Nos. 15-7767 &15A743

IN THE
Supreme Court of the United States

RICHARD ALLEN MASTERSON,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

Richard Masterson was convicted and sentenced to death for the robbery and murder of Darin Honeycutt. In the instant petition for writ of certiorari, he alleges that he has new evidence demonstrating his innocence, namely that Honeycutt died due to a heart condition rather than strangulation. He further claims that the State knowingly presented false testimony from the medical examiner and suppressed evidence that could have impeached the medical examiner. Masterson raised these claims in his subsequent state habeas application dismissed for abuse. The instant petition presents the following questions:

1. Whether Masterson's claim is barred from review following the state court's application of a state procedural bar.

2. Whether Masterson's claim is lacking in merit, considering that he raised a nearly identical claim the state and federal courts previously rejected on the merits—namely that cause of death was contested at trial—and that the State could not have suppressed evidence not yet in existence.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Masterson seeks review in this Court following the dismissal by the Texas Court of Criminal Appeals of his subsequent application for writ of habeas corpus. *Ex parte Masterson*, 59,481-03 at Order (January 11, 2016). Masterson was convicted and sentenced to death for the strangulation death and robbery of Darin Honeycutt. Masterson has previously and unsuccessfully challenged the constitutionality of his state capital murder conviction and death sentence in both state and federal court. He nonetheless filed his third state habeas application three weeks before his scheduled execution. In that, he asserted several claims that have long been available to him, namely claims pertaining to Honeycutt's cause of death and the medical examiner's testimony, which he raised when he filed his initial state and federal habeas petitions years ago. Masterson now re-raises this allegation but with "new" evidence that essentially mirrors the evidence he presented on initial habeas review. Notwithstanding the procedural default below, Masterson's claims have been rejected on the merits by both the state and federal courts. His new evidence changes nothing. The claims remains both procedurally barred and meritless. Therefore, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Statement of Facts

On Saturday morning, January 27, 2001, Alfred Bishop, the manager of a Houston apartment complex, was approached by friends of Darin Honeycutt. 18 RR 18-19, 21, 34.[1] The friends were worried about Honeycutt because he had not shown up for work. *Id.* at 21. They asked to be let into his apartment. *Id.* After Bishop opened Honeycutt's apartment, they found Honeycutt's naked body in the bedroom. *Id.* at 38-39. And Honeycutt's car was not in the parking lot. *Id.* at 36, 135.

Houston homicide detective Sgt. R. Parish was assigned to the case. *Id.* at 131. Parish was contacted by Morgan Porter, who had heard of Honeycutt's death. *Id.* at 117-18. Porter knew Masterson because Masterson's brother, James, worked for him. *Id.* at 109. The day after Honeycutt's murder, Masterson came looking for his brother, who was not at work. *Id.* at 110-11. Masterson told Porter: "I think I really put somebody to sleep." *Id.* at 112-13. Porter saw that Masterson was driving a red Ford Escort. *Id.* at 114. Asked

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[1] "RR" refers to the reporter's record of the trial testimony, preceded by volume number and followed by page number(s). "SX" refers to the numbered exhibits offered and admitted into evidence at trial by the State, followed by exhibit number(s). "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, preceded by volume number and followed by page number(s). "SHCR" refers to the state habeas clerk's record, followed by page number(s).

where he had gotten the car, Masterson failed to respond. *Id.* He said, however, that he was going back to Georgia. *Id.*

James Masterson also contacted Sgt. Parish and told the sergeant that he thought his brother had gone to Georgia. *Id.* at 168. James contacted Masterson and told him to call Sgt. Parish to clear up the circumstances surrounding Honeycutt's death, which was thought possibly to be the result of a heart attack. *Id.* at 169-71. Of the heart-attack theory, Richard Masterson told his brother, "[T]hat was bull shit" and that he "put [Honeycutt] down." *Id.* at 170-71. James understood Masterson's statement to mean that he had killed Honeycutt. *Id.* at 171. Masterson told James that he had Honeycutt in a headlock until he went limp. *Id.* at 174. Eventually, investigators found Honeycutt's red Ford Escort in Emerson, Georgia. *Id.* at 138.

Eight days after Honeycutt's death, Masterson met Steven Drew in a gay club in Tampa, Florida. 19 RR 201. The two left the club in Drew's vehicle and went to Drew's apartment. *Id.* at 203. There, Masterson jumped Drew and placed him in a headlock. *Id.* at 206. Drew said, "There was nothing sexual about it. . . . [I]t was really violent and I knew it had nothing to do with sex at all." *Id.* at 206-07. Drew fell to the ground; Masterson straddled him and continued to strangle him with both hands. *Id.* at 209. Drew lost consciousness, and when he came to, his wallet and car were gone. *Id.* at 209-

10. Drew had bruises around his throat, he lost his voice for a few days, and the blood vessels in his eyes were broken. *Id.* at 211.

On February 6, 2001, Deputy E. Thoreson, an officer with the Belleview, Florida, Police Department, was running tags in a mobile home park when he came across a Toyota—Drew's car—which had been reported stolen. *Id.* at 48-49, 226. After Masterson was identified as the driver of the Toyota, he was arrested. *Id.* at 48-49, 226-28; 18 RR 143-44.

While Masterson was in the Marion County, Florida, jail, he confessed both to the attack on Drew and Honeycutt's murder. 19 RR 59-89, 230-31. Houston Police Detective David Null recorded Masterson's statement, and the tape was played for the jury. *Id.* at 70-89; SX 2. In the statement, Masterson said he strangled and killed Honeycutt to steal his car. 19 RR 70-80; SX 2. Asked what happened with Drew, Masterson said: "Pretty much the same thing I did in Houston, except the person didn't die. . . . I didn't let the person get undressed this time." 19 RR 230.

At trial, Masterson testified at guilt-innocence. Although he acknowledged killing Honeycutt, he said the death was an accident that occurred during sex. *Id.* at 114-78. He said Honeycutt asked him to put his arm around his neck to perform erotic asphyxiation. *Id.* at 126-27. In the process, Honeycutt went "limp" from the "sleeper hold" and died. *Id.* at 128-29. Masterson said he fled because he had convictions. *Id.* at 130-31. To make

the incident appear to be a robbery, he took Honeycutt's VCR and car. *Id.* at 130-32.

Dr. Paul Shrode, an assistant Harris County medical examiner, conducted Honeycutt's autopsy. 18 RR 193. Dr. Shrode believed Honeycutt's death was caused by "external neck compression." *Id.* at 205, 208. Dr. Shrode said that Honeycutt had a narrowed coronary artery. *Id.* at 208. The doctor ruled out the narrow artery as the cause of death but said the condition may have hastened the death. *Id.* at 206-08. Dr. Shrode said Honeycutt's death was consistent with his having been subjected to a "sleeper hold," in which Masterson pressed the inside of his elbow against Honeycutt's windpipe and applied pressure. *Id.* at 201, 209.

II. Appellate and Postconviction Proceedings

Masterson was found guilty of the robbery-related capital murder of Darin Honeycutt and sentenced to death. 2 CR 318-19. His conviction and sentence were affirmed on appeal, *Masterson v. State*, 155 S.W.3d 167 (Tex. Crim. App. 2005), and certiorari review was denied, *Masterson v. Texas*, 546 U.S. 1169 (2006). His first application for state habeas corpus relief was denied, *Ex parte Masterson*, No. WR-59481-01, 2008 WL 3855113 (Tex. Crim. App. Aug. 20, 2008) (unpublished), and his second was dismissed as abusive, *Ex parte Masterson*, No. WR-59481-02, 2012 WL 6630160 (Tex. Crim. App. Dec. 19, 2012) (unpublished). The federal district court denied his petition for

habeas corpus relief and denied permission to appeal. *Masterson v. Thaler*, No. 4:09-CV-2731, 2014 WL 808165 (S.D. Tex. Feb. 28, 2014) (unpublished). The United States Court of Appeals for the Fifth Circuit subsequently denied Masterson a certificate of appealability (COA). *Masterson v. Stephens*, 596 Fed. Appx. 282 (5th Cir. Jan. 9, 2015) (unpublished). This Court denied Masterson certiorari review. *Masterson v. Stephens*, 135 S. Ct. 2841 (2015).

On December 30, 2015, three weeks before his scheduled execution, Masterson filed a third state application for habeas corpus relief. The Texas Court of Criminal Appeals dismissed the application as an abuse of the writ pursuant to Texas Code of Criminal Procedure, Article 11.071, § 5(a). *Ex parte Masterson*, 59,481-03 at Order (January 11, 2016). Masterson also sought authorization from the Fifth Circuit to file a successive federal habeas petition, but the Fifth Circuit denied Masterson's motion on January 15, 2016. *In re Masterson*, No. 16-20031 (5th Cir. 2016) (unpublished).

REASONS FOR DENYING THE WRIT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted for compelling reasons only. Sup. Ct. R. 10 (West 2014). In determining whether a compelling reason exists, this Court may consider whether the state court decided an important federal question in a way that conflicts with relevant decisions of this Court. *Id.* Masterson's claims rely in part on evidence that has been available to him for years.

Indeed, his claims are essentially the same as claims that the state and federal courts have already found to be without merit. A petition for writ of certiorari is rarely granted for such an allegation. Sup. Ct. R. 10. Further, the Court of Criminal Appeals dismissed Masterson's claims without considering its merits, based on an independent and adequate state procedural bar. And because the state court's decision is consistent with this Court's precedent, no compelling reason for review exists.

I. Certiorari Review Is Foreclosed by a Valid State Procedural Bar.

The issue in this case involves only the state court's proper application of state procedural rules for collateral review of death sentences. The state court did not consider the merits of Masterson's claims. *Ex parte Masterson*, No. 59,481-03 at Order. The state court's disposition, which relied on an adequate and independent state procedural ground, forecloses certiorari review. Specifically, Masterson's subsequent state habeas application was dismissed as an abuse of the writ because he asserted the claims in a subsequent application without making the required showing or adequately explaining why the claim could not have been raised in a previously filed application. *Id*. (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)).

This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and

adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Indeed, Masterson fails to present *any* justification for not applying the Court's long-standing rule against reviewing claims denied by state courts on state law grounds, and none exists. There is no jurisdictional adequate basis for granting certiorari review in this case.

Although this is not a federal habeas proceeding in which the Court actually retains jurisdiction to review procedurally defaulted claims, as explained in *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997), and *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991), Masterson nonetheless cannot demonstrate cause or a fundamental miscarriage of justice that might excuse such a default. In the "cause" inquiry, the core issue is whether the legal basis of allegation was not "reasonably available" to him during the time his initial state habeas application was pending. *Reed v. Ross*, 468 U.S. 1, 16 (1984); *Engle v. Isaac*, 456 U.S. 107, 129 (1982). This is clearly not the case, however, because these claims have been available to Masterson since he filed his first state habeas application, through the entirety of federal habeas proceedings and, arguably, since the time of trial. Any contention that ineffective

assistance in initial state habeas proceedings prevented him from raising his claims sooner than the current subsequent application is thus rendered meritless. As a result, Masterson fails to establish that this claim was unavailable or novel within the meaning of *Ross* and *Isaac* or that he could not have raised it earlier. On this record, Masterson has no basis on which to seek certiorari review.

II. Nevertheless, Masterson's Claims Are Without Merit.

Masterson's claim that he is entitled to habeas relief because of the alleged false or misleading testimony of medical examiner Paul Shrode, M.D., is without merit. Masterson's claims are based on Dr. Shrode's January 28, 2001, autopsy of Honeycutt and Dr. Shrode's testimony during Masterson's capital murder trial.

A. The claim is nearly identical to the allegation previously rejected by the state and federal courts.

First, Masterson presented essentially the same claim in his initial federal petition when he argued that trial counsel was ineffective for not presenting an expert to challenge Dr. Shrode's testimony. On state habeas and federal habeas review, Masterson presented an affidavit from Dr. Paul Radelat, who disputed Honeycutt's cause of death. Specifically, Dr. Radelat opined that the sleeper hold Masterson applied to Honeycutt's neck resulted in a fatal cardiac arrhythmia exacerbated by Honeycutt's narrowed coronary

artery. *See Masterson v. Thaler*, 4:09-cv-02731 (S.D. Tex. 2014), Docket Entry (DE) 79 at 19-20. However, trial counsel did in fact have a doctor, Robert Walmsey, standing by at trial to dispute Dr. Shrode's testimony. But counsel chose not to place Dr. Walmsey on the stand because Dr. Shrode conceded every point the defense wanted to make about the possibility that Honeycutt died due to the narrowed coronary artery. SHCR 146. Counsel then made those points to the jury. As the federal district court held, "In fact, the only meaningful difference between the information derived during cross-examination [at the original trial] and that in Dr. Radelat's affidavit is an expert opinion that the death was not accidental." DE 79 at 35-36. The federal court determined that Masterson, thus, could not demonstrate any prejudice due to counsel's failure to present the expert. *Id.* at 21-24.

In this case, Masterson is raising the same claim; he is simply attempting to present identical facts under a different legal theory and using different experts in order to pass off the allegation as "new" and "recently discovered." As the Fifth Circuit properly held in rejecting Masterson's motion for authorization to file a successive petition, "[a]lthough [Masterson's] witness may be 'new,' the issue of causation is as old as the case itself. . . . Masterson, then, cannot argue that the evidence related to the disagreement over causation is newly discovered." *In re Masterson*, No. 20031 at 5, 7.

Because this claim has already been deemed meritless, certiorari review is not warranted.

B. This is not new scientific evidence, but a disagreement about cause of death.

In support of his challenge to Dr. Shrode's work, Masterson relies on the December, 2015, report of forensic pathologist Christena Roberts, M.D., summarizing her review of Dr. Shrode's work and her disagreement with Shrode's conclusions regarding Honeycutt's cause of death. However, Dr. Roberts 2015 report does not constitute newly discovered evidence. Dr. Roberts does not assert in her report that she was relying on new scientific discoveries to reach her opinions concerning Dr. Shrode's work; she merely disagreed with Dr. Shrode's opinions based on a review of his autopsy report, autopsy photos, and his testimony at trial. Simply because Masterson obtained the opinion of another pathologist a month before his scheduled execution does not establish that another opinion was not available at trial or during prior habeas proceedings.[2] Significantly, as shown above, during initial state

[2] Indeed, the Fifth Circuit correctly held that Dr. Roberts' opinion did not constitute "new" evidence for 2244(b) purposes:

> Dr. Roberts's criticisms of the autopsy report are not based upon a "new" factual predicate but upon the original autopsy presented at the original trial, which was previously reviewed by two different defense experts (one at the original trial and one as part of the original state habeas proceeding). Dr. Roberts's "new" criticisms of an old document are not "new" within the meaning of successive habeas applications. *See Dowthitt v. Johnson*, 230 F.3d 733, 742–43 (5th Cir. 2000) (holding that

habeas proceedings, Masterson presented the affidavit of forensic pathologist Dr. Radelat to support his habeas claim that trial counsel were ineffective for failing to obtain independent expert testimony to refute Dr. Shrode's conclusion that external neck compression caused Honeycutt's death. Dr. Radelat, much like Dr. Roberts, reviewed the autopsy report, Dr. Shrode's trial testimony, and Masterson's testimony in reaching his conclusions regarding Dr. Shrode's opinion and testimony concerning the cause of death.

Moreover, the theories asserted by Dr. Radelat and Dr. Roberts were presented during Masterson's capital murder trial. As mentioned above, trial counsel consulted a medical expert, cardiologist Robert Walmsley, M.D., regarding Honeycutt's manner of death. Trial counsel prepared for cross-examination of Dr. Shrode through their consultation with Dr. Walmsley, who

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> newly submitted affidavits, the substance of which was presented at the original trial, did not qualify as newly discovered evidence); *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998) (distinguishing a petitioner's "knowledge of the factual predicate" of a claim with the "gathering [of] evidence in support of that claim"); *cf. Prince v. Thaler*, 354 F. App'x 846, 848 (5th Cir. 2009) (finding new expert testimony insufficient to toll the statute of limitations on a habeas petition because it merely opined that the State's scientific testing process was imperfect and failed to rebut other circumstantial evidence); *Turner v. Epps*, 412 F. App'x 696, 704–06 (5th Cir. 2011) (denying a certificate of appealability because "the opinions expressed in the new expert affidavits . . . indicate[d] a mere disagreement among experts").

In re Masterson, No. 16-20031 at 5 n.4.

suggested areas of questioning for trial counsel to pursue, and counsel ultimately decided not to present Dr. Walmsley as a defense expert after Dr. Shrode conceded crucial points about which Dr. Walmsley would have testified.

For instance, on direct examination, Dr. Shrode testified that the cause of death was external neck compression. However, because Honeycutt's coronary artery was narrowed, the heart muscle required more blood in the stressful situation and if it cannot get that blood, that portion of the heart is more susceptible to a heart attack. 18 RR 208. On cross-examination, Dr. Shrode conceded the following: (1) the congested palebral and bulbar conjunctiva in Honeycutt's eyes could have occurred due to gravity because of the position he was in, and it is not possible to determine if the congestion itself was caused by compression or gravity, *id.* at 217; (2) the pressure applied to Honeycutt's neck may have caused his heart to become arrhythmic, which is probably how he died, *id.* at 220; (3) people can die from heart arrhythmias and when autopsies are done, it is not possible to tell whether a heart attack occurred, *id.* at 221; (4) Honeycutt had an abnormal coronary heart condition for a person of his age and when occluded, the heart requires more blood during times of stress, *id.* at 222-23; (5) a sleeper hold is very stressful to the heart, *id.* at 224; (6) there was no evidence of hemorrhaging or injury to the hyoid or thyroid cartilage in Honeycutt's neck, *id.* at 226-27; (7) it is unusual to see a neck that does not reveal any trauma when the person has been strangled to

death, *id.* at 228; (8) the lack of petechiae of the larynx or trachea—*i.e.* signs of strangulation—indicates Masterson applied a sleeper hold to Honeycutt as opposed to manual strangulation, *id.* at 228-29; (9) the toxicology report showed Honeycutt's blood alcohol level was .11—above the legal limit for driving—which could have contributed to an arrhythmia, *id.* at 229-30; (10) a sleeper hold could be involved in autoerotic asphyxiation, particularly where the person applying the hold is engaging in anal intercourse, *id.* at 233; (11) if a person was unconscious and left in the unusual position in which Honeycutt was found—face down into the rug with his legs on the bed pointing upward—and if the neck was flexed on the chin toward the chest, then it is possible returning blood flow could be interrupted, *id.* at 234-35; and (12) when applied, the sleeper hold causes a person to lose consciousness in only a few seconds, but it might take longer if the persons involved in the sexual act wanted it to last. *Id.* at 236.

In sum, based on the direct and cross-examinations, the medical examiner left open the possibility that Honeycutt and Masterson were engaged in a sexual act, that Masterson applied a sleeper hold from behind—rather than a manual choke hold—to assist Honeycutt in the act, and that Honeycutt's death was accelerated due to his heart condition and unusual body position. Thus, Dr. Shrode's testimony differed little from Masterson's supposed new evidence.

Moreover, Dr. Shrode essentially admitted that, other than his belief that there is no reason to continue asphyxiation during sex if the person passes out, he had no evidence that would differentiate intentional strangulation from a sexual and accidental asphyxiation. 18 RR 230-38. Indeed, he acknowledged that intent is rather difficult for pathologists to determine. *Id.* at 238. During final argument, defense counsel stated:

> [Dr. Shrode] jumped on the home team's train just a little bit in this trial because when I tried to press him about his findings he said, well, it just couldn't have been. Why is that, Doctor? Well, it just couldn't have been. Why is that, Doctor? Because if you choke someone until they're unconscious why would you keep going? You'd stop. Well, that does make sense. Is that the only thing you can point to, Doctor? I think I asked him three times, and I think that was the only thing he ever came up with. He said, well, normal blood flow will resume, but that was only a surmise on his part. He doesn't know that. He admitted that the body was in this shape, no, this position - - excuse me - - with his head down. He admitted that gravity could have caused all these injuries that he found as well as the sleeper hold. Nothing he could point to said this is definitive that this was an intentional external compression.

20 RR 20-21. Therefore, not only did the defense force the doctor to concede issues on cross-examination, but the defense also made the point that Dr. Shrode's opinion regarding intent was out of his realm of expertise.

In short, the issues Masterson claims were "suppressed" were all brought out at trial. His claim does not actually amount to one of actual innocence but rather a conflict in the evidence resolved against him. As the Fifth Circuit has

long held, "[i]t is the sole province of the jury, and not within the power of this Court, to weigh conflicting evidence and evaluate the credibility of witnesses." *United States v. Seale*, 600 F.3d 473, 496 (5th Cir. 2010) (citation omitted); *see also United States v. Dula*, 989 F.2d 772, 778 (5th Cir. 1993) ("This court's review does not encompass weighing the evidence or judging the credibility of witnesses.") (citation omitted).

Finally, Masterson also complains about Dr. Shrode's qualifications and claims that his "misleading" testimony is concerning because Dr. Shrode, "is a prolific, habitual liar" and has "botched" other autopsies. Dr. Shrode's unrelated professional difficulties do not constitute a basis for habeas relief. It should be noted that, in 2010, the Court of Criminal Appeals dismissed capital defendant Michael James Perry's subsequent writ application in which Perry relied, in part, on Dr. Shrode's professional issues to support his subsequent habeas claim of actual innocence. *See Ex parte Perry,* No. 62, 906-02, 2010 WL 2618086 (Tex. Crim. App. June 24, 2010) (not designated for publication). Additionally, in 2014, the Court of Criminal Appeals dismissed capital defendant Suzanne Margaret Basso's subsequent writ application in which she too relied, in part, on Dr. Shrode's professional issues to support her subsequent habeas claim that her death sentence violated the Eighth Amendment. *See Ex parte Basso*, No. 63,672-02, 2014 WL 467743 (Tex. Crim. App. Feb. 3, 2014) (not designated for publication).

C. Other evidence of guilt

Any notion that Masterson is actually innocent is further undermined by the additional trial evidence. Masterson approached Morgan Porter after the crime and told him "I think I put somebody to sleep." 18 RR 112. Porter then asked Masterson if he *just* put someone to sleep and Masterson said, "No, I think it was more than that, and he said I think I really put somebody to sleep." *Id.* at 113. Masterson also said that he thought about stopping but decided to go on, referring to putting the person to sleep. *Id.* at 116.

When Masterson talked to his brother James, James stated that he heard Honeycutt may have died from a heart attack, to which Masterson replied "that was bull shit." *Id.* at 170. Masterson also told James "that he put [Honeycutt] down." *Id.* Later, James talked to Sergeant Parish and told Parish that Masterson said "he just had [Honeycutt] in a headlock 'til he went limp." *Id.* at 174.

Masterson's confession removed any doubt whether the crime was intentional or an accident. Masterson stated that he met Honeycutt at Cousins bar after 12:00 a.m. Friday morning. 19 RR 72. They "hit it off," and Honeycutt asked Masterson if he wanted to go home with him. *Id.* at 73. They hung out until closing time and then left, first taking a couple of people home. *Id.* Masterson and Honeycutt were in Honeycutt's red Ford Escort. *Id.* at 74. They proceeded to Honeycutt's apartment on Jackson Street and arrived there about

2:30 or 2:45 a.m. *Id.* at 74-75. Once inside, they went to the bedroom, and Honeycutt got undressed. *Id.* at 75. Masterson then grabbed Honeycutt around the neck, and Honeycutt never moved. *Id.* Masterson stated that he put Honeycutt's windpipe in the pit of his elbow and squeezed, and Honeycutt never struggled—he just went to sleep. *Id.* at 76. Masterson then pushed Honeycutt down on the bed. *Id.* However, Honeycutt slid in a strange position—face on the floor, legs elevated on the bed—while Masterson still had him around the neck. *Id.* at 76-77.

When Officer Null asked Masterson if he intended to kill Honeycutt, he responded, "Um, yeah, I think so." *Id.* at 77. Masterson explained that he did this because he needed a car. He had no intent on having sex with Honeycutt; he just played along to get the car. *Id.* When they left to go to Honeycutt's, Masterson did not know he was going to kill Honeycutt to get the car, but something told him in his mind that he was going to commit murder. *Id.* at 78. After Masterson grabbed Honeycutt around the neck and Honeycutt "went to sleep," "I just said to hell with it, I might as well go all the way with it now." *Id.* Masterson then put his jacket on, took the VCR, grabbed the car keys, and left. *Id.* He looked in Honeycutt's jewelry box but did not see anything he wanted, so he set the drawer on the floor. *Id.* at 80.

The prosecution also played a portion of Masterson's confession pertaining to Steven Drew. On the tape, Masterson told Officer Null he was

in Tampa and did "pretty much the same thing I did in Houston, except the person didn't die ... I didn't let the person get undressed this time." *Id.* at 230.

In sum, Masterson is not an innocent man; he is guilty and has admitted to his crime on numerous occasions. His claims, therefore, have no merit.

D. Masterson's suggestion that the prosecution presented false testimony or suppressed evidence is clearly meritless.

Masterson also appears to claim the State presented false and misleading expert testimony and suppressed exculpatory and impeachment evidence pertaining to Dr. Shrode. With regard to false evidence, a due process violation occurs only if: (1) the State offers false testimony; (2) the false testimony was material; and (3) the prosecution knowingly failed to correct the false testimony. *Giglio v. United States,* 405 U.S. 150, 153-54 (1972). Likewise, in order for a petitioner to show that the State suppressed evidence in violation of due process, the petitioner must make three showings: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The State bears "no responsibility to direct the defense toward potentially exculpatory evidence that either is in the possession of the defense or can be discovered through the exercise of reasonable diligence." *Bigby v. Cockrell*, 340 F.3d 259, 279 (5th Cir. 2004); *Rector v.*

Johnson, 120 F.3d 551, 558 (5th Cir. 1998). Further, "[w]hen evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002).

The State has shown above the lack of materiality with respect to Masterson's new evidence. Additionally, Masterson completely fails to demonstrate that the State *knowingly* presented false testimony or suppressed material evidence. His claims of State malfeasance are entirely unsubstantiated and conclusory, which are inadequate to warrant relief. *Koch v. Puckett*, 907 F.2d 524, 530 (1990).

Further, in denying Masterson's motion for authorization to file a successive petition, the Fifth Circuit addressed the improbability of Masterson's claim.

> [W]ith the exception of the misstatement in Dr. Shrode's application to Harris County, all of the supposedly exculpatory impeachment evidence that the State allegedly concealed either had not yet occurred when Dr. Shrode testified at Masterson's trial in 2002 (the alleged misstatements to El Paso, the "reprimands" by Harris County, and the alleged lies in the child protective trial) or could not have been discovered by the State of Texas at that time (the "botched autopsy" of 1997 in Ohio that did not come to light until 2010). Perhaps arguably a prosecutor has a continuing obligation to turn over impeachment evidence that was previously improperly suppressed. However, Masterson points to no authority for the proposition that a prosecutor has a duty to turn over subsequently discovered information about a witness related to events that *had not yet occurred* at the time of trial but would nevertheless, if a time machine were available, be useful to

> impeach the witness's credibility. *See generally Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009) (discussing temporal limitations on *Brady* duties). Masterson's theory essentially is that if a witness who testifies for the State ever lies or commits other misdeeds thereafter, the defendant is entitled to a new trial. Masterson provides no case that reaches that broadly, nor would such a rule make sense.

In re Masterson, No. 16-20031 at 10-11 (emphasis in original). In short, a prosecutor cannot engage in misconduct for failing to turn over evidence not yet in existence. Masterson's claims are evidently meritless and should be rejected.

III. Masterson Is Not Entitled to a Stay of Execution.

Masterson is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right which would become moot if he were executed. In *Barefoot v. Estelle,* this Court explained that a stay is appropriate only when there is a "reasonable probability" that certiorari will be granted, a "significant possibility" that the Court will reverse the lower court's decision after hearing the case, and a "likelihood" that the applicant will suffer irreparable harm absent a stay. 463 U.S. 880, 895 (1983). Masterson has met none of these requirements. As discussed above, Masterson's claims are procedurally barred from substantive review in this Court. Thus, there is no possibility that this Court could reverse the judgment of the Court of Criminal Appeals. Masterson's substantive constitutional claims are also without merit. Furthermore, the Court may also "consider the last-minute

nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States Dist. Ct. for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*). Under the circumstances of this case, a stay of execution would be inappropriate and Masterson's motion should be denied.

CONCLUSION

For the above reasons, the Court should deny Masterson's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Response has been served electronically to Mandy Miller and Pat McCann, counsel for the Petitioner, on this the 19th day of January, 2016.

/s/ Erich Dryden
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