NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON D. WOODRUFF
Petitioner

VS.

LORIE DAVIS, DIRECTOR,
TDCJ-CID
Respondent

On Petition for Writ of Certiorari to the
U. S. Court of Appeals, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

John D. Nation
SBN 14819700
4925 Greenville Ave., Suite 200
Dallas, Texas 75206
214-800-5160
214-800-5161 (facsimile)
nationlawfirm@gmail.com

Counsel of Record

QUESTION PRESENTED FOR REVIEW

A prosecutor had Petitioner's jail telephone calls recorded, listened to them, made notes from them and had at least one witness listen to them. This blatant violation of Petitioner's Sixth Amendment rights should have resulted in dismissal of the charge under *United States v. Morrison*, 449 U.S. 361, 365-366 (1981). The district court held otherwise and the Fifth Circuit denied a certificate of appealability. Did this denial constitute reversible error?

PARTIES TO THE PROCEEDING

1. Brandon Woodruff, Petitioner

2. Lorie Davis, Director Texas Department of Criminal Justice, Correctional Institutional Division.

TABLE OF CONTENTS

LIST OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

OPINION BELOW

The opinion in this case consist of an unpublished order in no. 18-10133 and appears in the Appendix.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. § 1254. The opinion on rehearing from the Ninth Circuit was issued September 20, 2018 and this petition is filed within 90 days of that date.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI provides:

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

STATEMENT OF THE CASE

Petitioner was convicted of capital murder in a jury trial in Texas state court. Punishment was assessed at life imprisonment. When he received no relief in state courts, Petitioner filed his 28 U.S.C. § 2254 application in cause no. 3:15-CV-01832 in the United States District Court for the Northern District of Texas, Dallas Division. When that court denied relief, Petitioner appealed to the Fifth Circuit under 28 U.S.C. § 1291. That court declined to issue a certificate of appealability on September 20, 2018.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in finding that That Petitioner failed to make a substantial Showing that his Sixth Amendment Right Was violated by the state court judge's refusal To dismiss the case following the revelation that the prosecutor had directed the recording of Petitioner's jail phone calls and listened to Them and made notes of their contents.

On October 16, 2005, Petitioner's parents, Dennis and Norma Woodruff, were murdered in their trailer in Royse City, Texas. They had been shot and stabbed several times. Charla Woodruff, Petitioner's sister, could not reach her parents by telephone, so she called Linda Matthews, her aunt, who in turn called Todd Williams, a family friend, to do a welfare check. Williams entered the trailer (having to break a window to do so) and found the couple. He found no signs of forced entry.

Police responded, though no thorough investigation was done. Officers did not take fingerprints inside the house, nor did they check for blood on the light switches. The bathroom was not checked for DNA evidence, although blood stain samples were taken from the sink. No blood was found on the handles on the sink.

Though some blood was detected on the carpet, the blood was not tested for DNA. Hairs were found in Norma Woodruff's hand—but they were not tested. Suffice it to say that no forensic evidence connected Petitioner to the murder or the trailer at or near the time of the offense.

Because Petitioner supposedly was the last person to see the Woodruffs alive, suspicion centered on him. But no physical evidence was found outside the Woodruff trailer. A search of Petitioner's truck revealed nothing but a car wash receipt. Police seized and searched a suitcase found in his dormitory room, but testing revealed nothing incriminating. No pistol was ever recovered.

In search of other clues, police began to search the barn on the Woodruff property. A

brief search was abandoned when police were deterred by the large number of boxes and amount of detritus. *Two years later*, however, Kathy Lach, Petitioner's aunt, discovered a dagger while cleaning out the barn. This soon became the alleged murder weapon, even though it was not found in 2005 during the initial investigation and there was absolutely no evidence that Petitioner had put it in the barn.

Friends of Petitioner at Abilene Christian University remembered him having a "medieval-looking" dagger. But none of the friends was ever able positively to identify the dagger found in the barn as the one Petitioner had possessed.

Though Dennis Woodruff's DNA was found near the hilt, autopsy reports did not

establish that a two-edged blade was used. Indeed, the wounds were more similar to being left by a kitchen knife. A forensic pathologist stated unequivocally that the dagger was not the murder weapon and the state's witnesses could only say that the dagger was possibly consistent with the wounds.

The prosecution attempted to bolster their case through a time line. In a meeting with police, Petitioner related that he had pizza with his parents on the night of the offense, then left and went to the Woodruff's old house in Heath, Texas (about twenty minutes away), fed the animals and then went night clubbing.[1]

[1] The prosecution challenged Petitioner's account of the time he did these activities; however, as the lead investigator conceded, none of the other witnesses was any more accurate as to the time frame.

What is significant about the time line is that it excludes Petitioner as the murderer. It is unchallenged that the Woodruffs were alive until about 9:20 p.m. on the night of the offense, as they had a 15-20-minute telephone conversation with Opal Johnston, Norma's mother.

Randal Lunz, who lived next door to the Woodruff home in Heath, saw Petitioner arrive there shortly after 10:00 p.m., his recollection being tied to the 10 p.m. news.

Telephone records made after 10 p.m. that night reflect that Petitioner was in constant contact with his friends, making it virtually impossible for him to have committed the murder after 10 p.m. And if Petitioner arrived at Heath shortly after 10 p.m., and was seen in North Dallas by 11 p.m., he could not

have driven the 25 minutes back to Royse City. Significantly, the prosecutor conceded in closing argument that Petitioner could not have committed the murder until after he had concluded a conversation with his girlfriend at 9:46 p.m.

If Petitioner had committed the murder after 9:20 p.m. and arrived in Heath shortly after 10:00 p.m., he would need to leave by no later than 9:40. Therefore, within a span of fifteen to twenty minutes, he would have to commit the following acts: confront his parents, commit two murders with a knife and a gun, make sure his victims were dead, clean himself up in the bathroom, clean the bathroom so thoroughly that no trace of physical evidence was left behind, turn off the lights, lock the trailer, take or dispose of the gun and knife and

then finally leave.[2] Indeed, if Petitioner finished his phone call at 9:46 p.m. and arrived at Heath at 10:06, this leaves him no time to have committed the murder.

The State offered various motives that Petitioner might have to kill his parents. None of these motives was unequivocal or necessarily sufficient to lead to murder. In any event, motive is essentially irrelevant when the State cannot prove opportunity. The State also brought up that the parents of Petitioner's girlfriend were missing a pistol and bullets from its holster and that Petitioner was at their house the day before the murders. Other persons had access to the gun and the parents

[2] This assumes that Petitioner entered the trailer having formed the intent to kill his parents. If he did not, and a confrontation occurred between him and his parents sufficient to enrage him to the point of murder, that consumes at least several minutes of the time line.

could not remember the last time they saw the gun.

Petitioner was no more or less a suspect than anyone else in that area and time. Law enforcement simply chose him as the best suspect and attempted to craft a case around him. The prosecutor inherited a weak case and took radical steps to obtain a conviction. These steps included violating Petitioner's Sixth Amendment right to counsel.

In August 2007, Petitioner filed a motion to dismiss the indictment with prejudice based on prosecutorial misconduct. Petitioner charged that the Hunt County District Attorney's Office and the Hunt County Sheriff's Department recorded telephone calls between him and his defense team while he was in jail prior to trial. (ROA 257-258).

The trial court conducted a hearing on this motion in September 2007. At that hearing, the chief jailer, Curtis Neel, testified that all inmate phone calls were recorded, including attorney-client calls. At the outset of the call, a recording warns the caller and any listener that the call is being recorded. The jailer related that one of the prosecutors instructed him to monitor Petitioner's phone calls, although he did not monitor them all.

The calls were monitored from 2005 till February 2006 and again after May 2007. The jailer listened to phone conversations between Petitioner and his defense team and he gave copies of the recordings he monitored and saved to the District Attorney's Office. (ROA 258).

Texas Ranger Jeffrey Collins related that he asked for copies of the recorded calls from

January 2006 until February 2006, which Neel provided. That production included about 150 calls. Upon request, Collins gave these recordings to the District Attorney in July or August of 2007. Although he listened to 8 or 10 calls, he threw his notes away. (ROA 258).

Then in April or May of 2007, Hunt County Sheriff's Department Investigator Joel Gibson received about 50 hours' worth of recorded calls which he forwarded to the District Attorney.

The trial court denied Petitioner's request to question the prosecutor who instructed Neel, the chief jailer, to monitor Petitioner's phone calls. The court also denied the motion to dismiss, although stating that some suppression rulings could follow, and the court ruled that witnesses could be asked if they

heard any conversations between Petitioner and his attorney.

Another prosecutor informed the court that none of the witnesses had listened to any of the conversations. The trial court finished by directing that no witnesses would be allowed to listen to the recorded conversations, that the recordings could no longer be saved on a computer and that there would be no further recording of defense team calls. (ROA 259).

At a September 11, 2007 pretrial hearing, a defense attorney asked to question the prosecutor who ordered the recording of Petitioner's phone calls, expressing concern about whether the prosecution learned anything about defense witnesses or strategy through the recordings.

The court listed to about three hours of recordings and found nothing of value. The court found that at the beginning of each call, the caller and recipient were advised that the call was being recorded; the trial court further found that Petitioner's Sixth Amendment right was violated by the recording, but that the participants in the call knew it was being recorded. Per the court, the district attorney did not act with malice in listening to the calls because "they had some case authority to support their actions." The court denied the motion to dismiss the indictment but suppressed any evidence obtained from the phone calls between Petitioner and the defense team or resulting from any investigation stemming from that information. (ROA 260).

Next, the District Attorney moved to be recused from the case and replaced by a special prosecutor. The trial court granted the motion and appointed an Assistant Attorney General as special prosecutor. This special prosecutor was ordered not to have contact with the District Attorney's office regarding the case. (ROA 260). The trial court also found that the recordings still needed transcription so that it could determine if suppression was necessary and to ensure that any suppressed evidence was not transmitted to the special prosecutor.

Prior to a May 2008 hearing, Petitioner filed a motion to require the District Attorney to disclose information learned as a result of the Sixth Amendment violation. In this, he asked for the notes and emails of the office with reference to the recordings. The State

responded that the material was protected by the work-product privilege. Petitioner rejoined that the crime-fraud exception trumped the privilege. A visiting judge ordered an in-camera review of the state's file. (ROA 261).

Petitioner later filed a motion to suppress any evidence or further investigation from the recordings. The trial court conducted a hearing on this motion in July 2008 where a state's witness, Morgan Lee, testified that she had been in a prosecutor's office for an interview about one year earlier and a prosecutor had played 8-10 minutes of a recorded conversation with Petitioner and his grandmother. The witness testified that the recording did not affect her ability to be a truthful witness. (ROA 261).

The visiting judge denied the motion to require disclosure and to suppress. After reviewing the transcripts of the calls and the State's file in camera, the court determined that there was no information or evidence learned or obtained by the District Attorney's office because of the recordings, the State did not initiate any further investigation based on the recordings and there was no additional evidence to suppress. (ROA 261-262). Finally, the court found that the prosecutor's notes and any other communications sought by Petitioner were privileged work product and not subject to disclosure. (ROA 261-262).

No court approved of the prosecutor's actions. But no court was willing to hold that dismissal of the indictment was the appropriate remedy. The state appellate court noted that

dismissal may be an appropriate remedy for certain violations of the Sixth Amendment right to counsel. *United States v. Morrison*, 449 U.S. 361, 365-366 (1981); *State v. Frye*, 897 S.W.2d 324, 330 (Tex. Crim. App. 1995). Nevertheless, dismissal is appropriate only if suppression of the evidence is insufficient to purge the taint of the violation. "Absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate." *Morrison*, 449 U.S. at 365. "Suppressing evidence and limiting cross-examination are the preferred methods for neutralizing the effects of right to counsel violations." *Frye*, 897 S.W.2d at 330. The defendant bears the burden to show prejudice or a substantial threat thereof. *Murphy v. State*, 112 S.W.3d 592, 603 (Tex. Crim. App. 2003). Prejudice can be

demonstrated either when the State obtains information which leads to admissible evidence against the accused or obtains any information that would only give the State a tactical advantage." *Weatherford v. Busey*, 429 U.S. 545, 558 (1977).

The court finally held "[t]he recorded conversations do not reveal anything that would be useful to the State. While there may be a theoretical threat of prejudice, there is not a substantial threat of prejudice." *Woodruff v. State*, 330 S.W.3d 709, 714 (Tex. App.—Texarkana 2010).

The opinion notes that approximately 165 calls were recorded, comprising both privileged and nonprivileged calls. Approximately 54 calls were placed to counsel or his staff. Several calls concerned how to track

down witnesses and where they might live, how a certain witness lied in his statement, that Petitioner can prove why he did not wear shoes the night of the murder and what truck he drove on that night. The opinion also notes that the prosecutor who reviewed the tapes took 43 pages of notes. *Woodruff*, 330 S.W.3d at 725-726.

The magistrate determined that Petitioner had failed to show prejudice:

> The trial court suppressed evidence obtained or derived from the recordings as a remedy for the Sixth Amendment violation. The prosecutor who took notes that the DA's Office were recused from the case and ordered not to communicate with the special prosecutor about the case. Petitioner has not shown that the special prosecutor was aware of any of the information contained in the recordings. He has not shown that the recorded discussions about defense witnesses were used by the State to develop the case against him or to undermine the defense. The statements that the defense could prove why

> Petitioner was not wearing shoes did not provide any details. Although the recordings included Petitioner's statements about the trucks he drove, he also told a television new station information about his movements that evening and about his use of his mother's truck. There was evidence that he returned to college the day after the murders in his mother's truck. Petitioner does not show how his recorded statements about the trucks he drove on the night of the murder adversely affected his defense or benefitted the State. He has not shown that the state court unreasonably determined that he had not shown prejudice sufficient to warrant dismissal of the indictment. He therefore [is] entitled to no relief on his claim.
>
> Findings, Conclusions and Recommendation of United States Magistrate at 16-17. (ROA 272-273).

The district court held that under *Morrison*, Petitioner had the burden to show that the trial court committed error in failing to dismiss the indictment as a remedy for the Sixth Amendment violation by the State. If he failed

to establish demonstrable or substantial threat of prejudice from the Sixth Amendment violation, the he did not meet his burden to show error in failing to dismiss the indictment. Order Accepting Findings and Recommendations at 4 (ROA 298).

The district court's prejudice analysis generally followed that of the magistrate:

> Petitioner does not explain how he was prejudiced in light of the suppression of any evidence obtained from the recordings, the recusal of the DA's Office, the appointment of a special prosecutor, and the order barring communication between the special prosecutor and the DA's Office about the case. He does not allege or suggest that the special prosecutor and the DA's Office communicated about the case in violation of the court order.
>
> Petitioner has not shown that the special prosecutor was aware of any of the information that the original prosecutor obtained from listening to the recordings, including discussions about defense witnesses and their addresses and discussions about Petitioner's

> potential testimony. He has not shown that the discussions about defense witnesses were used by the State to develop the case against him or to assist the State in preparing to meet his defense. He has not shown he was prejudiced under Morrison, such that the indictment should have been dismissed, or that he suffered a substantial or injurious effect under Brecht.

Order Accepting Findings and Recommendations at 5 (ROA 299).

Since the district court and the magistrate have adopted *Morrison* as the standard, it will be helpful to review this case a bit more closely. In *Morrison*, DEA agents, aware that the defendant had retained counsel, met and spoke with her without counsel present. The agents disparaged Morrison's counsel, asked her to think about what kind of representation she should expect for her $200 retainer, suggested that she seek representation from the public defender and informed her she would benefit

from cooperating with the government but face a stiff jail term if she did not. 449 U.S. at 362. The Court assumed, without deciding, that this constituted a Sixth Amendment violation. 449 U.S. at 364.

The Court noted that cases involving Sixth Amendment violations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. *Id*. The Court saw its approach to "identify and then neutralize the taint by tailoring the relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." 449 U.S. at 365. Rejecting the court of appeals' holding that dismissal of the indictment was proper, the Court held that "absent

demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *Id.* (footnote omitted).

In *Morrison*, the agents apparently acted on their own and the United States Attorney was not involved. The agents did not ask the defendant about her defense strategy and no strategy was disclosed to them. Nor did the agents learn any facts concerning the defense case or the identities of any witnesses from their visits to her. The information the agents conveyed to the defendant would not have constituted error had her counsel been in the room. The violation—discussing the defendant's choice on how to proceed—was the agents discussing the defendant's case sans her

counsel. Yet the Court nevertheless called this conduct egregious. 449 U.S. at 367.

Morrison provides the analytical framework but not the result in this issue. As stated above, no defense information passed from the defense to the government. But an intentional intrusion by the prosecutor into the attorney-client relationship may call for a different result.

In *Weatherford v. Bursey*, 429 U.S. 545 (1977), an undercover law enforcement agent was arrested and indicted along with the defendant to preserve his cover. The agent attended some of Bursey's trial preparation sessions but did not mention these sessions in his trial testimony.

Bursey sued the agent under 42 U.S.C. 1983 but lost at trial. The Fourth Circuit on

appeal crafted a per-se rule that whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship, the right to counsel is sufficiently endangered to require reversal and a new trial. *Bursey v. Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975). The Supreme Court reversed, holding that this per-se rule was more restrictive than necessary to vindicate the Sixth Amendment issues at stake. But the Court noted:

> Had Weatherford [the undercover agent] testified at Bursey's trial as to the conversation between Bursey and [his attorney]; had any of the State's evidence originated in those conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the . . conversations about trial preparations, Bursey would have a much stronger case.

429 U.S. at 548. The Court also noted that this was "not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship." 429 U.S. at 557.

In *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978), a DEA informer sat in on meetings between the defendant and his counsel and disclosed the defense strategy to prosecution officers. The Third Circuit held that the instruction, and mere disclosure, without more, was sufficient to make out a Sixth Amendment violation, and because no other relief could remedy the violation and considering the extent and seriousness of the improper conduct of the government, the court found that the only

appropriate relief was dismissal of the indictment. 577 F.2d at 210.

In a more recent case, *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995), the defendant and his counsel arranged to hold pretrial preparation sessions in the trial courtroom. A deputy was present at all times, although it was disputed who compensated him. During trial, it appeared that the prosecutor learned of the preparatory sessions by questioning the deputy. The prosecutor learned specific details of the preparatory sessions. 70 F.3d at 1135. The defendant filed a postconviction habeas application under 28 U.S.C. § 2254. The district court reviewed the *Weatherford* decision and held that the prejudice standard of *Weatherford* had been met

because of the communication of trial strategy to the prosecutor.

The court of appeals noted that some courts and commentators had suggested that in cases where the prosecution acts intentionally and without a legitimate purpose, *Weatherford* may not dictate a rule that would require a showing of prejudice in cases where intentional prosecutorial intrusions lack a legitimate purpose. 70 F.3d at 1139-1140.

Discussing *Morrison*, the court observed that the Supreme Court appeared to recognize that *Weatherford*, and the prejudice requirement articulated in that case, does not necessarily govern intentional intrusions by the prosecution that lack a legitimate purpose. 70 F.3d at 1140.

The court noted the Third Circuit opinion in *Levy* as an example of an intentional prosecutorial intrusion as constituting a per-se violation. *Id*. The court further stated:

> This is not a case in which the state's interest in effective law enforcement is at issue. Rather, this is a case in which the prosecutor, by his own admission, proceeded for the purpose of determining the substance of [defendant's] conversations with his attorney, and attorney-client communications were actually disclosed. This sort of purposeful intrusion on the attorney-client relationship strikes at the center of the protections afforded by the Sixth Amendment and made applicable to the states through the Fourteenth Amendment.

70 F.3d at 1141.

The court found that a per-se rule was appropriate because no other standard could adequately deter this type of misconduct. And prejudice is so likely in these circumstances that a case-by-case analysis is not worth the

cost. 70 F.3d at 1142. Consequently, the court noted that dismissal of the indictment could be appropriate in extreme circumstances. 70 F.3d at 1143.

What legitimate purpose could the prosecutor have had in listening to the Petitioner's conversations with his counsel? The only possible purpose is not legitimate—learning in advance of counsel's strategy and being prepared to meet it.

If the conduct in *Morrison*-which involved no disclosure of the defense strategy-was considered egregious by this Court, how much more egregious is this situation?

If dismissal would be overkill in this case, what kind of prosecutorial misconduct would ever justify dismissal?

The prosecutor certainly thought the possibility of prejudice was high, for she risked not only dismissal or some other sanction or even professional discipline. She took many pages of notes, which certainly indicates that *she* thought the material on the calls was prejudicial to the defense.

Does the trial court's suppression remedy and the appointment of a new prosecutor change the result? Petitioner submits that these factors do not ameliorate prejudice. First, the cases above have some element of deterrence, which was only weakly accomplished by the trial court's suppression ruling. While the succeeding prosecutor was forbidden to communicate with the original prosecutor, there is no showing that the file, which

contained 43 pages of notes on the conversations, was not available.

It should also be remembered that Petitioner was hamstrung in his efforts to prove prejudice. The state trial judge did not permit examination of the trial prosecutor, which foreclosed several lines of inquiry. Nor did the court conduct an inquiry into how much the succeeding prosecutors made use of the original file.

Under the AEDPA, the appellant must obtain a COA before the Court will consider an appeal of the district court's denial of a habeas petition. 28 U.S.C. § 2253 (c) (2). An appellant may be granted a COA if he makes a "substantial showing of the denial of a constitutional right." *Id*. This standard is satisfied by demonstrating that reasonable

jurists could debate the district court's resolution of constitutional claims or that jurists could conclude that the issues are adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Petitioner certainly made a substantial showing of the denial of his Sixth Amendment rights and that the issues were adequate to deserve encouragement to proceed further.

CONCLUSION

Petitioner prays that the Court grant his petition.

Respectfully submitted,

/s/ **John D. Nation**
John D. Nation
State Bar No. 14819700
4925 Greenville Ave.,
Suite 200
Dallas, Texas 75206
214-800-5160
214-800-5161 (facsimile)
nationlawfirm@gmail.com

Counsel of Record

APPENDIX

1. Report and Recommendations of United States Magistrate.

2. Opinion of the District Court.

3. Order Denying Certificate of Appealability.

1.

United States Magistrate's Report and Recommendations

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

BRANDON WOODRUFF, Petitioner,	)	
vs.	)	No. 3:15-CV-1832-M-BH
LORIE DAVIS[3], Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent	)	Referred to U.S. Magistrate Judge

FINDINGS CONCLUSIONS AND RECOMMENDATION

Pursuant to *Special Order 3-251*, this habeas case has been referred for findings, conclusions and recommendation. Based on the relevant findings and applicable law, the petition for writ of habeas corpus under 28

[3] Lorie Davis succeeded William Stephens as Director of the Correctional Institutions Division of the Texas Department of Criminal Justice. Under Rule 25 (d) of the Federal Rules of Civil Procedure, she "is automatically substituted as a party."

U.S.C. § 2254 should be **DENIED** with prejudice.

I. BACKGROUND

Brandon Woodward (Petitioner) challenges his conviction for capital murder. The respondent is Lorie Davis, Director of TDCJ-ID (Respondent).

A. Pretrial Proceedings

On November 19, 2005, the State indicted Petitioner for capital murder in Cause No. 23, 2319. (Doc. 8-1 at 49.).[4]

1. September 4, 2007 Hearing

On August 29, 2007, Petitioner filed a motion to dismiss the indictment with prejudice based on alleged prosecutorial misconduct. (Doc. 8-10 at 117). He contended that the Hunt

[4] Page citations refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

County District Attorney's Office (DA's Office) and Hunt County Sheriff's Department recorded telephone conversations between him and his defense team while he was in jail. (*Id*. at 117-18). Petitioner was provided with a copy of his recordings on July 12, 2007. (*Id*. at 118). He also filed a motion to disqualify the DA's Office based on prosecutorial misconduct. (*Id*. at 131).

At a hearing on September 4, 2007, the Chief Jailer for the Hunt County Sheriff's Department, Curtis Neel, testified that all inmate phone calls are recorded, including attorney-client calls. (Doc. 10-5 at 9). At the beginning of a phone call, the jail phone system warns the caller and the recipient that the conversation is being recorded. (*Id*. at 21, 31). One of the prosecutors instructed him to

monitor Petitioner's phone calls, but he did not monitor them all. (*Id.* at 10, 14-15). He monitored Petitioner's phone calls from 2005 until about February 2006, and after May 2007. (*Id.* at 27-28). Neel saved the monitored recordings on a computer, but the recording machine had automatically taped over the unmonitored recordings. (*Id.* at 15-16). He listened to phone conversations between Petitioner and members of the defense team. (*Id.* at 17-18). Neel gave copies of the recordings that he monitored and saved to the DA's Office. (*Id.* at 13).

Texas Ranger Jeffery Collins testified that he asked for copies Petitioner's recorded phone conversations from January 2006 to February 2006, which Neel provided. (*Id.* at 43). He received recordings of approximately 150

phone calls. (*Id*. at 44). At the request of one of the prosecutors, Ranger Collins gave the recordings to the DA's Office in July or August 2007. (*Id*. at 44-45). Ranger Collins listened to about 8 or 10 of the phone calls, one of which was from Petitioner to his attorney. (*Id*. at 46-47). (*Id*. at 46-47). He took notes regarding those calls in 2006, but the threw them away because they were of no value to him. (*Id*. at 48-49).

In April or May 2007, Hunt County Sheriff's Department investigator Joel Gibson received recordings of Petitioner's phone calls from November 2 through 23, 2005, which he gave to the DA's Office. (*Id*. at 51). In total, there were about 50 hours of recorded conversations. (Doc. 10-6 at 13-14).

The court denied the request to question the prosecutor who had instructed Neel to

monitor Petitioner's phone calls. (Doc. 10-5 at 39.) It also denied the motion to dismiss, but indicated that there might be some suppression rulings later. (*Id*. at 70). It held that witnesses at trial could be asked whether they had heard any of the recordings of Petitioner and his attorney. (*Id*. at 39). A different prosecutor informed the court that none of the witnesses listened to the phone calls between Petitioner and members of the defense team. (*Id*. at 40). The court ordered the DA's Office not to allow anyone to listen to those conversations in the future. (*Id*. at 40-41). It also ordered that recordings of Petitioner's phone calls would no longer be saved on a computer, and that there would be no future monitoring of his calls to the defense team. (*Id*. at 80-81). The court reserved

a ruling on the motion to disqualify the DA's Office. (*Id*. at 71).

2. September 11, 2007 Hearing

At a hearing on September 11, 2007, Petitioner again sought to question the prosecutor who asked that Petitioner's calls be monitored. (Doc. 10-6 at 12). Defense counsel expressed concerns about whether the prosecutors learned about defense witnesses or trial strategy through the recordings. (*Id*. at 13).

The court listened to three hours of recordings and did not hear anything of value. (*Id*. at 16). It entered an order denying the motion to dismiss and the motion to disqualify the DA's Office. (Doc. 8-11 at 97). If found that at the beginning of a jail inmate's phone call, the caller and recipient are advised that the

conversation is subject to being recorded. It also found that Petitioner's Sixth Amendment right was violated by the State's conduct in listening to his phone conversations with the defense team, but Petitioner and the defense team were aware that inmates' phone conversations were recorded. The court found that the DA's Office did not act with malice in listening to the phone conversations between Petitioner and the defense team because they had some case authority to support their actions. It concluded that dismissal of the case and disqualification of the DA's Office were not appropriate remedies. It suppressed any evidence obtained from the phone conversations between Petitioner and the defense team or as a result of any investigation stemming from information obtained from phone conversations. (*Id*. at 97-99).

The DA's Office moved to be recused from the case and for the appointment of a special prosecutor in light of the finding that there had been a Sixth Amendment violation. (Id. at 90). The court granted the motion and appointed an Assistant Texas Attorney General or other person designated by the Texas Attorney General as special prosecutor. (Id. at 103; doc. 10-9 at 4.) The DA's Office would remain on the case during the determination of certain pretrial motions. (Doc. 10-9 at 4.) The special prosecutor was ordered not to have contact with the DA's Office concerning the case. (Doc. 8-11 at 103; doc. 10-9 at 4.)

The court also found that the recordings still needed to be transcribed so it could determine what evidence should be suppressed. (Doc. 10-9 at 6.) A visiting judge was

temporarily appointed to address the suppression issue and ensure that any suppressed evidence was not transmitted from the DA's Office to the Attorney General. (Doc. 8-11 at 107-108).

3. May 8, 2008 Hearing

Petitioner filed a motion to require the DA's Office to disclose information learned as a result of the Sixth Amendment violation. (*Id*. at 110). He sought the notes and emails of the DA's Office regarding the recordings. (Doc. 10-11 at 1; p.4.) The visiting judge conducted a hearing on the motion on May 8, 2008. (Doc. 10-11.) In response to the State's argument that the material was protected by the work-product privilege, Petitioner argued the crime-fraud exception to that privilege. (Id. at 2, p. 6-7.) He asked the visiting judge to conduct an *in-*

camera review of the State's file, to which the State agreed, (id. at 4, p.13, at 5, p. 20), and the visiting judge ordered an *in camera* review, (doc. 8-12 at 38). Petitioner again sought to question the prosecutor about the matter. The visiting judge only heard argument and did not hear from witnesses at that hearing. (Doc. 10-11 at 1, p. 4-2 p. 5.).

4. July 11, 2008 Hearing

Petitioner also filed a motion to suppress any evidence or further investigation based on information from the recordings. (Doc. 8-12 at 44). At a hearing on July 11, 2008, Morgan Lee, a State's witness, testified that she had been in a prosecutor's office for an interview, approximately one year earlier, and a prosecutor has played about eight to ten minutes of a recording of a conversation

between Petitioner and his grandmother. Hearing the recording did not affect her ability to be a truthful witness. (Doc. 10-12 at 24-29). Her mother was in adjacent room or hall and overheard the recording, but did not listen to what was said on it. (*Id*. at 15-21.)

The visiting judge denied Petitioner's motion to require disclosure of information and to suppress and entered findings. (Doc. 8-12 at 153). The visiting judge noted that the recordings had been previously suppressed. The visiting judge read the transcripts of the callas and reviewed the State's file in camera. He found that there was no information or evidence learned or obtained by the DA's Office as a result of the recordings, the State did not initiate any investigation based upon the recordings, and there was no additional

evidence to suppress. He found the DA's Office's notes and any other communications sought by Petitioner were privileged and work product and were not subject to disclosure. (*Id*. at 153-154.)

B. Trial

Petitioner pleaded not guilty and was tried before a jury in the 354th Judicial District Court of Hunt County, Texas on March 4-20, 2009. (Doc. 8-1 at 32-3.) The state appellate court summarized the evidence at trial as follows. *See Woodruff*, 330 S.W.3d at 714-22.

Petitioner's parents had spoken with Petitioner's grandmother by telephone at 9 p.m. Petitioner's sister called them at 11 p.m., but got no answer. Police went to their house in Royce City the next day and found them dead on a couch. Petitioner's mother had five gunshot

wounds and a stab wound, while his father had one gunshot wound and nine stab wounds. The bullets were large caliber. There was no forced entry, no signs of a struggle, and the house had not been ransacked. Their wallets were missing, but other valuables had not been taken. A trail of blood drops led to the guest bedroom and bathroom, where very dark hair with light roots was found in the bathtub. At the time of the murder, Petitioner's hair was dark, but his natural hair color was blond.

Petitioner was living at a university in a dormitory room but was at his parents' Royce City house on the night of the murders. He left their house and went to another house they owned in Heath that was approximately 23 minutes away. A neighbor placed him at the Heath house at sometime between 10:15 and

10:45 p.m. His parents were in the process of moving from Heath to Royce City and many of their belongings were still in the Heath House. Cell phone records showed he passed Lake Ray Hubbard on his way to Dallas at around 10:45 p.m.

Petitioner was supposed to meet a friend named Robert Martinez in Dallas at 6 p.m. that evening. Martinez called him several times that evening and Petitioner was breathing heavily during one of the conversations. Petitioner met up with Martinez later than expected but suggested that Martinez should remember that they met at 9:30 p.m. Although Martinez claimed for three and a half years that they met at 9:30 p.m., he admitted that he did not know what time they met. When Petitioner arrived, he claimed he had gotten lost. He was not

wearing a shirt or shoes, which was the first time Martinez had seen him without a shirt or shoes. Another witness testified that Petitioner did not wear a shirt or shoes when riding horses. Petitioner and Martinez met Petitioner's boyfriend and the group went to a bar.

Petitioner told the police where he was on the night of the murders, but he lied about the timing. He also lied in an interview to a television news station, saying he left the Royce City house at around 7:30 p.m. and had gone to the Heath house, where it had taken him about 30-45 minutes to feed his parents' animals.

The day before the murders, Petitioner, and Morgan Lee, his girlfriend, went to her parents' house and took showers. Petitioner showered next to a room where an old Western-

style revolver and bullets were kept. Shortly after the murders, Lee's parents discovered that the revolver was missing, and several bullet loops on a holster had been torn and the large caliber bullets removed. While Petitioner was in jail, he asked another inmate how long a gun with a wooden handle would stay submerged and if it would float.

Before the murders, Petitioner kept a dagger in his college dormitory room. The dagger was not in his room when police searched it after the murders. Petitioner's aunt found the dagger in the barn at the Heath house two and a half years after the murders. A spot of Petitioner's father's blood was on the knife guard. A State's expert testified that the dagger was consistent with the stab wounds. A defense expert testified that the dagger could not have

caused the wounds based on the length of the knife and the depth of the wounds.

On several occasions before the murders, Petitioner told college friends that he was going to see his parents, who were going to give him a new truck. When he failed to return to college with the truck, he told his friends that his father did not want him to take the truck to college. On the morning after the murders, Petitioner returned to college with his mother's truck. He told the news station that he had permission to drive the truck and that he normally drove it. He told the police that he was driving the truck because his truck had broken down, but his truck did not appear to have any mechanical problems. His sister did not believe that their mother would have allowed Petitioner to take the truck to college.

The State suggested several possible motives for the murder. When Petitioner was arrested, he had his parents' debit card. Petitioner had reached the credit limit on his own two credit cards. There was tension between Petitioner and his father over his spending habits. They argued about a college tuition refund that Petitioner spend, which belonged to his father. However, Petitioner was receiving payments on a horse he had sold, he had received $15,000 for a horse that had died, and he had earned several thousand dollars for modeling. Petitioner's parents had a life insurance policy, but there is not evidence in the appellate record of the amount of the policy. Some of Petitioner's friends had the impression that his parents were wealthy because of his lavish spending habits. His parents were

moving to Royce City to decrease expenses, however, because they were almost $300,000 in debt.

Petitioner had academic problems in college. His parents told him they would not pay for any additional college expenses if he did not do well in his first semester. On the weekend of the murders, Petitioner told his parents that he was attracted to men. Although his father was disappointed, sad and hurt, there was no evidence that they threatened to disown him.

When Petitioner was told of his parents' death, but before learning the details of their death, he speculated to his roommate that their death was not an accident. When Petitioner was having his hair dyed for the funeral, he talked about his modeling activities and money.

The jury convicted Petitioner, and he received a life sentence without parole.

C. Postconviction Proceedings

The judgment was affirmed on appeal. *Woodruff*, 330 S.W.3d 709. His petition for discretionary review was refused. *Woodruff v. State*, PD-1807-10 (Tex. Crim. App June 1, 2011). His petition for writ of certiorari was denied on October 31, 2011. *Woodruff v. Texas*, 132 S.Ct. 502 (2011). He did not file a state habeas action. He filed a motion for DNA testing on November 8, 2011, and he filed a second motion for DNA testing on October 25, 2011, which was still pending when he filed his federal habeas petition. (Doc. 1 at 4; doc. 13 at 10 n.6.)

D. Substantive Claims

Petitioner's habeas petition, filed by counsel on May 27, 2015, raises the following grounds:

(1) The Texas courts erroneously refused to dismiss the indictment when the State intentionally violated Petitioner's attorney-client privilege;

(2) Assuming for the sake of argument Petitioner must prove prejudice when the State intentionally violated the attorney-client privilege, the Texas courts improperly permitted the prosecutor to invoke the attorney work product privilege.

(Doc. 1 at 6, 9.) Respondent filed a response to the petition on August 11, 2015. (Doc. 13.) Petitioner filed a reply on September 10, 2015. (Doc. 15.)

II. Applicable Law

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 State, 1217, on April 24, 1996. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Because Petitioner filed his petition after the effective date, the Act applies.

Title I of AEDPA substantially changed the way federal courts handle habeas corpus actions. Under 28 U.S.C. § 2254 (d), as amended by AEDPA, a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. "In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, as opposed to procedural." *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000).

Section 2254 (d) (1) concerns pure questions of law and mixed questions of law and fact. *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir. 2001). A decision is contrary to clearly established law within the meaning of § 2254 (d) (1) "if the state court arrives at a conclusion opposite to that reached [by the Supreme Court] on a question of law or if the state court decides

a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 414-13 (2000). As for the "unreasonable application" standard, a writ must issue "if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413; *accord Penry v. Johnson*, 532 U.S. 782, 792 (2001). Likewise, a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. "[A] federal habeas court making the 'unreasonable application' inquiry

should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409; *accord Penry*, 532 U.S. at 793.

Section 2254 (d) (2) concerns questions of fact. *Moore v. Johnson*, 225 F.3d 495, 501 (5th Cir. 2000). Under § 2254 (d) (2), federal courts "give deference to the state court's findings unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). The resolution of factual issues by the state court is presumptively correct and will not be disturbed unless the state prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254 (e) (1).

III. SIXTH AMENDMENT

Petitioner contends that the State violated his Sixth Amendment rights by recording his jail telephone conversations with his attorney and other members of the defense team.

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. An attorney-client communication is protected under the Sixth Amendment "if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential." *United States v. Nelson*, 732 F.3d

504, 518 (5th Cir. 2013) (citing *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981)).

A. State Court Findings

The trial court held that Petitioner's Sixth Amendment right to counsel was violated by the recordings of his conversations with counsel and the defense team. *See Woodruff*, 330 S.W.3d at 723, 724. On appeal, the State did not challenge the trial court's conclusion that Petitioner's Sixth Amendment right to counsel was violated. *Id*. at 723.

The state appellate court set out the standard for determining the appropriate remedy for the Sixth Amendment violation at issue:

> Both the United States Supreme Court and the Texas Court of Criminal Appeals have noted that dismissal may be the appropriate remedy for certain violations of the Sixth Amendment right to counsel. *United States v. Morrison*, 449 U.S. 361, 365-66, 101 S.Ct. 665, 66 L.Ed.2d 564

(1981); *State v. Frye*, 897 S.W.2d 324, 330 (Tex. Crim. App. 1995). However, both courts have also cautioned that dismissal is appropriate only when the suppression of evidence is insufficient to purge the taint of the violation. The United States Supreme Court has stated, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate." *Morrison*, 449 U.S. at 365, 101 S.Ct. 665. The Texas Court of Criminal Appeals has held:

When confronted with a Sixth Amendment violation, a trial court must "identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant effective assistance of counsel and a fair trial." *Morrison*, 449 U.S. at 365, 101 S.Ct. 665. . . The Supreme Court stated that suppressing evidence and limiting cross-examination are the preferred methods for neutralizing the effects of right to counsel violations.

Frye, 897 S.W.2d at 330 (quoting *Morrison*, 449 U.S. at 365, 101 S.Ct. 665). Dismissal of an indictment is "a drastic remedy only to be used in the most extraordinary circumstances." *Id*; see *State v. Munguia*, 11 S.W.3d 814, 817 (Tex. Crim. App. 2003) (trial court erred in dismissing indictment without constitutional violation).

Woodruff, 330 S.W.3d at 724-726. It stated that

Petitioner had the burden to show prejudice or

a substantial threat thereof. *Id*. at 725 (citing *Murphy v. State*, 112 S.W.3d 592, 603 (Tex. Crim. App. 2003). "Prejudice can be demonstrated either when the State obtains information which leads to admissible evidence against the accused or obtains any information that would only give the State a tactical advantage." *Id*. at 725 (citing *Weatherford v. Bursey*, 429 U.S. 545, 558 (1997)). It also noted that a split among federal courts concerning whether there is a rebuttable presumption of prejudice. *Id*.

The appellate court reviewed the recordings and found that although the recordings contained some information, the information was not even marginally valuable.

Id.[5] It found that the record did not show that the police or the prosecutor obtained any useful

---

[5] Approximately 165 telephone calls were recorded, including both privileged and nonprivileged calls. Approximately fifty-four of the calls were made to Brandon's defense counsel or his office staff. The following is a summary of the recorded privileged telephone calls. Most of the calls discuss irrelevant information such as relatives providing Brandon with money clothes Brandon is going to wear to court appearances, other inmates and lockdowns. A number of calls contain discussions about where witnesses live and attempts to track down the telephone numbers of witnesses. On Exhibit 1B, the defense counsel's secretary and Brandon discuss how Etherington lied in his statement to the police. On Exhibit 1E, track 5, the defense counsel's secretary and Brandon mention that they can prove why he did not have shoes on the night of the murder without providing any details. On Exhibit 1L, track 6, Brandon and the attorney's secretary discuss that one of the profilers used to date his sister. On Exhibit 1M, track 5, they talk about Mike Lee. On Exhibit 1P, track 1, the attorney's secretary askes Brandon what truck he drove to the Heath house and Brandon informs her he drove his truck to the Heath house and then drove Norma's truck to Abilene.

. . . The State's attorney who reviewed the tapes took forty-three pages of notes.

. . . It was apparent that the defense attorneys suspected that the telephone calls were being recorded. The defense attorney's office frequently reminded Brandon the telephone calls might be recorded and on a few occasions declined to discuss certain topics with Brandon over the telephone. In fact, on Exhibit 1F, track 5 the defense attorney informs Brandon that the district attorney's office has recorded attorney-client telephone calls in another case. On Exhibit 1L, track 5, the defense

information from the recordings. Id. at 726. It stated that:

> [i]t was apparent from the record that defense attorneys suspected that the telephone calls were being recorded. . . . Although the recording of the telephone calls might have chilled effective communication over the telephone, the record does not indicate that Brandon could not effectively communicate with his counsel through other means. The recorded conversations do not reveal anything that would be useful to the State. While there may be a theoretical threat of prejudice, there is not a substantial threat of prejudice. Because Brandon has failed to show demonstrable prejudice or a substantial threat thereof, the trial court did not err in refusing to dismiss the case. *See Arroyo v. State*, 259 S.W.3d 831, 834 (Tex. App.—Tyler 2008, pet. ref'd) (dismissal not required where no information was elicited from defendant).

Woodruff, 330 S.W.3d at 726.

B. Standard of Review

---

counsel's secretary mentions that she has been listening to the recordings. Certain matters were referred to by references so vague that the references could not be deciphered.

Woodruff v. State, 330 S.W.3d 709, 725-26 (Tex. App.—Texarkana 2010).

Petitioner contends that the state appellate court should have conducted a harmless error review under *Chapman v. California*, 366 U.S. 18, 24 (1967), which provides that the State must prove beyond a reasonable doubt that the constitutional error did not contribute to the conviction. (Doc. 1-1 at 16-18.) He notes that in *United States v. Morrison*, 449 U.S. 361, 365 (1981), cited by the state appellate court, the Supreme Court held that "absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate even though the violation may have been deliberate." He argues that Morrison did not address which party has the burden of proof regarding prejudice or lack of prejudice, and that some courts have held that prejudice should be

presumed when there is government interference with Sixth Amendment rights. *See, e.g., Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (presumption of prejudice when the State purposefully intrudes into the attorney-client relationship and becomes aware of confidential communications); *Biggs v. Goodwin*, 698 F.2d 486 (D.C. Cir. 1983) (rebuttable presumption of prejudice). He argues that the state appellate court should have presumed prejudice.

In *Morrison*, the Supreme Court "assumed that a pretrial unsuccessful attempt by government agents to deprive a defendant of her right to effective assistance of counsel was a violation of the Sixth Amendment." *Rushen v. Spain*, 464 U.S. 114, 128 n.7 (1983) (Brennan, J., concurring). Acknowledging "the necessity

for preserving society's interest in the administration of criminal justice," the court explained that "[c]ases involving Sixth Amendment deprivations were subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364. Accordingly, "absent demonstrable prejudice, or substantial threat thereof," an indictment should not be dismissed on the basis of a Sixth Amendment violation. *Id.* at 365. Rather, the remedy was to suppress evidence or information obtained from the constitutional violation. *Id.* at 366. In his concurring opinion in *Rushen*, Justice Brennan noted that *Morrison* was "not a harmless error case." 464 U.S. at 128 n.7. It had observed that if the

government obtained incriminating evidence or information as a result of a Sixth Amendment violation, the proper remedy was the suppression of the tainted evidence. *Id*. If that tainted evidence was erroneously admitted, then the erroneous introduction of that evidence would be susceptible to a harmless error analysis on appeal, "as the opinion indicated when it then noted in passing that 'certain' violations of the right to counsel may be disregarded as harmless error." *Id*. As explained by Justice Brennan in *Rushen*, and contrary to Petitioner's argument, a harmless error analysis on appeal under *Chapman* is required only if the trial court did not suppress evidence tainted by the Sixth Amendment violation. The analysis of prejudice in the context of determining whether a trial court

erred by not dismissing the indictment as a remedy for a Sixth Amendment violation is not the same as a *Chapman* harmless error analysis, in which the State bears the burden of showing that a constitutional error did not contribute to the conviction. Under *Morrison*, if there is no demonstrable or substantial threat of prejudice from the Sixth Amendment violation, there is no error in failing to dismiss the indictment. Regarding which party must show prejudice to obtain a dismissal of the indictment, the Supreme Court observed in *Morrison* that the defendant had "demonstrated no prejudice." 449 U.S. at 366. A defendant must show prejudice to secure a dismissal of the indictment. *See United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000) (finding that an indictment cannot be dismissed for a Sixth

Amendment violation "without some showing of prejudice" and that there was no error in failing to dismiss the indictment because the defendant did not show prejudice); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995) ("a defendant must show prejudice to his ability to receive a fair trial before charges will be dismissed"); *United States v. Laury*, 49 F.3d 145, 150 (5th Cir. 1995) (defendant could not demonstrate prejudice warranting dismissal of the indictment). These cases suggest that it is the defendant who has the burden to show prejudice that cannot be cured by a less drastic remedy than dismissal. Accordingly, the state appellate court was not required to presume prejudice, as Petitioner contends.

C. Prejudice

Petitioner argues that he was prejudiced because the prosecutor made 43 pages of notes from the recordings and the recordings included discussions about where witnesses live and attempts to track down their phone numbers, statements that the defense could prove why Petitioner was not wearing shoes on the night of the murder, and Petitioner's statement about the trucks he drove on that night. The trial court suppressed evidence obtained or derived from the recordings as a remedy for the Sixth Amendment violation. The prosecutor who took notes and the DA's Office were recused from the case and ordered not to communicate with the special prosecutor about the case. Petitioner has not shown that the special prosecutor was aware of any of the information contained in the recordings. He has not shown that the recorded

discussions about defense witnesses were used by the State to develop the case against him or to undermine the defense. The statements that the defense could prove why Petitioner was not wearing shoes did not provide any details. Although the recordings included Petitioner's statement about the trucks he drove, he also told a television news station information about his movements that evening and about his use of his mother's truck. There was evidence that he returned to college the day after the murders in his mother's truck. Petitioner does not show how his recorded statements about the trucks he drove on the night of the murder adversely affected his defense or benefitted the State. He has not shown that the state court unreasonably determined that he had not shown prejudice sufficient to warrant dismissal

of the indictment. He therefore entitled to no relief on this claim.

IV. WORK PRODUCT

Petitioner contends that the state court did not permit defense counsel to cross-examine the prosecutor who listened to the recordings or require her to produce the notes she took about the recordings based on the work product privilege. *See Woodruff*, 330 S.W.3d at 726-29; *see also Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007) (work product privilege of Tex. R. Evid. 503(b)(2) applies in criminal cases). He argues that the state appellate court erred in finding that the crime-fraud exception to the privilege (Tex. R. Evid. 503(d)(2)) did not apply because the Sixth Amendment violations did not constitute a crime, and that he did not show a substantial need to produce the

testimony or notes. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). The correctness of the state court's interpretation of state law is beyond the scope of federal habeas review. *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir. 2004); *Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998); *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995). The state court's application of state evidentiary rules is not reviewable. Petitioner suggests that a state court's erroneous application of its work product privilege can invoke the right to due process. He does not, however, argue or explain how his due process rights were violated. Notably, he did not raise due process in his petition for

discretionary review. (See doc. 12-21 at 20-23.) To the extent he seeks to raise a due process claim regarding the work product privilege, his claim is unexhausted. A petitioner must fully exhaust state remedies before seeking federal habeas relief. 28 U.S.C. § 2254(b). To exhaust under § 2254, he must fairly present the factual and legal basis of any claim to the highest available state court for review prior to raising it in federal court. *See Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993); *Richardson v. Procunier*, 762 F.2d 429, 432 (5th Cir. 1985); *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir. 1982). Moreover, Petitioner has not shown how he was harmed. As discussed, the prosecutor who took notes and the DA's Office were recused from the case and were ordered not to communicate with the special prosecutor about

the case. Petitioner has not shown that the special prosecutor was aware of any of the information contained in the recordings. He has not shown that this claim entitles him to relief.

V. EVIDENTIARY HEARING

Upon review of the pleadings and the proceedings held in state court as reflected in the state court records, an evidentiary hearing appears unnecessary. Petitioner has not shown he is entitled to an evidentiary hearing.

VI. RECOMMENDATION

The petition for habeas corpus relief under 28 U.S.C. § 2254 should be DENIED with prejudice.

SO RECOMMENDED this 16th day of May, 2017.

/s/ Irma Carrillo Ramirez
United States Magistrate Judge

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Servs. Automobile Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996).

/s/ Irma Carrillo Ramirez
United States Magistrate Judge

2.

ORDER OF DISTRICT COURT ACCEPTING FINDINGS OF MAGISTRATE JUDGE

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

BRANDON WOODRUFF, Petitioner,	)	
vs.	)	No. 3:15-CV-1832-M-BH
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent	)	

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

In this state habeas case under 28 U.S.C. § 2254, Brandon Woodruff (Petitioner) challenges his conviction for capital murder in Cause No. 23,319 in Hunt County, Texas. On May 16, 2017, the United States Magistrate Judge recommended that the petition for habeas corpus relief be denied with prejudice without an evidentiary hearing. (See doc. 17.) Petitioner

timely filed objections and requested an evidentiary hearing. After reviewing the objections and conducting a de novo review of those parts of the Findings and Conclusions to which objections have been made, I am of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court.

I. BACKGROUND

While Petitioner was in the pretrial custody of the Hunt County Sheriff's Department, all of his telephone calls were routinely recorded. The prosecutor from the Hunt County Assistant District Attorney's office instructed jail staff to monitor his telephone calls, and jail staff, investigators and the prosecutor listened to recordings of calls

between Petitioner and his attorneys. The recordings were ultimately provided to Petitioner, who moved to dismiss the indictment and sought to question the prosecutor who had ordered the monitoring and to obtain production of the information learned as a result. These issues were addressed during the course of several hearings. The court listened to some of the recordings, ordered that all of the recordings be transcribed, recused the Hunt County DA's office, appointed a special prosecutor, and reviewed the State's file in camera. It denied the motion to dismiss and the requests to question the prosecutor and obtain the State's file, but it suppressed any evidence obtained from the conversations or that resulted from any investigation stemming from information learned from the calls. After a trial,

a jury convicted Petitioner of the murder of his parents. Petitioner's habeas petition raised two grounds:

(1) The Texas courts erroneously refused to dismiss the indictment when the State intentionally violated Petitioner's attorney-client privilege; and

(2) Assuming for the sake of argument Petitioner must prove prejudice when the State intentionally violated the attorney-client privilege, the Texas courts improperly permitted the prosecutor to invoke the attorney work product privilege. (See doc. 1 at 6, 9.) He now objects to the recommendation in the Findings, Conclusions and Recommendation (FCR) that his petition be denied. Specifically, he objects to the conclusion that he had the burden to show harm as a result of the violation

of his attorney-client privilege, to the failure to find that there was a substantial and injurious effect under *Brecht v. Abrahamson*, and to the conclusion that the exception to the *Brecht* standard for a deliberate and especially egregious error does not apply. (Doc. 18 at 6-8.) He also objects to the conclusions that he failed to exhaust his due process claim and that an evidentiary hearing was not necessary. (Id. at 8, 11.)

II. BRECHT

Petitioner objects to the failure to apply the standard set out in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), for determining prejudice or harm as a result of a Sixth Amendment violation, i.e., whether the constitutional error had a substantial and injurious effect. He claims that the FCR erroneously assigned him

the burden of proof even though the burden is not assigned to either party under that standard and that the Magistrate Judge, in the Findings, Conclusions, and Recommendation, failed to apply the exception to Brecht for deliberate and especially egregious error. In Brecht, the Supreme Court held that the harmless error standard of *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), applied on federal habeas review of a state conviction.[6] *Brecht*, 507 U.S. at 637-38. Under *Kotteakos*, habeas relief is granted only if the constitutional error "had a substantial and injurious effect or influence in determining the

[6] In contrast, on direct appeal from convictions, courts apply the harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Brecht*, 507 U.S. at 630. The state has the burden of proving that error is harmless under the Chapman standard. *Id*.

jury's verdict." *Brecht*, 507 U.S. at 637-38. To obtain federal habeas relief, petitioners have the burden of demonstrating harm under *Brecht*. *See Basso v. Thaler*, 359 F. App'x 504, 509 (5th Cir. 2010). In *United States v. Morrison*, 449 U.S. 361, 365 (1981), the Supreme Court addressed whether the dismissal of an indictment was an appropriate remedy for a Sixth Amendment violation. The Court held that "absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate even though the violation may have been deliberate." *United States v. Morrison*, 449 U.S. 361, 365 (1981). *Morrison* placed on the petitioner the burden of demonstrating prejudice or a substantial threat of it that warrants dismissal of the indictment. See Morrison, 449 U.S. at 366 (the defendant

"demonstrated no prejudice"); *see also United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000) (finding that an indictment cannot be dismissed for a Sixth Amendment violation "without some showing of prejudice" and that there was no error in failing to dismiss the indictment because the defendant did not show prejudice); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995) ("a defendant must show prejudice to his ability to receive a fair trial before charges will be dismissed"); *United States v. Laury*, 49 F.3d 145, 150 (5th Cir. 1995) (defendant could not demonstrate prejudice warranting dismissal of the indictment). *Morrison* did not address harmless error; it examined the appropriate trial remedy for a Sixth Amendment violation by the government. *Rushen v. Spain*, 464 U.S. 114, 128 n.7 (1983)

(Brennan, J., concurring). As in *Morrison*, the issue in this case is whether the trial court erred in failing to dismiss the indictment as the remedy for a Sixth Amendment violation. Under *Morrison*, Petitioner has the burden to show that the trial court committed error in failing to dismiss the indictment as a remedy for the Sixth Amendment violation by the State. If Petitioner fails to establish demonstrable or substantial threat of prejudice from the Sixth Amendment violation, then he has not met his burden to show error in failing to dismiss the indictment. If there was no error, then an analysis under *Brecht* to determine whether the error was harmless is unnecessary. Moreover, even if *Brecht* applied to the determination of whether the trial court should have dismissed the indictment as the remedy for the Sixth

Amendment violation, Petitioner would still have the burden of demonstrating his entitlement to federal habeas relief, i.e., the burden of demonstrating a substantial or injurious effect. *See Basso*, 359 F. App'x at 509 (quoting *Brecht*, 507 U.S. at 637) ("habeas petitioners ... are not entitled to habeas relief on trial error unless they can establish that it resulted in 'actual prejudice.'"). For the same reasons that he was not prejudiced by the Sixth Amendment violation and was not entitled to a dismissal of the indictment, he did not show under Brecht that he suffered a substantial or injurious effect from the violation. Here, the trial court suppressed evidence that was obtained or derived from the recordings as a remedy for the Sixth Amendment violation. The prosecutor who listened to the recordings and

took notes and her office were recused from the case, and a special prosecutor was appointed. The office, including the prosecutor who listed to the recordings, was ordered not to communicate with the special prosecutor about the case. Petitioner does not explain how he was prejudiced in light of the suppression of any evidence obtained from the recordings, the recusal of the DA's Office, the appointment of a special prosecutor, and the order barring communication between the special prosecutor and the DA's Office about the case. He does not allege or suggest that the special prosecutor and the DA's Office communicated about the case in violation of the court order. Petitioner has not shown that the special prosecutor was aware of any of the information that the original prosecutor obtained from listening to the

recordings, including discussions about defense witnesses and their addresses and discussions about Petitioner's potential testimony. He has not shown that the discussions about defense witnesses were used by the State to develop the case against him or to assist the State in preparing to meet his defense. He has not shown that he was prejudiced under *Morrison*, such that the indictment should have been dismissed, or that he suffered a substantial or injurious effect under *Brecht*. His objection to the FCR's failure to apply the exception to *Brecht*, which provides for habeas relief without a *Brecht* harmless error analysis for a deliberate and especially egregious error, also lacks merit. The dismissal of an indictment is not an appropriate remedy absent prejudice, even if the Sixth Amendment violation was

deliberate. *Morrison*, 449 U.S. at 365. In summary, *Brecht* does not apply to this case. The FCR correctly held that Petitioner had the burden of showing prejudice under *Morrison*, even for a deliberate violation of the Sixth Amendment by the State. The FCR correctly concluded that he did not show that the state court unreasonably determined that he did not demonstrate prejudice from the Sixth Amendment violation sufficient to warrant dismissal of the indictment. Even under a *Brecht* analysis, however, he did not prove he suffered a substantial or injurious effect from the State's Sixth Amendment violation for the same reasons that he did not prove prejudice under *Morrison*.

III. WORK PRODUCT

Petitioner objects on grounds that the state appellate court's analysis of the work-product evidentiary ruling was erroneous. He does not present a specific objection to the FCR regarding this issue. However, as the FCR correctly held, the state court's interpretation and application of the state evidentiary rule is not reviewable on federal habeas. *See Young v. Dretke*, 356 F.3d 616, 628 (5th Cir. 2004); *Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998); *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995).

IV. DUE PROCESS

Petitioner contends that the FCR erred in determining that his due process claim regarding the state court's ruling on the state law work-product/crime-fraud issue was unexhausted. He claims that he exhausted the

due process claim in ground three of his petition for discretionary review (PDR). The federal habeas petition contends that the state court's erroneous ruling on the state law work-product/crime-fraud issue was so egregious that it violated his right to due process. As the FCR explained, the PDR argued that the state court of appeals erred in its work-product/crime-fraud analysis. (See doc. 18-1 at 3-6). It did not argue that the rulings of the appellate court and trial court were so egregious that there was a due process violation under the Constitution. Because Petitioner did not raise his due process claim in his PDR, the FCR correctly determined that his federal habeas due process claim regarding work product and the crime-fraud exception is unexhausted. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (federal habeas due

process claim was not exhausted where the petitioner "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him . . . due process"). Additionally, as the FCR correctly concluded, any due process error regarding the work product claim was harmless in light of the suppression of evidence obtained from the recordings, the appointment of a special prosecutor, and the order barring communication between the special prosecutor and the DA's Office about the case.

V. EVIDENTIARY HEARING

Petitioner contends that the FCR erroneously held that he is not entitled to an evidentiary hearing regarding prejudice. He contends that an evidentiary hearing is necessary so that he may ask the prosecutor

what she learned from listening to the recordings and examine the notes she took while listening to the recordings. Under *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011), even if the state court deprived the petitioner the opportunity for an evidentiary hearing, review under 28 U.S.C. § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits, if on the basis of the state court record the state court's decision was not contrary to and did not involve an unreasonable application of clearly established Federal law and was not based on an unreasonable determination of the facts under § 2254(e)(2). *Smith v. Cain*, 708 F.3d 628, 635 (5th Cir. 2013). Here, the FCR correctly concluded that Petitioner had not shown that the state court's decision was unreasonable.

Habeas review is therefore limited to the state court record, and he is not entitled to an evidentiary hearing. In addition, an evidentiary hearing would not support Petitioner's claims. The original prosecutor's knowledge of the content of the recordings and her notes from listening to the recordings are not relevant to the prejudice analysis under *Morrison* to determine whether the indictment should have been dismissed. The extent of what the prosecutor learned from the recordings and the notes she took would not affect the prejudice analysis because the special prosecutor and the prosecutor's office were ordered not to communicate about the case. Petitioner does not allege that they did communicate in violation of that order. The special prosecutor would not have known what the prosecutor

learned from the recordings when preparing for and trying the case. The information Petitioner seeks to develop in an evidentiary hearing would not demonstrate that he was prejudiced by the failure to dismiss the indictment in light of the recusal of the original prosecutor's office, the appointment of a special prosecutor, and the order that they not communicate about the case. The FCR therefore correctly determined that he is not entitled to an evidentiary hearing. *See Robinson v. Johnson*, 151 F.3d 256, 268-69 (5th Cir. 1998) (no abuse of discretion in denying evidentiary hearing where there were no relevant factual disputes that required development in order to assess the habeas claims); *Perillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996) (to obtain an evidentiary hearing, there must be a "factual dispute,

[that,] if resolved in the petitioner's favor, would entitle [him] to relief," but an evidentiary hearing is limited to the factual dispute and a "fishing expedition" is not authorized).

VI. CONCLUSION

A de novo review of those parts of the FCR to which objections have been made shows that Petitioner has failed to demonstrate that the order is either clearly erroneous or is contrary to law. See FED. R. CIV. PROC. 72(a). His objections are OVERRULED. The Findings and Conclusions of the Magistrate Judge are correct, and they are accepted as the Findings and Conclusions of the Court. For the reasons stated in the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, the petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 is

DENIED with prejudice. In accordance with Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c) and after considering the record in this case and the recommendation of the Magistrate Judge, Petitioner is DENIED a Certificate of Appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions and Recommendation in support of its finding that Petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the petitioner files a

notice of appeal, he must pay the $505.00 appellate filing fee or submit a motion to proceed in forma pauperis and a properly signed certificate of inmate trust account. SIGNED this 30th day of November 2017.

/s/ Barbara M.G. Lynn
Barbara M. G. Lynn
Chief Judge

3.

ORDER DENYING CERTIFICATE OF APPEALABILITY

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10133

BRANDON D. WOODRUFF,
Petitioner-Appellant

Versus

LORIE DAVIS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee

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

ORDER:

Brandon Woodruff, Texas prisoner #01559439, was convicted by a jury of the murder of his parents and was sentenced to life imprisonment. He requests a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 petition. He requests a COA with respect to his claim that the indictment should have been dismissed as a remedy for a pretrial Sixth Amendment violation.

To obtain a COA, a §2254 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court' s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). This court looks to the district court's application of the Anti-Terrorism and Effective Death Penalty Act in making that determination. Miller-El, 537 U.S. at 336; see also § 2254 (d).

Woodruff has not made the requisite showing. See Miller-El, 537 U.S. at 327, 336. Accordingly, the motion for a COA is DENIED.

/s/ Jerry E. Smith
Jerry E. Smith

[seal]
A True Copy
Certified Order issued Sep 20, 2018
/s/ Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit