Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70021

United States Court of Appeals
Fifth Circuit
FILED
January 28, 2019
Lyle W. Cayce
Clerk

RICK ALLEN RHOADES,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In 1992 a Texas jury convicted Rick Allan Rhoades of capital murder and he received a death sentence. After direct appeals and filing an unsuccessful state habeas petition, Rhoades petitioned for federal habeas relief. The district court denied his petition and declined to issue a certificate of appealability ("COA"). We granted a COA on three of Rhoades's claims, accepted further briefing, and heard oral argument. We now affirm the district court's denial of his petition.

I.

On the morning of September 13, 1991, the bodies of brothers Charles and Bradley Allen were discovered by a neighbor. Almost a month later, Rhoades was arrested leaving the scene of an unrelated school burglary. While in custody for the burglary, Rhoades gave the police a written statement admitting to killing Charles and Bradley Allen.

In that statement, Rhoades related his activities on release from prison in Huntsville, Texas less than 24 hours before the murders occurred. Instead of reporting to his assigned halfway house in Beaumont, Rhoades travelled to Houston by bus. After an unsuccessful search for his parents, he went to an apartment complex where he had previously lived and proceeded to have several beers. In his statement, Rhoades recalled wandering around the neighborhood and encountering Charles Allen outside of his home around 2:30 a.m. After a quarrel, Charles entered his house. Believing he was planning to retrieve a gun, Rhoades went into the house after him. Rhoades picked up a small metal bar from a weight bench and entered the kitchen, where Charles Allen grabbed a knife. The men began fighting and Rhoades recounted hitting Charles Allen with the bar several times until he dropped the knife. At that point, Rhoades grabbed the knife and stabbed him a number of times. Bradley Allen entered shortly thereafter and started trying to punch Rhoades, who stabbed Bradley Allen with the knife. Rhoades took some cash and clean clothing, because his clothes had been bloodied. He saw on the news later that morning that the two men had died. In his statement, Rhoades mentioned that he had not told anyone about the murders and it had been "bothering [him] ever since." Rhoades claimed he could have outrun the police officer who arrested him for the school burglary, but was "tired of running" so decided to tell the police about the murders while in custody.

A Harris County jury convicted Rhoades of capital murder on October 2, 1992. During the punishment phase of the trial, the State presented evidence of Rhoades's Naval court-martial for unauthorized absences and other previous criminal convictions including convictions for burglary and auto theft. The State also presented Rhoades as a danger to other prisoners, proffering evidence that when Rhoades was an inmate in an Indiana prison, prison officials had recovered a shank and a razor blade from his cell. Between 1986 and 1990 Rhoades stacked up various arrests and convictions for auto theft, possession of a prohibited weapon, theft, burglary, and carrying a weapon. During the punishment phase, Rhoades's trial counsel presented the testimony of Patricia Spenny, Rhoades's birth mother; Donna and Ernest Rhoades, Rhoades's adoptive parents; Meyer Proler, an assistant professor of physiology and neurology at the Baylor College of Medicine; Novella Pollard, Rhoades's teacher in his prison GED program; and Windel Dickerson, a psychologist. On rebuttal, the State presented testimony of David Ritchie, the Harris County jailer and Roy Smithy, an investigator with the special prosecution unit in Huntsville who testified about prison procedures.[1]

On October 8, 1992, the jury answered two requisite questions: (1) whether Rhoades "would commit criminal acts of violence that would constitute a continuing threat to society" and (2) whether there were "sufficient mitigating circumstances or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." The jury unanimously answered "yes" to the first and "no" to the second and Rhoades

[1] The testimony of the punishment phase witnesses will be discussed in more detail with the first and second issues certified on appeal. Rhoades challenges the trial court's exclusion of childhood photographs during the punishment phase and the admission of testimony by Smithy regarding an inmate's ability to receive a furlough when serving a life sentence.

received a sentence of death. The trial court denied Rhoades's motion for a new trial in December 1992.

On direct appeal, Rhoades raised eighteen points of error. The Texas Court of Criminal Appeals ("CCA") affirmed Rhoades's conviction and sentence in a published opinion in 1996.[2] Rhoades initiated state habeas proceedings the following year, raising thirty-eight grounds of error. Finding that there were unresolved factual issues, the state habeas court ordered trial counsel to file affidavits responding to Rhoades's allegations of ineffective assistance of counsel. The affidavits of James Stafford and Deborah Keyser were timely filed and the State filed its answer to Rhoades's habeas petition in October 2000. Nearly fourteen years later, the trial court entered its findings of fact and conclusions of law, denying Rhoades's state habeas petition. The CCA affirmed the denial in 2014.[3] With federally appointed counsel, Rhoades filed his federal habeas petition, raising five issues. The State filed a summary judgment motion in response and the district court entered an order denying Rhoades's petition, granting the State's summary judgment motion, and denying Rhoades a COA.

We granted a COA on three of Rhoades's claims for habeas relief: (1) that the convicting court unconstitutionally prevented him from presenting mitigating childhood photographs of himself to the jury during the sentencing phase; (2) that the convicting court unconstitutionally permitted the jury to hear testimony about the possibility of release on furlough for capital defendants sentenced to life in prison; and (3) that the State violated *Batson*

[2] *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App. 1996).

[3] *Ex Parte Rhoades*, No. WR-78,124-01, 2014 WL 5422197 (Tex. Crim. App. Oct. 1, 2014).

when it exercised racially motivated peremptory strikes against two prospective jurors.[4] We address each issue in turn.

II.

First, Rhoades argues that the trial court erred in excluding eleven photographs from Rhoades's childhood offered as mitigation evidence during the sentencing phase of trial. Before calling Rhoades's adoptive mother, Donna Rhoades, trial counsel sought to introduce photographs of Rhoades as a child from the ages of approximately four to ten.[5] Trial counsel argued that the photographs were admissible to counteract the dehumanizing photographs of Rhoades introduced by the State (e.g., his mugshots), to show the jury the defendant's development through his life and his human side, and to offset the effect of the emotional photos of the deceased victims and their families. The photographs depict typical childhood scenes such as Rhoades holding a trophy, fishing, and attending a dance. The State objected to the admission of the photographs as irrelevant, arguing that everyone was a child at one point, and that the photos did nothing to lessen his moral blameworthiness. The trial court agreed.[6] The CCA affirmed, holding that the trial court did not abuse its discretion in excluding the photos as irrelevant.[7] Specifically, the CCA held that there was no relationship between photos of Rhoades as a child and his moral culpability for the double murder.[8] On habeas review, the state court

[4] *Rhoades v. Davis*, 852 F.3d 422, 427–28 (5th Cir. 2017).

[5] There was one more recent photo trial counsel sought to introduce.

[6] Trial counsel offered the photos as a bill of exception, suggesting that the trial court had denied Rhoades effective assistance of counsel by impeding trial counsel's ability to humanize Rhoades and show his development as a child.

[7] *Rhoades*, 934 S.W.2d at 126. As we recognized in our decision to grant a COA to Rhoades on this issue, the issue of relevancy divided the CCA and Judges Clinton and Overstreet filed a dissenting opinion criticizing the majority's view that mitigating evidence is relevant "only if it reflects on the moral culpability of the defendant." *Id.* at 130–31 (Clinton, J., dissenting).

[8] *Id.* ("In our view, photographs of appellant which depict a cheerful early childhood are irrelevant to appellants moral blameworthiness for the commission of a violent double-

summarized the testimony of witnesses who testified on Rhoades's behalf during the punishment phase of the trial[9] and determined that trial counsel was able to submit other mitigating evidence that humanized Rhoades.[10] In his state habeas petition, Rhoades focused on the special issue of future-dangerousness, arguing that the photographs showed his ability to adapt to a structured environment.[11] The state habeas court rejected that contention, finding that the "childhood photos are not relevant to the issue of whether the applicant would be a threat to society while living in a structured environment and do not show whether he would or would not commit future acts of violence."

The district court concluded that the state courts were not unreasonable in determining that the proffered photos were irrelevant to the jury's determination of the special issues[12] and that any error was harmless because the photographs would have been "only a small thread in an intricately violent mosaic of Rhoades' life."[13] The district court found persuasive the State's argument that any mitigating value of the photos would be eclipsed by the

murder because such evidence has no relationship to appellant's conduct in those murders. That appellant was once a child does not diminish his moral culpability for the act of murder.").

[9] The court summarized evidence of his difficult childhood pre-adoption, including "being almost drowned by one of his mother's boyfriends" and the transition to his adoptive family when Rhoades hid food, defecated in the closet and drawers, and had a difficult time concentrating at school. The court summarized the evidence of his family life after transitioning to his adoptive family, including being "loving to everyone after his adoption" and "being 'gung-ho' into sports."

[10] "The Court finds that trial counsel were able to present mitigating evidence and to humanize [Rhoades] through punishment testimony concerning his childhood and background, rather than a photo that does not adequately inform the jury of his life."

[11] "These pictures, and evidence on his life while in boot camp and while incarcerated, showed the jury that he could adapt and conform in a structured society."

[12] *Rhoades*, 2016 WL 8943327, at *8 ("The state courts could reasonably conclude that the childhood photographs bore little, or no, relationship to Rhoades' character, record, or circumstances of the offense. The photographs merely showed that Rhoades had once been a child, and possibly a happy one. The photographs, however, were not demonstrative of trial testimony, nor did they play a direct role in the decision jurors faced.").

[13] *Id.*

aggravating nature of the photos—essentially that Rhoades committed brutal murders *despite* being adopted into a loving family.[14]

It is our task to assess whether the state court's determination that the proffered childhood photos were irrelevant was an unreasonable application of clearly established federal law.[15] The Supreme Court has adopted an expansive definition of relevant mitigation evidence.[16] "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."[17] A state court cannot, therefore, exclude evidence from the jury's consideration "if the sentencer could reasonably find that it warrants a sentence less than death."[18] This is a "low threshold for relevance."[19]

In *Lockett v. Ohio*, a plurality of the Court concluded that Ohio's death penalty statute was invalid because it did not "permit the type of individualized consideration of mitigating factors [the Court held] to be required by the Eighth and Fourteenth Amendments in capital cases."[20] The Court determined that the Constitution required that the sentencer "not be precluded from considering, *as a mitigating* factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the

[14] *Id.*

[15] 28 U.S.C. § 2254(d).

[16] *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (reiterating that when addressing "the relevance standard applicable to mitigating evidence in capital cases . . . [the Court speaks] in the most expansive terms").

[17] *Id.* (citing *McKoy v. North Carolina*, 494 U.S. 433 440–41 (1990) (quoting the dissenting state court opinion with approval) (internal quotation marks omitted)).

[18] *Id.* at 285 (citing *McKoy*, 494 U.S. at 441 (internal quotation marks omitted)).

[19] *Id.*

[20] *Lockett v. Ohio*, 438 U.S. 586, 606 (1978). It is worth noting, briefly, that in *Lockett* and its progeny, the Court was tasked with considering the constitutionality of state statutes that limited the sentencer's consideration of already *admitted* evidence. Here, we consider an antecedent problem: whether the trial court erred in excluding relevant mitigating evidence in the first instance. The *Lockett* line of cases more generally explain the standard for relevant mitigating evidence, and therefore apply with equal force here.

defendant proffers as a basis for a sentence less than death."[21] Four years later, the Court endorsed the plurality opinion in *Lockett* and held that a trial judge had erred in concluding that a defendant's violent upbringing and background was not relevant mitigating evidence.[22] Even where mitigating evidence does not "relate specifically to [the defendant's] culpability for the crime he committed," it may still be relevant as mitigation if the jury could draw favorable inferences regarding the defendant's character and those inferences "might serve 'as a basis for a sentence less than death.'"[23] *Lockett*, *Eddings*, and *Skipper* "emphasized the severity of imposing a death sentence and [made clear] that 'the sentencer in capital cases must be permitted to consider *any* relevant mitigating factor.'"[24]

Despite the expansive definition of relevant mitigating evidence, trial judges still retain their traditional authority to exclude irrelevant evidence that does not bear on the defendant's "character, prior record, or the circumstances of his offense."[25] Furthermore, "gravity has a place in the

[21] *Id.* at 604.

[22] *Eddings v. Oklahoma*, 455 U.S. 104, 112–14 (1982) ("We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentence refuse to consider, *as a matter of law*, any relevant mitigating evidence.").

[23] *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986) (quoting *Lockett*, 438 U.S. at 604) (holding that the exclusion of evidence regarding petitioner's good behavior in prison while awaiting trial deprived him of his right to place before the sentence relevant evidence in mitigation of punishment).

[24] *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 248 (2007) (summarizing rule of those cases). While this Court has upheld the exclusion of a singular piece of evidence at the punishment phase, distinguishing *Lockett* and *Eddings* as "deal[ing] with the exclusion of specific *types* of evidence rather than specific *items* in evidence," in that case the court was considering a videotape that was excluded as hearsay under Mississippi law. *Simmons v. Epps*, 654 F.3d 526, 544 (5th Cir. 2011). Here, on the other hand, the trial court excluded an item of evidence as irrelevant, in the face of the Supreme Court's admonition that the sentencer be permitted to consider any relevant mitigating factor.

[25] *Lockett*, 438 U.S. at 604 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.").

relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability."[26] This court has not accepted that it is unconstitutional to define mitigating evidence as evidence that reduces moral blameworthiness.[27]

Acknowledging those strictures, Rhoades contends that the state court's finding erroneously defined the universe of evidence relevant to moral blameworthiness too narrowly, undermining the rule established in *Lockett*. We agree. The proffered photos are relevant to Rhoades's character,[28] humanizing Rhoades in the face of Rhoades's long criminal history and suggestions by the prosecution that Rhoades was a psychopath[29] who viewed society's rules as a joke.[30] While photos of Rhoades as a child do not "relate specifically to [Rhoade's] culpability for the crime he committed," they are "mitigating in the sense that they might serve 'as a basis for a sentence less than death.'"[31] We distinguish here between culpability for the specific crime

[26] *Tennard*, 542 U.S. at 286–87 (citing *Skipper*, 476 U.S. at 7 n.2 ("We do not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating. For example, we have no quarrel with the statement of the Supreme Court of South Carolina that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination.") (internal citation omitted)).

[27] *Blue v. Thaler*, 665 F.3d 647, 667 (5th Cir. 2011) (holding that Texas trial court's jury instructions were sufficient to allow jury to consider mitigating effect of petitioner's good conduct in prison).

[28] *Skipper*, 476 U.S. at 4 ("There is no disputing that this Court's decision in *Eddings* requires that in capital cases 'the sentencer . . . not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (citing *Eddings*, 455 U.S. at 110)).

[29] "[The defendant's psychologist] admits that the defendant fits the antisocial personality profile, same thing as psychopath."

[30] "Society the systems' rules, are a joke to him, a challenge, a game."

[31] *Skipper*, 476 U.S. at 4 (quoting *Lockett*, 438 U.S. at 604). The Court has reminded that "a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*." *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (holding that the Texas special issues allowed adequate consideration of the petitioner's youth). While often

committed by Rhoades and his moral culpability more generally. In other words, although the photos do not relate to the circumstances of the crime, they go to his character and distinct identity. While the State is correct in reminding us that gravity has a place in the relevance determination, childhood photos are not "trivial" in the same way as, for example, personal hygiene practices, an inconsequential fact the Court has acknowledged to be irrelevant.[32] Beyond evaluating whether the proffered evidence is trivial, "[t]he Court [has] emphasized that, in assessing the relevance of mitigating evidence, a reviewing court should not weigh the severity or sufficiency of the evidence."[33] We cannot reconcile the mandate that a sentencing court may not preclude the jury from considering, as a mitigating factor, any aspect of a defendant's character that the defendant proffers as a basis for a sentence less than death with the exclusion of the childhood photos by the trial court here.[34]

mitigating evidence regarding a defendant's youth seeks to remind a jury of the defendant's turbulent background or the impetuousness that often defines bad decisions by younger offenders, *Johnson*, 509 U.S. at 367–68, we see no reason why photos highlighting positive or humanizing aspects of Rhoades's youth are any less relevant.

[32] *Skipper*, 476 U.S. at 7 n.2.

[33] *Nelson v. Quarterman*, 472 F.3d 287, 301 (5th Cir. 2006) (en banc) (citing *Skipper*, 476 at 7 n.2)).

[34] The State relies on *Saffle v. Parks*, 494 U.S. 484, 492 (1990) in its contention that "Rhoades did not have an unfettered constitutional right to make such an unbridled appeal to the jury's sympathy" through presentation of the childhood photos. In *Saffle*, the Court held that an instruction telling the jury to "avoid any influence of sympathy . . . when imposing sentence" was constitutional. *Id.* at 487. The petitioner in *Saffle* had argued that the *Lockett* line of cases precluded such an antisympathy instruction. *Id.* In rejecting that claim, the Court clarified the holding of *Lockett* and *Eddings*: "There is no dispute as to the precise holding in each of the two cases: that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. . . . *Lockett* and *Eddings* do not speak directly, if at all, to the issue presented here: whether the State may instruct the sentencer to render its decision on the evidence without sympathy. Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence." *Id* at 490. The State's reliance on *Saffle* is unavailing. Here, Rhoades's claim goes to the heart of *Lockett* and *Eddings*: *what* mitigating evidence the jury must be permitted to consider.

That said, we need not reach the question of whether the Court's precedent speaks with such clarity as to render its application by the trial court unreasonable under the strictures of AEDPA. Even assuming that *Lockett* and its progeny "squarely establish" "a specific legal rule" that required the admission of these photographs, we agree with the district court that any such error was harmless.[35] Although Rhoades's counsel did not brief the issue of the effect of any error on appeal, during oral argument, counsel suggested that a trial court's exclusion of mitigating evidence is structural error, entitling Rhoades to a new sentencing. We disagree and find that any error was harmless.

To obtain relief on collateral review, a habeas petitioner must establish that a constitutional trial error had a "substantial and injurious effect or influence in determining the jury's verdict."[36] In *Brecht*, the Court emphasized the distinction between trial error and structural defects, making clear that "[t]rial error 'occurs during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial.'"[37] On the other hand, structural errors warrant automatic reversal because "they infect the entire trial process."[38] Contrary to the assertion during oral argument of Rhoades's able counsel, the decision of the trial judge to exclude the photos as irrelevant, if error, is quintessentially a trial error subject to harmless error review.[39] The scope of the error is readily

[35] *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

[36] *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[37] *Id.* at 629–30 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991) (internal alterations omitted)).

[38] *Id.* at 630.

[39] *See Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) ("We have permitted harmless error analysis in both capital and noncapital cases where the evil caused by a Sixth

identifiable and we are able to engage in the "narrow task of assessing the likelihood that the error materially affected the deliberations of the jury."[40]

We agree with the district court that the exclusion of the photos did not have a "substantial or injurious effect or influence in determining the jury's verdict."[41] Even if the photos of Rhoades as a young child had led the jury to a positive inference of Rhoades's character, these photos from over a decade earlier would be unable to counteract the aggravating evidence of the previous crimes committed by Rhoades or testimony describing his violent behavior while incarcerated. And the portrayal of a positive adoptive childhood risks cutting against other mitigating evidence presented by trial counsel of Rhoades's difficult childhood—for example, testimony of Rhoades's biological mother that Rhoades had witnessed his mother's rape by his father. The marginal humanizing force of the photos is outweighed by the extensive aggravating evidence and, as the district court noted, backfires to the extent it highlights that Rhoades committed two brutal murders despite his adoption by a loving family. The hard reality is that any positive force of the proffered photographs was overrun by what the district court called "an intricately violent mosaic" of Rhoades's life.[42] We need not conclude that they had no relevance to conclude that Rhoades has not shown how the exclusion of the

Amendment violation is limited to the erroneous admission of particular evidence at trial."); *see also Simmons v. Epps*, 654 F.3d 526, 539 (5th Cir. 2011) (applying *Brecht* harmless error test to submission of an invalid aggravating circumstance to the jury). This court's en banc decision in *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) does not dictate otherwise. The *Penry* violation there, which involved jury instructions that prevented the jury from giving full effect to a defendant's already-admitted mitigating evidence, is qualitatively different. *Nelson*, 472 F.3d at 313. Here, the question is not whether the instructions allowed the jury to give effect to the impact of the mitigating evidence, but rather whether the trial judge erred in refusing to admit one piece of mitigating evidence as irrelevant.

[40] *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978).

[41] *Brecht*, 507 U.S. at 637.

[42] *Rhoades*, 2016 WL 8943327, at *8.

photos had a substantial or injurious effect on the jury's deliberations. He has not met his burden for habeas relief.[43]

III.

Rhoades contends that testimony adduced by the State during the punishment phase of trial about the possibility of Rhoades's being released on a furlough was constitutional error. In the punishment phase of Rhoades's trial, the State called Roy Smithy, an investigator with the prison system's special prosecution unit.[44] Smithy testified to the classification and housing of prisoners, crimes committed within the prison, and the range of weapons within the prison. The prosecutor then asked about furlough eligibility:

> [State]: If an inmate is in prison and behaves himself for a certain period of time, even if he has been convicted of capital murder, and, of course, is there on just a life sentence, is there an opportunity for him to get furloughed?
>
> [Smithy]: If he obtained . . . state approved trustee 3 status, then he is eligible for furloughs.
>
> [State]: Just exactly what does a furlough mean?
>
> [Smithy]: You have different types. You have emergency furloughs. You have other . . .

At this point, Rhoades's trial counsel asked for "a running objection to all of this," and the court instructed him to approach the bench. The transcript then reads: "Counsel went to the bench for an off-the-record conference; then the reporter was called to the bench . . . ." The first part of the bench conference was not transcribed by the court reporter.

[43] *Brecht*, 507 U.S. at 637 ("Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)).

[44] The special prosecution unit was established to investigate and prosecute all felony offenses that occur inside the prison system. *Id.*

Back on the record, defense counsel argued that "to allow [the State] to go into this stuff and not let me allude to – to let the jury know he is going to stay locked up for thirty-five years is a gross miscarriage of justice." The court responded: "I don't know where your objection is in there. *I understand what your previous objection was*. She has been admonished."[45] Defense counsel objected to "any further questions along this line." The trial judge stated "I am going to allow her to complete her line of questioning. That is all I am going to say."

After this exchange, the prosecution asked Smithy three additional questions about furloughs. Smithy explained:

> [a] furlough is when an inmate is allowed to leave prison unescorted to attend whatever reason it is that he has requested to leave the unit, things such as funeral, family emergency . . . where he, in essence, signs a piece of paper that says that he is going to be released [at] a certain time and that he will go to wherever this emergency is and that he promises he will be back and turn himself back into the unit.

On cross-examination, defense counsel asked Smithy who was responsible for deciding whether an inmate was eligible for a furlough. Smithy agreed that it was "basically the decision of the warden for each particular unit," subject to "certain guidelines . . . set by the overall prison system." Defense counsel then asked Smithy to confirm that "technically speaking, a person who has been convicted of capital murder and is serving a life sentence is technically eligible for a furlough." Finally, defense counsel asked whether Smithy had ever heard of a capital murderer serving a life sentence getting a furlough, and Smithy stated "I have not personally, no sir." In its closing argument, the State did not mention furloughs, but did emphasize that

[45] Again, the referenced previous objection was not recorded.

Rhoades had been out of prison for less than twenty-four hours when he committed the murder.[46]

In a motion for new trial, defense counsel objected to the State's furlough testimony as misleading. Defense counsel pointed to an administrative directive from TDCJ which stated that the state classification committee (not unit wardens) decide whether an inmate will be released on furlough. Defense counsel characterized the directive as "evidence . . . that an individual convicted of capital murder assessed life imprisonment is not eligible for furlough." The State responded that the prohibition on furloughs for capital murderers only applied to "appropriate reason furloughs," not emergency furloughs. The State then argued that Smithy's testimony referred only to emergency furloughs, and thus "[t]here was nothing misleading or incorrect" about the testimony.

On direct appeal, Rhoades challenged the furlough testimony as misleading. The CCA did not reach the merits, instead holding that Rhoades's claim was waived because "he failed to object to the line of questioning with ample specificity to notify the trial court of his contention."[47]

Rhoades again challenged the furlough testimony in his state habeas application. He separately raised an ineffective assistance of counsel claim with respect to defense counsel's failure to preserve error related to the

[46] "On the street less than 24 hours, [Rhoades] went in there, he smashed it, and he slashed and slashed and slashed till nothing was left but blood and death . . . . "Think about it. Less than 24 hours after his release from prison he slaughters two men."

[47] The court elaborated: "In the instant case, appellant objected only to the trial court's decision to preclude issues of parole eligibility from the trial; appellant did not actually object to the State's question regarding emergency furlough. Indeed, the trial court flatly told appellant that it did not comprehend the nature of appellant's objection. Rather than rephrasing the objection in a way that the trial court could fathom, appellant lodged another non-specific objection. Appellant failed to effectively communicate his objection . . . We therefore hold that appellant's complaint regarding the State's questioning is waived for failure to object with specificity."

furlough testimony. To help resolve the ineffective assistance claim, the state habeas court directed Rhoades's trial counsel to file affidavits addressing the furlough objection. In his affidavit, Rhoades's trial counsel stated:

> [T]he 'record' is not representative of the event at all. To the extent that we did not know that the court-reporter was not recording, or that conversations at the bench were not properly placed in the record, I admit error. However, the record, spotty as it might be, certainly reflects our object[ion]s to Roy Smithy's testimony as a whole, and to the furlough issue in particular.[48]

The trial prosecutor later submitted an affidavit stating:

> With regard to the furlough eligibility of Roy Smithy, the applicant's trial counsel objected repeatedly and strenuously to such evidence. I was aware of the nature of the applicant's objections to such testimony, and I believe that the trial court was also aware of such objections, even if such objections did not make it to the written record.

The state habeas court accepted this version of events when it found that "the trial court's reference to understanding counsel's 'previous' objection is a reference to trial counsel's objection to Smithy's testimony made during the unrecorded portion of the bench conference," and therefore that trial counsel was not ineffective.[49] Yet on substantive challenge to Smithy's testimony the state habeas court found that "the applicant is procedurally barred from advancing his habeas claims concerning Roy Smithy's testimony about prison furloughs" because "trial counsel's complaint . . . was not specific, so the complaint was waived." The state habeas court then found:

[48] The defense's co-counsel filed an affidavit stating the same recollection.

[49] "The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals was bound by the parameters of the appellate record which did not include the contents of the unrecorded portion of the bench conference when trial counsel objected to Smithy's furlough testimony. . . . The Court finds that trial counsel are not ineffective for allegedly failing to object to Smithy's admissible testimony, just as trial counsel are not ineffective for not moving to strike Smithy's testimony or requesting a limiting instruction."

> In the alternative, based on trial counsel's habeas assertion that counsel specifically objected to the furlough testimony during an unrecorded bench conference, the applicant is not procedurally barred from presenting his habeas claims, but the applicant fails to show that such claims have merit.

On federal habeas, the district court elected to "bypass [the] procedural-bar argument" because the claim could be "resolved more easily by looking past any procedural default."[50] The district court proceeded to the merits and concluded that "while not a likely occurrence, Texas law did not preclude life-sentenced capital inmates from furlough eligibility" and that "the Supreme Court has not precluded [s]tates from presenting factually correct, yet unlikely, testimony relating to furlough."[51]

Rhoades argues on appeal that his furlough claim is not procedurally barred and that the state court's determination that Rhoades had failed to show that the furlough testimony was false or misleading was unreasonable. With respect to the procedural bar, Rhoades contends that the state habeas court's finding on his ineffective assistance of counsel claim that trial counsel objected to Smithy's testimony during the unrecorded bench conference (meaning trial counsel was not ineffective), "undid" the CCA's holding on direct appeal that Rhoades had waived his claim by failing to adequately object during trial. Essentially he argues that the state habeas court's finding that the objection was sufficient to overcome the ineffective assistance claim displaces the earlier CCA opinion finding that the objection was insufficient to preserve the issue on appeal.[52] With respect to the state habeas court's finding

[50] *Rhoades*, 2016 WL 8943327, at *10 (citing *Busby v. Dretke*, 359 F.3d 708, 720 (5th Cir. 2004)). "Given the contested record regarding the defense's trial objection, the Court will address the state habeas court's alternative merits review." *Id.*

[51] *Id.* at 11.

[52] In response, the State devotes much of its briefing to a different argument. In its decision on the substantive furlough claim, the state habeas court decided the claim was

that the substantive furlough claim had been waived, Rhoades contends that those decisions are contradictory: the objection can't be sufficient for one purpose and insufficient for another. If the objection was properly made such that counsel was not ineffective, it was sufficient to preserve the issue on appeal. In response, the State maintains that the issue of the trial counsel's effectiveness with respect to their lodging an objection to the testimony is distinct from the issue of whether the objection was sufficient to preserve any alleged error for appeal.

We agree. If a state court is precluded from reaching the merits of a claim by a state-law procedural default, that claim cannot be reviewed in federal court.[53] "State procedural bars are not immortal, however; they may expire because of later actions by state courts."[54] The Supreme Court has made clear that if the last state court presented with a particular federal claim reaches the merits, that decision removes the procedural bar to federal court review.[55] A procedural default will not bar review of the federal claim on direct or habeas review "unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."[56] The

procedurally barred and, in the alternative, meritless. The State contends that the court's decision to address the merits of the furlough testimony challenge in the alternative does not displace the procedural default decision. As Rhoades makes clear in his reply, he is not making that argument and agrees an alternative merits holding does not negate a procedural default holding: "Rhoades's argument is that the CCA's holding—not alternative holding—on his claim that trial counsel was ineffective in failing to properly object to the testimony about furlough is the holding that controls the question of whether trial counsel properly objected." Because Rhoades does not contend that the alternative holding by the state habeas court displaces the procedural default holding, we do not address the argument here.

[53] *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87–88 (1977)).

[54] *Id.*

[55] *Id.* (citing *Harris v. Reed*, 489 U.S. 255, 262 (1989)).

[56] *Harris*, 489 U.S. at 263.

state court is free to reach the merits in the alternative, however, without interfering with the procedural bar.[57]

Here, the last state court to consider Rhoades's claim on the furlough testimony clearly and explicitly held that the claim was procedurally barred.[58] The state habeas court addressed the merits in the alternative, finding that the claim was without merit. The fact that the state court found that trial counsel's objection was sufficient to preclude relief on an entirely separate ineffective assistance of counsel claim does not erase the procedural default on the substantive claim about the furlough testimony. The Supreme Court in *Ylst* made clear that procedural default must be considered with respect to each specific federal claim: "If the last state court to be presented with a *particular federal claim* reaches the merits, it removes any bar to federal-court review that might otherwise have been available."[59] Although the question of whether an objection was lodged is relevant to both the ineffective assistance claim and the substantive furlough testimony claim, a statement about the objection in discussion of one claim does not erase the clear and explicit finding of procedural default on the other.[60]

[57] *Harris*, 489 U.S. at 264 n.10 ("Moreover, a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.").

[58] "On direct appeal of the applicant's conviction, the Court of Criminal Appeals held, based on the appellate record, that trial counsel's complaint about Roy Smithy's testimony concerning prison furloughs was not specific, so the complaint was waived. Thus, the applicant is procedurally barred from advancing his habeas claims concerning Roy Smithy's testimony about prison furloughs."

[59] *Ylst*, 501 U.S. at 801 (emphasis added).

[60] Rhoades also fails to establish "cause and prejudice" for the default. *Murray v. Carrier*, 477 U.S. 478, 493 (1986). He argues that there is cause because the court reporter failed to transcribe the bench conference, faulting either the court reporter or the trial court. While Rhoades is correct that external impediments can provide "cause" sufficient to overcome a procedural default, that is true only where those impediments cannot be ascribed to defense counsel. *Murray*, 477 U.S. at 488. Where counsel was not constitutionally

Ordinarily, where the last state court to consider a claim finds that there is a procedural bar, we are precluded from review as a federal court sitting in habeas. But because the distinction made by the state court between the effect of trial counsel's objection as it relates to the ineffective assistance claim versus the substantive furlough testimony claim is admittedly a fine one, and the internal consistency of the state court's findings is debatable, we need not rest on the procedural bar, and proceed to consider Rhoades's substantive argument.

Rhoades contends that the state court's determination that the furlough testimony was not false or misleading was an unreasonable determination of the facts. He argues that because there was no possibility that an inmate convicted of capital murder and sentenced to life in prison would be granted a furlough, Smithy's testimony was false and misleading. The state habeas court found that "Smithy's testimony . . . was not false or misleading" and found "unpersuasive the assertion that [Rhoades's] jury probably considered and speculated as to whether the applicant would receive furlough."

To succeed on his claim for habeas relief, Rhoades must show that the state court's decision was based "on an unreasonable determination of the facts."[61] It is not enough to demonstrate that the decision was incorrect, rather Rhoades must show that the decision was "objectively unreasonable, a

ineffective, the Supreme Court has held that it "discern[s] no inequity in requiring [counsel] to bear the risk of attorney error that results in procedural default." *Id.* Here, no external impediment or interference made compliance with the state's contemporaneous objection rule impractical. Trial counsel acknowledged in her affidavit that such compliance was not impractical and her failure to ensure the recording of the objection was her own error. As the CCA reiterated on direct appeal, trial counsel could have rephrased the objection and ensured that such objection was made on the record. *Rhoades*, 934 S.W.2d at 127. Rhoades has not shown cause to excuse the procedural default.

[61] 28 U.S.C. § 2254(d)(2).

substantially higher threshold."[62] "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."[63]

To support his contention that the information about the furlough testimony was not truthful, Rhoades relies on *Simmons v. South Carolina.*[64] In *Simmons*, the Supreme Court held that "where [a] defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."[65] Future dangerousness was a focus of both sides during the punishment phase of Simmons's trial—the prosecution argued that Simmons was a continuing threat and the defense responded that Simmons's dangerousness was limited to elderly women and he would not be violent in a prison setting.[66] To show the jury that Simmons would be confined to prison for life, his counsel requested an instruction that state law made Simmons parole ineligible.[67] The trial judge refused, even after the jury sent a note asking whether a life sentence carried the possibility of parole.[68] The Supreme Court held that the defendant's due process rights were violated.[69]

The refusal of the trial court to instruct the jury that Simmons was parole ineligible led to the jury's "grievous misperception" that it was choosing

[62] *Blue*, 665 F.3d at 654 (citing *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007) (internal quotation marks omitted)).

[63] *Wood v. Allen*, 558 U.S. 290, 302 (2010).

[64] 512 U.S. 154 (1994).

[65] *Id* at 156.

[66] *Id.* at 157.

[67] *Id.* at 158.

[68] *Id.* at 160. The trial judge answered the jury's question by instructing that it was "not to consider parole or parole eligibility in reaching [its] verdict. . . . The terms of life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning." *Id.*

[69] *Id.* at 161.

between a death sentence and a limited period of incarceration.[70] By allowing the prosecution to "raise[] the specter of petitioner's future dangerousness . . . but then thwart[ing] all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he would never be released on parole,"[71] the trial court in *Simmons* sanctioned a death sentence on the basis of information that the defendant "had no opportunity to deny or explain."[72]

In Rhoades's case, on the other hand, defense counsel was permitted to cross-examine Smithy and solicited testimony that he had "never heard of a capital murderer serving a life sentence getting a furlough." The testimony elicited by the prosecution was factually true and Rhoades's trial counsel had an opportunity to "deny or explain" the testimony and show the likelihood of Rhoades actually being furloughed to the jury.[73] As the Court reiterated in *Simmons*, "nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release."[74] Rhoades attempts to analogize *Simmons*, arguing that the state court's basis for not giving an instruction that the defendant was parole ineligible in that case was that no statutory law prohibited an inmate from being furloughed or given work release. But the Court expressly noted that while no *statute*

[70] *Id.* at 162.

[71] *Id.* at 165.

[72] *Id.* at 161 (quoting *Gardner v. Florida*, 530 U.S. 349, 362 (1977)) ("The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'").

[73] *Simmons*, 512 U.S. at 161 (quoting *Gardner*, 530 U.S. at 362 (internal quotation marks omitted)).

[74] *Id.* at 168; *see also California v. Ramos*, 463 U.S. 992, 994 (1983) (upholding a California law requiring trial judges to inform the jury in a capital case that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole). Rhoades attempts to distinguish *Ramos* by arguing that California governors had actually commuted sentences of life without parole, whereas Texas had never granted a furlough to someone convicted of capital murder. But defense counsel was able to elicit testimony from Smithy that he was not aware of any inmate convicted of capital murder receiving a furlough.

prohibited "petitioner's eventual release into society," "state regulations unambiguously prohibit[ed] work-release and virtually all other furloughs for inmates who [we]re ineligible for parole."[75] Here, as the state habeas court recognized, Rhoades would have been technically eligible for emergency furlough had he received a life sentence.[76]

Finally, Rhoades contends that even if the testimony wasn't impermissible when it was given, it later "became false" which entitles him to relief. Rhoades points to an amendment to the furlough statute passed by the Texas legislature three years after his sentence which would require that all emergency furloughs be supervised. Rhoades relies on *Johnson v. Mississippi*, where the Supreme Court considered a death sentence that was predicated on the jury's finding of an aggravating factor—a prior violent felony conviction—where that prior conviction was vacated after his capital trial.[77] In *Johnson*, the jury found an aggravating circumstance that the defendant "was previously convicted of a felony involving the use or threat of violence to the person of another."[78] After sentencing, the New York Court of Appeals reversed his prior felony conviction.[79] Nonetheless, the Mississippi Supreme Court

[75] *Simmons*, 512 U.S. at 167 n.6.

[76] "The Court finds . . . that temporary furloughs were available to prison inmates and capital murderers serving a life sentence." The state habeas court noted that the one piece of testimony given by Smithy that was objectively false was his statement on cross-examination that prison wardens decide who is furloughed. The TDCJ administrative directive submitted as part of Rhoades's motion for a new trial makes clear that the State Classification Committee, rather than the warden, considered inmates for furloughs. The state habeas court found that "this administrative difference does not affect the substance of Smithy's testimony about capital murderers serving life sentences being eligible for furlough and is not 'materially misleading.'" We agree. The identity of the decision-maker is irrelevant to Rhoades's complaint: that Smithy's testimony allowed the jury to speculate as to whether the applicant would receive a furlough and caused them to choose the death penalty.

[77] *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988).

[78] *Id.* at 581.

[79] *Id.* at 582.

denied Johnson postconviction relief.[80] The Supreme Court reversed, finding that the "New York conviction provided no legitimate support for the death sentence imposed on petitioner" and that "the use of that conviction in the sentencing hearing was prejudicial."[81] The effect of the New York Court of Appeals' decision was that the New York judgment was not valid at the time the Supreme Court considered the case *and* it "was not valid when it was entered in 1963." Here on the other hand, while the furlough testimony would not have been accurate if given after the legislative amendment, it *was* valid at the time it was given and a subsequent change to the statute did not make the earlier testimony—based on an earlier version of the law—invalid. A change in statute is fundamentally different from an invalidated criminal conviction: the criminal conviction was never valid whereas the pre-amendment statute was. *Johnson* does not dictate the relief Rhoades requests.

IV.

In his last claim for habeas relief, Rhoades argues that the district court erred by failing to conduct a comparative analysis with respect to his *Batson* claim.[82] In his application for a COA, Rhoades challenged the district court's

[80] *Id.* at 583.

[81] *Id.* at 586.

[82] *Batson v. Kentucky*, 476 U.S. 79 (1986). There is some confusion in Rhoades's briefing on this point. Although his point heading argues that "[t]he district court abused its discretion in failing to conduct the comparative analysis," Rhoades later contends that "[t]he failure of the *state court* to conduct this sort of comparative analysis was an unreasonable application of federal law or an unreasonable determination of the facts, or both, and the failure of the court below to conduct comparative analysis was error." In other words, Rhoades seems to argue simultaneously that the state court and district court erred in not doing a comparative analysis. In response to the State's Fed. R. App. P. 28(j) letter advising this panel of the court's en banc decision in *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018) (en banc), Rhoades submitted a letter purporting to clarify his position. *See* Apr. 11, 2018 28(j) response. Rhoades states that while *Chamberlin* declined to hold that *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), required a *state court* to conduct a comparative juror analysis, Rhoades was arguing that it was the *district court* who failed to conduct a comparative analysis and therefore *Chamberlin* was not controlling. *See* Apr. 11, 2018 28(j) response at 2.

substantive determination that the state court was not clearly erroneous in finding that there was no *Batson* violation. In his brief, Rhoades has shifted ground—arguing that the error was the district court's failure to conduct a comparative analysis. Although Rhoades does not present any comparative argument or explain what he expects a comparative analysis to show, he contends that the district court's failure to conduct such an analysis is itself error requiring remand. At oral argument, Rhoades's counsel acknowledged that remand may not be necessary because we could engage in our own comparative analysis, referring us to the briefing in the district court.

At the outset, we note that there is some debate about whether the district court actually conducted a comparative analysis. During argument, the State suggested that because the district court had a comparative analysis briefed before it and concluded that the *Batson* claim was without merit, that was sufficient.[83] In the alternative, the State contends we can resolve this question without remanding the case back to the district court after conducting our own comparative analysis. We agree.[84] So, despite the parties' disagreement over whether the district court was required to do a comparative

[83] In *Chamberlin*, this court held that a Mississippi state court had conducted a comparative juror analysis, finding sufficient the state court's statement that it conducted a "thorough review of the record . . . including the jury questionnaires provided by Chamberlin" and had found no evidence of "disparate treatment of the struck jurors." *Chamberlin*, 885 F.3d at 839 (citing *Chamberlin v. State*, 55 So. 3d 1046, 1051–52). In other words, the court's statement that it had reviewed the record and did not find disparate treatment of the struck jurors, without any comparisons of particular jurors, was sufficient to constitute a comparative analysis. *Id.* ("[R]egardless of whether it was required to so, the Mississippi Supreme Court *did* conduct a comparative juror analysis in Chamberlin's case, albeit in a postconviction proceeding instead of on direct appeal.").

[84] *See Fields v. Thaler*, 588 F.3d 270, 276–77 (5th Cir. 2009) (determining that the court need not resolve the question of whether the Texas court actually engaged in a comparative analysis because the decision of the court that the defendant "had not shown disparate treatment with respect to the strikes of [the contested jurors] [was] not unreasonable").

analysis after *Chamberlin*,[85] whether the district court actually performed a comparative analysis,[86] and whether Rhoades's brief was adequate for us to consider his comparative analysis claim, the answer here is simpler: Rhoades's proffered comparisons do not lead to his desired result. After review of the voir dire record, we find that the state courts' decision that there was no *Batson* violation in the peremptory strikes of Mr. Randle and Ms. Holiday was not unreasonable.

The *Batson* analysis proceeds in three steps: (1) a defendant must present a prima facie case that the prosecution exercised peremptory challenges on the basis of race;[87] (2) the burden then shifts to the prosecutor to present a race-neutral explanation for striking the juror in question;[88] and (3)

[85] In *Chamberlin*, this court held that *Miller El II* "did not clearly establish any *requirement* that a state court conduct a comparative juror analysis at all, let alone *sua sponte*." *Chamberlin*, 885 F.3d at 838. Rhoades relies on *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009) for his contention that "a federal district court must perform a comparative analysis." *See* Apr. 11, 2018 28(j) response at 2. *See Reed*, 555 F.3d at 373 ("We recently agreed that *Miller-El II* requires us to consider a 'comparative juror analysis' in a *Batson* claim.") (quoting *United States v. Brown*, 553 F.3d 768, 796 (5th Cir. 2008)).

[86] In its decision, the district court considered Rhoades's argument that the prosecutors had questioned Ms. Holiday differently than other prospective jurors by (1) probing her views on the death penalty more deeply and (2) focusing on Ms. Holiday's relationship to someone incarcerated despite the fact that other jurors were related to incarcerated people. The district court concluded: "Given the numerous race-neutral reasons proffered by the State, Rhoades' weak showing of disparate questioning, and the absence of any meaningful evidence of discriminatory intent, the Court finds that Rhoades has not met his AEDPA burden with regard to Ms. Holiday." *Rhoades*, 2016 WL 8943327, at *20. With respect to Mr. Randle, the district court considered Rhoades's argument that other veniremembers that had family members with a criminal history had been seated on the jury. The district court found that the state courts were not unreasonable in determining that there was no *Batson* violation because (1) no other seated juror had a *sibling* who was incarcerated, (2) the State contended that Mr. Randle had not been forthright in his discussion of his brother's incarceration, and (3) Mr. Randle articulated that he would prefer that a defendant have a history of violent acts to justify a finding on the future dangerous special issue. *Id.*

[87] *Batson*, 476 U.S. at 96–97.

[88] *Id.* at 97–98; *Chamberlin*, 885 F.3d at 838 ("At the second step, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered should be deemed race-neutral. The proffered explanation need not be persuasive, or even plausible . . . . The issue is the facial invalidity of the prosecutor's explanation." (quoting *Williams v.*

the court must determine whether the defendant has met his burden of proving purposeful discrimination.[89] In analyzing whether a prosecution's use of peremptory strikes evinces invidious discrimination, the Supreme Court has employed a comparative juror analysis.[90] This court has recently provided a framework for such an analysis and has made clear that *Miller-El II* did not establish a requirement that the state court employ a comparative juror analysis *sua sponte*.[91]

A state court's *Batson* ruling is a finding of fact "accorded great deference" on habeas review.[92] In order to prevail here, Rhoades must show that "[the] trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary."[93] Rhoades challenges the peremptory strikes of two jurors: Berniece Holiday and Gregory Randle.

Ms. Holiday

In its voir dire questioning, the court asked Ms. Holiday about her job as a second grade teacher, the occupation of her three children, her prior service as a juror in a burglary case,[94] her relationship with a first cousin who had

Davis, 674 F. App'x 359, 363 (5th Cir. 2017) (unpublished) (internal quotation marks omitted))).

[89] *Id.* at 98.

[90] *Miller-El II*, 545 U.S. at 241 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. . . . While we did not develop a comparative juror analysis last time, we did note that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served. The details of two panel member comparisons bear this out." (internal citation omitted)).

[91] *Chamberlin*, 885 F.3d at 838.

[92] *Hernandez v. New York*, 500 U.S. 352, 364 (1991).

[93] *Hoffman v. Cain*, 752 F.3d 430, 448 (5th Cir. 2005).

[94] When asked by the prosecutor whether she participated in deciding the penalty in the case, Ms. Holiday responded: "We set him free."

been incarcerated,[95] and her views about capital punishment.[96] The State followed up with additional questions about Ms. Holiday's beliefs on the death penalty, probing whether her questionnaire accurately reflected her views and what she meant by her statement that she had "mixed emotions" about the death penalty.[97] The State then asked Ms. Holiday whether her experience as a teacher led her to believe that children with turbulent childhood were "less responsible" for conduct as adults, to which Ms. Holiday responded that she "believe[d] that is one of the problems." Ms. Holiday informed the prosecutor that her religious beliefs would not keep her from imposing the death penalty. Shortly after Rhoades's trial counsel began questioning Ms. Holiday, the prosecutor exercised a peremptory challenge.

Rhoades's trial counsel then challenged the State's peremptory strike under *Batson*. Trial counsel argued that Ms. Holiday was the first and only black venireperson on that particular panel and that her responses could reasonably be read as pro-prosecution. Although the trial court did not find that Rhoades had made a prima facie case, the judge asked the prosecutor to explain the State's race-neutral reasons for striking Ms. Holiday "[o]ut of an abundance of caution."[98] The trial court acknowledged that by asking the State to provide these reasons, the CCA would proceed in its review as though a

[95] Ms. Holiday stated that she believed he was in prison at that time, but was not certain because she was not close to the cousin.

[96] Ms. Holiday noted on her questionnaire that she was strongly in favor of the death penalty, but wished it wasn't necessary. She confirmed that her decision on whether the death penalty should be assessed would depend on the facts and circumstances of the individual case.

[97] Ms. Holiday confirmed that her beliefs tracked what she had written in the questionnaire and that although she had "mixed emotions," she "follow[s] the rules" and believed "that there are some cases if you take a life you should give a life."

[98] Before the prosecutor gave the state's reasons, the trial judge made clear that he thought "the record [wa]s full of information why [Ms. Holiday] would not be a proper . . . juror from the State's standpoint, having nothing to do with her race."

prima facie case had been made. The prosecutor offered several race-neutral reasons for striking Holiday, including:

> (1) she "dozed off a couple of times" during earlier proceedings;
>
> (2) her answers were "too succinct" and gave the impression that she was "not being open in her answers";
>
> (3) she only answered three of seventeen questions on the ninth page of the juror questionnaire;
>
> (4) she answered certain questions with "a little smile" that the prosecutor perceived to mean she was going to say what she thought she needed to say;
>
> (5) she works with children and "is very much aware of the effect of broken homes and difficult childhood" and thus might "be particularly impressed" by evidence about the defendant's background;
>
> (6) she had a "real tone of pride" when explaining that, while serving on a previous jury for burglary, she "set free" the defendant;[99]
>
> (7) one of her daughters had a job that "indicates an interest in rehabilitation"; and
>
> (8) she had a first cousin in prison.

Defense counsel responded, noting that numerous people on the panel had dozed off during the voir dire, Ms. Holiday was not close to her cousin in prison, and that the court had seated others on the jury who indicated they agreed with the idea that a troubled childhood could explain later behavior. The trial court observed for the record that it had noted three people napping, one of whom was Ms. Holiday. It proceeded to find that the State's reasons for striking Ms. Holiday were race neutral. On direct appeal, the CCA affirmed, "[u]pon review of the record, this [c]ourt is not left with a definite and firm conviction that error was committed. [Rhoades'] showing of purposeful discrimination was minimal. The State's race-neutral explanations were not

[99] The prosecutor described this as the "thing that weighed most heavily" in the state's decision to strike Ms. Holiday.

whimsical, . . . and the record does not reflect that the State demonstrated a disparate pattern of strikes against any suspect class."[100]

In his habeas petition before the district court, Rhoades argued that the State probed Ms. Holiday's views on the death penalty in an "uncharacteristic manner," questioning her about her family's feelings and whether her religious beliefs would interfere with her ability to impose a sentence of death. Rhoades averred that there was an "extreme difference" in the pattern of questioning. Finally, Rhoades contended that the race-neutral explanations for the strike were not supported by the record because other seated jurors had a family member with a criminal conviction and several indicated that they believed a turbulent childhood could explain later behavior.

Mr. Randle

With respect to Mr. Randle, the trial court questioned him during voir dire about his children, his brother's criminal record,[101] his television preferences, and his views on the death penalty.[102] The State then asked more questions about his views on the death penalty, whether he would require a motive to convict, his family's views on the death penalty,[103] his interactions with his brother,[104] his views on psychologists and expert witnesses, whether a difficult childhood reduces someone's moral culpability as an adult, and

[100] *Rhoades*, 934 S.W.2d at 124.

[101] Randle indicated that he did not know what his younger brother was arrested for, though he had visited him once in prison. Randle explained that his brother "ran away from home at an early age," and he only learned of the criminal case when his brother was already incarcerated..

[102] The court summarized Randle's questionnaire responses, stating "it appears you are basically opposed to capital punishment, that you think it's wrong, you really don't believe in it, but you believe it's necessary for some crimes." Randle confirmed, "Right."

[103] The State also asked if Randle's "family or anybody who is close to [him], anybody who matters to [him], . . . who would disapprove if [he] were on a jury that gave the death penalty." Randle answered no, and stated that he is "used to . . . tak[ing] responsibility for himself."

[104] The State asked Randle "[A]re you going to be thinking about: Gee, that could be my brother sitting there? What effect do you think that would have on you?"

concerns about future dangerousness. Defense counsel then asked Mr. Randle questions about his job as a machinist, whether his emotions would lead him to automatically choose the death penalty, his views on expert testimony, and his views on the death penalty more generally.

Defense counsel once again raised a *Batson* challenge, and the court asked the State to provide racially neutral reasons for striking Mr. Randle. The prosecutor responded that Mr. Randle "ha[d] a brother in prison at the present time," that he "professed not to know what offenses the brother had been convicted or what length of sentence the brother was serving" despite having visited him in prison, and expressed concern that this appeared to be "one area of inquiry" where Randle was not very honest. The prosecutor also noted that Randle "wanted a prior criminal act of violence to persuade him that somebody was going to be a continuing threat to society," which the prosecutor could not provide in this case.[105] After defense counsel responded, the trial court found that the strike was exercised for racially neutral reasons.

Again, the CCA affirmed on direct appeal, stating "[g]iven the utter lack of any real evidence that the State purposefully discriminated against Randle in the record, and the relative strength of the State's explanations, we are not left with a definite and firm conviction that a mistake was committed."

In his habeas petition, Rhoades contends that the trial court was unreasonable in denying his *Batson* challenge because of the disparate questioning of Mr. Randle. Rhoades argues that five other seated jurors had been convicted of a crime or had someone close to them convicted but the prosecutor asked only Mr. Randle if he would be putting his brother in the

[105] The prosecutor also mentioned that Randle "didn't seem to be too conscientious" about paying child support, but stated "[t]hat certainly didn't rise to the level of the other two things [he] mentioned." The court gave "[no] weight whatsoever to any of the child support comments."

place of the defendant when they considered the special issues. Trial counsel disputed the prosecutor's determination of Mr. Randle's truthfulness and pointed to at least two occasions where Mr. Randle confirmed he would answer the first special issue based solely on the facts of the capital murder case, attempting to refute the prosecutor's argument that Mr. Randle would require prior acts of violence.

At the outset, both parties acknowledge that the record on appeal is incomplete. We do not have a racial breakdown of the entire venire. In terms of numbers, here is what the record tells us: of the prosecution's fourteen peremptory strikes, twelve of the individuals were white and two were black; at the time Ms. Holiday was struck, the prosecutor noted that of the more than 64 veniremembers that had been questioned, Ms. Holiday was the first black veniremember that the State had peremptorily challenged;[106] the seated jurors included ten white individuals and one Hispanic individual; and the race of the final seated juror is not clear from the record. In *Miller-El II*, the Court took account of juror comparisons, statistical data, contrasting voir dire questions, the prosecutor's office policy of systematic exclusion of black jurors, and the prosecutors' use of a "jury shuffle."[107] Here, because of the incomplete record, Rhoades can present only limited juror comparison.[108] As the Supreme Court

[106] Again, we do not know the racial composition of the roughly 64 prospective jurors who were questioned before Ms. Holiday.

[107] *Woodward v. Epps*, 580 F.3d 318 (5th Cir. 2009) (citing *Miller-El II*, 545 U.S. at 261–63). A "jury shuffle" is a practice by which either side may reshuffle the cards bearing panel members' names to rearrange the order in which veniremembers are questioned. *Id.* at 253. The Court noted that "the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury." *Id.* at 254 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (*Miller-El I*) (internal quotation marks omitted)).

[108] *See e.g.*, *Lewis v. Horn*, 581 F.3d 92, 104 (3d Cir. 2009) ("Without information about the number and racial composition of the entire venire, we cannot calculate the exclusion rate and we lack the 'contextual markers' to analyze the significance of the strike rate.").

has acknowledged, however, "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve" can be "[m]ore powerful than . . . bare statistics."[109] "If a prosecutor's proffered reason for striking a panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."[110] In conducting this qualitative analysis, we need not "compare jurors that exhibit *all* of the exact same characteristics. If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was pretext for discrimination, even if the two jurors are dissimilar in other respects."[111] The narrow focus in the *Batson* inquiry is on "the actual, contemporary reasons articulated for the prosecutor's decision to strike a prospective juror" and when a prosecutor gives a facially race-neutral rationale for striking a black juror, "a reviewing court must 'assess the plausibility of that reason *in light of all evidence with a bearing on it*.'"[112] Reviewing courts therefore are tasked with testing "the veracity" of "timely expressed neutral reasons."[113] After considering Rhoades's proffered comparisons, we conclude that the state court was not unreasonable in rejecting his *Batson* challenge.

[109] *Miller El II*, 545 U.S. at 241.

[110] *Id.*

[111] *Reed*, 555 F.3d at 376 (citing *Miller-El II*, 545 U.S. at 247 n.6).

[112] *Chamberlin*, 885 F.3d at 841 (quoting *Miller-El*, 545 U.S. at 251–52). In *Chamberlin*, this court determined that the district court erred in its conclusion that there had been a *Batson* violation where a white venire member who was seated answered three questions identically to two black venire members who were struck. *Id.* at 840. The district court there did not account for other pro-prosecution responses on the white juror's questionnaire, failing to test the veracity of the race-neutral rationale in light of all evidence bearing on it and conflating the assertion of a post-hoc rationale for striking one juror (impermissible) with the explanation for keeping another (permissible). *Id.* at 840–42.

[113] *Id.*

Rhoades primary complaint is that Ms. Holiday and Mr. Randle were questioned differently than the seated jurors. With respect to Ms. Holiday, Rhoades contends that because Ms. Holiday offered no opposition to the death penalty in her written questionnaire or during questioning, the prosecutor "prodded and probed to find a hidden difficulty or conscientious reservation." Rhoades alleges that the prosecutor questioned her about her family's beliefs on the death penalty and religious beliefs. But as Rhoades acknowledges, the State questioned nine of the twelve seated jurors about their friends' or families' views on the death penalty[114] and two of the seated jurors about the teachings of their religious beliefs on the death penalty.[115] Far from evincing an "extreme difference" in the pattern of questioning, the prosecutor's questions about the beliefs of Ms. Holiday's family on the death penalty and her religiosity track closely the questions posed to other jurors. The record simply belies the notion that Ms. Holiday was subjected to disparate questioning. Tasked with testing the veracity of the contemporaneously given race-neutral reasons,[116] we note that Rhoades offers no sincere challenge to most of the prosecutor's stated race-neutral reasons, including the rationale the prosecutor identified as the "thing that weighed most heavily"—the fact

[114] For example, several seated jurors, including Mr. Harvill, Mr. Garcia, and Ms. Wilkinson, were asked whether any members of their families held different views about the death penalty, whether anyone close to them would disapprove if they served on a jury that gave a death penalty verdict, and whether they would feel any pressure in that regard. Similarly, Ms. Holiday was asked whether she had talked with her children about their beliefs about the death penalty and if anyone in her family disagreed with her beliefs.

[115] Mr. Garcia was asked whether his Catholicism would prevent him from "being a part of a death penalty verdict," to which he replied "No, I don't think so." To Ms. Holiday, the prosecutor posed a virtually identical question: "I am always concerned to know whether there is anything, any teachings in your church or your religious beliefs that would keep you from giving the death penalty?" Ms. Holiday responded "no."

[116] *Chamberlin*, 885 F.3d at 842.

that Ms. Holiday described the result of her previous jury service as "setting a man free" "with a real tone of pride."[117]

With respect to Mr. Randle, Rhoades points to five seated jurors who had been convicted of a crime or had someone close to them convicted and asserts that the prosecutor engaged in disparate questioning because she asked only Mr. Randle whether he would put his incarcerated family member in the place of the defendant. As the district court recognized, none of the five seated jurors Rhoades points to had a sibling who was incarcerated.[118] Instead, of the five jurors Rhoades mentions, only three were actually connected to someone who served time in prison—and the connections were remote: Ms. Duane had a third cousin who was incarcerated when she was a child,[119] Mr. Harville had a friend from high school who had gone to prison,[120] and Ms. Wilkinson's friend of her fiancé was incarcerated for a drug offense.[121] A prospective juror's family member's carceral status has been credited as a race-neutral rationale for a peremptory strike and when comparing seated jurors who a defendant argues were similarly situated, this court has countenanced distinguishing between the crimes of those related to veniremembers.[122] In sum, the state court was not unreasonable in rejecting Rhoades's *Batson* challenges.

[117] *United States v. Thompson*, 735 F.3d 291, 297 n.14 ("This court has routinely found demeanor to be a race-neutral justification.").

[118] *Rhoades*, 2016 WL 8943327 at *20.

[119] Ms. Duane stated that she had not seen her third cousin since she was approximately 12 years old.

[120] Mr. Harville indicated that he did not know what offense his high school friend was convicted of. He stated: "I have never spoken to him about it, but it seems like it was some kind of an oilfield theft of some kind."

[121] Ms. Wilkinson stated that she thought her fiancé's friend had been incarcerated for a drug offense but "didn't even really know him very well."

[122] *United States v. Jimenez*, 77 F.3d 95, 100–01 (5th Cir. 1996) (accepting prosecutor's distinction between a Hispanic juror who was struck due to potential bias against the prosecution because a close relative was convicted by federal prosecutors and two seated jurors with DWI convictions where those convictions did not involve federal prosecutors).

V.

We conclude that Rhoades is not entitled to habeas relief and the decision of the district court is AFFIRMED.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70021

RICK ALLEN RHOADES,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

ON PETITION FOR REHEARING EN BANC

(Opinion 1/28/19, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel

Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Patrick E. Higginbotham

UNITED STATES CIRCUIT JUDGE

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 27, 2017
Lyle W. Cayce
Clerk

No. 16-70021

RICK ALLEN RHOADES,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Rick Allen Rhoades murdered two men on September 12, 1991. Roughly one month later, while in custody for burglarizing a school, he confessed to the murders. A Harris County jury convicted him of capital murder and sentenced him to die. The Texas Court of Criminal Appeals ("CCA") affirmed Rhoades's conviction and sentence on direct appeal.[1] He unsuccessfully petitioned a Texas state court for a writ of habeas corpus.[2] Having exhausted his state

[1] *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App. 1996).

[2] *Ex parte Rhoades*, No. WR-78,124-01, 2014 WL 5422197 (Tex. Crim. App. Oct 1, 2014).

remedies, Rhoades petitioned a federal district court for federal habeas corpus relief. The district court rejected all of Rhoades's claims and declined to issue a certificate of appealability ("COA"). He now asks this court for a COA to appeal the district court's resolution of his claims. We will grant a COA in part.

I.

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal."[3] Federal law requires that he first obtain a COA.[4] A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."[5] Until the applicant secures a COA, we may not rule on the merits of his case.[6]

> The COA inquiry . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown 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." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."[7]

We limit our examination "'to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'"[8]

[3] *Buck v. Davis*, No. 15-8049, 2017 WL 685534, at *11 (U.S. February 22, 2017).
[4] 28 U.S.C. § 2253(c)(1).
[5] *Id.* § 2253(c)(2).
[6] *Buck*, 2017 WL 685534, at *11 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).
[7] *Id.* (citations omitted).
[8] *Id.* (quoting *Miller-El*, 537 U.S. at 327, 348).

"Where the petitioner faces the death penalty, 'any doubts as to whether a COA should issue must be resolved' in the petitioner's favor."[9] When the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[10]

II.

Rhoades seeks a COA on five claims for federal habeas relief:

(1) that the convicting court unconstitutionally prevented him from presenting mitigating childhood photographs of himself to the jury during the sentencing phase;

(2) that the convicting court unconstitutionally permitted the jury to hear testimony about the possibility of release on furlough for capital defendants sentenced to life in prison;

(3) that the convicting court unconstitutionally prevented him from informing the jurors about the parole implications of a life sentence;

(4) that his trial counsel provided constitutionally ineffective assistance by failing to object to (a) comments by the prosecutor supposedly implicating Rhoades's right not to testify and (b) the guilt/innocence-phase discussion of Rhoades's extraneous offenses; and

(5) that the State violated *Batson* when it exercised racially motivated peremptory strikes against two prospective jurors.

We will grant a COA on Rhoades's claims 1, 2, and 5, but deny a COA on his claims 3 and 4.

1.

[9] *Allen v. Stephens*, 805 F.3d 617, 625 (5th Cir. 2015) (quoting *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)).

[10] *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Rhoades's first claim is that the convicting trial court unconstitutionally prevented him from presenting mitigating childhood photographs of himself to the jury during the sentencing phase of his trial. During sentencing, the defense's theory was that Rhoades was generally nonviolent and would do well in a prison environment. Rhoades called his adoptive mother to testify about his troubled childhood. Prior to her testimony, the defense offered into evidence eleven photographs depicting a young Rhoades doing normal, happy childhood things (like fishing, holding a trophy, and going to a dance). The trial court excluded the photographs as irrelevant.

The CCA affirmed.[11] It said that Rhoades had no constitutional right to introduce the photographs because they were not relevant to Rhoades's moral blameworthiness for the murders, relying on Justice O'Connor's concurring opinion in *Franklin v. Lynaugh*.[12] Judges Clinton and Overstreet dissented, pointing out that the relevant-to-moral-blameworthiness standard embraced by the CCA majority had never been adopted by the Supreme Court in a majority holding.[13] They further observed that *Skipper v. South Carolina* seems to say that mitigating evidence can be relevant even when it does not touch on the defendant's culpability for the crime committed.[14] Those dissenting judges would have found that Rhoades had a constitutional right to introduce the photographs "even if the only purpose of their introduction was to solicit the mercy of the jury."[15]

Rhoades contends on federal habeas that the state court unreasonably applied the Supreme Court's standard for what mitigating evidence capital

[11] *Rhoades*, 934 S.W.2d at 125-26.

[12] *Id.* at 126 (quoting 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment)).

[13] *Id.* at 130-31 (Clinton, J., dissenting).

[14] *Id.* at 131 (citing 476 U.S. 1 (1986)).

[15] *Id.*

defendants have a right to present to the jury. The district court analyzed the Supreme Court's jurisprudence in this area and found that it permitted state courts "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."[16] According to the district court, the state court could have reasonably applied that standard to find the photographs irrelevant, and in any event the exclusion of the photographs did not affect Rhoades's sentence, rendering any error harmless.

Persuaded that Rhoades has made a substantial showing of the denial of a constitutional right, we grant a COA on this claim. In particular, we note the challenge of determining what information is "relevant to the sentencing decision" within the meaning of the Supreme Court's cases[17]—a challenge that divided the Texas CCA on this issue. "When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine."[18] A COA is granted on Rhoades's claim 1.

2.

Rhoades's second claim is that the State presented false or misleading sentencing evidence. During the sentencing phase of Rhoades's trial, the State put on testimony that Texas inmates convicted of capital murder but sentenced to life imprisonment are "eligible for furloughs"—the theory apparently being that the jury would be more likely to sentence Rhoades to death if it thought that sentencing him only to life imprisonment meant that he could take furloughs. Defense counsel objected, and the trial judge called for a bench

[16] *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978).

[17] *Kansas v. Marsh*, 548 U.S. 163, 175 (2006) ("In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here.").

[18] *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011).

conference to which the court reporter was evidently not invited; the record does not show what counsel said at the bench. At some point, the court reporter was summoned to the bench, whereupon defense counsel wrapped up his argument and the judge overruled any objection, noting "I don't know where your objection is in there."

Rhoades raised this point on his direct appeal to the CCA, but it found the objection not preserved because "he failed to object to the line of questioning with ample specificity to notify the trial court of his contention."[19] Because the CCA held any objection to the furlough testimony defaulted, it did not reach the merits.[20] Rhoades nonetheless raised this claim on state habeas. The state habeas court recognized that the CCA's procedural ruling barred Texas habeas review, but went on to rule, in the alternative, that "the applicant fails to show that such claims have merit." On federal habeas, the district court avoided the procedural-bar issue, choosing instead to reject this claim on the merits.

Rhoades seeks a COA to challenge the district court's determination that his challenge to the furlough testimony lacks merit. Texas maintains that the claim is both procedurally barred and should be rejected on the merits. We grant a COA for both the merits and procedural issues.

Merits

Capital defendants have the constitutional right to reliable sentencing proceedings,[21] which precludes the State from presenting false or misleading

[19] *Rhoades*, 934 S.W.2d at 127.

[20] *Id.*

[21] *See California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

evidence to the sentencing jury.[22] The merits issue is whether the state court's factual finding that the furlough testimony was *not* false or misleading was "an unreasonable determination of the facts."[23] We presume that finding to be correct, and Rhoades bears the burden of rebutting it by clear and convincing evidence.[24]

In support of this claim, Rhoades has offered evidence that, notwithstanding the nominal rule permitting Texas inmates serving a life sentence for capital murder to go on furlough, it was the *de facto* policy of the Texas Department of Criminal Justice ("TDCJ") not even to consider such inmates for any type of furlough. This evidence includes the affidavit of a TDCJ officer saying as much and the fact that at the time of Rhoades's trial, no Texas inmate serving a life sentence for capital murder had *ever* been granted a furlough of the kind that they are supposedly eligible for.

We find that Rhoades has made a substantial showing of the denial of a constitutional right and grant a COA on the merits of this claim. Telling the jury that its giving Rhoades a life sentence would qualify him for furloughs in order to make it more likely to give him a death sentence, when in reality he would never be considered for a furlough, raises serious questions about the reliability of Rhoades's sentencing determination.

Procedural Bar

The district court opted to reach the merits of Rhoades's furlough-testimony claim, but Texas insists that we should deny a COA because it is procedurally barred as a result of the CCA's holding. The unique procedural posture of this claim gives rise to some ambiguity. The Texas CCA denied it

[22] *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) ("[W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been [misled.]").

[23] 28 U.S.C. § 2254(d)(2).

[24] *Id.* § 2254(e)(1).

solely on state procedural grounds, the contemporaneous-objection rule, and made no mention of the merits.[25] Then the state habeas court acknowledged the CCA's holding as a bar to state habeas review, but reached the merits anyway as an alternative holding.

"When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court."[26]

> State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.[27]

Here, it appears that the Texas CCA created a procedural bar to federal habeas review of Rhoades's furlough-testimony claim.[28] However, it is not clear whether the state habeas court's subsequently reaching the merits as an alternative holding "removes any bar to federal-court review that might otherwise have been available."[29] We grant a COA on this issue.

3.

Rhoades's third claim is that the trial court unconstitutionally prevented him from informing the jury, if it sentenced him to life in prison instead of death, how long he would be imprisoned before becoming eligible for parole. In Texas at the time that Rhoades was convicted and sentenced, inmates

[25] *Rhoades*, 934 S.W.2d at 127.

[26] *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977)).

[27] *Id.* (citing *Harris v. Reed*, 489 U.S. 255, 262 (1989)).

[28] *See Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999) (stating that Texas's contemporaneous-objection rule is an "independent and adequate state-law procedural ground sufficient to bar federal court habeas review of federal claims" (quoting *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995))).

[29] *See Ylst*, 501 U.S. at 801.

convicted of capital murder but sentenced to life imprisonment would be eligible for parole after thirty-five years.[30] Prior to jury selection, the State moved in limine to prevent Rhoades from informing the jury of that fact—the theory being that the jury might feel more comfortable imposing a life sentence if the defendant's incarceration were guaranteed for thirty-five years. The trial court granted that motion. Rhoades's jury never knew about the parole implications of choosing a life sentence over a death sentence.

On direct appeal, the Texas CCA affirmed based on state precedent.[31] Judge Overstreet dissented, penning a thorough analysis of why the CCA's ruling misapplied federal law.[32] The district court rejected this challenge on the merits. It noted that several capital habeas petitioners prior to Rhoades had made the same argument for the extension of *Simmons* to Texas's pre-2005 parole eligibility scheme,[33] but that the Fifth Circuit rejected them all.

The Supreme Court said in *Simmons v. South Carolina* that when a capital defendant sentenced to life in prison will *never* be eligible for parole under state law, the jury must be informed of that fact.[34] Rhoades seeks to extend that reasoning to Texas's parole scheme as it existed at the time of his conviction, which forbade parole for thirty-five years for capital defendants sentenced to life in prison. Rhoades's argument is foreclosed by circuit precedent. In *Kinnamon v. Scott*, the habeas petitioner "assert[ed] constitutional error in his inability to argue to the jury in sentencing that if spared the death penalty [he] would be required to serve a minimum of 20

[30] *Rhoades*, 934 S.W.2d at 128.

[31] *Id.* (citing *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995) and *Broxton v. State*, 909 S.W.2d 912 (Tex. Crim. App. 1995)).

[32] *Id.* at 131-44 (Overstreet, J., dissenting).

[33] In 2005, Texas eliminated the possibility of parole for capital defendants sentenced to life in prison. Tex. Code. Crim. P. art. 37.071 § 2(g).

[34] 512 U.S. 154, 162-64 (1994).

calendar years without good time before becoming eligible for parole."[35] He "rest[ed] this claim upon *Simmons v. South Carolina*," just as Rhoades does.[36] We said "we would not extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole."[37]

Because Rhoades's claim 3 challenge is foreclosed, jurists of reason would not debate the district court's resolution of it. We deny a COA on claim 3.

4.

Rhoades's fourth claim is that he was denied effective assistance of trial counsel. To demonstrate a claim of ineffective assistance of trial counsel under *Strickland v. Washington*, the defendant must show both that counsel rendered deficient performance and that counsel's actions resulted in actual prejudice.[38] To demonstrate deficient performance, the defendant must show that, in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness" as measured by "prevailing professional norms."[39] There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[40] Trial counsel's strategic decisions must be given a strong degree of deference.[41] On habeas review, if there is any "reasonable argument that counsel satisfied *Strickland*'s deferential standard," the state court's denial must be upheld.[42] Therefore, the question is whether jurists of

[35] 40 F.3d 731, 733 (5th Cir. 1994).
[36] *See id.*
[37] *Kinnamon*, 40 F.3d at 733. *See also Montoya v. Scott*, 65 F.3d 405, 416-17 (5th Cir. 1995).
[38] 466 U.S. 668, 687 (1984).
[39] *Id.* at 687-88.
[40] *Id.* at 689.
[41] *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993).
[42] *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

reason would debate the district court's resolution of this claim in light of these standards.

To demonstrate prejudice under *Strickland*, Rhoades must show that counsel's deficient performance was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable."[43] This requires the showing of a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different.[44] Rhoades alleges two instances of ineffectiveness: first, in failing to object to a portion of the prosecutor's closing argument that he claims was an impermissible comment on his failure to testify; and second, in failing to object to other-bad-act evidence during the guilt/innocence phase of trial.

Comment on Failure to Testify

Rhoades did not testify at trial. During the prosecutor's closing argument, she said:

> When you talk about whether one intentionally killed, it doesn't mean he had to enter that house with the intent to kill. In fact, I mean, why he went into the house? Why he killed those two young men? I know we would all love to know. Ask Mr. Stafford to tell you why he would do a thing like that.

"Mr. Stafford" was Rhoades's trial defense counsel. Counsel did not object that the prosecutor's comment was an impermissible reference to Rhoades's failure to testify.[45]

Rhoades argued in his state habeas application that his trial defense counsel's failure to object that those comments were an impermissible reference to his failure to testify constituted ineffective assistance of trial

[43] *Strickland*, 466 U.S. at 687.

[44] *Id.* at 694.

[45] Defense counsel did object that some of the statements were unsupported by the evidence, but that objection was overruled.

counsel, but the state habeas court denied that claim. The district court found that the prosecutor's comment was not a comment on Rhoades's failure to testify, so Rhoades's trial counsel was not ineffective for failing to have objected to it.

"[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[46] "[T]he test for determining whether the prosecutor's remarks were constitutionally impermissible is: (1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence."[47] Rhoades does not rely on the first prong of that test, opting instead to argue that the prosecutor's "ask Mr. Stafford to tell you" comment would naturally and necessarily be construed by the jury as a comment on the defendant's silence.

Rhoades has not made a substantial showing of the denial of a constitutional right on this portion of his ineffective-assistance-of-counsel claim. Counsel is not ineffective for failing to raise an unmeritorious objection. The prosecutor's argument explicitly referred to and invited defense *counsel* to respond to her challenge, not Rhoades himself. This rhetorical flourish does not foul the Fifth Amendment.[48] Rhoades has presented us with no colorable argument that the jury would *naturally* and *necessarily* construe the remark as a comment on Rhoades's failure to testify. We deny a COA on this portion of Rhoades's ineffective-assistance-of-counsel claim.

Other-Bad-Act Evidence

[46] *Griffin v. California*, 380 U.S. 609, 615 (1965).

[47] *United States v. Bohuchot*, 625 F.3d 892, 901 (5th Cir. 2010) (quoting *United States v. Grosz*, 76 F.3d 1318, 1326 (5th Cir. 1996)).

[48] *Rivera v. Collins*, 934 F.2d 658, 661 (5th Cir. 1991).

A month after Rhoades committed the murders for which he was convicted, he was arrested for burglarizing a school. While in custody for that offense, he confessed to the murders. During that confession, Rhoades also detailed other crimes and bad acts, such as other burglaries and auto thefts. Defense counsel did not object to the references to Rhoades's burglarizing a school or prior burglaries and auto thefts. In fact, defense counsel specifically told the prosecutor and the trial court that he was taking a "let it all hang out approach," with no intent to object to any of the prior acts.

Rhoades argued in his state habeas petition that failure to object to these other bad acts was ineffective assistance of counsel. Rhoades's trial counsel submitted affidavits in which they explained that their primary trial strategy was to save Rhoades's life.

> Not only did we not object to this [other-bad-act] evidence, we told the jury of these facts in our opening statement. As previously stated, from the outset this was primarily a case to save [Rhoades's] life. Our prominent focus was on punishment. As a part of the trial strategy, we decided to let the jury know of these very aggravating facts early on in an attempt to "de–sensitize" them. We feared that if this information was heard for the first time at punishment, that the jury would find it difficult to give proper weight to all of our punishment evidence and would be so incensed that the death penalty would be nearly automatic. We had put substantial time and energy into developing evidence of [Rhoades's] tortured background, his medical, brain abnormality and the fact that he was non–violent in prison. We felt that if the jury learned of his prior arrest and parole immediately prior to our evidence, that this mitigation evidence would fall on deaf ears. In retrospect, I stand by that decision.

Under Texas Rule of Evidence 404(b), "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." The State here admits that the other-bad-act evidence was perhaps objectionable

under TRE 404(b), but points out the reasonableness of counsel's trial strategy not to object to the evidence and allow the jury to hear it early.

Rhoades has not made a substantial showing of the denial of a constitutional right on this portion of his ineffective-assistance-of-counsel claim. Our federal habeas review of a state court's denial of an ineffective-assistance-of-counsel claim is "doubly deferential" because we take a highly deferential look at counsel's performance through the deferential lens of § 2254(d).[49] "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[50]

> Counsel . . . may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course.[51]

Rhoades presents us with no colorable argument that the state court's finding defense counsel's trial strategy reasonable was unreasonable. We also deny a COA on this portion of Rhoades's ineffective-assistance-of-counsel claim.

5.

Rhoades's fifth and final claim is that the prosecutor violated *Batson* by using peremptory strikes against two black jurors. Rhoades himself is white, but the defendant need not be in the same protected class as stricken jurors to raise *Batson*.[52] Under the rule established by *Batson v. Kentucky*, peremptory strikes may not be racially motivated.[53] Proof of a *Batson* violation proceeds in three steps: first, the defendant must make a prima facie case of racial

[49] *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

[50] *Strickland*, 466 U.S. at 690.

[51] *Florida v. Nixon*, 543 U.S. 175, 191 (2004).

[52] *Powers v. Ohio*, 499 U.S. 400, 410-16 (1991).

[53] 476 U.S. 79, 85 (1986).

discrimination in connection with the prosecutor's use of a peremptory strike.[54] Then the burden shifts to the State to come forward with a race-neutral explanation for exercising the strike.[55] The prosecutor's explanation "need not rise to the level justifying exercise of a challenge for cause."[56] Finally, the burden shifts back to the defendant to "establish[] purposeful discrimination."[57]

At the third step, the defendant may rely on "all relevant circumstances" to show purposeful discrimination.[58] "[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.'"[59]

A state court's *Batson* ruling is a finding of fact that we afford a presumption of correctness unless the petitioner rebuts it with clear and convincing evidence.[60] Therefore, the question is whether jurists of reason would debate the district court's resolution of this claim in light of these standards. Rhoades challenges his prosecutor's use of peremptory strikes with respect to two potential jurors: Berniece Holiday and Gregory Randle.

Berniece Holiday

One of Rhoades's prospective jurors was Berniece Holiday, a black woman. The prosecutor exercised one of her peremptory strikes to dismiss Ms.

[54] *Id.* at 96-97

[55] *Id.* at 97. When the state trial court called on the government to provide race-neutral justifications, we assume that the defendant satisfied his or her initial burden. *United States v. Webster*, 162 F.3d 308, 349 (5th Cir. 1998).

[56] *Batson*, 476 U.S. at 97.

[57] *Id.* at 98.

[58] *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Batson*, 476 U.S. at 96-97).

[59] *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003) (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)).

[60] 28 U.S.C. § 2254(e)(1); *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

Holiday, then Rhoades immediately objected under *Batson*. The trial court found that Rhoades could not establish a prima facie case of racial selection, but ordered the State to offer race-neutral reasons for striking the prospective juror anyway "[o]ut of an abundance of caution."

The prosecutor offered several race-neutral reasons for using her strike. As summarized by the Texas CCA on direct appeal:

> (a) Holiday "dozed off" during the State's group voir dire examination; (b) Holiday's answers were very succinct, in a way which demonstrated a lack of candor; (c) Holiday only answered three of seventeen questions on a particular page of her juror questionnaire; (d) Holiday's facial expressions led the prosecutor to believe that she was saying what she believed the prosecutor wanted to hear; (e) Holiday was an elementary school teacher and might identify too closely with evidence of [Rhoades]'s difficult childhood; (f) Holiday indicated, with a tone of pride, that, while previously serving on a jury, she "set free" the defendant; (g) Holiday had a first cousin who was in prison.[61]

After giving the defense a chance to respond, the trial court denied the *Batson* challenge. The Texas CCA affirmed, saying that "Appellant's showing of purposeful discrimination was minimal[,] [t]he State's race-neutral explanations were not whimsical, . . . and the record does not reflect that the State demonstrate a disparate pattern of strikes against any suspect class."[62] The district court ruled: "Given the numerous race-neutral reasons proffered by the State, Rhoades' weak showing of disparate questioning, and the absence of any meaningful evidence of discriminatory intent, the Court finds that Rhoades has not met his AEDPA burden with regard to Ms. Holiday."

We are persuaded that Rhoades has made a substantial showing of the denial of a constitutional right in connection with the strike of this prospective

[61] *Rhoades*, 934 S.W.2d at 124.
[62] *Id.*

juror. Rhoades cites significant evidence that Ms. Holiday was a strong juror for the prosecution, but that she was treated differently than the white jurors questioned before her. She said that she was "strongly in favor of the death penalty." Rhoades points out that the prosecutor questioned her more extensively than the previous, white jurors. He also notes that the prosecutor's proffered race-neutral reasons for striking Ms. Holiday are unsupported by the record. We find this claim at least debatable, and we grant a COA.

Gregory Randle

The prosecutor also exercised one of her peremptory strikes against Gregory Randle, a black man, and Rhoades again objected under *Batson*. The trial court asked the prosecutor to state her race-neutral reasons for exercising the strike, and she did so. As summarized by the Texas CCA on direct appeal:

> (a) Randle had a brother in prison, and although Randle had visited him recently, Randle professed that he did not know what crime his brother committed. The prosecutor professed that she was concerned Randle was being disingenuous, and down-playing the effect his relationship with his brother would have on him; (b) Randle vacillated on the kind of evidence he would require to find future danger. Although this vacillation was not legally sufficient to subject Randle to a challenge for cause, he nevertheless occasionally articulated that he would prefer evidence of past violent behavior to find future danger (the State had no evidence of past violent behavior); (c) Randle indicated during voir dire that he thought the death penalty was wrong, although he conceded that it might be necessary for some crimes.[63]

The trial court found that the prosecutor had struck the prospective juror for race-neutral reasons. The Texas CCA affirmed.[64] The federal district court concluded that "Rhoades has not shown that the state courts were unreasonable in their assessment of the State's peremptory strike against

[63] *Id.* at 124-25.
[64] *Id.* at 125.

Gregory Randle." We are persuaded that Rhoades has made a substantial showing of the denial of a constitutional right. Like Ms. Holiday, Mr. Randle articulated a pro-prosecution perspective. He said he would not insist on evidence of motive to impose a death sentence. The prosecutor cited, as one of her race-neutral reasons for striking Mr. Randle, that he had a brother in prison; but other white jurors who went unchallenged by the State also had family members in prison. Rhoades also points out that Mr. Randle never actually made one of the statements that the prosecutor cited as a reason for striking him. Taken together, we find this evidence to be a substantial showing of the denial of a constitutional right under *Batson*. We grant a COA.

III.

In sum, we grant a COA on Rhoades's claims 1, 2, and 5 for habeas relief involving the exclusion of mitigating photographs, the admission of furlough testimony, and two *Batson* challenges. We deny a COA on Rhoades's claims 3 and 4 involving ineligibility for parole and ineffective assistance of counsel.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Rick Allan Rhoades,	§	
	§	
Petitioner,	§	
	§	
VS.	§	Civil Action No. 14-3152
	§	
Lorie Davis,[1]	§	
Director, Texas Department of	§	
Criminal Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

A jury convicted Rick Allan Rhoades of capital murder and he was sentenced to death in 1992. After unsuccessfully availing himself of Texas' appellate and post-conviction remedies, Rhoades now seeks federal habeas corpus relief. Respondent Lorie Davis has moved for summary judgment. (Docket Entry No. 26). The Court has thoroughly examined the record in this case, including the state court pretrial, trial, appellate, and habeas proceedings. Based on this review and the application of governing legal authorities – giving special consideration to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") – the Court grants

[1] Effective May 1, 2016, Lorie Davis replaced William Stephens as the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice. Pursuant to Rule 25 of the Federal Rules of Civil Procedure, Davis "is automatically substituted as a party." FED.R.CIV.P. 25(d).

the pending summary judgment motion, denies federal habeas relief, and dismisses this case. This Court will not certify any issue for review by the Court of Appeals for the Fifth Circuit.

BACKGROUND

On September 13, 1991, a neighbor discovered the bodies of brothers Bradley and Charles Allen in the home they shared. Both men had been beaten and stabbed. For weeks, the police did not have any information about who killed the men.

A few weeks later, the police arrested Rhoades as he left a school that he had burglarized. Rhoades initially gave the police a false name. While in jail, Rhoades indicated that he wanted to confess to the murder of the two brothers. Rhoades provided the police a statement that served as the backbone of the capital murder prosecution against him.

In his police statement, Rhoades said that he had been released from prison in Huntsville, Texas fewer than twenty-four hours before the murders. Rhoades took a bus to Houston rather than report to his assigned halfway house. Rhoades described how he spent that day wandering around a neighborhood where he once lived, drinking beer and looking for acquaintances. As Rhoades wandered around through the streets in the early morning hours, he saw Charles Allen outside of his home. A verbal confrontation ensued, and Charles entered his house. Thinking that Charles was going to retrieve a gun, Rhoades followed him inside. When the men began fighting, Rhoades hit Charles with a metal bar and stabbed him repeatedly with a

knife. When Bradley Allen entered the room and tried to throw punches, Rhoades turned on him. As the two men fought, Rhoades repeatedly stabbed Bradley. Rhoades eventually left the home, stealing clothing and cash. He could hear one of the men gurgling when he left. Rhoades later saw a television news report that both men had died.[2]

The State of Texas indicted Rhoades on two counts of capital murder for killing either (1) during the course of a burglary or (2) for killing twice in the same criminal transaction. Clerk's Record at 5. The trial court appointed counsel to represent Rhoades.[3]

With Rhoades' detailed confession, no question existed about his identity as the killer. The prosecution bolstered its case against Rhoades with forensic evidence, such as blood found on the kitchen floor of the Allens' house that matched Rhoades' DNA pattern. Also, a latent print examiner testified that bloody prints found at the crime scene matched Rhoades' feet. Blood found at the place where Rhoades had

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[2] On state habeas review, Rhoades submitted an affidavit providing a different explanation for his crime. According to Rhoades' affidavit, he sold one of the victims five pounds of marijuana in 1990. The victim gave Rhoades only part of the money he owed, and the police arrested Rhoades before the victim could pay the remainder. When Rhoades was released from prison, he sought out the victim because he needed money. A confrontation ensued after the victim said he would not pay. As the fight escalated, Rhoades killed the two men much in the same manner as he confessed to the police. Rhoades explained that he did not take the stand to tell that story because he would have had to divulge that the murder had resulted from a drug transaction. State Habeas Record at 257-59.

[3] James Stafford and Deborah Kaiser represented Rhoades at trial. Unless necessary to identify one attorney, the Court will refer to the attorneys who represented Rhoades at trial collectively as "trial counsel."

cleaned up after the murders matched that of his victims. Given all the evidence, the State told jurors that the only question for them to consider was Rhoades' intent. Tr. Vol. 30 at 820-21. The State strenuously argued that any verbal provocation by the victims, as reported in Rhoades' confession, was insufficient to excuse his subsequent actions.

The defense's case focused on self-defense as a justification for the murders. The defense called two witnesses in the guilt/innocence phase. A police officer testified that, because nothing had been disturbed in the victims' house, the killer's motive did not appear to have been burglary. A forensic expert provided testimony about the blood spatter at the crime scene to bolster Rhoades' claim of self-defense. The jury found Rhoades guilty of capital murder.

Texas law determined Rhoades' sentence through the jury's answers to two special issue questions: whether Rhoades "would commit criminal acts of violence that would constitute a continuing threat to society" and whether "sufficient mitigating circumstance or circumstances [existed] to warrant that a sentence of life imprisonment." Clerk's Record at 294-95. The State presented testimony and evidence in the punishment phase that focused on Rhoades' lengthy history of legal difficulties and incarceration. Rhoades had previously received ninety days hard labor as a result of a Naval court-martial. Tr. Vol. 33 at 590-592. Rhoades had been imprisoned for burglary three times before. Rhoades had previously been convicted of felony theft of an automobile. After an incident when he had threatened to kill a

club bouncer, Rhoades was convicted for possessing a switchblade.

The prosecution also presented testimony that Rhoades had repeatedly performed bad acts and had engaged in numerous unadjudicated offenses. He had committed statutory rape. He had burglarized churches, homes, and farms. He was violent, obscene, and belligerent with others. He had repeatedly fled from the police. During arrests, Rhoades had previously threatened violence on police officers. Rhoades possessed weapons during previous incarcerations. He had given the police false names during prior arrests. He served time under an alias immediately before the murders for which he was convicted. Rhoades' behavior was poor during his incarceration before trial. For example, while in jail Rhoades told a detention officer: "I am going to have to shank me a deputy to get a little respect around here." Tr. Vol. 33 at 555.

An investigator with the special prosecution unit for the Texas prison system testified about the classification of prisoners. During his testimony, the investigator told jurors that a life-sentenced inmate may be eligible to receive a furlough. The prosecution also presented testimony about the effect that the two murders had on the victims' family.

The defense focused its punishment-phase efforts on Rhoades' "nonviolent nature and his ability to do well in a prison society." State Habeas Record at 470. A neuropsychologist testified that an EEG he ran on Rhoades indicated a major affective disorder, specifically a bipolar depressive disorder. Rhoades' biological

mother, Patricia Spenny, testified about his early childhood and the abuse he suffered at the hands of his biological father. His biological mother testified that she was tricked into giving him up for adoption while she was incarcerated and that she had not seen him since he was young. Rhoades' adoptive mother, Donna Rhoades, testified about his childhood, described the beginnings of his lawlessness, and expressed that she would always love him. The defense unsuccessfully tried to introduce into evidence photographs of Rhoades' childhood to accompany his mother's testimony. A person involved in a prison education program testified that, during a prior incarceration, Rhoades was valedictorian of his GED class. She described Rhoades as thriving in prison, suggesting that he would not be violent in the future. A psychologist, Dr. Windel Dickerson, gave his professional opinion that Rhoades would behave well in a structured environment. Dr. Dickerson testified that Rhoades' risk for committing violent acts would diminish with age.

The jury answered Texas' special issue questions in a manner requiring the imposition of a death sentence. Rhoades unsuccessfully litigated a motion for new trial based on the trial testimony about furlough. The Texas Court of Criminal Appeals affirmed Rhoades' conviction and sentence in a published opinion in 1996. *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App. 1996).

Rhoades filed an application for state habeas relief on August 18, 1997. The State filed an answer three years later. After over a decade of inaction, in 2012 the Court of Criminal Appeals entered an order for "the trial court to resolve the issues

in [Rhoades'] habeas application." After receiving proposed orders from the parties, the trial court entered findings of fact and conclusions of law recommending that the Court of Criminal Appeals deny relief. State Habeas Record at 547-97.

On October 1, 2014, the Court of Criminal Appeals entered an order adopting all the lower court's factual findings and all but one of its legal conclusions. On that record, the Court of Criminal Appeals denied habeas relief. *Ex parte Rhoades*, WR-78,124-01 (Tex. Crim. App. Oct. 1, 2014).

This Court appointed counsel to represent Rhoades on federal habeas review. Rhoades subsequently filed a federal petition for habeas corpus raising the following grounds for relief:

1. The trial court violated Rhoades' Fifth, Eighth, and Fourteenth Amendment rights by refusing to admit childhood photographs into evidence during the penalty phase.

2. Penalty-phase testimony regarding Rhoades's possible release on furlough if he were sentenced to life in prison violated his constitutional rights.

3. The trial court unconstitutionally denied Rhoades' request to inform jurors about the parole implications of a life sentence.

4. Trial counsel provided constitutionally ineffective assistance by not objecting to (a) comments allegedly implicating Rhoades' right not to testify and (b) guilt/innocence phase discussion of Rhoades' extraneous offenses.

5. The State exercised racially motivated peremptory strikes against two prospective jurors.

Respondent has filed an answer and an opposed motion for summary judgment.

(Docket Entry No. 26). Rhoades has not filed a reply, and the time to do so has passed. This matter is ripe for adjudication.

STANDARD OF REVIEW

The writ of habeas corpus provides an important, but narrow, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). "Society's resources have been concentrated at [a criminal trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977); *see also McFarland v. Scott*, 512 U.S. 849, 859 (1994) (stating that a "criminal trial is the 'main event' at which a defendant's rights are to be determined"). The States, therefore, "possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

How an inmate has litigated his claims determines the course of federal habeas adjudication. Under the exhaustion doctrine, AEDPA precludes federal relief on constitutional challenges that an inmate has not first raised in state court. *See* 28 U.S.C. § 2254(b)(1). As a corollary to exhaustion, the procedural-bar doctrine requires inmates to litigate claims in compliance with state procedural law. *See Dretke v. Haley*, 541 U.S. 386, 392 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A federal court may only review an inmate's unexhausted or procedurally barred claims if he shows: (1) cause

and actual prejudice or (2) that "a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent[.]'" *Haley*, 541 U.S. at 393 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

If the inmate has presented his federal constitutional claims to the state courts in a procedurally proper manner, and the state courts have adjudicated their merits, AEDPA provides for a deferential federal review. "[T]ime and again," the Supreme Court "has instructed that AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, 'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.'" *White v. Wheeler*, ___ U.S. ___, 136 S. Ct. 456, 460 (2015) (quoting *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013)). Under AEDPA's rigorous showing, an inmate may only secure relief after showing that the state court's rejection of his claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1),(2).[4] A federal habeas court must also

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[4] Inmates arguing legal error in state court decisions must comply with § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). A petitioner does not merit relief by merely showing legal error in the state court's decision. *See White v. Woodall*, ___ U.S. ___, 134 S. Ct. 1697, 1702 (2014) (stating being "merely wrong" or in "clear error" will not suffice federal relief under AEDPA). In contrast to "ordinary error correction through appeal," AEDPA review exist only to "guard against extreme malfunctions in the state criminal justice systems . . . ." *Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1376 (2015) (quotation omitted). "[F]ocus[ing] on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), AEDPA requires inmates to "'show that the state court's ruling on the claim (continued...)

presume the underlying factual determinations of the state court to be correct, unless the inmate "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

With those standards in mind, the Court turns to the issues presented in Rhoades' federal petition.

ANALYSIS

I. Admissibility of Childhood Photographs

In his first ground for relief, Rhoades claims that the trial court violated his constitutional rights by not allowing him to put into evidence photographs from his childhood. Rhoades called his adoptive mother, Donna Rhoades, to testify during the penalty phase of trial. Before Mrs. Rhoades took the stand, trial counsel tried to offer into evidence eleven photographs depicting Rhoades from about age four until about age ten. The photographs showed common childhood scenes such as Rhoades posing with family, fishing, and holding a trophy. Tr. Vol. 38, DX 6-16. The defense also argued that the photographs were a response to the State's punishment-phase

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[4] (...continued)
being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woodall*, 134 S. Ct. at 1702 (quoting *Richter*, 562 U.S. at 103); *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102. A petitioner challenging the factual basis for a state decision must show that it was an "unreasonable determination of the facts in light of the evidence . . . ." 28 U.S.C. § 2254(d)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

evidence.[5]

The State, however, objected that the defense's photographs of Rhoades' childhood were not relevant to the punishment hearing. The state argued that the photographs merely depicted something common to all mankind – childhood – and did "not go to any lessening of [Rhoades'] moral blameworthiness." Tr. Vol. 34 at 739. Trial counsel in turn responded that the jury

> should be able to see his development progress as he grew older and how he was functioning with his family. . . . These pictures may be the piece of evidence that would let them exercise that discretionary act of mercy and vote for life instead of death. That is a tool that you are taking away from me. The State has plenty of tools. I have very few. I think I am being denied due process under the United States Constitution by the Court's failure to let me introduce this material.

Tr. Vol. 34 at 740. The trial court found that the photographs were not relevant to the issues before the jury. Tr. Vol. 34 at 739.

Trial counsel, however, offered the photographs as a bill of exception to show that the trial court "is denying our effective assistance of counsel to be able to humanize my client and fully develop and show this jury what type of person he was

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[5] Trial counsel provided three reasons for introducing the photographs. First, trial counsel explained that the photographs were a response to those introduced by the State "throughout the dehumanizing stage of their punishment hearing, showing various photographs of [Rhoades] when he was arrested at the time of seventeen, eighteen, throughout, mug shots." Trial counsel also argued that the defense had a "right to show the human side of the defendant as much as the State has attempted to dehumanize and turn him into some sort of monster." Tr. Vol. 34 at 737. Finally, the defense argued that it would be "very unfair and very unjust" to deny admission of the photographs when the prosecution had "publicized very emotional pictures of the deceased and their family, [when] they had other non-emotional pictures available." Tr. Vol. 34 at 737. Trial counsel explained that the photographs would "aid the jury to understand the development of the defendant through his various stages of his life . . . ." Tr. Vol. 34 at 373.

as he was growing up." Tr. Vol. 34 at 740, 745. Testimony from Rhoades' mother did not explain any events related to, or otherwise describe the significance of, any of the photographs.[6]

Rhoades argues in his federal habeas petition that the trial court denied his rights under the Fifth, Eight, and Fourteenth Amendments by disallowing the introduction of his childhood photographs. The Constitution guarantees that a jury will make "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 972-73 (1994). The Constitution guarantees that a criminal defendant may present mitigation evidence relating to "any aspect of [his] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). The state courts recognized that the federal constitution prevents States from impeding a jury's consideration of all relevant mitigating evidence. *See Rhoades*, 934 S.W.2d at 125. Rhoades does not dispute that the state courts decided his challenge to the admissibility of the photographs under the correct constitutional standard. (Docket Entry No. 13 at 19-20). Rhoades,

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[6] Rhoades' mother testified about adopting Rhoades and his sister when he was four. She explained that Rhoades exhibited strange behavior when he came into their family. Tr. Vol. 34 at 753-55. Because he had problems with concentration, a doctor proscribed Rhoades ritalin. Tr. Vol. 34 at 757. Rhoades never got into fights, never had serious behavioral problems, and went to church with his family. Tr. Vol. 34 at 794. His mother described Rhoades as "very smart," "a very loveable kid," and as "very well loved." Tr. Vol. 34 at 784-85, 807. Only at about age fourteen did he begin to engage in criminal behavior. Tr. Vol. 34 at 758-59.

however, contends that the state courts unreasonably applied that federal law.

For federal relief to become available, Rhoades must show that the state court "correctly identifie[d] the governing legal rule but applie[d] that rule unreasonably to the facts of [his] case." *White v. Woodall*, ___ U.S. ___, 134 S. Ct. 1697, 1706 (2014). The Court of Criminal Appeals upheld the trial court's ruling because the photographs were irrelevant to Rhoades' moral blameworthiness and they held no relationship to his commission of the murders. *See Rhoades*, 934 S.W.2d at 126. The Court of Criminal Appeals relied on *Franklin v. Lynaugh*, 487 U.S. 164 (1988), in which a plurality of the Supreme Court remarked that it had "never suggested that sentencers be given – in the context of mitigation – 'unbridled discretion in determining the fates of those charged with capital offenses.'" *Id.* at 125. "The *Franklin* plurality recognized a relevance requirement to evidence bearing on the jury's mitigation determination." *Rhoades*, 934 S.W.2d at 126. The Court of Criminal Appeals quoted Justice Sandra Day O'Connor's concurrence in *Franklin* when demarcating the limits of relevancy:

> Indeed, Justice O'Connor provides further guidance to the issue of relevancy by placing a limit on the categories of evidence which are conceivably mitigating. She provides a prism with which to determine the relevance of proposed mitigating evidence: the culpability of the defendant. As she explained in *Franklin, supra*, and later in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989):
>
> > [E]vidence about the defendant's background and character is relevant because of the belief, long held in society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental

> problems, *may be less culpable than defendants who have no such excuse. Franklin, supra*, 487 U.S. at 184, 108 S.Ct. at 2333. [citing *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)] [emphasis added].
>
> To Justice O'Connor, the evidence is relevant because it relates to the moral culpability of a defendant's act. By this logic, if evidence has no relation to a defendant's moral culpability for the charged crime, then it is irrelevant to mitigation.

Id. at 125-26; *see also Pierce v. Thaler*, 604 F.3d 197, 206 (5th Cir. 2010) (acknowledging that the Supreme Court adopted Justice O'Connor's *Franklin* concurrence in later cases). With that, the Court of Criminal Appeals found that Rhoades' childhood photographs "ha[d] no relationship to [his] conduct" in committing "a violent double-murder." *Rhoades*, 934 S.W.2d at 126. Simply, "[t]hat [Rhoades] was once a child does not diminish his moral culpability for the act of murder." *Id.*[7]

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[7] The Court of Criminal Appeals began by interpreting the use of the term "mitigating" in Article 37.071, § 2(a) of the Texas Code of Criminal Procedure: "evidence mitigates against the imposition of the death penalty if a reasonable juror could conclude that the evidence was a basis for a sentence less than death" or of it "reduc[ed] the defendant's moral blameworthiness." *Rhoades*, 934 S.W.2d at 125 (quotations omitted). Under Texas law, if the evidence did not fit within that definition, "then a trial court would be within its discretion to exclude the evidence." *Id.* Citing applicable Supreme Court precedent, the Court of Criminal Appeals observed that a jury's "unbridled discretion in determining the fates of those charged with capital offenses" did not prevent a State from having a "role in structuring or giving shape to the jury's consideration of these mitigating factors." *Id.* (quotations omitted). The Court of Criminal Appeals found that "the culpability of the defendant" was the "prism with which to determine the relevance of proposed mitigating evidence," specifically with regard to "a defendant's moral culpability for the charged crime." *Id.* (quotations omitted). Applying that constitutional interpretation to the facts in this case, the Court of Criminal Appeals found that

> photographs of [Rhoades] which depict a cheerful early childhood are irrelevant to [his] moral blameworthiness for the commission of a violent double-murder because such evidence has no relationship to [his] conduct in those murders. That [he] was

(continued...)

On state habeas review, Rhoades renewed his challenge to the trial court's evidentiary ruling, but with a focus on the relationship between the photographs and the future-dangerousness special issue.[8] Attempting to bypass the Court of Criminal Appeals' link between moral culpability and mitigating evidence, Rhoades argued that the photographs from his childhood "showed the jury that he could adapt and conform in a structured society," thus indicating that he would not be a future societal danger. State Habeas Record at 34. The state habeas court found that, notwithstanding the exclusion of the photographs, "trial counsel were able to present mitigating evidence and to humanize [Rhoades] through punishment testimony concerning his childhood . . . ." State Habeas Record at 556. In contrast, the photographs did "not adequately inform the jury of his life." State Habeas Record at 556. Similar to the Court of Criminal Appeals' holding on direct review, the state habeas court found that the "childhood photos are not relevant to the issue of whether [Rhoades] would be a threat to society while living in a structured environment and do not show whether he would or would not commit future acts of violence." State

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[7] (...continued)
once a child does not diminish his moral culpability for the act of murder. Thus, we find no abuse of discretion on the part of the trial court in refusing to admit these photographs.

Rhoades, 934 S.W.2d at 125-26.

[8] Rhoades augmented the arguments he made on direct appeal with an affidavit from an expert who opined that the excluded photographs "would have shown Ricky Allen Rhodes was given normal experiences at a young age and participated in a normal family atmosphere." State Habeas Record at 253. The state habeas court found that affidavit "unpersuasive." State Habeas Record at 557.

Habeas Record at 556.

Rhoades argues that the Court of Criminal Appeals too narrowly focused its interpretation of relevant mitigating evidence on its relationship to his moral culpability, specifically involving the commission of the double murder. Rhoades contends that "the Supreme Court [has] explicitly acknowledged that mitigating evidence may inform the jury of something other than lessened moral culpability." (Docket Entry No. 13 at 20). Rhoades points to language from *Skipper v. South Carolina* in which the Supreme Court recognized that mitigating evidence may contain "inferences would not relate specifically to petitioner's culpability for the crime he committed" but for which "there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" 476 U.S. 1, 4-5 (1986) (quoting *Lockett*, 438 U.S. at 604). Rhoades states that "[e]vidence of happy, normal events during childhood can impact the moral-culpability question by showing the presence of normality and purity somewhere within the defendant's character and history." (Docket Entry No. 13 at 21).

The Fifth Circuit, however, has recognized extensive Supreme Court law since the *Skipper* case which refutes the argument "that it is unconstitutional to define mitigating evidence as evidence that reduces moral blameworthiness." *Blue v. Thaler*, 665 F.3d 647, 667 (5th Cir. 2011). After *Skipper*, the Supreme Court observed that its precedent relating to "relevant, mitigating evidence . . . leaves

unanswered the question: relevant to what?" *Franklin*, 487 U.S. at 179. While the Supreme Court has made "it clear that a State cannot take out of the realm of relevant sentencing considerations the questions of the defendant's 'character,' 'record,' or the 'circumstances of the offense,'" it has not held "that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors." *Id.* at 179. The Supreme Court has not usurped a trial court's "traditional authority . . . to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604, n.12; *see also Holiday v. Stephens*, 587 F. App'x 767, 784 (5th Cir. 2014); *Jackson v. Dretke*, 450 F.3d 614, 616-17 (5th Cir. 2006).[9] For instance, trial courts may exclude as irrelevant punishment-phase evidence such as that involving alleged innocence or residual doubt. *See Oregon v. Guzek*, 546 U.S. 517, 523-24 (2006); *Franklin*, 487 U.S. at 174 (plurality opinion). With regard to Texas, the Supreme Court has "focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability *for the crime*." *Brewer v. Quarterman*, 550 U.S. 286, 294 (2007) (emphasis added).

The state courts could reasonably conclude that the childhood photographs bore little, or no, relationship to Rhoades' character, record, or circumstances of the offense. The photographs merely showed that Rhoades had once been a child, and

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[9] Even "[i]n *Skipper*, the Supreme Court recognized that some evidence, such as how often the defendant will shower while in prison, is irrelevant to the sentencing scheme." *Smith v. Quarterman*, 515 F.3d 392, 412 (5th Cir. 2008).

possibly a happy one. The photographs, however, were not demonstrative of trial testimony, nor did they play a direct role in the decision jurors faced. The Texas courts were not unreasonable in deciding that the proffered photographs were not relevant to the matters the jury would consider in answering the special issues.

Respondent also contends that, relevance aside, any error by the trial court in not admitting the photographs was harmless. A habeas petitioner is not entitled to relief unless any error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also Fry v. Pliler*, 551 U.S. 112, 121 (2007). Rhoades wanted the photographs to evoke a sympathetic response from jurors, hoping that they would see his life worth saving. A reviewing court can only speculate what, untethered from any trial testimony about happiness in his childhood, the jurors would take away from viewing the photographs. The photographs could as easily work against the defense, highlighting the vast gulf between the apparently happy child Rhoades was and the double-murderer he became.

Even assuming that jury would respond to the photographs in a merciful manner, they would be only a small thread in an intricately violent mosaic of Rhoades' life. The evidence of the fierce and lawless person Rhoades was would vastly overwhelm weak and tentative inferences about the child he once had been. Respondent persuasively argues that "[a]ny mitigating value that the photographs might have had would be undone by the aggravating nature of evidence showing that

Rhoades engaged in extensive criminal activity and committed the instant brutal double-murder despite having been afforded a loving adoptive family." (Docket Entry No. 26 at 38). Under both the AEDPA and harmless-error standards, the Court will deny Rhoades' first ground for relief.

II. Possible Release on Furlough

Rhoades' second claim argues that the State violated his Eighth Amendment right to reliable sentencing proceedings by adducing testimony about the possibility of furlough that accompanies a life sentence. Because "[t]he Supreme Court has . . . made it clear that capital sentencing decisions cannot be predicated on caprice or factors that are constitutionally impermissible or totally irrelevant to the sentencing process," (Docket Entry No. 10 at 29) (citing *Zant v. Stephens*, 462 U.S. 862, 884-885, 887 n. 24 (1983)), Rhoades contends that testimony concerning furlough allows the jury to speculate about factors irrelevant to the sentencing decision. Rhoades must show that the state court's rejection of his arguments was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

A. Background

The issue of furlough came before the jury during the testimony of Roy Smithy, an investigator with the special prosecutions unit that investigates offenses committed in the Texas prison system. When asked if an inmate convicted of capital murder but sentenced to life in prison could "get furloughed," Tr. Vol. 35 at 1024, Mr. Smithy answered that such a prisoner "is eligible for furloughs" under certain circumstances.

Tr. Vol. 35 at 1024. As the prosecutor began to develop this line of questioning, the defense objected. The trial court held an off-the-record bench conference in which the trial court allowed testimony about furlough to proceed. Tr. Vol. 35 at 1037.

Over the defense's objection, Mr. Smithy described for jurors what furlough means:

> A furlough is when an inmate is allowed to leave the prison unit unescorted to attend whatever reason it is that he has requested to leave the unit, things such as funeral, family emergency and things of that sort where he, in essence, signs a piece of paper that says that he is going to be released a certain time and that he will go to wherever this emergency is and that he promises that he will be back and turn himself back into the unit.

Tr. Vol. 35 at 1038. On cross-examination, Mr. Smithy explained that the prison warden, not the parole board, has discretion to allow a furlough. Mr. Smithy testified that he had never heard of a life-sentenced capital murderer receiving a furlough. Tr. Vol. 35 at 1042-43.

The prosecution did not mention the issue of furlough during closing arguments. The defense, however, reminded jurors that Mr. Smith had said that no inmate convicted of capital murder had ever been released on furlough. The defense pleaded with jurors not to let the prosecution "play to your emotions on that issue." Tr. Vol. 39 at 50-51.

Rhoades unsuccessfully initiated his constitutional challenge to the furlough issue in a motion for new trial. In response, the State submitted administrative records showing that, while an inmate convicted of capital murder would be ineligible

for an "appropriate reason furlough," he could still receive an "emergency furlough." Tr. Vol. 40 at 23. The trial court denied the motion for a new trial. Tr. Vol. 40 at 27.

When Rhoades renewed his challenge on direct appeal, the Court of Criminal Appeals found that trial counsel did not adequately object at trial. Because trial counsel "failed to object to the line of questioning with ample specificity to notify the trial court of his contention," the Court of Criminal Appeals found that Rhoades' "complaint regarding the State's questioning is waived for failure to object with specificity." *Rhoades*, 934 S.W.2d at 127. The Court of Criminal Appeals accordingly did not address the merits on direct appeal.

On state habeas review, Rhoades argued that the testimony rendered his sentence arbitrary and capricious, violated the separation of powers, denied him due process, precluded reliable sentencing, and was materially false or misleading. In addition, Rhoades claimed that trial counsel provided ineffective representation by not objecting to the furlough testimony. Rhoades submitted evidence showing that it was unlikely that a life-sentenced inmate would ever receive a furlough. State Habeas Record at 260-62.

In the habeas proceedings, trial counsel provided an affidavit attesting that during the unrecorded bench conference he "loudly and stridently object[ed]" in a "very heated, animated discussion . . . ." State Habeas Record at 319-20. As a result, the state habeas court provided two different conclusions about the procedural status of Rhoades' furlough-testimony claim. The state habeas court first acknowledged the

procedural bar imposed on direct appeal and decided that Rhoades "is procedurally barred from advancing his habeas claims concerning Roy Smithy's testimony about prison furloughs." State Habeas Record at 581. The state habeas court, however, also concluded "[i]n the alternative, based on trial counsel's habeas assertion that counsel specifically objected to the furlough testimony during an unrecorded bench conference, [Rhoades] is not procedurally barred from presenting his habeas claims . . . ." State Habeas Record at 581.

The state habeas court considered the merits of Rhoades' furlough-testimony claim in the alternative, finding no constitutional violation. Specifically, the state habeas court found that the trial testimony was not false because "Smithy did not testify that [Rhoades] would be granted a furlough; instead, Smithy's testimony was about the furlough process in general." State Habeas Record at 559. Relying on "a 1987 administrative directive concerning furlough procedures that stated an inmate convicted of capital murder would be eligible for an emergency furlough but not eligible for an appropriate-reason furlough," the state habeas court noted that "temporary furloughs were available to prison inmates and capital murderers serving a life sentence were not excluded in the provision." State Habeas Record at 560.[10] Thus, Mr. Smithy's testimony "was not false or misleading," "did not prevent

[10] The state habeas court found that "the only difference between Smithy's testimony and the prison administrative directive is the person or entity who makes the decision to grant a furlough, i.e., the State Classification Committee or warden, and that this administrative difference does not affect the substance of Smithy's testimony about capital murderers serving life sentences being eligible for furlough and is not 'materially misleading.'" State Habeas Record at 561.

[Rhoades'] jury from considering and giving effect to relevant mitigating evidence," and "did not render [Rhoades'] sentence of death arbitrary and capricious." State Habeas Record at 561.

Rhoades' federal habeas petition renews his challenge to the trial testimony about the possibility of furlough. Before turning to the merits of his arguments, the Court must consider Respondent's argument that a procedural bar prevents federal review.

B. Procedural Bar

Respondent now argues a the procedural bar forecloses federal review. Rhoades responds that the state courts erred in procedurally barring his claims because trial counsel objected, although off the record. (Docket Entry No. 13 at 28-29). A "'basic tenet of federal habeas review is that a federal court does not have license to question a state court's finding of procedural default, if based upon an adequate and independent state ground.'" *Smith v. Johnson*, 216 F .3d 521, 523 (5th Cir. 2000) (quoting *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995)); *see also Rowell v. Dretke*, 398 F.3d 370, 375 (5th Cir. 2005) ("[i]t is not the role of the federal habeas court to reexamine state-court determinations of state-law questions."). In such a circumstance, "[t]he federal court may only inquire into whether cause and prejudice exist to excuse that default, not into whether the state court properly applied its own law." *Barnes*, 58 F.3d at 974. However, a federal court may bypass a procedural-bar argument when the claim can be "resolved more easily by looking past

any procedural default." *Busby v. Dretke*, 359 F.3d 708, 720 (5th Cir. 2004); *see also Roberts v. Thaler*, 681 F.3d 597, 605 (5th Cir. 2012) ("While our normal procedure is to consider issues of procedural default first, we may nonetheless opt to examine the merits first . . . ."). Given the contested record regarding the defense's trial objection, the Court will address the state habeas court's alternative merits review.

C. The Merits

Rhoades asserts that testimony about furlough allowed jurors "unfettered discretion to speculate about whether prison officials would grant Rhoades a furlough if given a life sentence—a matter totally irrelevant to the capital sentencing process." (Docket Entry No. 13 at 30). According to Rhoades, "[t]his produced an arbitrary and capricious sentencing determination of the type specifically condemned by the Supreme Court since *Furman v. Georgia*, 408 U.S. 238 (1972)." (Docket Entry No.13 at 30).[11] However, Rhoades has failed to show that the state court's rejection of his challenges to the furlough testimony were contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

Rhoades contends that jurors considered the question of furlough important to their deliberations. (Docket Entry No. 13 at 28). The state habeas court, however,

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[11] Rhoades particularly draws comparison to *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), a case in which the Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." The *Simmons* Court reasoned that "[t]he State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at 171.

found "unpersuasive the assertion that [his] jury probably considered and speculated as to whether [Rhoades] would receive a furlough." State Habeas Record at 561. Under AEDPA's deferential standards, this Court must consider that finding to be correct unless Rhoades adduces clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(2). Rhoades has not put forth any evidence that the possibility of furlough was important to jury deliberations. Rhoades has not undercut the state court's rejection of his arguments "based on [Rhoades'] unsupported contention that [his] jury speculated or probably considered whether [he] would be granted a furlough." State Habeas Record at 582.

With that speculative foundation, the state courts emphasized that, while not a likely occurrence, Texas law did not preclude life-sentenced capital inmates from furlough eligibility. The record verifies that only extremely limited circumstances exist in which a life-sentenced capital inmate may receive a furlough. In fact, Respondent does not dispute Rhoades' argument that no such inmate has yet received a furlough. Still, the state courts found that the challenged trial testimony was not false because a small chance of furlough remained available. *See Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997) (stating that a due process violation from false or misleading testimony only when the witness's testimony was actually false). Trial counsel ameliorated the impact of the testimony through cross-examination showing that it was unlikely that Rhoades would ever be released on furlough. Tr. Vol. 35 at 1042-43.

Still, the Supreme Court has not precluded States from presenting factually correct, yet unlikely, testimony relating to furlough. In fact, the Supreme Court has stated that "nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release." *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994); *cf. California v. Ramos*, 463 U.S. 992, 1001-02 (1983) (finding "unpersuasive the suggestion that the possible commutation of a life sentence must be held constitutionally irrelevant to the sentencing decision and that it is too speculative an element for the jury's consideration"). Because Rhoades has not shown that the state court's rejection of this claim was contrary to, or an unreasonable application of, federal law, *see* 28 U.S.C. § 2254(d)(1), the Court will deny relief.

III. Parole Implications of a Life Sentence

Rhoades' third ground for relief complains that the trial court violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by not allowing jurors to know about the period of time before he would be eligible for parole if given a life sentence. At the time of Rhoades' trial, Texas law provided that an inmate receiving a life sentence after a capital conviction would not be eligible for parole until he had served thirty-five years.[12] The State filed a pre-trial motion in limine asking the trial court to preclude witnesses and attorneys from discussing "[t]he length of time

[12] In 2005, Texas revised its capital sentencing statute. Capital defendants in Texas state court now face two possible sentences: (1) the death penalty or (2) a sentence of life imprisonment without the possibility of parole. TEX. CODE CRIM. PRO. art. 37.071 § 2(g).

[Rhoades] will be imprisoned before becoming eligible for parole if assessed a life sentence for the offense of capital murder." Clerk's Record at 146. On June 23, 1992, the trial court granted the State's motion in limine. Clerk's Record at 146. Nonetheless, in a pre-trial hearing the defense argued that jurors would be more likely to vote for a life sentence if they knew that the defendant would not be eligible for parole for thirty-five years. Tr. Vol. 3 at 39-49. The trial court stated: "It's clear what the law is[:] . . . .parole is not a proper consideration for jury deliberation on punishment in a capital murder trial." Tr. Vol. 3 at 47.

Trial counsel requested permission to discuss parole law during the voir dire of some prospective jurors. Trial counsel later unsuccessfully renewed his motion "to inform the jury of the thirty-five-year rule as far as parole is concerned." Tr. Vol. 27 at 19; *see also* Tr. Vol. 29 at 4-5. The trial court instructed jurors in the penalty phase: "During your deliberations you are not to consider or discuss any possible action of the Board of Pardons and Paroles Division of the Texas Department of Criminal Justice or of the Governor or how long the Defendant would be required to serve to satisfy a sentence of life imprisonment." Clerk's Record at 291-92.

On both state direct appeal and habeas review, Rhoades challenged the lack of parole information, relying heavily on *Simmons v. South Carolina*, 512 U.S. 154 (1994). Under *Simmons*, due process guarantees a right to inform sentencing juries about parole if two conditions are met: (1) "jurors should consider the defendant's future dangerousness when determining the proper punishment" and (2) "a capital

defendant was ineligible for parole under state law." *Lynch v. Arizona*, ___ U.S. ___, 136 S. Ct. 1818, 1819 (2016). The Court of Criminal Appeals found, as it had previously in numerous cases, that *Simmons* did not govern because "life without parole was not a sentencing option . . . unlike . . . in *Simmons*[.]" State Habeas Record at 562. On those grounds, the state courts denied relief. State Habeas Record at 583.[13]

On federal review, Rhoades argues that the Court of Criminal Appeals unreasonably applied federal law under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the trial court left the jury to speculate about the possibility of parole. Rhoades also asserts that his jury could not consider mitigating evidence relating to the low possibility that he would be a threat. Focusing on the due process and cruel and usual punishment clauses,[14] Rhoades argues that the lack of a "life-

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[13] On direct appeal, Rhoades raised several complaints about the prohibition on parole information: (1) the denial infringed on his ability to use peremptory challenges effectively; (2) trial counsel could not perform effectively without informing jurors of parole eligibility; (3) the State presented jurors with false information about parole; and (4) Texas law violated due process and equal protection by not allowing discussion of parole. The Court of Criminal Appeals held that Rhoades did not adequately brief his second argument relating to the performance of counsel. Also, the court held that Rhoades had not preserved error with regard to his third argument. The Court of Criminal Appeals relied on its precedent to deny the merits of his first and fourth arguments. On state habeas review, Rhoades again complained that the absence of information about "the true parole implications of a life sentence" violated his Eighth and Fourteenth Amendment rights, particularly under *Simmons v. South Carolina*, 512 U.S. 154 (1994). State Habeas Record at 100.

[14] To the extent that Rhoades continues to rely on the remaining constitutional arguments, the Court of Criminal Appeals' decision relating to the second and third arguments he made on direct appeal procedurally bar federal review. At any event, for the reasons discussed at greater length above, the Constitution does not require the court or parties to inform Texas juries about parol eligibility, and any holding to the contrary would require the creation of new constitutional law.

without-parole option in [his] trial . . . is not a relevant distinction" that would prevent *Simmons* from applying. (Docket Entry No. 13 at 32). The Supreme Court, however, has clarified that *Simmons* only applies to a capital sentencing scheme that provides for life without the possibility of parole. *See Ramdass v. Angelone*, 530 U.S. 156, 166-69 (2000). In *Simmons* itself, the Supreme Court specifically cautioned that, "[i]n a State in which parole is available," it would "not lightly second-guess a decision whether or not to inform a jury of information regarding parole." 512 U.S. at 168. The *Simmons* Court "expressly held that its ruling did not apply to Texas, because it does not have a life-without-parole alternative to capital punishment." *Tigner v. Cockrell*, 264 F.3d 521, 525 (5th Cir. 2001) (citing *Simmons*, 512 U.S. at 168 n.8).

In essence, Rhoades' federal claim is fundamentally similar to those Texas inmates have repeatedly brought in trying to apply *Simmons* to Texas' former capital procedure. The Supreme Court has not, however, extended the *Simmons* holding to States like Texas where an inmate is eligible for parole. *Ramdass*, 530 U.S. at 166. On that basis, the Fifth Circuit has consistently and unconditionally ruled that Texas has no constitutional obligation to inform its juries of a defendant's future parole eligibility. *See Cantu v. Quarterman*, 341 F. App'x 55, 59 (5th Cir. 2009); *Thacker v. Dretke*, 396 F.3d 607, 617-18 (5th Cir. 2005); *Elizade v. Dretke*, 362 F.3d 323, 332-33 (5th Cir. 2004); *Woods v. Cockrell*, 307 F.3d 353, 360-62 (5th Cir. 2002); *Johnson v. Cockrell*, 306 F.3d 249, 256-57 (5th Cir. 2002); *Collier v. Cockrell*, 300

F.3d 577, 583 (5th Cir. 2002); *Rudd v. Johnson*, 256 F.3d 317, 320 (5th Cir. 2001); *Wheat v. Johnson*, 238 F.3d 357, 361-62 (5th Cir. 2001); *Miller v. Johnson*, 200 F.3d 274, 290-91 (5th Cir. 2000); *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir. 1999); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir. 1998); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995); *Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir. 1994). The Fifth Circuit has also refused to extend the *Simmons* holding through novel constitutional theories such as the Cruel and Unusual Punishment Clause, *Nealy v. Dretke*, 172 F. App'x 593, 597 (5th Cir. 2006); *Thacker*, 396 F.3d at 617; and the Equal Protection Clause, *Tigner*, 264 F.3d at 525-26; *Collier*, 300 F.3d at 585-86; *Green v. Johnson*, 160 F.3d 1029, 1044 (5th Cir. 1998). Rhoades' briefing does not acknowledge, much less distinguish, the weighty precedent contrary to his arguments.

Accordingly, the state courts' rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). Additionally, because no federal law required Texas to inform its juries of a capital defendant's parole eligibility, establishing such a rule on federal habeas review would require the creation of new constitutional law. *Teague v. Lane*, 489 U.S. 288 (1989), thus bars relief on these claims. *See Wheat*, 238 F.3d at 361 (finding any extension of *Simmons* to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000) (same); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir. 1999) ("Relief based on *Simmons* is foreclosed by *Teague*."). Federal precedent and *Teague*'s non-retroactivity provision

preclude relief on Rhoades' third ground for relief.

IV. Ineffective Assistance of Counsel

Rhoades raises two complaints against the representation provided by his trial attorneys. Rhoades argues that trial counsel failed to object: (1) when the State allegedly commented on his Fifth Amendment right to silence in closing argument and (2) to the State's discussion of extraneous offenses and bad acts in the guilt/innocence phase. *Strickland v. Washington*, 466 U.S. 668, 686 (1984), provides the general conceptual framework for judging an attorney's representation. Under *Strickland*, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

Rhoades exhausted both of his *Strickland* arguments on state habeas review. "Surmounting *Strickland*'s high bar is never an easy task[,]" *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), but when the state courts have adjudicated a *Strickland* claim its decision "must be granted deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 562 U.S. at 101. Under AEDPA, federal courts employ a "doubly deferential judicial review," that gives wide latitude to state adjudications. *Knowles v. Mirzayance*, 556 U.S. 111,123 (2009); *see also Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). "The question is

whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

A. Comments Allegedly Implicating Rhoades' Right to Silence

Rhoades first argues that trial counsel should have objected to the State's closing argument which allegedly commented on his Fifth Amendment right to silence. Rhoades did not testify at trial. The defense's guilt/innocence strategy focused on showing that Rhoades lacked the intent necessary for a capital-murder conviction.[15] Rhoades hoped that jurors would find that, as he explained in his confession, he only killed in response to his fear that one victim had tried to get a gun. The defense's opening arguments in this case encouraged jurors to focus on Rhoades' own words in deciding his intent when killing the two victims: "Confession will speak for itself." Tr. Vol. 27 at 38

The State sharply disputed the suggestion that Rhoades killed out of self-defense. The guilt/innocence closing arguments by both parties focused, consequently, on Rhoades' intent. The prosecutor told jurors that, even taking Rhoades' description of the crime as true, he killed in response to verbal provocation alone – an insufficient justification for his actions. In arguing that Rhoades intended

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[15] For example, trial counsel told jurors: "based upon the evidence, there is nothing that would make you believe he went in there to kill anybody with the intent to cause harm to anybody with the intent to commit burglary." Tr. Vol. 30 at 842. Trial counsel's closing argument emphasized that "what [the State] doesn't have is evidence to dispute what Mr. Rhoades has said in these few little areas that [it] chooses not to believe this confession" that suggested that he had acted in self defense. Tr. Vol. 30 at 832.

to kill, the prosecutor made a statement that has given rise to the instant ground for relief:

> When we talk about whether one intentionally killed, it doesn't mean he had to enter that house with the intent to kill. In fact, I mean, why he went into the house – Why he killed those two young men – I know we would all love to know. Ask [trial counsel] Mr. Stafford to tell you why he would do a thing like that.

Tr. Vol. 30 at 821. The prosecutor then argued that "the evidence supports the conclusion he went into that house to burglarize is what he did." Tr. Vol. 30 at 821. Trial counsel objected, saying that the prosecution's argument about burglary relied only on speculation. Rhoades argued on habeas review that counsel should have objected that the prosecutor had impermissibly referred to his silence.

Clearly established federal law "forbids . . . comment by the prosecution on the accused's silence[.]" *Griffin v. California*, 380 U.S. 609, 615 (1965). In essence, "*Griffin* prohibits the . . . prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976); *see also Portuondo v. Agard* 529 U.S. 61, 65 (2000) (describing "the rationale of *Griffin*" as prohibiting "comments upon a defendant's *refusal* to testify"). However, the Supreme Court instructs that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). "Ordinarily, the test for determining whether the prosecutor's remarks

were constitutionally impermissible is: (1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *United States v. Bohuchot*, 625 F.3d 892, 901 (5th Cir. 2010) (quotation omitted).

When Rhoades raised this claim on state habeas review, trial counsel provided an affidavit stating: "[i]f the proper objection would have been that the prosecutor was making a comment on the defendants failure to testify, then I concede error." State Habeas Record at 451-52, 468. The state habeas court, accordingly, focused on whether the State had actually commented on Rhoades' silence. The state habeas court held "the prosecutor's proper jury argument was a reasonable deduction from the evidence in light of [Rhoades] claiming he killed Charles and Bradley Allen in self-defense." State Habeas Record at 589. The state habeas court found that Rhoades had not shown "ineffective assistance of trial counsel based on counsel not advancing the meritless objection that the State's argument was a comment on [his] failure to testify" because "the prosecutor's argument was not such where the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on [his] failure to testify." State Habeas Record at 590. The state habeas court also observed that "[a]t the conclusion of the guilt-innocence phase, the trial court instructed the jury concerning the law of self-defense, [Rhoades'] right not to testify, and how not testifying could not be

discussed or used against him." State Habeas Record at 570. Thus, Rhoades "fail[ed] to meet the two-prong *Strickland* test . . . ." State Habeas Record at 590.[16]

On federal review Rhoades renews his complaint about the prosecutor telling jurors to "ask" his attorney to "tell you why" Rhoades killed. Tr. Vol. 27 at 820. The state habeas court would not be unreasonable in finding that the jury would not have necessarily understood that the State was attacking Rhoades' silence. A prosecutor's statement is not "manifestly intended to comment on the defendant's silence" when another plausible explanation exists. *United States v. Martinez*, 894 F.2d 1445, 1451 (5th Cir. 1990). "[T]he question is not whether the jury possibly or even probably would view the challenged remark in this manner [as a comment on the defendant's silence], but whether the jury necessarily would have done so." *United States v. Grosz*, 76 F.3d 1318, 1326 (5th Cir.1996) (citations and internal quotations omitted). The prosecutor's challenged statement explicitly referred to trial counsel's failure to explain his actions. "[M]erely calling attention to the fact that the government's evidence has not been rebutted or explained is not automatically a comment on a defendant's failure to testify." *United States v. Bermea*, 30 F.3d 1539, 1564 (5th Cir. 1994). In other words, the State's comment "was intended to be a 'comment on the failure of the *defense*, as opposed to the *defendant*, to counter or explain the

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[16] The state habeas court found that Rhoades had procedurally defaulted his argument because his "objection at trial to the State's jury argument about why [he] entered the house and killed Charles and Bradley Allen and the State's telling the jury to ask defense counsel does not comport with [his] objection at habeas to such argument . . ." State Habeas Record at 589. Respondent does not rely on that procedural default to bar federal review of the claim.

testimony presented or evidence introduced.'" *Montoya v. Collins*, 955 F.2d 279, 287 (5th Cir. 1992) (quoting *United States v. Becker*, 569 F.2d 951, 965 (5th Cir. 1978)); *see also United States v. Grosz*, 76 F.3d 1318, 1327 (5th Cir. 1996); *United States v. Guzman*, 781 F.2d 428, 432 (5th Cir. 1986). The Fifth Circuit has routinely held that "[t]his kind of comment 'is not an infringement of the defendant's fifth amendment privilege.'" *Montoya*, 955 F.2d at 287 (quoting *Becker*, 569 F.2d at 965); *see also United States v. Kitt*, 157 F.3d 901 (5th Cir. 1998); *Johnson v. Johnson*, 114 F.3d 1180 (5th Cir. 1997). Accordingly, Rhoades has not shown that counsel provided deficient performance by not making the indicated objection.

Further, the challenged comment was only a minor theme in a highly incriminating summation. *See United States v. Davis*, 609 F.3d 663, 686-87 (5th Cir. 2010) (finding no error when the challenged comments were only "a few lines of transcript in a lengthy summation, and were the only prosecutorial remarks which referred to" the defendant's silence). The rhetorical gloss was far from a pivotal element of the prosecution's case. Even then, the trial court instructed jurors not to consider the fact that Rhoades had not testified. Clerk's Record at 292.[17] Federal law

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[17] Specifically, the trial court instructed jurors as follows:

> You are instructed that the Defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The Defendant has elected not to testify in this punishment phase of trial and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

(continued...)

presumes that juries follow their instructions. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985). Given the small part the comment played in the prosecutor's summation and the instruction not to consider Rhoades' silence, Rhoades has not shown that trial counsel's failure to object prejudiced the defense.

Given the nature of the comment made, and the relatively minor role it played in the State's summation, the state courts were not unreasonable in finding no *Strickland* deficient performance or prejudice on this issue.

B. Failure to Object Regarding Bad Act and Extraneous Offenses

Rhoades complains that trial counsel should have objected to the discussion of extraneous crimes and bad acts during the guilt/innocence phase of trial. Generally, Texas does not permit the admission of extraneous offenses until the punishment phase. Such evidence, however, may "be admissible [in the guilt phase] for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." TEX. R. EVID. 404(b). Even so, the trial court may still exclude such evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." *Id.*

The jury knew from the beginning of trial that Rhoades had previous interactions with the criminal justice system. The prosecution discussed several

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[17] (...continued)
Clerk's Record at 292.

crimes and bad acts during the trial of Rhoades' guilt, including that he committed the murders immediately after his release from prison, Tr. Vol. 27 at 39; that he was arrested during the burglary of a building, Tr. Vol. 27 at 32, Tr. Vol. 28 at 265; that on his arrest Rhoades gave the police a false name, Tr. Vol. 27 at 32; and that Rhoades had previously been incarcerated under a different name, Tr. Vol. 28 at 265. Information about prior bad acts and crimes came before the jury through witnesses, prosecutorial argument, and Rhoades' own confession. This background allowed the prosecution to argue that Rhoades was a "hothead ex-con" and a "brazen ex-con." Tr. Vol. 30 at 813, 818, 855-56.

Trial counsel did not object to discussion of bad acts and prior crimes. Before the guilt/innocence phase, the prosecutor told the trial court that the parties had discussed whether some information, such as Rhoades' arrest after a burglary, would come before jurors. The prosecution told the trial court that the defense said that it intended to take a "let it all hang out approach." Tr. Vol. 27 at 8. Trial counsel affirmed that the defense would not object. Tr. Vol. 27 at 7-8. In fact, trial counsel also told jurors in guilt/innocence opening arguments: "We are not going to hide one thing from you. My client just got out of prison. In the confession he said I just got out of prison, just got off the bus. I was supposed to go to a halfway house but I went over to my neighborhood where I used to live." Tr. Vol. 27 at 38.[18]

[18] Both trial attorneys provided affidavits that included identical reasons for not objecting.

Both trial attorneys provided affidavits on state habeas review explaining their approach to the guilt/innocence phase. Trial counsel knew that "[t]he evidence in this case appeared substantial," particularly with the "unexpected, gift-wrapped statement from [Rhoades] confessing to the killings." State Habeas Record at 455-56. The defense decided that "although we would develop any evidence that might lead to a verdict of a lesser-included offense, our central focus was to save [Rhoades'] life." State Habeas Record at 456. Trial counsel defended the choice not to object when information about bad acts and prior crimes came before the jury in the guilt/innocence phase:

> Not only did we not object to this evidence, we told the jury of these facts in our opening statement. As previously stated from the outset this was primarily a case to save [Rhoades'] life. Our prominent focus was on punishment. As a part of the trial strategy we decided to let the jury know of these very aggravating facts early on in an attempt to de-sensitize them. We feared that if this information was heard for the first time at punishment, that the jury would find it difficult to give proper weight to all of our punishment evidence and would be so incensed that the death penalty would be nearly automatic. We had put substantial time and energy into developing evidence of [his] tortured background, his medical brain abnormality, and the fact that he was non-violent in prison. We felt that if the jury learned of his prior arrest and parole immediately prior to our evidence, that this mitigation evidence would fall on deaf ears. In retrospect I stand by that decision.

State Habeas Record at 464, 471-72.

Rhoades argued that trial counsel's strategy denied him the effective assistance of counsel. The state habeas court credited trial counsel's statement that "the prominent defense focus was on punishment and trial counsel believed that the jury

would be 'incensed,' causing the extensive mitigation evidence to 'fall on deaf ears' if . . . presented for the first time at punishment." State Habeas Record at 577. The state habeas court found that "counsel made a strategic decision to let the jury know of these aggravating facts . . . in an effort to 'de-sensitize' them . . . ." State Habeas Record at 577. The state habeas court concluded that

> [t]rial counsel are not ineffective for adopting the plausible trial strategy of focusing on punishment and allowing the jury to hear about [Rhoades'] arrest for an extraneous burglary, his being in custody when he confessed to the capital murder, and his prior prison sentences, including the fact that he had been released from prison just a short time before the offense, so that [Rhoades'] jury would concentrate on mitigation evidence at punishment.

State Habeas Record at 594.

On federal review, Rhoades claims that it was not reasonable for counsel to choose a strategy that was "likely to eviscerate their client's only hope of a noncapital verdict." (Docket Entry No. 13 at 46). However, the law honors an attorney's "conscious and informed decision on trial tactics and strategy," allowing for federal relief only when "it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003); *see also Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."). The state courts found that

trial counsel crafted a plausible strategy to represent Rhoades, particularly in light of the overwhelming evidence of his guilt. Rhoades "cannot now disclaim his attorney's decisions just because he does not like the results or believes that his counsel made some mistakes." *United States v. Brito*, 601 F. App'x 267, 271-72 (5th Cir. 2015). Given the weighty deference federal habeas courts gives both to an attorney's strategic choices and to state court decisions, Rhoades has not shown that the state court's rejection of this claim was contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1).[19] The Court will deny this claim.

V. *Batson*

In his final ground for relief, Rhoades complains that the prosecution exercised its peremptory strikes to exclude two African-Americans from jury service. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), the prosecution violates the equal protection clause when it strikes potential jurors solely on the basis of race. *Batson* jurisprudence has established a three-step burden shifting scheme to ascertain the State's intent when striking members of a protected category:

> First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand

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[19] The state habeas court did not make an explicit finding regarding *Strickland* prejudice on this claim. Even so, the Court alternatively finds that Rhoades has not shown a reasonable probability of a different result had trial counsel objected to evidence of extraneous crimes and bad acts.

> an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Rice v. Collins, 546 U.S. 333, 338 (2006) (quotations and citations omitted); *see also Johnson v. California*, 545 U.S. 162, 168 (2005); *Miller-El v. Dretke*, 545 U.S. 231, 251-52 (2005).

Trial counsel raised a *Batson* objection when the State used its peremptory strikes to remove two African-American prospective jurors, Berniece Holiday and Gregory Randle. The trial court ordered the State to provide race-neutral reasons for each strike. The trial court afterward allowed the defense to respond, and then denied the *Batson* objection.

Rhoades challenged the rulings on direct appeal. With regard to both jurors, the Court of Criminal Appeals found that the trial court had not committed error. The traditional respect given to state court judgments and AEDPA's deferential standards, therefore, govern and guide federal review of Rhoades' *Batson* claim. Under clearly established law, "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference . . . ." *Hernandez v. New York*, 500 U.S. 352, 364 (1991); *see also Murphy v. Dretke*, 416 F.3d 427, 432 (5th Cir. 2005). Unless a petitioner can show that the state court's assessment of the prosecutor's intent was "clearly erroneous," the decision "will not

be overturned . . . ." *Hoffman v. Cain*, 752 F.3d 430, 448 (5th Cir. 2014). AEDPA creates a high burden for an federal petitioner raising a *Batson* claim: he must prove that "trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary." *Id.*; *see also Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2198-99 (2015) (emphasizing AEDPA review of *Batson* claim); *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (same); *Rice v. Collins*, 546 U.S. 333, 342 (2006) (same). Under those standards, the Court will consider the questioning of the two potential jurors.

A. Ms. Holiday

While the record is not clear with regard to the race of all potential jurors, Ms. Holiday was apparently the first African-American prospective juror questioned by the parties. After the prosecutor extensively examined Ms. Holiday, the defense began asking questions. After only a few moments, however, the State interrupted "[i]n the interest of time" and exercised a peremptory strike. Tr. Vol. 18 at 2368. The defense objected, and provided the following arguments to establish a *prima facie* case of discrimination: Ms. Holiday was African-American and the first black questioned, and stricken, by the State; her answers seemed favorable to the State; and the State interrupted defense questioning to strike her, something it had not done before. Tr. Vol. 18 at 2370.

The trial court ordered the State "to give racially neutral reasons." Tr. Vol. 18 at 2373. The State provided extensive reasons for striking Ms. Holiday. Tr. Vol. 18

at 2373-75. As summarized by the Court of Criminal Appeals:

> (a) Holiday "dozed off" during the State's group voir dire examination; (b) Holiday's answers were very succinct, in a way which demonstrated a lack of candor; (c) Holiday only answered three of seventeen questions on a particular page of her juror questionnaire; (d) Holiday's facial expressions led the prosecutor to believe that she was saying what she believed the prosecutor wanted to hear; (e) Holiday was an elementary school teacher and might identify too closely with evidence of [Rhoades'] difficult childhood; (f) Holiday indicated, with a tone of pride, that, while previously serving on a jury, she "set free" the defendant; (g) Holiday had a first cousin who was in prison.

Rhoades, 934 S.W.2d at 124. The State particularly emphasized "the very distinctive fact that Ms. Holiday is the only person we have talked to who has told us that she set someone free when she served on a jury in the past." Tr. Vol. 18 at 2380.

Trial counsel responded to the State's explanation. Trial counsel stated that other potential jurors had dozed off; Ms. Holiday was not close to her incarcerated cousin; her responses to questions about Rhoades' childhood were not different from other jurors; and she was open and honest in answering questions. Tr. Vol. 18 at 276-79. Trial counsel argued that "all of her responses to the State's questions were typical of what the State has relished in seating a juror on this panel . . . ." Tr. Vol. 18 at 2378. The trial court, however, found that the State's "reasons were racially neutral." Tr. Vol. 18 at 2381.

Rhoades challenged the dismissal of Ms. Holiday on direct appeal. After reviewing the record, the Court of Criminal Appeals was "not left with a definite and firm conviction that error was committed." *Rhoades*, 934 S.W.2d at 124. The Court

of Criminal Appeals found that Rhoades' "showing of purposeful discrimination was minimal. The State's race-neutral explanations were not whimsical, and the record does not reflect that the State demonstrated a disparate pattern of strikes against any suspect class." *Id.* (citations omitted).

On federal habeas review, Rhoades argues that the State engaged in an "extreme difference" in its "pattern of questioning" of Ms. Holiday. (Docket Entry No. 13 at 54). Rhoades, however, only identifies two areas in which the prosecution allegedly varied in its questioning of Ms. Holiday. First, Rhoades complains that the State probed her more deeply than other jurors about her views on the death penalty. Second, Rhoades argues that the State's reliance on Ms. Holiday's relationship to someone in prison was pretext because other potential jurors had someone close to them who was incarcerated.

In response, Respondent extensively reviews Ms. Holiday's questioning, showing that the State asked Ms. Holiday more questions about views on capital punishment because she expressed "mixed emotions" and uncertainty in her answers. Tr. Vol. 18 at 2351, 2365. Otherwise, Respondent argues that other courts have accepted as race neutral justifications in other cases similar to those used by the State here.

Batson cases "turn[] largely on an evaluation of credibility." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (quotation omitted). Federal courts must afford the trial court's determination "great deference" and sustain that decision "unless it

is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). Given the numerous race-neutral reasons proffered by the State, Rhoades' weak showing of disparate questioning, and the absence of any meaningful evidence of discriminatory intent, the Court finds that Rhoades has not met his AEDPA burden with regard to Ms. Holiday.

B. Mr. Randle

After questioning by both parties, Respondent exercised a peremptory strike against Mr. Randle. The defense asked the trial court to require the State to divulge race-neutral reasons for the strike. The defense described why it thought a *Batson* error occurred:

> I would like for the record to reflect that the prospective juror on paper and in person was very intelligent; he articulated very strongly, very intelligently; he was very observant and considerate to the prosecution. He was very attentive to the prosecution. He was over-eager to respond to her as to her questions. He was very protective to his family and very protective as to society. And I would ask the record to reflect that everything about him made him a great State's juror and can only lead to one conclusion, that he was exercised or challenge was exercised based upon his race.

Tr. Vol. 24 at 3338-39. Trial counsel also argued that "[t]he Harris County District Attorney's Office has had a history of trying to exclude blacks from juries." Tr. Vol. 24 at 3338.

The trial court then required the State to offer a race-neutral explanation. The Court of Criminal Appeals summarized the State's reasons for the strikes:

(a) Randle had a brother in prison, and although Randle had visited him

> recently, Randle professed that he did not know what crime his brother committed. The prosecutor professed that she was concerned Randle was being disingenuous, and down-playing the effect his relationship with his brother would have on him; (b) Randle vacillated on the kind of evidence he would require to find future danger. Although this vacillation was not legally sufficient to subject Randle to a challenge for cause, he nevertheless occasionally articulated that he would prefer evidence of past violent behavior to find future danger (the State had no evidence of past violent behavior); (c) Randle indicated during voir dire that he thought the death penalty was wrong, although he conceded that it might be necessary for some crimes.

Rhoades, 934 S.W.2d at 124-25. Trial counsel then argued that the reasons were merely pretext for discrimination. Tr. Vol. 24 at 3342-43. Even though Rhoades then disputed how the State had characterized Mr. Randle's answers to questions, the trial judge found the State's reasons to be race-neutral. On direct appeal, the Court of Criminal Appeals held: "Given the utter lack of any real evidence that the State purposefully discriminated against Randle in the record, and the relative strength of the State's explanations, we are not left with a definite and firm conviction that a mistake was committed." *Rhoades*, 934 S.W.2d at 125.

On habeas review, Rhoades again complains that the State's justifications were pretext for intentional discrimination. Rhoades challenges the State's reasons as weak, especially when compared to the *voir dire* of other jurors. The State, however, gave reasons that other courts have previously held as a sufficient reason for a peremptory strike. For example, courts have recognized having a close family member who is incarcerated as a race-neutral basis for a strike. *United States v. Jimenez*, 77 F.3d 95, 101 (5th Cir. 1996); *United States v. Valley*, 928 F.2d 130, 136

(5th Cir. 1991). Rhoades alleges that other veniremembers who had family members with criminal history served on the jury, but none of those family members was a sibling, as in Mr. Randle's case. In conjunction with that justification, the State felt like Mr. Randle was not forthright in his discussion of his brother's incarceration. Rhoades has not provided any basis on which to question the State's observation of his demeanor. Additionally, Mr. Randle's requirement that the State show a history of violent acts to justify a finding on the future dangerousness special issue was an acceptable race-neutral justification. *See Garcia v. Stephens*, 793 F.3d 513, 531-32 (5th Cir. 2015) (upholding a strike on a potential juror who would "apply a higher standard of proof at the punishment phase). Rhoades has not shown that the state courts were unreasonable in their assessment of the State's peremptory strike against Mr. Randle. The Court, therefore, will deny Rhoades final ground for relief.

CERTIFICATE OF APPEALABILITY

AEDPA bars appellate review of a habeas petition unless a district or circuit court certifies specific issues for appeal. *See* 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b). Rhoades has not sought a Certificate of Appealability ("COA"), though this Court may consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). The Court must address whether the circumstances justify an appeal before issuing a final judgment. *See* Rule 11, Rules Governing Section 2254 Cases in the United States District Courts.

A certificate of appealability will not issue unless the petitioner makes "a

substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, this requires a petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336. Where denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

After a careful review of the pleadings and the applicable law, the Court concludes that reasonable jurists would not find that this Court was incorrect in its procedural rulings or that the Court's assessment of the constitutional claims was debatable or wrong. Because Rhoades does not otherwise allege facts showing that his claims should be resolved in a different manner, this Court will not certify for appeal any of his habeas claims for consideration by the Court of Appeals for the Fifth Circuit.

CONCLUSION

For the reasons described above, the Court finds that Rhoades has not shown entitlement to federal habeas relief. This Court **GRANTS** Respondent's motion for summary judgment, **DENIES** Rhoades' petition, and **DISMISSES** this case **WITH PREJUDICE**. The Court will not issue a Certificate of Appealability.

SIGNED at Houston, Texas, on this the 20 day of July, 2016.

DAVID HITTNER
United States District Judge