IN THE UNITED STATES

SUPREME COURT

RE:

No.

CAMERON TODD
WILLINGHAM

REQUEST FOR STAY OF EXECUTION

TO THE HONORABLE JUDGES OF SAID COURT:

Comes now Walter M. Reaves, Jr., appointed counsel for Petitioner and file this request for stay of execution, and as grounds therefore would show the court as follows:

1. Petitioner was convicted of the offense of capital murder and sentenced to death. Petitioner appealed to the Texas Court of Criminal Appeals. His conviction and sentenced were affirmed in a published opinion, delivered on March 22, 1995, *Willingham v. State, 897 S.W.2d 351 (Tex. Crim. App. 1995)* Following an unsuccessful Motion for Rehearing, a Petition for Writ of Certiorari was denied. Petitioner subsequently filed an application for writ of habeas corpus, which was denied. He then filed an application for writ of habeas corpus in federal court, which has also been denied.

2. Petitioner has filed an original application for Writ of Habeas Corpus with this court. That application is based on newly discovered evidence, which is the expert opinion of Dr. Gerald Hurst. Dr. Hurst is an expert in fire investigations, and has recently had the opportunity to review the reports on this case. In Dr. Hurst's opinion the fire was not intentionally set. If the fire was not intentionally set petitioner cannot be guilty of the crime, since there would be no crime. Petitioner has only recently been able to obtain Dr. Hurst's services. As set forth in his affidavit, his opinion is based in part on discoveries during the last several years about the identification and classification of fires. Thus, this information was not something that was available to petitioner until this week.

3. As set forth above, petitioner has only obtained the opinion of Dr. Hurst within the last few days. Because of petitioner's pending execution date, Dr. Hurst has not been able to conduct

a complete and thorough review of the evidence in this case. What he has reviewed supports the conclusions in his affidavit, which is that no crime was committed. Petitioner needs additional time to fully present this claim to the court, and include a complete and thorough review of the evidence. Petitioner believes he has presented sufficient evidence to support the relief requested in this petition. Even if the court does not agree, at a minimum, petitioner suggests he presented more than enough evidence to warrant further review. For these reasons petitioner requests the court enter an order staying his execution until the court can fully review the claim presented in this petition.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Petitioner respectfully prays that the Court issue an order staying his execution until petitioner's subsequent application for writ of habeas corpus has been fully considered.

Respectfully submitted,

Walter M. Reaves, Jr.
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State Bar No. 16644200
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and a correct copy of the above and foregoing document was served upon Navarro County District Attorney and the State's Prosecuting Attorney, and the Texas Attorney General, on the 17th day of February 2004.

Walter M. Reaves, Jr.

03-8910

Supreme Court, U.S.
FILED
FEB 17 2004
CLERK

CAUSE NO.

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 2003

IN RE: CAMERON TODD WILLINGHAM

PETITION FOR WRIT OF HABEAS CORPUS FILED AS AN ORIGINAL MATTER PURSUANT TO 28 U.S.C. SEC. 2241 AND FOR AN APPROPRIATE WRIT PURSUANT TO 28 U.S.C. SEC. 1651 (A)

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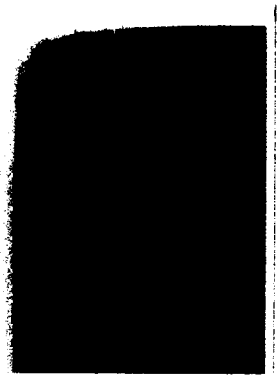
Attorney for Petitioner



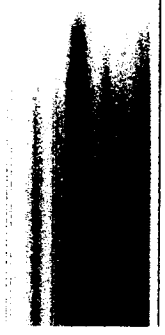
ISSUES PRESENTED

I.

WHETHER HERRERA V. COLLINS DOES, IN FACT, MEAN THAT AN INNOCENT CONDEMNED HABEAS PETITIONER MAY SEEK RELIEF BASED ON THE SUBSTANTIVE DUE PROCESS CLAIM OF INNOCENCE

II.

WHETHER THIS COURT SHOULD ALLOW PETITIONER TO PRESENT HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND THE PRESENTATION OF FALSE EVIDENCE TO THE DISTRICT COURT, EVEN ABSENT TECHNICAL COMPLIANCE WITH THE AEDPA, TO AVOID A SUBSTANTIAL MISCARRIAGE OF JUSTICE



CAUSE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In Re CAMERON TODD WILLINGHAM

The Petitioner Cameron Todd Willingham, respectfully prays that a writ of habeas corpus issue pursuant to this Court's jurisdiction to entertain original petitions for a writ of habeas corpus.

OPINION BELOW

The Court of Appeals for the Fifth Circuit did not issue an opinion on this case but merely issued an order denying petitioner leave to file a successor writ of habeas corpus.

JURISDICTION

This Court's jurisdiction is based upon 28 U.S.C. Sec. 224; Rule 20.3 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651(a).

STATEMENT OF THE CASE

Petitioner was charged by indictment issued by the Navarro County Grand Jury with the offense of capital murder. Petitioner entered a plea of not guilty, and jury selection commenced on August 10, 1992 in the 13th District Court of Navarro County, Texas, the Honorable Kenneth A. Douglass, presiding. Trial commenced on August 19, 1992 and concluded on August 20,

1992 when Petitioner was found guilty. Punishment was subsequently assessed atdeath, in accordance with the jury's answers to the special issues.

Petitioner appealed to the Texas Court of Criminal Appeals. His conviction and sentence were affirmed in a published opinion, delivered on March 22, 1995, *Willingham v. State*, 897 S.W.2d 351 (Tex. Crim. App. 1995), *cert. denied* 516 U.S. 946 (1995). Following an unsuccessful Motion for Rehearing, a Petition for Writ of Certiorari to the United States Supreme Court was denied. Petitioner subsequently filed an application for writ of habeas corpus in the trial court on December 11, 1996. Without a hearing, the trial court entered findings of fact and conclusions of law on August 28, 1997, and recommended that relief be denied. The Texas Court of Criminal Appeals followed that recommendation, and denied the application for writ of habeas corpus on October 31, 1997.[1] Petitioner then filed another petition for writ of certiorari, which was denied. 524 U.S. 917 (1998)

Following the exhaustion of his state remedies, Petitioner filed an Application for Writ of Habeas Corpus in the United States District for the Northern District of Texas. Without a hearing, the Court denied relief on December 31, 2001. *Willingham v. Johnson*, 2001 WL 1677023 (N.D. Tex.) Petitioner sought an Application for a Certificate of Appealabilty which was denied. Petitioner then took his appeal to this Court, and sought a certificate of appealability. The court denied the certificate of appealability, and affirmed the denial of relief, in an unpublished opinion delivered on February 17, 2003. Petitioner then filed a petition for writ of certiorari in the United States Supreme Court, which was denied on November 3, 2003.

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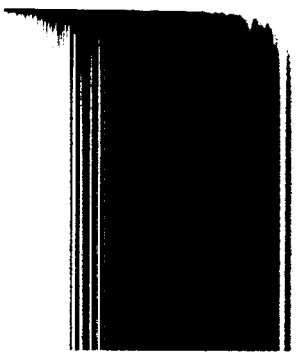
[1]The court denied relief, but expressly refused to adopt several of the trial court's findings.



Petitioner filed a second application for writ of habeas in state court on February 13, 2004, and sought permission to file such application from the Texas Court of Criminal Appeals. That request was denied on February 17, 2004. Petitioner then sought leave to file a successor petition for writ of habeas corpus in the United States Court of Appeals for the Fifth Circuit, which was also denied.

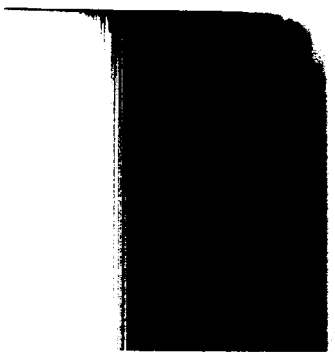
REASONS FOR GRANTING THE WRIT

Petitioner brings three claims to this Court: (1) that he is innocent of the offense for which he has been convicted; (2) that but for the presentation of false evidence, he would have been acquitted, and (3) but for the ineffectiveness of his trial counsel, he would have been acquitted.

These claims are based on "newly discovered" evidence in the form of an expert opinion from Dr. Gerald Hurst. The only witnesses who testified at trial about the cause of the fire were those called by the State. In the opinion of the state fire marshal the fire was intentionally set, and therefore was arson. Dr. Hurst has reviewed the evidence that opinion was based on in light of what is now known about the characteristics and behavior of intentionally set fires. In Dr. Hurst's opinion the fire was not intentionally set. Thus, not only is petitioner actually innocent, there was no crime to begin with.

I.

WHETHER HERRERA V. COLLINS DOES, IN FACT, MEAN THAT AN INNOCENT CONDEMNED HABEAS PETITIONER MAY SEEK RELIEF BASED ON THE SUBSTANTIVE DUE



PROCESS CLAIM OF INNOCENCE

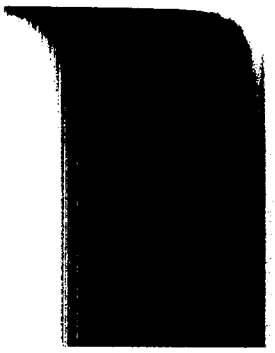
A. PETITIONER IS INNOCENT OF THE OFFENSE FOR WHICH HE IS TO BE PUT TO DEATH

The Fifth Circuit has consistently held that a habeas petitioner has no independent substantive claim on actual innocence based on newly discovered evidence.. See *Lucas v. Johnson*, 132 F.3rd 1069 (5th Circ. 1998); *Jacobs v. Scott*, 31 F3rd 1319 (5th Circ. 1994), citing *Herrera v Collins*, 506 U.S. 390 (1993). Petitioner respectfully contends that the Fifth Circuit is wrong on this issue. Other Courts of Appeals have construed *Herrera* to give rise to just such a claim in the proper case. See generally, *Caro v. Carlderon*, 162 F3rd 1167 (9th Circ. 1998); *Carriger v. Stewart*, 132 F.3rd 463 (9th Circ. 1997); *Cornell v. Nix*, 119 F3rd 1329 (8th Circ . 1997); *Triestman v. United States*, 124 F3rd 361 (2nd Circ. 1997)(actual innocence claim in a non death penalty case).

Herrera v. Collins did not hold that an innocent individual condemned to death has no remedy in habeas corpus. Justice O'Connor, joined by Justice Kennedy, wrote differently:

> I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed – "contrary to contemporary standards of decency," (citation omitted), "shocking to the conscience" (citation omitted) , or "offensive to a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, " (citation omitted) – the execution of a legally and factually innocent person would be a constitutionally intolerable event. Dispositve to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.

Justice O'Connor went on to analyze the tension between the State's legitimate demand for finality and stated that no criminal defendant would be entitled to seek a new trial based solely on newly discovered evidence of innocence "except for the disturbing nature of the claim



before us." Justice O'Connor noted that the Court and Justice White assumed for the sake of argument that were a habeas petitioner to present "an exceptionally strong showing of actual innocence, the execution could not go forward." Herrera's claim had to fail because, whatever the merits of his legal argument, he had not demonstrated his innocence no matter what the standard.

Justice White assumed "that a persuasive showing of 'actual innocence' made after trial, even though after the expiration of th time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of" such a petitioner. He would hold that the standard to be satisfied was that of *Jackson v Virginia*, 443 U.S. 307 (1979).

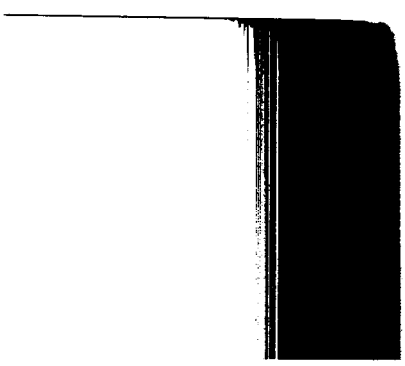
Justices Blackmun, Stevens, and Souter dissented, arguing that the execution of an innocent defendant was both contrary to contemporary standards of decency, See *Ford v Wainwright*, 477 U.S. 399 (1986) as well as shocking to the conscience. See *Rochin v California*, 342 U.S. 165 (1952).

Whatever the construct for an innocence claim, petitioner has presented just such a case. Appellant's claim is different from most innocence claims that come before the court. In most cases a defendant cannot establish his innocence without establishing someone else's guilt. However, this case is unusual, in that the newly discovered evidence establishes that no crime was committed. As such not only is appellant innocent of the offense, no one else is guilty either. The existence of a crime hinges on establishing that the fire was intentionally set, which would establish arson. Specifically, the factors relied on were the following:

- Pour patters and puddle patters on the floor indicate the use of an accelerant. **Recent**

testing establishes that post-flash over burning makes it impossible to visually identify accelerant burns. The fire in the case involved extended flash over, which was evidenced by flames pouring from the windows and doors.

- There were multiple origins of the fire. **Multiple origins can only be established where two fires are completely isolated from one another. In this case the burn areas were contiguous. This finding was not appropriate even in 1991.**
- V-patterns were present on the walls, indicating the fire started on the floor. **V-patterns are indicative of the source of origin only when the fire is extinguished fairly quickly. Once a fire passes to the flash over stage original patterns are overwhelmed and new patterns are formed from the burning of items such as doors as combustible items that may be on the floor**
- Burned wood under the door threshold indicating an accelerant was poured under a threshold. **Charring of wood under a threshold is common in post flash over fires. Previously it was assumed this was from accelerants, but is now accepted that the cause is radiation, which is extremely at doorways because of the mixing of hot gases with incoming fresh air.**
- Tiles were burned from underneath, indicating an accelerant was under the tile. **Burning under tile is caused by the tile curling from post flash over radiation. Also, kerosene materials burn with great difficulty on top of tile material; it tends to self-extinguish, leaving unburned kerosene, with little effect on the tile.**
- Brown rings on the cement porch indicates presence of accelerant. **The presence of**



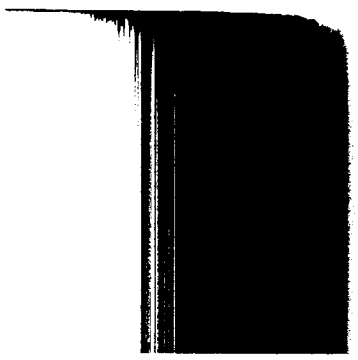
accelerant can only be established with scientific analysis. Puddles of fire hose water tend to leave behind brown material on cement.

- Positive analysis for accelerant. **"Mineral spirits of kerosene was found in a single sample from the bottom of the doorway adjacent to the porch. Charcoal lighter was also on the porch, and belongs to the same class of liguids. The presence of such material would be an expected natural occurrence in the wake of a fire, and would have been spread through the application of water.**
- Presence of crazed glass indicates use of accelerant. **This is an "old wives tale" that has been refuted by recent tests. Those tests establish crazed glass is caused by the rapid cooling of hot glass by water used to extinguish the fire.**

Without the above factors, there is nothing to indicate the fire was intentionally set. Thus, there is nothing to establish a crime was committed. If there was no crime, then there is nothing to be guilty of. As such, petitioner suggests he can now establish his innocence by whatever standard is applied.

If this Court continues to allow *Herrera* claims to be ignored by lower courts, there is more than a substantial risk that petitioner, an innocent man, will be put to death for a crime he did not commit.

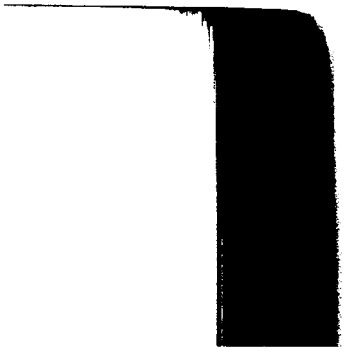
II. THIS COURT SHOULD ALLOW PETITIONER TO PRESENT HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND THE PRESENTATION OF FALSE EVIDENCE TO THE DISTRICT COURT, EVEN ABSENT TECHNICAL COMPLIANCE WITH THE AEDPA, TO AVOID



A SUBSTANTIAL MISCARRIAGE OF JUSTICE

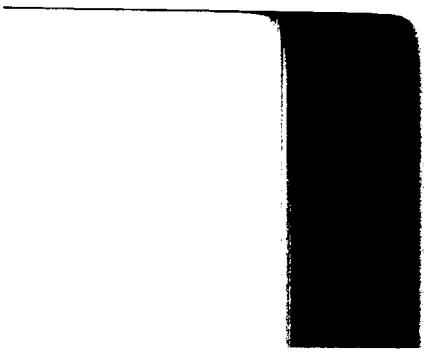
In the case at bar, petitioner had to establish, to satisfy the AEDPA, that (1) the factual predicate for the claims presented could not have been ascertained through the exercise of due diligence and (2) the facts underlying the claims, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 USC Section 2244(b)(2). To apply the AEDPA in such a fashion to deny petitioner the opportunity to litigate his claims runs afoul of this Court's holding in *Schlup v. Delo*, 513 U.S. 851 (1995). *Schlup* established a gateway through which a habeas petitioner who presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial as free of nonharmless constitutional error," is allowed to pass in order to present those constitutional claims. Such a habeas petitioner must "establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice" unless the trial was fair.

The Court noted that despite Congressional and Court adopted limitations on successor writs of habeas corpus, the writ was, "at its core, an equitable remedy." The Court consistently relied on the equitable nature of habeas corpus to preclude application of such strict limitations. For example, prior to the 1966 amendments to habeas corpus, the Court allowed successor writs of habeas corpus when the "ends of justice" demanded it. In 1966, Congress deleted that requirement in favor of a more strict standard. Despite that limitation, the Court maintained the "ends of justice" standard in order to grant habeas relief where it was required. See *Kuhlman v*



Wilson, 477 U.S. 436, 451 (1986). The Court has consistently reaffirmed "the existence and importance of the exception for fundamental miscarriages of justice." The Court explicitly tied the fundamental miscarriage exception to the habeas petitioner's innocence. Such a claim, to be credible, must be supported by new reliable evidence, "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial." If the due diligence requirement precludes the hearing of a claim of actual innocence, the due diligence requirement is unconstitutional.

This Court has stated that a procedural limitation "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445 (1992) (citations and internal quotation marks omitted). "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. at 325. It follows, therefore, that the continued imprisonment – or execution – of an actually innocent person would violate the kind of fundamental principle that the Court had in mind in *Medina.* Indeed, in *Herrera v. Collins*, supra, the Court assumed, without deciding, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no ... avenue open to process such a claim." *Id.* at 417. And in its pre-AEDPA abuse of the writ cases, the Court repeatedly held that habeas corpus would remain available to all prisoners – not just those facing execution – even absent a showing of cause for the failure to raise the issue at an earlier time, where the alleged error "has probably resulted in

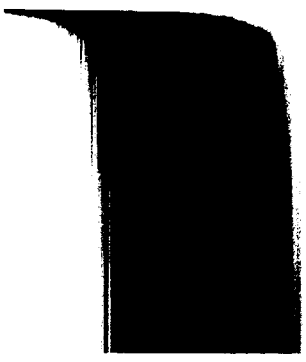


the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). These cases provided prisoners with "a meaningful avenue by which to avoid a manifest injustice." *Schlup*, 513 U.S. at 327. It follows that due process would be violated if Congress were to close off all avenues of redress in such cases.

This Court in *Felker v. Turpin*, 518 U.S. 651 (1996), concluded that it had the power to issue an original writ of habeas corpus despite the Congressional limitations imposed by the AEDPA. The standards for issuing such a writ were set forth in Rule 20.4(a) of the Rules of the Supreme Court:

> A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. Section 2242 and 2242, and in particular with the provision in the last paragraphs of Section 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. Section 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

Petitioner suggests this petition satisfies these requirements. He presented these claims to the Texas Court of Criminal Appeals which rejected his claim, as did the Fifth Circuit when presented with the claim. He has exhausted all his available remedies. Further, he has clearly shown exceptional circumstances. No court will hear his claim of actual innocence, either standing alone, or in connection with two very strong other constitutional claims which rendered his trial unfair. Absent the exercise of this Court's discretionary authority, he will be executed on March 1, 2000, an innocent man.



Petitioner further suggests he has clearly also met the standard of *Schlup v Delo*, supra. As set forth above, the most important evidence in this case has now been rebutted. The evidence now available establishes that there was not even a crime, and therefore petitioner would not have been prosecuted had this evidence been available at the time. Even if he were prosecuted, no reasonable jury would have convicted him in the face of such compelling evidence. Petitioner suggests he should be given an opportunity to present his claims.

A. THE KNOWING PRESENTATION OF FALSE EVIDENCE

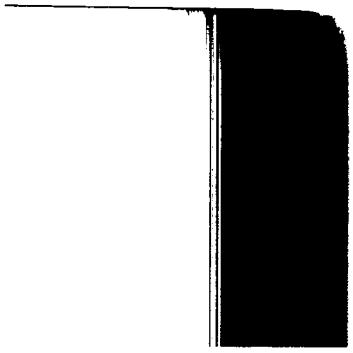
According to Dr. Hurst, there were several part's of the fire marshall's testimony that were blatantly false, even under then existing standards. Those were:

- The opinion that the fire had multiple origins. That conclusion is only appropriate where there are two or more isolated areas of fire
- The accelerant burned under the door threshold. As Dr. Hurst states this phenomenon is clearly impossible.
- Brown rings on the cement were indicative of an accelerant. This was a natural occurrence from the use of water on the fire; the presence of an accelerant could only be established by scientific testiing.

Petitioner suggests this amounts to the knowing use of false evidence and is therefore a violation of due process. See *Miller v. Pate*, 386 U.S. 1 (1967)(Paint, not blood on shorts); *Mooney v. Holohan*, 294 U.S. 103 (1935); *United States v. Agurs*, 427 U.S. 97 (1976

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner suggests his trial counsel failed to conduct an adequate investigation, especially



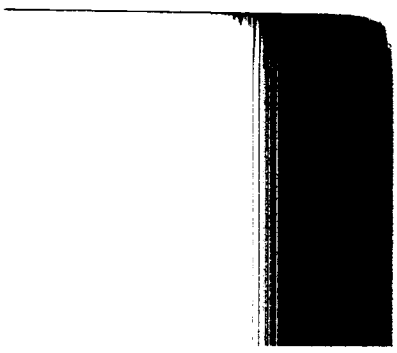
by failing to explore the possibility of attacking the fire marshall's report. Had they done so, petitioner suggests at least some of the fire marshall's conclusions could have been questioned. While the state of fire investigation has progressed greatly in the last few years, there were still some things that were known at the time of trial that could have been used to attack the expert testimony.

A defense attorney renders ineffective assistance of counsel when he make some exploration of the defense but fails to take an obvious and readily available investigatory stip which would have made the defense viable, does not produce reasonable tactical reasons for not pursuing further investigation, and raises no other plausible defense. See *Profitt v. Waldron*, 831 F.2d 1245 (5th Circ. 1987). See also *Bryant v. Scott*, 28 F.3rd 1411 (5th Circ. 1994) (failure to interview eyewitnesses or the codefendant); *Kemp v. Leggett*, 635 F2d 453 (5th Circ. 1981) (failure to interview and adequately investigate state's witnesses); *Gaines v. Hopper*, 575 S.W.2d 1147 (5th Circ. 1978) (counsel failed to adequately investigate case a failure which left the viable guilt phase defense theory undeveloped and left client with no viable defense). See also *United States v. Gray*, 878 F.2d 702 (3rd Circ. 1989).

PRAYER FOR RELIEF

Petitioner, respectfully requests this Court to grant his Original Petition for Writ of Habeas Corpus and to remand this case to the District Court for a hearing.

habeas corpus under 28 USC 2244 (b)(3).



No. 03 - 8910
No. 03A708

IN THE SUPREME COURT OF THE UNITED STATES

In re Cameron Todd Willingham,
Petitioner.

On Original Petition for Writ of Habeas Corpus
and Motion for Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney General of Texas

*GENA BUNN
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BARRY MCBEE
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ATTORNEYS FOR RESPONDENT

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* Counsel of Record

BRIEF IN OPPOSITION TO ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION

Petitioner Cameron Todd Willingham is a Texas death-sentenced inmate scheduled to be executed after 6:00 p.m., today, Tuesday, February 17, 2004. He is seeking a writ of habeas corpus and stay of execution through this Court's authority to grant the extraordinary writ under 28 U.S.C. § 1651(a) and 28 U.S.C. §§ 2241 and 2254. Willingham initially raises a free-standing actual innocence claim based on alleged newly discovered evidence. In addition, Willingham raises the following two claims also based on the same alleged newly discovered evidence: 1) that, but for the presentation of false evidence by the State, he would have been acquitted, and 2) but for the ineffectiveness of his trial counsel, he would have been acquitted.

However, Willingham's actual innocence claim is not cognizable on federal review: is procedurally defaulted because it was properly dismissed as successive by the Texas Court of Criminal Appeals in his most recent state habeas application; and, in any event, the affidavit on which his claim is based does not establish Willingham's innocence but only criticizes the State expert, and, thus, even if the claim called be raised, it lacks merit. Additionally, as Willingham concedes, his last two claims are defaulted due to his failure to exhaust them in State court. Yet, even if not defaulted, neither his claim of ineffective assistance of counsel nor his false presentation of evidence has merit. In the absence of any credible claims and in the interest of finality, the instant request and motion for stay of

execution should be denied.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

Willingham's capital murder conviction and death sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals in a published opinion. *Willingham v. State*, **897 S.W.2d 351, 354-5 (Tex. Crim. App. 1995). This Court denied certiorari review on October 30, 1995.** ***Willingham v. Texas*****, 516 U.S. 946 (1995). Willingham then filed a state writ of habeas corpus on which the trial court recommended denying relief. The Court of Criminal Appeals denied the writ of habeas corpus on the findings of the trial court.** ***Ex parte Willingham,*** **No. 35,162-01 (Tex. Crim. App. 1997). Willingham's certiorari petition was denied by this Court on June 8, 1998.** ***Willingham v. Texas,*** **524 U.S. 917 (1998).**

Willingham then filed a federal writ of habeas corpus in the Northern District of Texas, Dallas Division on April 21, 1998. The Director filed an answer and motion for summary judgment on July 1, 1998, and filed a supplemental answer on October 15, 1998. On July 25, 2000, the federal magistrate issued findings and conclusions and recommended that relief be denied. Subsequently, the court adopted the magistrate's findings, granted the Director's motion for summary judgment and denied Willingham's petition for federal habeas relief.

Willingham subsequently filed an application for a certificate of appealability ("COA

Brief") in the Fifth Circuit Court of Appeals which was denied on February 17, 2003. *Willingham v. Cockrell*, No. 02-10133 (5th Cir. 2003). After the appellate court also denied Willingham's motion for rehearing, he filed a timely petition for writ of certiorari with this Court on July 21, 2003. His petition was denied on **November 3, 2003. On Friday, February 13, 2004, Willingham filed a subsequent writ of habeas corpus in state court which was dismissed today, February 17, 2004.** *Ex parte Willingham*, No. 35,162-02 (Tex. Crim. App. February 17, 2004). After his motion for leave to file a successive petition in the Fifth Circuit was denied this afternoon, Willingham filed the instant pleading. *Willingham v. Dretke*, No. 04-10179 (5th Cir. 2004).

II. Facts of the Crime

The Texas Court of Criminal Appeals summarized the evidence presented during the guilt/innocence and punishment phases of Willingham's trial as follows:

> **The evidence adduced at trial was that on December 23, 1991, [Willingham] poured a combustible liquid on the floor throughout his home and intentionally set the house on fire, resulting in the death of his three children. Amber, age two, and twins Karmon and Kameron, age 1, died of acute carbon monoxide poisoning as a result of smoke inhalation, according to autopsy reports. Neighbors of [Willingham] testified that as the house began smouldering, [Willingham] was "crouched down" in the front yard, and despite the neighbors' pleas, refused to go into the house**

in any attempt to rescue the children. An expert witness for the State testified that the floors, front threshold, and front concrete porch were burned, which only occurs when an accelarant has been used to purposely burn these areas. The witness further testified that this igniting of the floors and thresholds is typically employed to impede firemen in their rescue attempts.

The testimony at trial demonstrates that [Willingham] neither showed remorse for his actions nor grieved the loss of his three children. [Willingham's] neighbors testified that when the fire "blew out" the windows, [Willingham] "hollered about his car" and ran to move it away from the fire to avoid its being damaged. A fire fighter also testified that [Willingham] was upset that his dart board was burned. One of [Willingham's] neighbors testified that the morning following the house fire, Christmas Eve, [Willingham] and his wife were at the burned house going through the debris while playing music and laughing.

At the punishment phase of trial, testimony was presented that [Willingham] has a history of violence. He has been convicted of numerous felonies and misdemeanors, both as an adult and as a juvenile, and attempts at various forms of rehabilitation have proven unsuccessful.

The jury also heard evidence of [Willingham's] character. Witnesses testified that [Willingham] was verbally and physically abusive toward his family, and that at one time he beat his pregnant wife in an effort to cause a miscarriage. A friend of [Willingham's] testified that [Willingham] once bragged about brutally killing a dog. In fact, [Willingham] openly admitted to a fellow inmate that he purposely started this fire to conceal evidence that the children had been abused.

Dr. James Grigson testified for the State at punishment. According to his testimony, [Willingham] fits the profile of an extremely severe sociopath whose conduct becomes more violent over time, and who lacks a conscience as to his behavior. Grigson explained that a person with this degree of sociopathy commonly has no regard for other people's property

or for other human beings. He expressed his opinion that an individual demonstrating this type of behavior can not be rehabilitated in any manner, and that such a person certainly poses a continuing threat to society.

***Willingham*, 897 S.W.2d at 354-5.**

REASONS FOR DENYING THE WRIT

I. The Issues Presented for Review Are Unworthy of the Court's Attention.

Willingham's claims, presented here as an original petition for writ of habeas corpus, are unworthy of this Court's attention. Rule 20.4(a) of the RULES OF THE SUPREME COURT OF THE UNITED STATES (West 2001) provides that "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted." *See also Felker v. Turpin,* 518 U.S. 651, 665 (1996) (explaining that Rule 20.4(a) delineates the standards under which this Court grants such writs). For the reasons explained below, Willingham fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

II. Willingham Fails to Meet the Requirements of 28 U.S.C. § 2244(b)(2) for Authorization to File a Successive Federal Habeas Petition.

Supreme Court Rule 20.4(a) and 28 U.S.C. § 2242 (West 2001) state that an original habeas petition in the Supreme Court must set forth "reasons for not making application to the district court." In this case it is evident that, because Willingham has filed a previous

application in federal district court, any new application below would be deemed successive, subjecting Willingham to the gate-keeping requirements of 28 U.S.C. § 2244(b)(2) & (3). Nevertheless, having previously filed a federal post-conviction application, Willingham's alternative application here arguably is similarly successive and impermissibly bypasses the pre-authorization requirements of 28 U.S.C. § 2244(b)(2) & (3). In effect, Willingham seeks authorization from this Court to file a successive petition for writ of habeas corpus, to which he fails to demonstrate he is entitled. Section 2244(b)(2) provides that:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).[1]

Willingham does not meet the foregoing standard. First, Willingham cannot identify

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[1] In *Felker v. Turpin*, 518 U.S. at 662, this Court held that the foregoing provision applies to second or successive habeas applications filed after the AEDPA was enacted. The Court also held that, at a minimum, the limitations of section 2244(b) "certainly inform [the Court's] consideration of original habeas petitions." *Id.*

any new rule of constitutional law made retroactive by the Supreme Court that was previously unavailable. Second, he cannot prove that the factual predicate of his claims was not previously available to him through the exercise of due diligence. Third, Willingham is unable to demonstrate that the factual predicate is sufficient to establish by *clear and convincing evidence* that no reasonable fact finder would have found him guilty of capital murder.

In order to prove that he is entitled to authorization to file a successive petition, Willingham must satisfy *both* the "cause" *and* the "actual innocence" prongs of section 2244(b)(2)(B). Here, since Willingham's claims are being raised for the first time in a federal court, and because he does not rely on a new rule of constitutional law, he must meet the two-prong standard imposed by § 2244(b)(2)(B). *See In re Goff*, 250 F.3d 273, 275 (5th Cir. 2001). Addressing § 2244(b)(2)(B)'s first prong, the factual predicate presented to establish Willingham's underlying actual innocence claim consists of the affidavit testimony of Dr. Gerald Hurst. Willingham alleges this testimony is "newly discovered evidence" due to scientific advancements in arson investigation.

Dr. Hurst's affidavit is insufficient to create a valid factual predicate. Importantly, Dr. Hurst never expresses an opinion that the fire that killed Willingham's children was not intentionally set. Indeed, Dr. Hurst only states that in his opinion, the reasons Fire Marshall Manuel Vasquez gave for his conclusion that the fire was intentionally set are inadequate based on advances in the fire investigation field since Vasquez testified at Willingham's trial.

Moreover, the key references utilized by Dr. Hurst as the basis for his criticism of Vasquez' conclusion are not "newly discovered evidence" within the confines of § 2244(b)(2)(B)(i). To the contrary, each of the references on which Hurst relies were available prior to **April 21, 1998, when Willingham filed his first federal habeas petition.** Indeed, three out of the six references cited by Dr. Hurst were available before Willingham filed his first state habeas application. And, by Dr. Hurst's own admission, his first key reference, the "NFPA 921," which has "become the de facto standard of care for the fire investigation community" first became available "within a few weeks of the issuance of the Fire Marshall's report." *See* Hurst Affidavit at 1. Furthermore, even reference six, relied on by Dr. Hurst was arguably available prior to the filing of Willingham's first federal habeas petition in 1998. While, Hurst cites the copyright of reference six as 2002, he also notes that reference six is in its Fifth Edition. *See* Hurst Affidavit at 2. Hurst does not indicate when this particular reference first became available. Neither does Willingham, which is his burden. In light of the foregoing, Willingham fails to demonstrate that the factual predicate for his claim could not have been discovered previously through the exercise of due diligence as required by 28 U.S.C. § 2244(b)(2)(B)(i). Additionally, newly discovered evidence in the form of affidavit testimony that only goes to guilt/innocence has traditionally been an insufficient ground to merit a new trial. *See Davis v. Blackburn*, 789 F.2d 350, 352 (5th Cir. 1986); *Boyd v. Puckett*, 905 F.2d 895, 896 (5th Cir. 1990).

Nevertheless, assuming, but not conceding, that this evidence could satisfy

§2244(b)(2)(B)'s first prong, it cannot withstand § 2244(b)(2)(B)'s second mandatory requirement that, when viewing the evidence as a whole, the new evidence would be sufficient to establish by clear and convincing evidence that no reasonable factfinder could have found Willingham guilty of capital murder. In other words, in light of the evidence implicating Willingham in his children's murders – namely, Willinghams' confession; testimony from Assistant Fire Chief Doug Fogg excluding the possibility of accidental fire due to natural gas, space heaters, electrical wiring and outlets; the fact that although Willingham was barefoot he suffered no burns on his feet or hands; the fact that a refrigerator was placed in front of the back door blocking any means of egress; that testimony from neighbors that although there was time to rescue the children, Willingham seemed reluctant to do so; Willingham's behavior interpreted by several witnesses as an apparent lack of grief over the deaths of his children, and his jubilant behavior of laughing and playing music while going through the debris of the burned house the day after the fire – Hurst's affidavit testimony is insufficient to show by clear and convincing evidence that a jury could find Willingham to be actually innocent.

Dr. Hurst claims that in his opinion, Fire Marshall Vasquez' conclusions are "invalid in light of current knowledge." *See* Hurst Affidavit at 1. This evidence, without more, is insufficient, highly problematic, and inherently unreliable under Supreme Court law to merit the granting of leave to file a successive federal habeas corpus application. First, Dr. Hurst's affidavit testimony is problematic because it was obtained without the benefit of cross-

examination and an opportunity to make credibility determinations. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993). Moreover, the evidence is insufficient to show actual innocence. As stated previously, Dr. Hurst does not express an opinion on whether or not the fire was intentionally set. As this Court stated in *Herrera*, which applies equally here:

> This is not to say that petitioner's affidavits are without probative value. Had this sort of testimony been offered at trial, it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict. Since the statements in the affidavits contradict the evidence received at trial, the jury would have had to decide important issues of credibility. But coming 10 years after petitioner's trial, this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist.

Herrera, 506 U.S. at 418-19. Willingham's fails to make a prima facie showing under 28 U.S.C. § 2244(b) governing successive federal habeas applications. Accordingly, this Court must deny habeas relief.

III. In Any Event, Willingham Is Not Entitled to Habeas Relief.

A. A Claim of Actual Innocence is Not a Cognizable Constitutional Violation Under Established Supreme Court Law and Fifth Circuit Precedent.

Assuming arguendo that Willingham is able to meet the gatekeeping requirements of section 2244(b)(2)(B), his underlying constitutional claim is not cognizable as an independent constitutional violation.

"Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400; *see also Lucas v. Johnson*, 132 F.3d 1069, 1074 (5th Cir. 1998); *contra In re Byrd*, 269 F.3d 585 (6th

Cir. 2001). In accord with this Court, the Fifth Circuit has repeatedly upheld *Herrera's* refusal to permit an actual innocence claim to be the basis of an underlying constitutional violation, despite language in *Herrera* assuming arguendo, and in dicta, that a "truly persuasive showing of actual innocence made after trial would render the execution of a defendant unconstitutional." *See Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (expressly rejecting the assuming arguendo portion of *Herrera*); *Graham v. Johnson*, 168 F.3d 762, 788 (5th Cir. 1999); *Lucas v. Johnson*, 132 F.3d at 1074 (reaffirming long-standing principle that "the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus"); *Jacobs v. Scott*, 31 F.3d 1319, 1324 (5th Cir. 1994). Thus, Willingham fails to raise a constitutionally cognizable claim.[2]

And finally, although in dicta, this Court assumed "for the sake of argument that a *truly persuasive* showing of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," the Court nevertheless reasoned that habeas relief would be warranted only "if there were no state avenue open to process such a claim. . . ." *Herrera*, 506 U.S. at 417. Willingham cannot demonstrate that there is not state avenue open to process his claim. Indeed, certiorari was dismissed in *Lucas v. Johnson*, 524 U.S. 965 (1998), because the petitioner presented his claims of actual innocence through the clemency

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[2] To the extent Willingham wants the Court to issue a new rule of law finding that claims of actual innocence do provide a basis for federal relief, then he is foreclosed from relief based on the principles announced in *Teague v. Lane*, 489 U.S. 288, 310 (1989).

process and the Governor commuted his death sentence to life imprisonment. Willingham fails to state a valid claim for relief and his request for permission to file a successive federal habeas application should be denied.

B. The Claim is Defaulted

Willingham's claim is procedurally barred because the state court's disposition of this claim relies upon an adequate and independent state law ground, *i.e.*, the Texas abuse of the writ statute. *Ex parte Willingham*, No. 35,162-02, slip op. at 2 (citing TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *and Harris v. Reed*, 489 U.S. 255, 265 (1989) (holding that federal review of a claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default).

The statutory abuse of the writ doctrine has been regularly and strictly applied in Texas since its 1995 enactment. *See, e.g., Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (holding that pre-11.071 abuse of the writ doctrine was strictly and regularly applied and, thus, was independent and adequate state procedural bar); *Emery v. Johnson,* 139 F.3d 191, 195-96 (5th Cir. 1997) (extending *Fearance* to article 11.071 statutory abuse of writ doctrine). Willingham failed to overcome the state law standard for raising a successive claim for the same reasons he fails to meet the successive federal standard under 28 U.S.C. § 2244(b). The Texas courts appropriately dismissed his successive claim. In what quickly becomes repetitive argumentation, Willingham cannot demonstrate sufficient cause for not

bringing his claims in an earlier state habeas application in order to overcome the state procedural bar. *Murray v. Carrier,* 477 U.S. 478, 487 (1986); *Engle*, 456 U.S. at 132-133. If the "basis of the constitutional claim is available, and other defense counsel have perceived and litigated that claim," a particular petitioner's lack of knowledge of the legal basis for the claim does not constitute cause for the failure to raise the claim below. *Engle,* 456 U.S. at 134. In other words, the issue is "whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray,* 477 U.S. at 488. In this case, the record does not reflect an "external impediment" that may have prevented Willingham from raising his claims prior to his second state application.

For these reasons, Willingham fails to meet the "cause" standard for default set forth in *Murray.* Nor do Willingham's claims implicate the narrow exception to the cause and prejudice requirement that exists when a fundamental miscarriage of justice will result. A "fundamental miscarriage" implies that the "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. Accordingly, neither this Court nor any federal habeas court may consider Willingham's belated claims. As a result, Willingham fails to demonstrate that his claims are not procedurally barred and, thus, habeas corpus relief is foreclosed.

IV. Habeas Corpus Relief Should Be Denied on Willingham's Remaining Two Claims.

A. Willingham's Claims Are Unexhausted

Initially, as stated previously, Willingham is barred from relief on his claims due to his failure to raise them in state court. It is well settled that habeas relief "shall not be granted" under any circumstances unless it appears that "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1) (West 2001). Where a petitioner "advances in federal court an argument based on a legal theory distinct from that relied on in the state court, he fails to satisfy the exhaustion requirement." *Nobles v. Johnson,* 127 F.3d at 420 (citing *Vela v. Estelle,* 708 F.2d 954, 958 n. 5 (5th Cir. 1983)).

The exhaustion of state remedies doctrine codified in section 2254(b)(1) reflects a policy that has been consistently adhered to by this Court and the Fifth Circuit. *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 8-10 (1992); *Picard v. Connor,* 404 U.S. 270, 275, 277-78 (1971); *Dowthitt,* 230 F.3d at 745-46. A petitioner must have first provided to the highest court of the state a fair opportunity to apply (1) the controlling federal constitutional principles to (2) the same factual allegations, before a federal court will entertain the alleged errors. *Duncan v. Henry,* 513 U.S. 364, 365-66 (1995); *Rose v. Lundy,* 455 U.S. 509, 522 (1982); *Anderson v. Harless,* 459 U.S. 4, 6 (1982); *Thomas v. Collins,* 919 F.2d 333, 334 (5th Cir. 1990). This doctrine reflects the policy of comity between federal and state governments. The requirement is designed to give state courts the initial opportunity to pass upon or correct errors of federal law in a state prisoner's conviction. *Picard v. Connor,* 404 U.S. at 275-76.

In order to satisfy exhaustion, all of the grounds raised in a federal application for writ of habeas corpus must have been "fairly presented" to the state courts prior to being presented to the federal courts. ***Id; Nobles,*** **127 F.3d at 420. This Court has reasoned that the purpose of exhaustion "is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court."** ***Keeney,*** **504 U.S. at 10. "Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court."** ***Id.***

It is equally clear, however, that Willingham would be barred from raising these claims in a successive state habeas application under Article 11.071 § 5(a) of the Texas Code of Criminal Procedure.[3] Indeed, Willingham just got poured out on in state court where only raised the innocence claim. Indeed, if he now attempted to raise these last two claims, he would again be dismissed. Pursuant to 28 U.S.C. § 2254(b)(1)(A), habeas corpus relief may not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State." However, "[b]ecause [the exhaustion] requirement refers only to remedies still available at the time of the federal petition, it

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[3] Article 11.071§ 5(a), which became effective September 1, 1995, provides that a state court may not consider the merits of or grant relief on claims presented in a successive state habeas application absent facts giving rise to a statutory exception. TEX. CODE CRIM. ANN. art. 11.071 § 5(a). Greer has made no showing that one of the article 11.071 exceptions would apply to allow review of this claim in state court.

is satisfied if it is clear that the habeas petitioner's claims are now procedurally barred under state law." *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (internal citations omitted); *see also Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Graham v. Johnson*, 94 F.3d at 969 ("exhaustion is not required if it would plainly be futile"). Nonetheless, such an unexhausted claim is subject to denial in federal court as procedurally defaulted. Although under *Harris v. Reed*, 489 U.S. 255, 265 (1989), federal review of a habeas claim is procedurally barred only if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default,

> **[t]his rule does not apply if the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.**

***Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1989). In the instant case, just as in *Gray v. Netherland*, "the procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *Gray*, 518 U.S. at 162 (barring claim on basis that claim would be barred in state court if it were presented there); *Nichols v. Scott*, 69 F.3d 1255, 1280 (5th Cir. 1995).**

For the reasons discussed previously, Willingham cannot demonstrate cause and prejudice for his failure to raise this claim in state court. Thus, circuit precedent compels the denial of this claim as procedurally defaulted.

B. Alternatively, Neither Claim Has Merit.

1. Willingham's *Strickland* claim is groundless.

To prevail on a claim of ineffectiveness of counsel, Willingham bears the burden of satisfying the stringent two-part test set out in *Strickland v. Washington*, 466 U.S. 668 (1984), by showing both (1) deficient performance by counsel and (2) resulting actual prejudice. *Id.* at 687. An ineffective assistance claim may be rejected for want of either deficient performance or actual prejudice. Therefore, the absence of either element of the claim is dispositive, and a reviewing court is not required to inquire into an element of the claim if the defendant has failed to carry his burden on the other element. *Strickland*, 466 U.S. at 697.

To establish deficient performance under *Strickland*, Willingham must show that in light of all the circumstances as they appeared at the time of the conduct, counsel's performance fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 687-88. This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effects of hindsight." *Id.* at 689-90; *see also Rector v. Johnson,* 120 F.3d at 563; *Belyeu v. Scott*, 67 F.3d 535, 538, 540 (5th Cir. 1995). Further, reviewing courts are to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466

U.S. at 689; *Rector*, 120 F.3d at 563. Indeed, "[a] conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Crane v. Johnson*, 178 F.3d 309, 314 (5th Cir.) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)); *see also Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999).

Even if counsel's representation were deficient, Willingham must also affirmatively prove prejudice by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. It is not sufficient that the habeas petitioner merely allege a deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. *Hill v. Lockhart,* 474 U.S. 53, 60 (1986); *Manning v. Blackburn,* 786 F.2d 710, 712 (5th Cir. 1986). The claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive, it is not necessary for the court to address the other. *Strickland,* 466 U.S. at 697.

Willingham cannot make a case for ineffective assistance of counsel for failure to conduct an adequate investigation to explore the possibility of attacking the Fire Marshall's report. **Although he criticizes counsel for not finding an ex**pert, the record reflects that Willingham's trial counsel thoroughly cross examined Fire Marshall Vasquez in an attempt to cast doubt on his conclusions. Surely, in light of record counsel's performance was not deficient in this regard. Even if counsel was somehow deficient for not locating an expert

to testify in the manner suggested by Dr. Hurst in his affidavit, Willingham cannot show that he was prejudiced by counsel's actions. As previously explained, the newly discovered affidavit fails to refute the State's contention that the fire was intentionally set. In addition to the Fire Marshall's report clearly indicating that the fire was intentionally set, Willingham confessed his crime to another inmate while awaiting trial. In light of all of the evidence presented, there is no reasonable probability that had counsel found an expert who would testify consistent with Dr. Hurst's affidavit, the jury would have reached a different verdict.

2. Willingham's presentation of false testimony is groundless.

Willingham also alleges that according to Dr. Hursts affidavit, several parts of the Fire Marshall's testimony were blatantly false, even under then existing standards. However, a close reading of Dr. Hurst's affidavit reveals that Hurst never makes the assertion that the Fire Marshall's testimony was false. Furthermore, Willingham has not alleged much less demonstrated that the prosecutor knew that the Fire Marshall's testimony was false. For Willingham to establish that his right to the due process of law has been violated, he must show (1) the actual falsity of a witness's testimony, (2) that the testimony was material, and (3) that the prosecution knew the witness's testimony was false. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). At most, Willingham has established that the Fire Marshall's opinion about the cause of the fire conflicts with or is inconsistent with the affidavit of Dr. Hurst. Conflicting or inconsistent testimony is insufficient to establish perjury. *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001)

(citing *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir.1990)). Furthermore, Willingham has made no showing that this testimony was material in light of the overwhelming evidence of his guilt, or that the prosecution team knew of the testimony's falsity. In sum, Willingham's unexhausted claim lacks merit.

V. Willingham Is Not Entitled to a Stay of Execution.

Willingham is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right that would become moot if he were executed. In *Barefoot v. Estelle*, this Court held that a federal habeas applicant is *entitled* to a stay of execution only where the court of appeals is unable to resolve the merits of an appeal prior to the scheduled execution. *Barefoot,* 463 U.S. 880, 889 (1983). The Court also articulated guidelines for resolving requests for stays of execution, two of which are relevant to Willingham's request for a stay of execution.

First, this Court held that in order to demonstrate an entitlement to a stay, a petitioner must demonstrate more than "the absence of frivolity" or "good faith" on the part of petitioner. *Id.* at 892-93. A petitioner must additionally demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. *Id.* at 893 n.4 (citations omitted); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (holding that the 28 U.S.C. § 2253 COA requirement is a codification of the prior CPC standard of *Barefoot, i.e.,* a substantial showing of the denial of a federal/constitutional right). In a

capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate." *Barefoot,* 463 U.S. at 893.

Second, "a court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal where a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal." *Id.* at 894; *see also Slack,* 529 U.S. at 483. As the state court has already denied relief on this claim based on an adequate and independent state law ground, Willingham cannot demonstrate the likelihood of success on the merits of his claim on appeal; nor can he demonstrate that his grounds for relief amount to a substantial case on the merits that would justify the granting of COA. Under the circumstances of this case, a stay of execution would be inappropriate.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Willingham's original petition for writ of habeas corpus and application for stay of execution be denied.

Respectfully submitted,

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