories close-in-time to the grand jury proceedings. *See* ECF #148 at 12–15. Considered cumulatively, Mr. Medina's proffer amounts to good cause for discovery of the grand jury transcripts and related evidence. This Court should grant the requested discovery.

3. Information related to undisclosed eyewitness identifications.

Mr. Medina also requested discovery related to the State's failure to disclose statements and evidence concerning additional eyewitnesses to the crime, stemming from HPD references to undisclosed tips that "some black males" were involved in the offense. ECF #148 at 10; ECF #53, Exh. 1 at 127. Mr. Medina has supported this discovery request with information from (1) the initial police report and (2) the affidavit of Dallas Nacoste. ECF #148 at 10; *see also* ECF #53, Exh. 18 (Affidavit of Dallas Nacoste).

Respondent contends that this discovery should be denied because Mr. Medina "does not have information to prove this claim now." ECF #151 at 12. But again, discovery is a mechanism by which information is obtained *in order to prove* "specific allegations," and Mr. Medina has pled fact-specific claims for relief related to suppression of exculpatory evidence, including the information related to the

eyewitness tip(s). To demonstrate good cause for discovery, Mr. Medina is not required to show that he has information to prove his claim today, but rather that the information he seeks might help him prove the claim. *See Bracy*, 520 U.S. 908–09. Because he has demonstrated both the utility and the existence of the evidence he seeks, Mr. Medina has shown good cause under *Bracy*.

Respondent attempts to undermine Mr. Medina's claim and deflect the proper inquiry by arguing that "the fact that the police investigated African American suspects who were involved in the crime was not withheld from the defense." ECF #151 at 13. The discovery Mr. Medina seeks, however, is not the fact that a police investigation occurred, but specific information related to that investigation, namely the identity of the original eyewitness(es) who reported that African-American males were responsible for or involved in the crime. *See* ECF #148 at 10 (requesting information related "to any person who gave information about people who may have been involved in this incident.").

Mr. Medina has demonstrated that, in fact, there *was* information about the shooters provided to the HPD within 48 hours of the crime: the police report indicates that "information had also been received that some black males may also be involved in this incident," but does not provide the origin of this information. ECF #53, Exh. 1 at 127. As Mr. Medina argued in his Motion for Discovery, the timing of this initial tip proves that the information must have come from an eyewitness or a tipster who obtained the information from an eyewitness. ECF #148 at 10. Therefore, Mr. Medina seeks discovery related to the origin of that information, the identity of the tipster(s),

and evidence related to the investigation of any tip(s) that an African-American was involved in the shooting. *See* ECF #148 at 10.

Respondent further asserts that because "Nacoste's hearsay statement about what the police told him does not provide credible evidence that there were undisclosed eyewitnesses," ECF #151 at 13, Mr. Medina fails to show good cause for discovery on this claim. *Id.* at 14. But the information in Nacoste's affidavit substantiates that undisclosed eyewitnesses exist and were known to HPD; the fact that Nacoste's affidavit may be hearsay does not mean it cannot support Mr. Medina's showing of good cause for discovery of the requested evidence. *Cf. Bracy*, 520 U.S. at 907, 909 (finding good cause for discovery on the basis of, *inter alia*, a newspaper article describing testimony from Maloney's corruption trial, in which a witness described an additional, uncharged incident where he bribed Maloney to fix a murder case).

Because Mr. Medina has pointed to police reports indicating the existence of the particular information he seeks, and has supported this request with additional statements from HPD officers that a witness reported that the assailants were African-American, *see* ECF #53 Exh. 18 (Nacoste Affidavit), he has met his burden under *Bracy* to obtain discovery related to his suppression of evidence claim.

4. Statements related to disposal of the murder weapon.

Mr. Medina also seeks discovery related to previously-undisclosed inconsistent statements by State's witness Dominic Holmes. ECF #148 at 17. Specifically, Mr. Medina points to an HPD officer's statement on January 11, 1996, that Holmes

reported Johnny Valadez "may have or disposed of the murder weapon." ECF #148 at 17; ECF #53, Exh. 1 at 190. This statement by Holmes is inconsistent with both his written statements to law enforcement as well as Holmes's ultimate testimony at Mr. Medina's trial. ECF #148 at 17–18.

Respondent attempts to thwart discovery on this issue by observing that the line in the police report cited by Mr. Medina—that Holmes implicated Valadez in the possession and/or disposal of the murder weapon—was not suppressed. ECF #151 at 17. Mr. Medina does not contest this; *he offers the police report* in support of his request for discovery *of the suppressed information—i.e.* information about the interview in which Holmes told the police that Valadez had or disposed of the weapon—to substantiate the specific allegation that the state suppressed favorable evidence. The reference in the police report demonstrates that the statement was made; it must have been memorialized, formally or otherwise, beyond the one-line mention available in the police report. It is this substantiating evidence that Mr. Medina requests, and he has shown good cause for discovery as to this issue.

Through the police report, Mr. Medina has established that Holmes made a statement that is inconsistent with his written statement and his trial testimony explaining away the fact that—when the murder weapon was found—Holmes' prints, and not Medina's, were on the bag in which it was wrapped. Furthermore, Mr. Medina has previously offered the post-conviction statement of another testifying witness, Regina Juarez, that she was instructed by Harris County prosecutors to testify falsely about Mr. Medina's role in the crime and the disposal of the murder weapon, and that

she was threatened with jail if she did not comply. ECF #53 at 177. Considering that (1) Holmes told different stories about the murder weapon in the days following the crime; (2) Holmes ultimately changed his story and testified against Mr. Medina;[21] (3) though initially thought to be the shooter and charged with capital murder, Holmes was not convicted of any offense related to the crime; and, (4) another witness has confirmed that she was told to change her story and testify falsely against Mr. Medina, Mr. Medina has shown good cause for discovery on this issue.

5. Regina Juarez's criminal records

Mr. Medina has requested discovery related to Regina Juarez's juvenile criminal history. ECF #148 at 19. In support, Mr. Medina has offered a rap sheet indicating the witness's juvenile history in support and requests specific information related to the crimes apparent from the rap sheet. *Id.*; *see also* ECF #53 at 174–76. Respondent asserts that discovery should be denied in part because juvenile records are presumptively inadmissible and "inadmissible evidence is not *Brady* material." ECF 151 at 21. But this argument ignores the prosecution's explicit argument to the jury that they should believe Regina "because "she's never been in trouble before." 18 RR 2310.

Mr. Medina has demonstrated the existence of Regina Juarez's juvenile convictions, and has specifically requested information related to her juvenile criminal history, attached supporting documentation in the form of the rap sheet, and

[21] *See* 15 RR 1906–07 (prosecutor prompting Flaco Holmes to tell the gun burial story they discussed a couple of months before trial).

briefed the relevance of the information requested in relation to his specific allegations and claims for relief. With regards to Ms. Juarez's criminal records, too, Mr. Medina has made the requisite showing of good cause.

6. Additional documents and evidence requested from HPD and HCDAO.

Finally, Mr. Medina seeks discovery of law enforcement files and various depositions of law enforcement personnel related to the investigation and prosecution of this case, as well as information related to the HCDAO's policies and practices relating to maintenance and storage of files. *See* ECF #148 at 19–24. In support of this request, Mr. Medina points to several examples of judicial opinions finding that senior Harris County prosecutors gravely misunderstood and thus failed to comply with *Brady*. *See, e.g., Ex Parte Temple,* No. WR-78,545-02, 2016 WL 6903758, *3 (Tex. Crim. App. Nov. 23, 2016) (adopting the lower court's findings that a senior prosecutor's "*misconception regarding her duty under Brady was 'of enormous significance*'" and "the method of 'disclosure' utilized by the prosecution did not satisfy the State's duty under *Brady*."); ECF #148 at 20 (*referring back to* ECF #133 at 81–101). Mr. Medina has also documented multiple failures of the HCDAO to disclose exculpatory information despite numerous requests from counsel. Moreover, the HCDAO has a pattern of claiming to have "lost" specific documents known to be within its possession until a postconviction court orders production of it and causes the files to promptly reappear. *Id*.

In addition to this pattern and practice evidence, Mr. Medina also points specifically to the HCDAO's responses to both Public Information Act requests and

counsel's request to review the prosecution file *in his own* case. ECF #148 at 19–20. Respondent argues that discovery should be denied *in toto* because Mr. "Medina has explained that he was permitted to review the State's file four times," and "he has discovered no support for his new *Brady* claims." ECF #151 at 11. But as Mr. Medina also explained, during these file reviews, counsel observed HCDAO personnel physically withholding volumes of material. ECF #148 at 19–20. The pattern and practice of the HCDAO, as well as the indications in the record as to additional evidence that exists and has not yet been produced, belie the idea that these incomplete reviews should preempt discovery. Instead, they provide support for the idea that discovery is now necessary, and Mr. Medina has shown due diligence in his attempts to discover the requested information himself.

Mr. Medina has pled numerous and specific allegations of Due Process violations, and offered supporting information similar to both the atmospheric and specific facts upon which the petitioner in *Bracy* relied. And in fact, Mr. Medina's allegations—based on both HCDAO's office-wide pattern of conduct and its conduct in Mr. Medina's case—are more specific and less speculative than those supporting Bracy's request for discovery. *Bracy*, 520 U.S. 901, 906 (discussing Maloney's history of bribing judges as a defense attorney before ascending to the bench, convictions for fixing trials both before and after Bracy's case was tried, and lack of allegations that Maloney was offered a bribe in Bracy's case).

Because Mr. Medina has, again, made fact-specific allegations of prosecutorial misconduct, demonstrated the existence of additional documents and evidence in the

possession of the HCDAO not turned over despite counsel's repeated requests, and briefed the relevance of information requested in relation to his specific allegations and claims for relief, Mr. Medina has shown good cause for discovery.

B. Discovery is warranted for Mr. Medina's IATC claims.

Mr. Medina has submitted compelling evidence that his trial counsel were utterly unprepared for trial and that, with adequate preparation, there is a reasonable probability that Mr. Medina would not have been convicted or sentenced to death.[22] Respondent's only objections to factual development of Mr. Medina's IATC claims are based on her mistaken beliefs that *Pinholster* has ended all fact development in federal habeas corpus proceedings and that Mr. Medina was not sufficiently diligent in his repeated attempts to secure discovery and hearing in state court. ECF #151 at 21–22.[23] Mr. Medina has explained, *supra*, why Respondent is wrong on both counts. As Mr. Medina has previously briefed, for multiple independent reasons, § 2254(d) poses no bar to relief on his IATC claims. Thus, this Court may now "apply[] traditional standards to decide whether discovery is appropriate.'" ECF #151 at 5 n.3 (quoting *Cole v. Davis*, 2018 WL 6019165 (S.D. Tex. Nov. 16, 2018)) (emphasis added). Mr. Medina has demonstrated good cause for discovery and his efforts to develop the facts of his claim were thwarted by the state courts. These claims are now ripe for the record expansion necessary to resolve Mr. Medina's allegations.

[22] *See e.g.* ECF #53 at 88–159 (guilt-phase IATC claim); *id.* at 185–267 (penalty-phase IATC claim).

[23] Respondent has abandoned her prior meritless non-exhaustion objections to Mr. Medina's guilt-phase IATC claim. ECF #151 at 22.

C. Discovery for Mr. Medina's juror misconduct claim is warranted.

In his Second Amended Petition and Reply, Mr. Medina asserts a claim involving sitting juror Alma Volante, who lied about her prior criminal history during the voir dire process. *See* ECF #53 at 292–307; ECF #93 at 212–25. She falsely answered five separate questions related to her prior criminal record. *Id.* Mr. Medina's counsel spoke with Ms. Volante and confirmed that the criminal Volante and the juror Volante are, in fact, the same person. However, Mr. Medina has been unable to obtain written verification of this, and thus seeks discovery as outlined in his Motion for Discovery and Evidentiary Hearing, to resolve disputed factual issues regarding this claim. ECF #148 at 30–31. Respondent has no viable argument as to why discovery is not warranted, and the requested discovery should be granted.

Respondent asserts procedural defenses previously discredited by Mr. Medina, none of which are compelling. ECF #151 at 23; ECF #93 at 214–19. For instance, Respondent incorrectly asserts that Mr. "Medina fails to make a prima facie case for these claims[.]" ECF #151 at 24. Contrary to the Director's assertion, juror Volante's dishonesty is of constitutional magnitude. *Compare* ECF #151 at 24–25, *with Gray v. Mississippi*, 481 U.S. 658, 668 (1987); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). Moreover, despite Mr. Medina pleading that the criminal Volante and the juror Volante are one in the same, with specific facts to support that assertion, Respondent opposes discovery that would conclusively establish this fact, again erroneously asserting that Mr. Medina has failed to prove it. ECF #151 at 25–26. As addressed previously, *supra*, neither § 2254(d) or §

2254(e)(2) are a barrier to discovery, or the consideration of this evidence if discovery is granted. This factual dispute is precisely the sort that discovery proceedings are meant to address. *See Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997).

D. Discovery for Mr. Medina's right to presence claim is warranted.

In his Second Amended Petition, Mr. Medina asserts that he was denied his constitutional right to be present at all critical phases of his capital murder trial. ECF #53 at 333–38. In his discovery motion, Mr. Medina requested discovery to address factual disputes between the parties regarding this claim, which Respondent opposes. ECF #148 at 32–33; ECF #151 at 23–27. Mr. Medina has previously addressed Respondent's procedural default argument regarding this claim in his Reply. ECF #93 at 257–71. Regarding the merits of the claim, which Mr. Medina has requested discovery to resolve, Respondent takes the internally-contradictory position that Mr. "Medina was in fact not absent from the courtroom, and that any brief absence did not implicate constitutional concerns." ECF #151 at 26. Either Mr. Medina was present or he was not; Mr. Medina has asserted that he was not present during critical phases of his trial, and this dispute should be resolved through the requested discovery. Moreover, Respondent's assertion that Mr. "Medina ultimately has provided no evidence to show that his right-to-presence was violated" shows a fundamental misunderstanding of habeas corpus law. *See id.* at 27. In a federal habeas petition, the petitioner must "state facts supporting each ground." Habeas Rule 2(c). There is no requirement that it contain "evidence," only that it contain

factual assertions. Mr. Medina has carried that burden, and discovery should be granted to resolve the disputed factual issues regarding this claim.

CONCLUSION AND PRAYER FOR RELIEF

For all of the reasons set forth in his motion, and in relevant briefing incorporated herein by express reference, Mr. Medina requests leave to conduct the requested discovery, including production of records and evidence, which will enable him to fully investigate, develop, and prove any and all relevant constitutional claims including, but not limited to, prosecutorial misconduct, jury misconduct, and ineffective assistance of counsel. There is "good cause" for discovery. By making this request at this time, Mr. Medina does not waive his right to seek additional discovery in the future, in the form of further requests for access to relevant documents and records, as well as depositions of relevant witnesses that come to light through the disclosure of such relevant documents and records.

This Court should also allow Mr. Medina to issue subpoenas to the relevant authorities for the production of the requested evidence. Mr. Medina notes that much of the requested discovery is *Brady* material and was due to Mr. Medina before trial. It is now twenty-two years overdue. If any party or witness alleges that any information sought herein is privileged and/or constitutes attorney work product, Mr. Medina requests at a minimum that the Court require that the information be produced for *in camera* inspection and review by the Court. If any such material is submitted to the Court but not eventually provided to Mr. Medina, Mr. Medina asks

the Court to copy the undisclosed material and maintain it in the record under seal for purposes of any potential subsequent appeal in this proceeding.

Mr. Medina also requests that this Court, after the completion of the requested discovery, order an evidentiary hearing so that Mr. Medina may fully present his claims to the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by CM/ECF upon counsel for Respondent:

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This 29th day of January, 2019.

/s/ James Marcus
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