No. _____

In the Supreme Court of the United States
October Term, 2018

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

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

APPENDIX TO APPLICATION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Capital Case
Execution set: January 30, 2019, 6 p.m.

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Index of Appendices

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-70005

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

ROBERT MITCHELL JENNINGS,

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
USDC No. 4:09-CV-219

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges.

PER CURIAM:*

Robert Mitchell Jennings, a Texas state prisoner on death row convicted in 1989 and scheduled to be executed on January 30, 2019, filed a Rule 60(b)(6) motion in district court. From 1996 until October 2018, he had the same counsel representing him in state and federal habeas matters. Through newly appointed counsel, Jennings filed his motion on January 22, 2019. He claimed

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that his longtime attorney had a conflict of interest that caused him not to take advantage of United State Supreme Court authority that would have allowed presentation of issues that depended on proof of that pre-existing counsel's ineffectiveness. The district court denied all relief on the grounds that the Rule 60(b)(6) motion was untimely, refused to stay the execution, and granted a certificate of appealability on the issue of timeliness. We AFFIRM and DENY a stay of execution.

FACTUAL AND PROCEDURAL BACKGROUND

The background facts of this case are set forth in our original opinion from 2013, so we refer to them only briefly here. *Jennings v. Stephens*, 537 F. App'x 326, 327-29 (5th Cir. 2013) (*Jennings I*), *rev'd and remanded*, 135 S. Ct. 793 (2015) (*Jennings II*). Jennings was convicted in 1989 for the murder of Houston, Texas police officer Elston Howard. Jennings' conviction and sentence were affirmed by the Texas Court of Criminal Appeals in 1993. Attorney Randy Schaffer began to represent Jennings in post-conviction proceedings, filing a state habeas application in September 1996 and supplementing it in 2001. The trial court entered findings of fact and conclusions of law in 2006. The Texas Court of Criminal Appeals denied relief in 2008.

In 2009, Jennings filed an application for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. The district court granted the application, finding that Jennings had received ineffective assistance of counsel. Specifically, the court found that counsel was ineffective for failing to present mitigation evidence regarding

Jennings' disadvantaged background and for failing to investigate Jennings' mental health. Texas appealed.

This panel handed down its first opinion in Jennings' habeas proceedings in July 2013. *Jennings I*, 537 F. App'x at 336. We found that the district court erred in granting relief on two of Jennings' ineffective assistance of counsel claims under *Wiggins v. Smith*, 539 U.S. 510 (2003). *Id.* at 330-35. As an alternative ground, we also addressed an argument concerning mitigation that the district court did not consider because it had found the claim was not exhausted in the state habeas proceeding; we held that the claim was meritless and unexhausted. *Id.* at 335-37 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Penry v. Johnson*, 532 U.S. 782 (2001)). Finally, we dismissed a "cross-point" Jennings raised under *Smith v. Spisak*, 558 U.S. 139 (2010) for lack of jurisdiction because Jennings did not first seek a COA from the district court on that point. *Jennings I*, 537 F. App'x at 338-39.

In response, Jennings filed a petition for rehearing in our court. He relied on the newly issued *Trevino* opinion and on *Martinez*, then argued that if we had been correct in concluding that Jennings' "state counsel failed to exhaust this argument in state court, then clearly he was ineffective." He requested a remand to district court to develop the issue. We denied rehearing, which effectively denied the argument about the new caselaw. Jennings did not raise this point again until recently.

The Supreme Court granted certiorari solely on the question of whether Jennings was required to take a cross-appeal or seek a certificate of appealability on his cross-point; the Court held he was not. *Jennings II*, 135

S. Ct. at 798, 802. On remand, this panel in 2015 affirmed the district court's denial of relief on the cross-point. *Jennings v. Stephens*, 617 F. App'x 315, 319 (5th Cir. 2015) (*Jennings III*).

Jennings filed a subsequent state habeas application in May 2016 and supplemented it in July 2016. The Texas Court of Criminal Appeals dismissed the subsequent applications in May 2018. The court denied reconsideration on September 19, 2018. A petition for a writ of certiorari from that decision remains pending in the Supreme Court. Case No. 18-6848 (filed Nov. 20, 2018).

On September 20, 2018, Jennings, still represented by Schaffer, filed a motion for appointment of conflict-free counsel in the United States District Court for the Southern District of Texas. The district court granted the motion, appointing Edward Mallett as counsel on October 23, 2018, then appointing two Federal Public Defenders as co-counsel a month later. On December 21, 2018, Jennings' new counsel filed a motion for a stay of execution in the district court. On January 22, 2019, Jennings filed a motion for relief from judgment under Rule 60(b)(6). The district court denied the motion and dismissed the motion to stay. Jennings appealed and filed another motion to stay his execution with this court.

DISCUSSION

We have two matters before us. One is whether to grant the motion to stay the imminent execution.[1] The other is whether there has been a sufficient

[1] Jennings contends that we are required to grant a stay, given the district court's grant of a COA. However, the law is to the contrary, as granting a stay is discretionary. 28 U.S.C. § 2251(a). Further, granting a stay based upon the appointment of counsel in the district court is limited to 90 days, a time period that has already passed. § 2251(a)(3).

showing under Rule 60(b)(6) to set aside the judgment in Jennings' federal habeas claim, resolved against him finally in 2015. The district court granted Jennings a certificate of appealability ("COA") on the issue of whether the Rule 60(b)(6) motion, filed by newly appointed counsel the week prior to our ruling today, should be denied because it was untimely. As we will explain, the COA brought us jurisdiction to consider all other record-based grounds to support the denial. If we conclude that the Rule 60(b)(6) motion was properly denied, there is no reason for us to grant a stay of execution.

Among Jennings' arguments is that we must give *de novo* review to the district court's denial. Our caselaw is to the contrary. *Clark v. Davis*, 850 F.3d 770, 778 (5th Cir. 2017) (applying abuse of discretion standard). Ultimately, however, our resolution of this appeal does not depend on the standard of review. We conclude that issues of the ineffectiveness of trial counsel that Jennings wishes to raise were resolved against him years ago. He may not use the vehicle of a Rule 60(b)(6) motion to reopen that issue, even if he is using allegedly intervening Supreme Court authority in the attempt.

A. Rule 60(b)(6) motion to set aside denial of federal habeas relief

The procedural right Jennings wishes to use was initially identified in a Supreme Court decision in 2012, in which the Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez v. Ryan*, 566 U.S. 1, 17 (2012). It is fair to say that there was at least uncertainty that *Martinez* would apply to ineffective assistance of counsel

claims in Texas until, 14 months later, the Court extended the rationale of *Martinez* to Texas convictions where procedural rules made it "highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). To assert the rights identified in these decisions, capital habeas petitioners may have conflict-free counsel appointed in federal court. *See Clark*, 850 F.3d at 780.

We note here that in both *Martinez* and *Trevino*, the inmate was bringing his initial application for a writ of habeas corpus under 28 U.S.C. § 2254. *See Martinez*, 566 U.S. at 7-8; *Trevino*, 569 U.S. at 419-20. Rather differently, Jennings is seeking to use the mechanism of a Rule 60(b)(6) motion to set aside the initial federal judgment denying relief under Section 2254. Under that rule, a "court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). The "any other reason" means a reason other than those set out in subparts (1) through (5). *Rocha v. Thaler*, 619 F.3d 387, 389-400 (5th Cir. 2010). Other reasons must constitute "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

The Rule 60(b) questions present some potentially credible issues of what is "extraordinary" and how timeliness is measured in the "conflicted counsel" arena. Among the relevant legal principles is that *Martinez* and *Trevino together* qualify as a "'change in decisional law after entry of judgment"; such a change does not constitute [extraordinary] circumstances and is not alone grounds for relief from a final judgment.'" *Raby v. Davis*, 907 F.3d 880, 884

(5th Cir. 2018) (quoting *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (alteration in original). Our *Clark* decision examines closely how to determine timeliness. 850 F.3d at 781-83. Further, finality is important in all decisions, but "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting." *Diaz v. Stephens*, 731 F.3d 370, 376 n.1 (5th Cir. 2013). The Supreme Court itself has addressed the use of Rule 60(b)(6) in a death penalty case when a COA was denied. *See Buck v. Davis*, 137 S. Ct. 759, 778-79 (2017). An additional issue is presented by the fact that "conflicted counsel" actually presented this very *Martinez/Trevino* issue five years ago in his petition for rehearing in this court, so it is not truly "new." After we denied rehearing, Jennings' counsel did not raise it in the Supreme Court or before any court that we know of until the motion in the district court filed by new counsel this month. Neither party addresses how the fact that conflicted counsel previously, belatedly, and unsuccessfully raised this point intersects with Rule 60(b).

We conclude it is unnecessary to answer these various questions. Even were we to answer all of them in his favor, Jennings' underlying *Martinez/Trevino* argument lacks merit. As we move to that dispositive issue, we dispense with a false limit Jennings would place on our analysis. We may go beyond what the district court held, which was to deny relief solely due to the untimeliness of the motion. The Supreme Court's 2015 decision in Jennings' own case explains why:

> An appellee who does not take a cross-appeal may "urge in support of a decree any matter appearing before the record,

> although his argument may involve an attack upon the reasoning of the lower court."

Jennings II, 135 S.Ct. at 798 (quoting *United States v. Am. R. Express Co.*, 265 U.S. 425, 435 (1924)). Our resolution of the underlying issue is a "matter appearing before the record."

B. Initial resolution of Jennings' Penry *claims*

Jennings, through his new counsel, argues that the initial habeas counsel, Schaffer, was ineffective at the state level in presenting his *Penry* claim. The 2013 panel of this court considered Jennings' mitigation evidence claims at some length.[2] The standard he needed to meet, and still does, was that the state habeas court's decision denying him relief

> (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "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).

The argument at that time was that his trial counsel had failed to present proper evidence either of Jennings' mental impairment or of his disadvantaged background. *Jennings I*, 537 F. App'x at 329. As to his mental capacity, we concluded that Jennings had failed to show prejudice because the evidence presented in the habeas proceedings was conflicting, which was not sufficient to show that the state habeas court has acted unreasonably in

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[2] Jennings did "not advance a pure-*Penry* argument. Instead, he argues that the failure to offer mitigating evidence of his background deprived him of an argument on appeal that the nullification instruction violated his Eighth and Fourteenth Amendment rights, which could have resulted in overturning his sentence." *Jennings*, 537 F. App'x 336-37.

rejecting the claim. *Id.* at 334. On Jennings' disadvantaged background, the evidence was both favorable and unfavorable, "a 'double-edged' sword" that "might permit an inference that he is not as morally culpable for his behavior, [but] also might suggest [that he], as a product of his environment, is likely to continue to be dangerous in the future." *Id.* at 335 (quoting *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002)) (alterations in original). There, too, the state habeas court had not acted unreasonably in rejecting the claim. *Id.*

After making those determinations, which were sufficient to deny relief, we stated that "we need not consider whether counsel's decision prejudiced Jennings." *Id.* Nonetheless, we did consider. Our holding was that counsel "did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument [on state habeas review] — he inserted it in a footnote at the end of his brief." *Id.* at 337. That additional holding does present an issue of counsel ineffectiveness but only on a point that was an independent reason for denying relief.

In summary, our 2013 decision addressed the underlying issue of mitigation evidence now asserted to support the claim. We held that the state habeas court had not unreasonably applied federal law nor unreasonably determined the facts. The final judgment denying Jennings' Section 2254 application was not based on procedural default but instead on the upholding of the state habeas court's decision regarding the mixed nature of the evidence. Yes, we discussed procedural default as an alternative ground, but our holding did not depend on that.

At most what is being argued now is that Schaffer may have been able to argue more than he did about the mitigation evidence. We already held in our 2013 opinion that the state habeas court had not been unreasonable in holding that trial counsel had satisfied his constitutional obligation of representation in deciding what evidence to present. Thus, the prerequisite for applying *Trevino*, which is "a procedural default" that otherwise would "bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial," *Martinez*, 566 U.S. at 17, does not exist in this case.

We AFFIRM the denial of the Rule 60(b)(6) motion. We DENY the motion for a stay of execution and the motion for a stay pending appeal.

Certified as a true copy and issued as the mandate on Jan 28, 2019

Attest: Tyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

2019 WL 280958
Only the Westlaw citation is currently available.

United States District Court,
S.D. Texas, Houston Division.

Robert Mitchell JENNINGS, Petitioner,
v.
Lorie DAVIS, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.

H-09-219
|
Signed 01/22/2019

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Denial of Stay of Execution

Lynn N. Hughes, United States District Judge

***1** Robert Mitchell Jennings is scheduled for execution on January 30, 2019. On January 22, 2019, he filed a motion for relief from this Court's prior judgment denying a claim in his petition for a writ of habeas corpus as procedurally defaulted.

Background

Jennings was sentenced to death for murdering Houston Police Officer Elston Howard during a robbery. While Jennings' federal habeas corpus petition was making its way through the courts, the Supreme Court issued its decisions in *Martinez v. Ryan*, 566U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). In *Martinez*, the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim ... where appointed counsel in the initial-review collateral proceeding ... was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 ... (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Id. at 13-14. *Trevino* established that Texas state habeas corpus proceedings are initial-review collateral proceedings for purposes of *Martinez*.

On September 20, 2018, Jennings filed a motion for appointment of new counsel. His motion argued that his former counsel labored under a conflict of interest. This was the case because the same attorney represented Jennings in both state and federal habeas corpus proceedings, and because a claim might exist under the *Martinez* rule, which would require a showing that state habeas counsel was ineffective. Because this is a death penalty case, this Court, in an abundance of caution, appointed conflict-free counsel on October 23, 2018 to determine if such a claim was available to Jennings. On December 21, 2018, Jennings filed a motion to stay his execution, arguing that his new counsel needs additional time to investigate possible claims. Respondent opposes the motion. On January 22, 2019, Jennings filed a motion for relief from this Court's prior judgment, arguing that his federal habeas proceedings lacked integrity because bis counsel labored under a conflict of interest. He further argues that a meritorious claim of ineffective assistance of trial counsel was procedurally defaulted because prior

counsel failed to raise the claim in Jennings' state habeas proceedings.

Discussion

A. Rule 60(b)

Rule 60(b) allows a losing party to seek relief from judgment under a limited set of circumstances including fraud, mistake, and newly discovered evidence. Fed. R. Civ. Pro. 60(b); *see Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). Relief is available under Rule 60(b) in habeas proceedings only in conformity with AEDPA, including its limits on successive federal petitions. *Gonzalez*, 545 U.S. at 529. An ostensible Rule 60 motion is a subsequent habeas corpus petition if the Rule 60 motion presents a "claim" for habeas relief. The Court provided examples in *Gonzalez*, explaining that a Rule 60(b) motion is a habeas petition when it presents a new claim for relief, or when it presents new evidence in support of a claim already litigated.

***2** Jennings raises a claim that this Court previously denied as procedurally defaulted. He argues that prior counsel's alleged conflict of interest undermines the integrity of the federal habeas corpus proceeding, bringing the claim under Rule 60(b).

> [T]o bring a proper Rule 60(b) claim, a movant must show "a non-merits-based defect in the district court's earlier decision on the federal habeas petition." *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). Accordingly, if the Rule 60(b) motion attacks "some defect in the integrity of the federal habeas proceedings," rather than the resolution on the merits, then the motion is not treated as a second-or-successive petition. *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641.

In re Edwards, 865 F.3d 197, 204 (5th Cir.), *cert. denied sub nom. Edwards v. Davis*, 137 S.Ct. 909, 197 L.Ed. 2d 83 (2017). A Rule 60(b) motion based on habeas counsel's conflict of interest is an attack on the integrity of the proceedings. *Clark v. Davis*, 850 F.3d 770, 779-80 (5th Cir.), *cert. denied*, 138 S.Ct. 358 (2017). Jennings' motion is not a successive petition and is properly brought under Rule 60(b).

B. Timeliness

A Rule 60(b) motion must be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1). "Timeliness ... is measured as of the point in time when the moving party has grounds to make [a Rule 60(b)] motion...." *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004). The grounds for Jennings' proposed claim arose when the Supreme Court decided *Trevino*. *see Clark*, 850 F.3d at 781-82. The Supreme Court issued its *Trevino* decision on May 28, 2013, approximately five years and eight months before Jennings filed his Rule 60(b) motion. The Rule 60(b) motion is therefore untimely.

Jennings, relying on *Maples v. Thomas*, 565 U.S. 266 (2012), argues that he should not be held responsible for the delay because his counsel was conflicted. In *Maples*, the petitioner was represented by *pro bono* counsel. The attorneys filed a state postconviction petition. While that petition was pending, the attorneys left their law firm, but never advised the petitioner of their departure and never withdrew as counsel of record. The state habeas court's decision was mailed to counsel and returned to the court unopened. The petitioner was unaware that his counsel abandoned him. With no counsel on the case, the petitioner missed a deadline to file an appeal thereby procedurally defaulting claims. His subsequent federal habeas corpus petition was denied based on that procedural default. *Id.* at 270-71. The Supreme Court held that the petitioner's abandonment by his counsel could serve as cause to excuse the procedural default.

The Court distinguished between attorney abandonment and attorney error, expressly holding that error, such as miscalculating a deadline, does not constitute cause. *Id.* at 281-82. This case is closer to the attorney error situation than it is to attorney abandonment. Jennings' prior counsel continued to vigorously and zealously represent Jennings by, for example, filing a successive state habeas corpus application and moving in the Texas Court of Criminal Appeals for reconsideration of Jennings' original state habeas corpus application. It was prior counsel who called his own conflict of interest to the attention of this Court, and moved for appointment of conflict-free counsel. Because, however, there is a possibility that the claim raised in the 60(b) motion was not raised earlier due to counsel's conflict, and because the facts of this case do not fit squarely into either the "attorney error" or "attorney abandonment" category, the Court will grant Jennings a certificate of appealability on this issue.

C. Certificate of Appealability

***3** A petitioner may obtain a certificate of appealability ("COA") either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *see Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kinder*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253© is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where ... the district court dismisses the [motion] based on procedural grounds. We hold as follows: When the district court denies a [60(b) motion] on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jennings presents a colorable claim of ineffective assistance of trial counsel. Jurists of reason could disagree as to whether prior counsel's conflict of interest excuses his delay in filing his Rule 60(b) motion. A COA is granted on the issue of whether the conflict of interest renders his Rule 60(b) motion timely.

D. Motion to Stay Execution

Prior to filing his Rule 60(b) motion, Jennings moved to stay his January 30 execution. That motion was predicated on a purported need for additional time to investigate and prepare a Rule 60(b) motion. As Jennings has now filed a detailed 56 page Rule 60(b) motion, his motion to stay his execution is moot.

E. Motion to Seal

Jennings also filed a motion to seal two exhibits filed in connection with his motion to stay. The exhibits both clearly reflect attorney work product and were submitted to demonstrate diligence by Jennings' attorneys. The motion to seal is granted to protect the attorney work product.

All Citations

Slip Copy, 2019 WL 280958

537 Fed.Appx. 326
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Robert Mitchell JENNINGS, Petitioner–Appellee
v.
William STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent–Appellant.

No. 12–70018.
|
July 22, 2013.

Synopsis

Background: Following affirmance of his state court conviction for capital murder and his death sentence, and denial of his state habeas petition, petitioner sought federal writ of habeas corpus. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 2012 WL 1440387,granted petition. Director of Texas Department of Criminal Justice appealed.

Holdings: The Court of Appeals held that:

[1] counsel's failure to investigate mental impairment was not prejudicial;

[2] counsel's strategic decision not to call sister to testify was not ineffective assistance;

[3] claim regarding nullification instruction was procedurally defaulted; and

[4] ineffective assistance claim regarding closing argument was procedurally barred.

Reversed; petition denied.

West Headnotes (4)

[1] **Criminal Law**
Adequacy of investigation of mitigating circumstances

Any deficient performance by trial counsel in failing to discover psychological report suggesting that defendant was mildly retarded and suffered from organic brain dysfunction and failing to subsequently investigate his mental health was not prejudicial to defendant, as required to support his claim of ineffective assistance of counsel at punishment phase of his capital murder trial that resulted in imposition of death penalty, since there was ample evidence that defendant was malingering and did not suffer from any mental infirmity. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[2] **Habeas Corpus**
Post-trial proceedings; sentencing, appeal, etc

State habeas court's conclusion, that defense counsel's failure to call defendant's sister at death penalty phase of his capital murder trial to present mitigation testimony about his disadvantaged background was reasonable strategic decision and not ineffective assistance of counsel, did not unreasonably apply federal law or unreasonably determine facts in light of evidence presented at state habeas proceeding, as would have warranted habeas relief, since state court could reasonably have decided that risks associated with sister's unsympathetic testimony outweighed any benefits. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

Cases that cite this headnote

[3] **Habeas Corpus**
Sufficiency of Presentation; Fair Presentation

Habeas petitioner's claim that he was prejudiced by counsel's failure to present background and mental health mitigating evidence during punishment phase of his capital murder trial that resulted in death penalty, allegedly depriving him of argument on appeal that nullification instruction jury received violated his Eighth and Fourteenth Amendment rights, was procedurally defaulted as not exhausted, since defendant established factual basis for his claim but did not provide state habeas court with fair opportunity to consider substance of his argument inserted in footnote at end of his brief. U.S.C.A. Const.Amends. 8, 14; 28 U.S.C.A. § 2254(b)(1).

1 Cases that cite this headnote

[4] **Habeas Corpus**
Habeas corpus
Habeas Corpus
Procedural error; wrong court or remedy

Habeas petitioner's claim that his attorney provided ineffective assistance during his closing argument at capital murder trial by allegedly conceding defeat and stating that he could not quarrel with jury's decision imposing death penalty was procedurally barred, where petitioner failed to file timely notice of appeal 14 days after Director of Texas Department of Criminal Justice filed his notice of appeal of district court's grant of habeas relief on petitioner's two other claims, and petitioner failed to first obtain certificate of appealability (COA). 28 U.S.C.A. §§ 2253(c), 2254; F.R.A.P.Rules 4(a)(1)(A), 4(a)(3), 28 U.S.C.A.

1 Cases that cite this headnote

Attorneys and Law Firms

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Andrew S. Oldham, Deputy Solicitor General, Office of the Attorney General, Office of the Solicitor General, Ellen Stewart–Klein, Assistant Attorney General, Office of the Attorney General, Postconviction Litigation Division, Austin, TX, for Respondent–Appellant.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:09–CV–219.

Before STEWART, Chief Judge, SOUTHWICK and HAYNES, Circuit Judges.

Opinion

PER CURIAM:*

In 1989, Robert Mitchell Jennings was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal, and his state habeas application was denied. In 2009, Jennings filed a federal habeas petition, alleging that his attorneys were ineffective for failing to present evidence of his disadvantaged background and for failing to find and present evidence of his mental impairment. The district court agreed and granted habeas relief. The Director of the Texas Department of Criminal Justice filed a timely notice of appeal. We REVERSE and RENDER.

***328** FACTS AND PROCEDURAL HISTORY

On July 19, 1988, Jennings shot and killed Elston Howard, an officer with the Houston Police Department. Officer Howard was in the process of arresting the clerk of an adult bookstore when Jennings entered the store, intending to commit a robbery. Jennings shot Officer Howard four times in the back and head and then robbed the store clerk.

A jury convicted Jennings of capital murder. During the punishment phase, the State of Texas presented evidence of Jennings' lengthy criminal history. At the age of fourteen, Jennings was declared a delinquent and placed on probation. At seventeen, he was convicted of aggravated robbery and sentenced to five years' imprisonment. At twenty, he was convicted of two more aggravated robberies and a burglary and sentenced to concurrent thirty-year sentences. Within two months of his release, he committed six more aggravated robberies, including the one that resulted in Officer Howard's death.

George Burrell, the jail chaplain, was the only defense witness called during the punishment phase. Burrell testified that he met Jennings in the county jail shortly after Jennings' arrest for Officer Howard's murder. Burrell saw Jennings two to three times a week, and he testified that he did not believe Jennings was "incorrigible." No other mitigation evidence was presented.

In 1996, Jennings filed a state habeas application, alleging he received ineffective assistance of counsel at the punishment phase. Specifically, he claimed that his attorneys were ineffective for failing to call his mother and sister to testify regarding his disadvantaged background and for failing to find and present a 1978 psychological report, which suggested that Jennings had "mild organic brain dysfunction" and was mildly mentally retarded.

The state court found that Jennings' attorneys had performed a sufficient investigation into Jennings' background. As part of that investigation, counsel interviewed Flora and Carla Jennings, his mother and sister, respectively. Connie Williams, one of Jennings' attorneys, submitted an affidavit explaining that he decided not to call Jennings' mother because he perceived her as "not very sympathetic" to Jennings. He reached the same conclusion with respect to Jennings' sister Carla. One of the attorney's concerns was that Jennings had been in and out of prison for most of his sister's life. The state court concluded that counsel's decision not to present testimony from either Flora or Carla Jennings was reasonable trial strategy.

The state court also found that Jennings had failed to show he was mentally retarded or suffered from organic brain dysfunction. The state court considered the 1978 psychological report completed by Dr. J.M. Bloom (the "Bloom Report").[1] In his report, Dr. Bloom suggested that Jennings was mildly retarded and suffered from organic brain dysfunction. The court noted that Dr. Bloom believed Jennings was malingering.

The state court also considered the reports from the more recent psychological evaluations performed on Jennings in connection with the state habeas proceedings. In 1996, a quantitative electroencephalography ("QEEG") test was performed on Jennings. The QEEG revealed "dysfunction in the frontal and temporal areas of the applicant's brain." A single photon ***329** emissions tomography ("SPECT") study was also performed, and it revealed "the presence of frontal and left temporal lobe impairment." The SPECT and QEEG results were then evaluated by a psychologist, who concluded that Jennings' "capacity for emotional control and self-inhibition" was impaired.

The state court found that the conclusions reached based on the SPECT and QEEG results were unpersuasive given the contrary evidence that Jennings was smart and did not suffer from any mental defects. A 1978 pre-sentence investigation report revealed that Jennings had obtained his G.E.D. and had completed over forty hours of college credit while incarcerated. A 1989 psychological evaluation performed by the Texas Department of Corrections ("TDC") indicated that Jennings had no history of mental health problems and voiced no psychological complaints. A TDC social summary report reflected that Jennings had obtained a barber's license and a butcher's certificate while incarcerated. Accordingly, the state court recommended that the Texas Court of Criminal Appeals deny Jennings' request for habeas relief. The Court of Criminal Appeals accepted the recommendation and denied relief.

In 2009, Jennings filed a petition under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. The district court granted the petition, finding that Jennings had received ineffective assistance of counsel. Specifically, the court found that counsel was ineffective for failing to present testimony regarding Jennings' disadvantaged background and for failing to uncover the Bloom Report and perform a subsequent investigation into Jennings' mental health.

The court acknowledged the "legitimate risks" associated with calling Jennings or his mother to testify regarding his background, then concluded that counsel's decision not to call them was reasonable trial strategy. The court found that the decision not to call his sister Carla "made no sense." The court reasoned that while she may not have had a close relationship with Jennings, she still could have testified regarding the difficult circumstances of their home life. The court explained that while each individual decision not to call a specific witness may have made sense in isolation, the failure to present *any* evidence of Jennings' disadvantaged background was not reasonable trial strategy.

The district court also found that Jennings' counsel was deficient for failing to uncover the Bloom Report. The court acknowledged Dr. Bloom's concern that Jennings was malingering; even so, the court noted that Dr. Bloom concluded that Jennings suffered from mild mental retardation and organic brain dysfunction. The court held that counsel was deficient for failing to adequately investigate and uncover evidence of Jennings' mental impairment.

Finally, the district court found that counsel's failure to investigate, develop, and present mitigation evidence prejudiced Jennings. The court concluded that evidence of Jennings' disadvantaged background and his mental impairments "might have been sufficient to convince at least one juror that Jennings did not deserve the death sentence."

DISCUSSION

This case is governed by the Antiterrorism and Effective Death Penalty Act. Under AEDPA, a federal court may not grant habeas relief after an adjudication on the merits in a state court proceeding unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined ***330** by the Supreme Court of the United States" or (2) "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). Moreover, a state court's factual findings are presumed to be correct unless the applicant rebuts the presumption by clear and convincing evidence. 8 U.S.C. § 2254(e)(1).

When reviewing a district court's grant of habeas relief, issues of law are reviewed *de novo* and factual findings are reviewed for clear error. *Woodfox v. Cain*, 609 F.3d 774, 788–89 (5th Cir.2010). "A claim of ineffective assistance of counsel presents a mixed question of law and fact. If the district court's findings of fact are not clearly erroneous, we will independently apply the law to the facts as found by the district court." *Id.* (citation omitted).

All of Jennings' habeas claims relate to the issue of whether he received ineffective assistance of counsel at the punishment phase. To succeed in this claim, Jennings must demonstrate that his attorneys performed deficiently and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance exists when an attorney's conduct falls "below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. An attorney's effective assistance at least includes conducting a "reasonably substantial investigation" into potential defenses. *Id.* at 680, 104 S.Ct. 2052. Nonetheless, the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms,' " *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052).

Demonstrating prejudice requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The *Strickland* standard does not require the petitioner to show it was more likely than not that the outcome would have been different. *Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002). Instead, "[u]ndermining confidence in the outcome is exactly *Strickland* 's description of what is meant by the reasonable probability standard." *Id.* at 23, 123 S.Ct. 357 (quotation marks omitted). Further, although "[j]udicial scrutiny of counsel's performance must be highly deferential ..., strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 689–91, 104 S.Ct. 2052.

At the time of Jennings' trial, Texas law provided that a death sentence could not be imposed unless the jurors unanimously answered three special issues in the affirmative; it permitted jurors to answer the special issues in the negative only if "10 or more jurors agree." TEX.CODE CRIM. PROC. ANN. art. 37.071(d)-(e) (West 1985). Therefore, Jennings can show he would not have been sentenced to death by this panel of jurors if he can establish a "reasonable probability" that one juror would have persisted in a negative answer to one ***331** of the special issues based on evidence that his attorneys did not discover or present. Importantly, AEDPA deference requires that Jennings establish that all reasonable jurists would agree that he was prejudiced, which means that no reasonable person could adopt the state habeas court's position that no prejudice occurred. *See Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

A. Mental Impairment

Jennings argues that his attorneys' failure to discover the Bloom Report and perform a subsequent investigation

into his mental health constitutes deficient performance and that the state habeas court's conclusion to the contrary is unreasonable.[2]

[1] In his affidavit, Williams admitted that he had failed to review the case files from Jennings' prior convictions, which contained the Bloom Report. He further stated that if he had known about the report, he would have "requested further psychological evaluation." The Director acknowledges these statements but contends that regardless of what Jennings' attorney did or not did not review, every document in existence at the time of trial showed that Jennings was intelligent and did not suffer from any mental impairment. Stated another way, Jennings has failed to show prejudice under *Strickland.* We agree.

Dr. Bloom stated that his evaluation of Jennings revealed a low IQ and mild organic brain dysfunction, but he also concluded that Jennings was malingering. The relevant portion of the Bloom Report reads:

> Although the results of psychological assessment techniques suggest[ ] the presence of mild mental[ ] retardation and mild organic brain dysfunction, it is [my] opinion that these are not severe enough to produce the kind of deficits which Mr. Jennings manifested during [the] interview. It is felt that he is attempting to present himself as a mentally ill person in order to delay proceedings.

The Bloom Report's statement that these conditions were enhanced by Jennings' malingering does not necessarily excuse his attorneys' failure to perform a mental-health investigation. Indeed, the Texas Court of Criminal Appeals noted that Jennings' attorneys "may well have performed deficiently" by not conducting a mental-health investigation based on the Bloom Report. It explained that "[e]ven if Dr. Bloom himself attributed the applicant's test results to malingering, it is arguable that his report should nevertheless have sufficed to alert competent trial counsel that further psychological evaluation would be appropriate." In the end, the court did not decide this issue because it determined that even if Jennings' attorneys performed deficiently, their failure to perform a mental-health ***332** investigation did not prejudice Jennings.

The district court disagreed. It held counsel to be deficient for failing to uncover the Bloom Report and investigate Jennings' mental health. The district court relied on *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Williams,* the Supreme Court held that the defendant's attorneys performed deficiently when "[t]hey failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395, 120 S.Ct. 1495. Attorneys deficiently performed when they failed to uncover or introduce a "voluminous amount" of available evidence, including that the defendant was "borderline mentally retarded." *Id.* at 396, 120 S.Ct. 1495.

The Supreme Court has also explained that a defendant's attorney "has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. Investigation is essential to fulfillment of these functions." *Wiggins,* 539 U.S. at 524–25, 123 S.Ct. 2527 (quoting 1 ABA Standards for Criminal Justice 4–4.1, cmt., p. 4–55 (2d ed. 1982)). The *Wiggins* Court went on to conclude that the representation provided by Wiggins' attorneys fell below the *Strickland* standard when they failed "to expand their investigation beyond the [presentence investigation report] and the [Department of Social Services records]." *Id.* at 524, 123 S.Ct. 2527.

Jennings' attorneys admit that "fail[ing] to investigate Mr. Jennings' mental status or present evidence of his mental impairment was not strategic; rather, it was a consequence of our lack of knowledge of any diagnosed mental impairment." The district court considered the similarities between Jennings' case and *Williams* "too strong to ignore." One distinction we see is that there was significantly more mitigation evidence available in *Williams* than here. For example, in addition to the evidence that Williams was "borderline mentally retarded," his attorneys failed to uncover and present evidence that Williams had only achieved a sixth-grade education and had received commendations for helping end a prison drug ring and for returning a prison guard's wallet. *Williams,* 529 U.S. at 396, 120 S.Ct. 1495. Further, prison guards would have testified that Williams was the least likely among the inmates to act violently, and a certified public accountant would have testified based on his interactions with Williams during a prison ministry program that he was "thriv[ing] in a more regimented and structured environment." *Id.* We have already summarized the evidence discoverable as to Jennings, and it is not of that magnitude.

Jennings also argues that in light of the evidence that could have been presented supporting a mental deficiency, the Texas Court of Criminal Appeals unreasonably concluded that his attorneys' errors did not prejudice him. Specifically, he points to the results of the additional psychological evaluations performed as part of the state habeas proceedings. Following the discovery of the Bloom Report by Jennings' state habeas attorney, Jennings' mental condition was evaluated by at least three doctors. Dr. Meyer Poler performed a QEEG test on Jennings. According to Dr. Poler's report, Jennings' QEEG results were consistent with "affective disorder and/or learning disability" and suggested that Jennings might benefit from treatment with antidepressants. The test also suggested that Jennings suffered ***333** from post-concussive syndrome—a mild form of traumatic brain injury.

A SPECT study was also performed on Jennings. Dr. Theodore Simon reviewed the results. In his report, Dr. Simon explained that the results of the SPECT test revealed abnormalities in certain parts of Jennings' brain that "support the contention" that Jennings had suffered from a brain injury. The results of the QEEG and the SPECT test were reviewed by Dr. Windel Dickerson. In his report, Dr. Dickerson concluded that Jennings was not mentally retarded. Dr. Dickerson nevertheless concluded that the QEEG and SPECT tests confirmed that "Mr. Jennings suffers from periods in which impulsive action overcomes the capacity for reason and foresightful action." Dr. Dickerson further explained that "Mr. Jennings' capacity for emotional control and self-inhibition is less than that of an unimpaired person and his condition has a demonstrable physical basis."

The Director responds to these reports by admitting that Jennings "may have a learning disability, may benefit from antidepressants, and may have a brain injury of unspecified type and severity." The Director nonetheless contends that the presentation of the Bloom Report and the findings of a subsequent investigation would not have served Jennings' interests because they would have led the State to present evidence that Jennings is mentally sound. For instance, the State could have presented the report of Dr. John Nottingham, who performed an independent psychiatric examination of Jennings the day after Dr. Bloom. In his report, Dr. Nottingham explained that his findings "are consistent with a person who is attempting to appear to be mentally disturbed on a voluntary basis." He concluded that "[t]here does not appear to be a disease of the mind or mental defect which would interfere with [Jennings'] ability to consult with his attorney."

Also, prior to Jennings' capital trial in 1989, the court ordered Dr. Jerome Brown to perform a competency evaluation. Dr. Brown concluded that "[n]one of the information that is available at present suggests that [Jennings] was suffering from any severe mental illness or mental defect at the time the alleged offense took place" and that he was of sound mind at the time of the crime. Moreover, the State hired Dr. Victor Scarano during the state habeas proceedings to offer his opinion of Jennings based on evidence that had been collected by other doctors. Dr. Scarano did not examine Jennings; instead, his conclusions were based on his review of the psychological reports mentioned above along with other documents bearing on Jennings' mental status. Dr. Scarano concluded that Jennings "was malingering a mental disease or disorder" during his interactions with Drs. Bloom and Nottingham. Dr. Scarano also concluded that Jennings "was not mentally retarded or suffering from an organic brain dysfunction" at the time of the primary crime, which the report found "was not an impulsive act but a controlled and deliberate act."

Dr. Scarano also criticized Dr. Dickerson's reliance on the QEEG and SPECT tests. With respect to the QEEG test, Dr. Scarano noted that "[a] specific clinical advantage has yet to be unequivocally demonstrated for any of the quantitative EEG or mapping techniques." He explained that "a QEEG is insufficient to diagnose brain damage, but may be confirmatory of a diagnosis of brain damage." Dr. Scarano also pointed to several deficiencies in the SPECT test, which Dr. Simon had emphasized in his report. For example, Dr. Simon noted that "[n]o information was available regarding the binding ***334** or age on the tracer used in this examination"—a significant limitation given that the tracer molecule used in the test is "highly unstable" and "should be injected within fifteen minutes of preparation." Dr. Simon also noted that the "banded color table ... used for imaging the data" was not provided to him. Dr. Scarano found it problematic that despite stating he lacked important information bearing on the reliability of the study, Dr. Simon nonetheless concluded Jennings had suffered a brain injury.

In addition to these reports, the Director urges that there was ample evidence that Jennings did not suffer from any mental infirmity. Specifically, he points to Jennings' scholastic achievements while incarcerated, his professional certifications, and his score of 105 on an IQ test. The Director contends that this evidence further demonstrates that Jennings was not prejudiced by his attorneys' failure to investigate his mental condition.

Based on the above, Jennings has failed to establish prejudice. At best, Jennings relies on the opinions of

dueling experts who would have provided conflicting evidence concerning his mental capacity. This is insufficient to meet the burden under AEDPA's deferential standard, which requires Jennings to show that no reasonable jurist would have reached the same conclusion as the state habeas court. The Court of Criminal Appeals did not reach an unreasonable conclusion regarding the lack of prejudice, and under AEDPA its decision should stand.

B. Disadvantaged Background

Jennings also argues that his attorneys provided ineffective assistance by failing to present the mitigation testimony of himself, his mother, or his sister. The Texas Court of Criminal Appeals rejected Jennings' claim on all three points. The district court held that the state court's conclusion was unreasonable to the extent that it found that the failure to call Jennings' sister did not result in ineffective assistance. The Director contends that the decision to call a prison chaplain, whose testimony presented fewer risks than the testimony of Jennings or his family members, was a fully informed strategic decision and did not amount to ineffective assistance.

In evaluating whether Jennings' attorneys were deficient, this court is "required not simply to give [Jennings'] attorneys the benefit of the doubt, ... but to affirmatively entertain the range of possible reasons [Jennings'] counsel may have had for" not presenting the testimony of these three individuals. *See Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 1407, 179 L.Ed.2d 557 (2011) (citation and quotation marks omitted). Indeed, an attorney may decline to present evidence of a defendant's background during the penalty phase and instead focus on "convinc[ing] the jury that [the defendant] would not be a future danger in prison." *Perkins v. Quarterman*, 254 Fed.Appx. 366, 371 (5th Cir.2007) (unpublished); *see also Brown v. Thaler*, 684 F.3d 482, 498–99 (5th Cir.2012).

The Texas Court of Criminal Appeals credited several reasons that would justify not calling Jennings, his mother, or his sister. For instance, Williams stated in his affidavit that he did not ask Flora Jennings to testify because he determined after interviewing her that she "was not very sympathetic to Jennings." Similar to the problem posed by calling Flora Jennings, Williams did not believe that Carla Jennings would be a sympathetic witness. In addition, Williams suggested in his affidavit that Carla Jennings would not be a beneficial witness because she was several years younger than Jennings and had little ***335** interaction with him given that he had been in and out of juvenile detention and prison for most of her life. Thus, she had limited knowledge of Jennings' upbringing. There were also legitimate risks associated with calling the defendant Jennings given that his attorneys were unable to persuade the trial court to allow him to testify about his background without being subjected to full cross-examination.

The district court concluded it was reasonable for counsel not to call either Jennings himself or his mother as witnesses. With respect to the sister Carla Jennings, though, the court complained that the "explanation for not calling Jennings' sister makes no sense." In the district court's view, the fact that Carla Jennings did not have a close relationship with her brother had no bearing on her ability to testify about the conditions at home.

[2] Although Carla Jennings may have been the best available option to present evidence concerning Jennings' background, we conclude there was no AEDPA-recognizable error when the state court determined that his attorneys reasonably could have decided that the risks associated with her unsympathetic testimony outweighed any benefits. True, omitting her testimony meant jurors heard no evidence regarding Jennings' disadvantaged background. A capital defendant's disadvantaged background, though, can be a "double-edged" sword that "might permit an inference that he is not as morally culpable for his behavior, [but] also might suggest [that he], as a product of his environment, is likely to continue to be dangerous in the future." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir.2002); *see also Brown*, 684 F.3d at 499. Jennings' attorneys could reasonably have concluded that resources were better spent focusing the jury's attention on Jennings' lack of future dangerousness rather than attempting to garner support for Jennings based on his troubled background. As such, it was not unreasonable for the Texas Court of Criminal Appeals to conclude that Jennings' attorneys were not deficient with respect to their strategic decision to omit evidence of Jennings' background.

C. *Penry* Claim

Because we have determined that the state habeas court's conclusion that Jennings' attorneys were not deficient with respect to the omission of evidence on Jennings' background is reasonable, we need not consider whether counsel's decision prejudiced Jennings. Nonetheless, we address Jennings' argument that he suffered prejudice

because "had counsel introduced mitigating evidence of [his] mental impairment and disadvantaged background," any death sentence he received would have been reversed based on the nullification instruction the jury received in violation of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*), as interpreted by *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*).

Penry requires that jurors be provided the opportunity to "fully consider [ ] the mitigating evidence as it [bears] on the broader question of [the defendant's] moral culpability." *Penry II*, 532 U.S. at 787, 121 S.Ct. 1910. "[I]t is only when the jury is given a vehicle for expressing its reasoned moral response to [mitigating] evidence in rendering its sentencing decision ... that [the court] can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Id.* at 797, 121 S.Ct. 1910 (citation and quotation marks omitted) (finding a nullification instruction unconstitutional because a "reasonable juror could well have believed that there was no vehicle for expressing the view that [the ***336** defendant] did not deserve to be sentenced to death based upon his mitigating evidence" (quoting *Penry I*, 492 U.S. at 326, 109 S.Ct. 2934)). Indeed, the "statutory special issues presented to the jury at sentencing and the prosecutor's closing arguments regarding those special issues" must allow the jury to give "meaningful consideration and effect to all of [the defendant's] mitigating evidence." *Pierce v. Thaler*, 604 F.3d 197, 201 (5th Cir.2010).

This special instruction requirement was first announced by the Supreme Court on June 26, 1989, in *Penry I*, 492 U.S. at 328, 109 S.Ct. 2934. The guilt phase of Jennings' trial followed shortly thereafter on July 5, 1989. In light of *Penry I*, the court gave Jennings' jury the following nullification instruction:

> When you deliberate about the questions posed in the Special Issues, you are to consider mitigating circumstances and factors, if any, supported by the evidence presented in both phases of trial. A mitigating circumstance may be any aspect of the Defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine that, in consideration of this evidence, [ ] a life sentence rather than a death sentence, is an appropriate response to the personal moral culpability of the Defendant, you are instructed to answer the Special Issue under consideration "No."

Notably, Jennings' attorneys requested this instruction and did not object to it as inadequate. Jennings was sentenced to death, and his conviction became final in 1993. In 2001, the Supreme Court in *Penry II* held that a jury instruction that was substantially similar to the instruction provided to Jennings' jury did not satisfy the Eighth Amendment's mitigation-instruction requirement as established by *Penry I*. *See Penry II*, 532 U.S. at 789–90, 803–04, 121 S.Ct. 1910.

Based on the similarity between the instruction Jennings' jury received and the instruction the Supreme Court found inadequate in *Penry II*, Jennings argued in his state habeas proceeding that his Eighth Amendment right to a special instruction had been violated. After noting that Jennings' "*Penry* claim is limited to evidence adduced at his trial, and does not include the jury's ability to render a reasoned moral response to mitigating evidence he now claims *should* have been adduced," the Texas Court of Criminal Appeals determined that based on the "circumstances there is no Eighth Amendment deficiency." Specifically, the court explained that "[t]he only mitigating evidence presented at trial was Chaplain Burrell's testimony with respect to the applicant's behavior and demeanor in the jail." This evidence, the court concluded, had only a "tenuous connection" to Jennings' moral culpability and therefore the special instruction was unnecessary. *See Abdul–Kabir v. Quarterman*, 550 U.S. 233, 253 n. 14, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (explaining that a "special instruction is not required when mitigating evidence has only a tenuous connection ... to the defendant's moral culpability"). Consequently, the court did not evaluate the sufficiency of the *Penry* instruction on the merits based on its holding that Jennings presented inadequate mitigating evidence to require an instruction.

On appeal, Jennings does not advance a pure-*Penry* argument. Instead, he argues that the failure to offer mitigating evidence of his background deprived him of an argument on appeal that the nullification instruction ***337** violated his Eighth and Fourteenth Amendment rights,

which could have resulted in overturning his sentence on direct appeal or by a state or federal habeas court.

The district court did not consider Jennings' *Penry*-based prejudice argument because it found that Jennings failed to exhaust this claim in his state habeas proceeding. "The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir.1999); *see also Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). A fair opportunity to consider a claim requires that "all the facts necessary to support the federal claim were before the state courts" and "the habeas petitioner must have fairly presented to the state courts the substance of his federal habeas corpus claim." *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (quotation marks omitted).

[3] Although Jennings established the factual basis to support his *Penry*-based prejudice argument, he did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument—he inserted it in a footnote at the end of his brief. *See Bridas SAPIC v. Gov't of Turkm.*, 345 F.3d 347, 356 n. 7 (5th Cir.2003) (holding that an argument raised only in a footnote of a brief is waived). Specifically, Jennings argued that:

> Had applicant's counsel introduced mitigating evidence of his mental impairment and disadvantaged background, and thereafter objected to the nullification instruction, this Court would be obligated to reverse the death sentence pursuant to *Abdul–Kabir v. Quarterman*, 550 U.S. [233, 127 S.Ct. 1654, 167 L.Ed.2d 585] (2007); *Smith v. Texas*, 550 U.S. [297, 127 S.Ct. 1686, 167 L.Ed.2d 632] (2007); and *Brewer v. Quarterman*, 550 U.S. [286, 127 S.Ct. 1706, 167 L.Ed.2d 622] (2007). However, the jury could consider and give effect to applicant's mitigating evidence of good behavior while confined in jail in answering the future dangerousness special issue. *See Franklin v. Lynaugh*, 487 U.S. 164 [108 S.Ct. 2320, 101 L.Ed.2d 155] (1988). Thus, the nullification instruction was superfluous under controlling Supreme Court precedent because counsel did not present and, thus, the jury was not called upon to consider and give effect to the mitigating evidence of applicant's mental impairment and disadvantaged background. In short, *Penry II* is not applicable.

This argument only vaguely alerted the state habeas court to his *Penry*-based prejudice argument and focused instead on arguing that *Penry II* is not applicable. This passing reference to his *Penry*-based prejudice argument during his state habeas proceedings does not suffice to exhaust his claim. As a result, Jennings is barred from asserting this claim in his federal habeas petition.

Because this claim is unexhausted and procedurally defaulted, Jennings cannot now rely on it to establish prejudice resulting from the failure to present background and mental-health mitigating evidence during the penalty phase. *See* 28 U.S.C. § 2254(b)(1).

D. Closing Argument

Jennings argues in a "cross-point" that his attorney provided ineffective assistance during his closing argument by conceding defeat and stating that he could not quarrel with the jury's decision to find him eligible for the death penalty. Before turning to the merits of Jennings' argument, ***338** this court must determine whether his claim is procedurally barred because he did not file a timely notice of appeal and filed a certificate of appealability ("COA") with this court six months after the Director filed his notice of appeal.

[4] A defendant generally must file a notice of appeal of a district court's denial of a federal habeas application within thirty days after the entry of final judgment. *See Bowles v. Russell*, 551 U.S. 205, 207, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007); *see also* FED. R.APP. P. 4(a)(1)(A). When the opposing side appeals first, the party also seeking to appeal must do so "within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." FED. R.APP. P. 4(a)(3). Failure to file a notice of appeal deprives this court of jurisdiction to consider the appellant's claims. *See Bowles*, 551 U.S. at 206–07, 127 S.Ct. 2360. Here, although the Director filed a timely notice of appeal, giving the court jurisdiction to consider two of Jennings' ineffective-assistance-of-counsel claims, Jennings did not file a notice of appeal concerning the claim the district

court decided against his interest—the closing argument claim.

Jennings also failed to seek a COA from the district court first. The district court must first rule on a petitioner's COA request before this court has jurisdiction to consider it. *See Cardenas v. Thaler*, 651 F.3d 442, 443 (5th Cir.2011). While the State may appeal a grant of habeas relief without seeking a COA, "a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition" and "must first seek and obtain a COA." *Miller–El v. Cockrell*, 537 U.S. 322, 335–36, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (*Miller–El I*) (citing 28 U.S.C. § 2253).

When the State appeals a grant of habeas relief, circuit courts of appeal are split on whether a petitioner can raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court without first seeking a COA. For instance, the Seventh Circuit views the COA requirement in 28 U.S.C. § 2253(c) as a gate-keeping function and therefore finds it unnecessary for a petitioner to seek a COA when an appeal is already before the court based on the state's appeal of a grant of habeas relief. *Szabo v. Walls*, 313 F.3d 392, 397 (7th Cir.2002). The court held that Section 2253(c) "deals only with *appeals* by prisoners; it does not mention arguments by prisoners as *appellees* offered in support of relief they have obtained." *Id.* In contrast, the Second Circuit has held that "a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting him to argue that ground." *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir.2003).

This circuit has rejected the idea that a State's appeal displaces Section 2253(c)'s gate-keeping function, and with it the requirement that a petitioner must seek a COA. *See Wiley v. Epps*, 625 F.3d 199, 204 n. 2 (5th Cir.2010). In *Wiley*, the district court granted habeas relief based on the petitioner's claim that he was mentally retarded and ineligible for a death sentence as contemplated by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Id.* at 202. The State appealed the district court's grant of habeas relief. *Id.* This court noted that the district court rejected the petitioner's other arguments in support of relief, but the petitioner had failed to file a notice of appeal or seek a COA as to those arguments. *Id.* at 204 n. 2. As a result, the only issue before the ***339** court was the petitioner's *Atkins* claim. *Id.*

Jennings does not distinguish *Wiley* or argue in his brief that a notice of cross-appeal or COA is unnecessary to establish jurisdiction. A party seeking to invoke the court's jurisdiction must advance arguments establishing jurisdiction. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir.1983).

Jennings' "cross-point" is DISMISSED and his motion for a COA is DENIED. The judgment granting habeas relief is REVERSED, and judgment is RENDERED, denying habeas relief.

All Citations

537 Fed.Appx. 326

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 The report, completed ten years before Officer Howard's murder, was prepared as part of a competency evaluation Jennings had been ordered to undergo in connection with the prosecution of aggravated robbery and burglary charges.

2 Jennings also urges that this court need not defer to the state habeas court's findings because the Texas Court of Criminal Appeals did not adopt the factual findings of the state district court concerning this issue. The case on which Jennings relies for this proposition, *Guidry v. Dretke*, 397 F.3d 306, 326 (5th Cir.2005), was abrogated by the Supreme Court's decision in *Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). *McCamey v. Epps*, 658 F.3d 491, 497 n. 1 (5th Cir.2011). Further, although it declined to decide the deficient-performance element for the mental-impairment issue, the Court of Criminal Appeals did not disturb the state district court's finding that Jennings' attorneys were not deficient in this regard. *See Ex parte Jennings*, Nos. AP–75806, AP–75807, 2008 WL 5049911, at *2 (Tex.Crim.App. Nov. 26, 2008). Because this issue has been decided by the state habeas court, it must be given deference. *See Gregory v. Thaler*, 601 F.3d 347, 353 (5th Cir.2010).

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

ROBERT MITCHELL JENNINGS,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-09-219
	§	
RICK THALER, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

Memorandum and Order

Robert Mitchell Jennings filed a petition for a writ of habeas corpus. Rick Thaler moved for summary judgment. Thaler's motion is denied and Jennings' Petition is granted.

I. Background

The facts are not in dispute. Houston Police Officer Elston Howard was in the Empire Bookstore, a sexually oriented business, arresting the store clerk for violating a city ordinance. Jennings entered to rob the store. He shot Howard twice in the neck. Howard tried to leave the store, but collapsed on the floor. Jennings shot Howard two more times from behind. Howard died.

Jennings was convicted of capital murder. During the penalty phase of Jennings's trial, the State presented evidence of Jennings's extensive criminal history, including juvenile offenses, three aggravated robberies, and burglary of a habitation. Jennings also committed numerous prison disciplinary violations.

Jennings's only witness was a chaplain with the Harris County Sheriff's office. He testified

that Jennings changed for the better during his pretrial detention.

The jury found that Jennings acted deliberately in killing Howard and that there was a probability that Jennings would commit future acts of criminal violence constituting a continuing threat to society. The trial court sentenced him to death. The Texas Court of Criminal Appeals ("TCCA") affirmed the sentence and conviction, *Jennings v. State*, No. AP-70,911 (Tex.Crim.App.), *cert. denied*, 510 U.S. 830 (1993), and denied Jennings's application for a writ of habeas corpus, *Ex Parte Jennings*, Nos. AP-75,806 and 75,807 (Tex.Crim.App. 2008).

II. Discussion

A. The Anti-Terrorism and Effective Death Penalty Act

This petition is governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, this Court cannot grant relief on claims that were decided on the merits by the state courts unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "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); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact decided on the merits in state court, this Court may not grant relief unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). A state court decision is contrary to clearly established precedent if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than

. . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)).

The "unreasonable application" standard permits relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The sole question under the 'unreasonable application' prong is "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'"). The state court's factual determinations are

presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Ordinarily, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). When, however, the petitioner fails to show by clear and convincing evidence that the presumption of correctness required by 28 U.S.C. § 2254(e)(1) should not apply to state court findings, those findings are entitled to deference. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Foster v. Johnson*, 293 F.3d 766, 777 (5th Cir.), *cert. denied sub nom Foster v. Epps*, 537 U.S. 1054 (2002); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998)

C. Summary Judgment

Jennings asserts that he received ineffective assistance of counsel during the penalty phase of his trial. To prevail on a claim for ineffective assistance of counsel, Jennings

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). To show deficient performance by counsel,

Jennings must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

In assessing prejudice in a sentencing hearing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

1. Deficient Performance

a. Failure to Present Background Evidence

Counsel wanted Jennings to testify about his upbringing without being subject to cross examination. 39 Tr. at 196-200.[1] When the trial court refused that request, counsel decided not to call Jennings. Jennings now contends that counsel was deficient. He argues that, because the State presented evidence of his criminal past, no additional harm could have come from cross examination. He also observes that his mother and his sister were available to testify about his childhood.

Evidence about Jennings's background would have shown that he grew up in poverty, that he was conceived as a result of a rape, that his mother gave birth to him when she was 17 and blamed his birth for interrupting her education, she resented him for it and made her resentment plain to him,

[1] "TR" refers to the transcript of Jennings's trial.

and that she was a drug addicted single mother. 1 SH at 77-80.[2] The record shows that counsel elected not to call Mrs. Jennings because she was unsympathetic to Jennings, but Jennings argues that any resentment she displayed on the witness stand would only emphasize his difficult background. Counsel did not call Jennings's sister Carla because he thought she was too young to remember relevant facts when Jennings first entered the juvenile justice system. Jennings points out that she was 12 years old at the time, and argues that she was old enough to remember the family's living conditions. 1 SH at 351.[3]

Counsel did not review the clerk's file from Jennings's previous convictions. That file contained evidence that Jennings has a low IQ and some brain damage, resulting in poor impulse control. Counsel acknowledged that he would have sought expert psychological assistance if he knew of the previous examinations. 1 SH at 41-42. Jennings also argues that counsel's failure to present evidence of low intelligence and mental health problems forfeited a habeas claim that would have resulted in a new sentencing hearing.

1.) Failure to Call Jennings

The state habeas court found that counsel had valid strategic reasons for choosing not to call Jennings, his mother, or his sister. 2SH at 416, 426. Jennings now argues that counsel's opinion that cross examination would harm his case was not valid in light of the State's evidence of his extensive criminal background. The record does not show what counsel feared, but cross examination always

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[2] "SH" refers to the transcript of Jennings's state habeas corpus proceeding.

[3] It is not clear that Carla was 12 years old at the time. Her affidavit indicates that she was born in 1961 or 1962 (her 1996 affidavit states that she was 34 years old), and TDCJ records list Jennings's birthdate as 1957. Carla's affidavit estimates that Jennings entered the juvenile justice system when he was 15, at which time Carla would have been about 10. Nonetheless, a 10 year old is certainly old enough to be aware of her family's living conditions.

carries risks. It may be true that there was no additional evidence of Jennings's criminal history, but counsel could reasonably have feared that Jennings would appear unremorseful, be provoked into an angry outburst, or otherwise appear in an unsympathetic light.

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689. Because there were legitimate risks, counsel's decision is entitled to deference as a valid strategic decision.

2.) Failure to Call Jennings's Mother

Counsel also stated that he elected not to call Mrs. Jennings because she was unsympathetic to her son. Jennings argues that this would have made her a more potent witness, demonstrating how he grew up without any parental support. While Jennings's argument is compelling, *Strickland* requires great deference to counsel's decisions. Counsel's concerns that Mrs. Jennings's hostility would be harmful, *e.g.*, might convince jurors that Jennings was irredeemable (if even his own mother does not like him), were legitimate, even if Jennings offers a valid argument for viewing the potential impact of the testimony differently. Counsel's decision not to call Mrs. Jennings is within the bounds of counsel's reasonable discretion.

3.) Failure to Call Jennings's Sister

Counsel's explanation for not calling Jennings's sister makes no sense. Counsel stated that Jennings's sister was too young to remember pertinent events. The record shows that she was about

10 years old when Jennings first entered the juvenile justice system. That is certainly old enough to remember conditions at home at the time. Counsel's explanation is therefore contrary to the facts, and the TCCA's conclusion "was based on an unreasonable determination of the facts . . . ." 28 U.S.C. § 2254(d).

Moreover, while counsel's explanations for not calling Jennings or his mother might make sense in isolation, the decision to call *none* of these three potential witnesses, and therefore present *no* evidence of the emotional and economic deprivations of Jennings's background, was not sound trial strategy. Whatever damage counsel may have feared from cross examination of Jennings or Mrs. Jennings's hostility toward her son is far outweighed by the damage caused by presenting *no* evidence at all of Jennings's background, *i.e.*, giving the jury no reason not to impose a death sentence. *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor,* 529 U.S. 362 (2000) make clear that failure to present available significant mitigating evidence resulting in the virtual absence of a mitigation case is deficient performance. Considering both the objective unreasonableness of counsel's conclusion that Jennings's sister was too young to remember pertinent events and conditions and the objective unreasonableness of presenting *no* evidence of Jennings's background, the state court's conclusion that counsel was not deficient was unreasonable.

b. Failure to Present Evidence of Low IQ and Mental Health Issues

In 1978, a state court ordered a psychological evaluation to determine Jennings's competency to stand trial after he was charged with two aggravated robberies and burglary of a habitation. The psychologist, Dr. J.M. Bloom, found that Jennings has an IQ of 65 and mild organic brain dysfunction. 2 SH at 391-94. There is evidence that the brain damage was caused by a childhood injury. *Id.* at 77-78.

There is also evidence that Jennings was malingering. 1 SH at 48-49, 336-47. Some of the evidence of malingering is in Dr. Bloom's report. The State presented a report by Victor R. Scarano, M.D. Dr. Scarano states unequivocally that Jennings malingered. His opinion was not based on an examination of Jennings, but on review of documents. *Id.* at 336-47.

The state habeas court found that counsel was not deficient because the evidence did not show organic brain dysfunction. 2 SH at 414, 425. Specifically, the court found that Dr. Bloom stated "that the applicant was malingering or attempting to present himself as a mentally ill individual in order to delay court proceedings." 2 SH at 425. The court's conclusion quotes selectively from Dr. Bloom's report. Bloom concluded that Jennings has low IQ and mild organic brain dysfunction but that he was exaggerating his symptoms in an attempt to appear incompetent to stand trial.

> Although the results of psychological assessment techniques suggests the presence of mild mental[] retardation and mild organic brain dysfunction, it is [my] opinion that these are not severe enough to produce the kind of defects which Mr. Jennings manifested during [the] interview."

Id. at 393. The court's conclusion was based on an unreasonable determination of the facts; Dr. Bloom's report *did* conclude that Jennings has low IQ and brain damage. Counsel, however, did not know this because they never reviewed the clerk's file from Jennings's prior convictions.

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. at 521(internal quotation marks and alteration omitted) (quoting *Strickland*, 668 U.S. at 690-91). When assessing the reasonableness of an attorney's investigation, a court must "consider not only the quantum of evidence already known to counsel, but also whether the known

evidence would lead a reasonable attorney to investigate further." *Id.* at 527. Based on the evidence available to counsel at the time of trial, reasonable investigation, *i.e.*, reading the clerk's files from Jennings's prior convictions, would have revealed that Jennings was diagnosed with a low IQ and organic brain damage, and would have led to further investigation and a request for expert assistance. Counsel was deficient for failing to investigate.

c. Closing Argument

In his closing argument at the penalty phase, counsel stated that "I can't quarrel with" a decision to sentence Jennings to death because counsel, like the jurors, lived and worked in Harris County and cared about having a safe community. He nonetheless asked the jurors to give sufficient weight to the mitigating evidence to return a life sentence. 39 Tr. ay 239-40. Jennings now argues that this was ineffective.

Counsel was trying to convince the jury to decline to impose a death sentence on a man who they found murdered a police officer. The penalty phase evidence showed that Jennings had a long and violent criminal history. There was virtually no mitigating evidence. It is clear from the record that counsel was trying to identify with the jurors, and to convince them that he was a reasonable man who shared their interest in a safe community. In that posture, he argued that they should still impose a life sentence. In light of the extremely weak mitigation case, the state habeas court's conclusion that this was a plausible strategy was not unreasonable.

2. Prejudice

In determining whether Jennings was prejudiced by counsel's deficient performance, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

Strickland, 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Texas requires a unanimous jury to impose a death sentence. TEX. CODE CRIM PROC. art. 37.071 § 2(d)(2). Therefore, if there is a reasonable probability that even one juror would have voted against a death sentence, then Jennings was prejudiced.

a. Evidence of Brain Damage

One of the special issues the jury had to answer was whether Jennings deliberately killed Howard.[4] The State now argues, and the TCCA found, that evidence of poor impulse control would have been worthless because Jennings murdered Officer Howard in a deliberate manner, approaching Howard from behind and firing the last two shots from point blank range after Howard collapsed. The TCCA concluded that no juror would have found that Jennings acted impulsively, as opposed to deliberately, because "at least two to three seconds" lapsed between the first two shots and the last two. *Ex Parte Jennings*, Nos. AP-75,806 and 75,807 at 15 (Tex. Crim. App. Nov. 26, 2008). This conclusion is unreasonable.

All that was necessary for a "no" answer to the deliberateness special issue was for one juror to find that Jennings acted impulsively and not deliberately. In support of this argument, counsel could have presented evidence that Jennings had organic brain dysfunction resulting in poor impulse control. The TCCA has explained that "[t]he person who engages in certain conduct deliberately has upon consideration said to himself, 'Let's do it.'" *Fearance v. State* 620 S.W.2d 577, 584 n.6 (Tex.Crim.App., 1980). A juror could certainly have found that a brain-damaged man who has poor

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[4] "[W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that ... death ... would result"). *See* former TEX. CODE CRIM. PROC. art. 37.071 § b(1).

impulse control and a low IQ did not engage in that kind of reflection and consideration during a lapse of two or three emotionally charged seconds. The TCCA's contrary conclusion was an unreasonable determination of the facts. *See, e.g., Ex Parte Garrett* 831 S.W.2d 304, 307 (Tex.Crim.App. 1991) (Clinton, J., dissenting on grounds that evidence of brain damage and mental illness not presented at trial raised a reasonable probability of a different outcome).[5]

b. Background Evidence

The factual basis for Jennings's claim is comparable to those in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000). In both cases, counsel failed to investigate and develop a mitigation case. Evidence presented during postconviction proceedings showed that both Wiggins and Williams suffered parental abuse and neglect as children, and had low intelligence (though neither was mentally retarded). *See, e.g.*, 539 U.S. at 516-17, 525; 529 U.S. at 370. Williams, like Jennings, had an extensive criminal history dating to his childhood and including violent offenses. 529 U.S. at 368-69. In each case, the Supreme Court found the petitioner was prejudiced by counsel's failure to investigate, develop, and present mitigating evidence. 539 U.S. at 536; 529 U.S. at 397-98.

"[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse."

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[5] Judge Clinton's dissent is not cited as precedent, but as support for the conclusion that there is a reasonable probability the result would have been different if counsel presented the evidence of brain damage and resulting poor impulse control. If a Judge of the Texas Court of Criminal Appeals could find similar evidence in a similar case compelling, then it is reasonably probable that at least one juror could have found that Jennings did not act deliberately.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

Evidence about Jennings's background and character, his low intelligence, and his brain damage leading to poor impulse control, might have been sufficient to convince at least one juror that Jennings did not deserve a death sentence. *See Williams*, 529 U.S. at 370 (finding prejudice when counsel failed to present evidence of "neglect during [Williams's] early childhood, as well as testimony that he was borderline mentally retarded, had suffered repeated head injuries, and might have mental impairments organic in origin.") The similarities between this case and *Williams* are too strong to ignore, and the TCCA "decided [the] case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 406. The TCCA's decision was therefore contrary to clearly established federal law and Jennings has established prejudice.

c. *Penry*

Jennings also argues that evidence of his low intelligence would have entitled him to state habeas relief after the Supreme Court decided *Penry v. Johnson*, 532 U.S. 782 (2001). Because Jennings never raised this claim based on this evidence in state court, it is unexhausted and procedurally defaulted.[6] *See* 28 U.S.C. § 2254(b)(1); *Orman v. Cain*, 228 F.3d 616, 619-20 (5th Cir. 2000); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

III. Order

1. Jennings's Petition (Docket Entry 1) is Granted;

2. Thaler's Motion for Summary Judgment (Docket Entry 6) is Denied;

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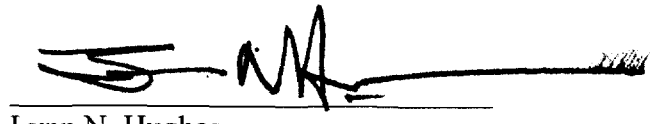
[6] Jennings raised a *Penry* claim in state court but limited it to the evidence he presented at trial. That was insufficient to exhaust the claim. *See Jones v. Jones*, 163 F.3d 285, 298 (5th Cir. 1998); *Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989).

3. Thaler shall release Jennings from custody unless, within 120 days, the State of Texas grants Jennings a new sentencing hearing or resentences him to a term of imprisonment as provided by Texas law at the time of Jennings's crime; and

4. This Order is stayed until all post-judgment motions and appeals are final or the time to file such motions and appeals expires.

So Ordered



Lynn N. Hughes
United States District Judge

Houston, Texas
April 23, 2012

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. AP-75,806 & 75,807

EX PARTE ROBERT MITCHELL JENNINGS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 506814-A FROM THE 208TH DISTRICT COURT OF HARRIS COUNTY

PRICE, J., delivered the opinion of the Court in which MEYERS, WOMACK, KEASLER, HERVEY and COCHRAN, JJ., joined. KELLER, P.J., and JOHNSON, J., concurred in the result. HOLCOMB, J., dissented.

OPINION

In 1989, the applicant was convicted of capital murder and his punishment was assessed, in accordance with the jury's answers to the special issues at the punishment phase of trial, at death. On direct appeal, this Court affirmed his conviction and sentence in an unpublished opinion issued in 1993.[1] The applicant filed this initial application for writ of

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1 *Jennings v. State*, No. 70,911 (Tex. Crim. App., delivered January 20, 1993).

habeas corpus, brought pursuant to Article 11.071 of the Texas Code of Criminal Procedure,[2] in September of 1996. He filed a supplement to his initial writ application in July of 2001. Inexplicably, the writ application did not make its way up to this Court until March of 2007. In December of 2007, we filed and set his initial writ application in order to address two contentions: 1) whether his trial counsel provided ineffective assistance of counsel at the punishment phase of his trial in failing to adequately investigate mitigating evidence; and 2) whether the trial court erred in attempting to satisfy the Eighth Amendment dictates of *Penry v. Lynaugh*,[3] by submitting a so-called jury nullification instruction.

FACTS

Guilt Phase

On July 19, 1988, Houston police officer Elston Howard was in the process of arresting the clerk of an adult bookstore when the applicant entered the establishment with the intention of committing robbery. Howard was wearing a jacket with the words "Houston Police" emblazoned on the front and back. The applicant shot Howard a total of four times in the back and head, three of which shots were sufficient to cause death, and then proceeded to rob the store clerk. The applicant was later apprehended, gave a written statement in which he admitted killing Howard in the course of a robbery (but denied knowing Howard had been a police officer), and eventually directed investigators to the murder weapon.

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2 TEX. CODE CRIM. PROC. art. 11.071.

3 492 U.S. 302 (1989).

Punishment Phase

At the punishment phase of trial, in satisfaction of its burden of proof to show a probability that the applicant "would commit criminal acts of violence that would constitute a continuing threat to society,"[4] the State presented evidence of his criminal history. At the age of fourteen, the applicant was declared a delinquent and placed on probation. Less than two years later his probation was revoked, and he was committed to the custody of the Texas Youth Council. By the time he was seventeen, he had been convicted of aggravated robbery and sentenced to five years in the penitentiary. In 1978, at the age of twenty, he was convicted of two more aggravated robberies and a burglary and assessed concurrent thirty-year sentences. While in the penitentiary, the applicant committed thirteen disciplinary violations. Within two months of his release from the penitentiary in 1988, he began a spree of at least six more aggravated robberies at restaurants, nightclubs, and adult bookstores and cinemas. This crime spree culminated in Officer Howard's murder.

The defense called jail chaplain George Burrell. Burrell testified that he had met the applicant in the county jail shortly after the applicant was arrested for Howard's murder and had visited him two or three days a week since. He knew of no disciplinary violations that the applicant had committed while in the jail. In the brief time that Burrell had known the applicant, the applicant's demeanor had evolved from untalkative and disconnected to

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[4] *See* former TEX. CODE CRIM. PROC. art. 37.071, § b(2) (now § b(1)) ("whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]").

"revived" and "bright." The applicant had even begun to counsel other inmates. Burrell had come across others during his jail ministry whom he regarded as "incorrigible," but did not count the applicant among them.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Law

There are two components to any Sixth Amendment claim of ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.[5]

To show prejudice, the defendant must demonstrate that, but for his counsel's deficiency, there is a reasonable probability of a different result.[6] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[7] A reviewing court need not "address both components of the inquiry if the defendant makes an insufficient showing on one."[8]

The applicant alleges that his trial attorneys performed deficiently in failing to conduct

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5 *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

6 *Id.* at 694.

7 *Id.*

8 *Id.* at 697.

an adequate mitigation investigation, and that, had they investigated, they would have discovered significant mitigating evidence that could have been introduced at the punishment phase of his trial. With respect to counsel's duty to investigate, the Supreme Court has observed that:

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[9]

Moreover, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation."[10]

These principles do "not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."[11] But they do require counsel to pursue any reasonably available line of mitigating evidence that preliminary investigation suggests may have promise.[12] And, because

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9 *Id.* at 691.

10 *Id.* at 690-91.

11 *Wiggins v. Smith*, 539 U.S. 510, 533 (2003).

12 *See id.* at 527 ("In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.").

trial counsel also have a duty to investigate what they reasonably know to be likely *aggravating* evidence against their client, a claim of ineffective assistance of counsel may also be predicated upon the failure of counsel to discover significant mitigating evidence that would have come to light, however incidentally, had they satisfied their duty to adequately investigate all reasonably anticipated aggravating circumstances.[13]

The applicant claims that, had his trial attorneys examined the district clerk's file in one of his prior aggravated-robbery cases, they would have discovered a psychological evaluation that would have led them to evidence of brain damage. He also claims that his trial attorneys were aware of other significant mitigating aspects of his life and background and should have investigated those with a view toward producing evidence at the punishment phase of his trial. We hold that, while his trial counsel may well have performed deficiently in these respects, the applicant has failed to establish a reasonable probability that, but for these deficiencies, the outcome of his punishment proceeding would have been different.

The Facts: Brain Damage?

Prior to his prosecutions for aggravated robbery in 1978, the applicant underwent a court-ordered evaluation for sanity and competency to stand trial. Along the way to finding the applicant both sane and competent to stand trial, Dr. J. M. Bloom, a psychologist, observed:

> Although the results of psychological assessment techniques suggests [sic] the presence of mild mentally [sic] retardation and mild organic brain dysfunction, it is the [sic] opinion that these are not severe enough to produce

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13 *Rompilla v. Beard*, 545 U.S. 374 (2005).

> the kind of deficits which [the applicant] manifested during interview. It is felt that he is attempting to present himself as a mentally ill person in order to delay proceedings.

Applicant's trial attorneys have acknowledged via affidavit that they were unaware of this report because they made no attempt to review the case files in the district clerk's office with respect to any of the applicant's prior convictions. This failure, they admit, was not the result of any particular strategy. Because of their failure to review the district clerk's files, they were "not aware of Dr. Bloom's report at the time of [the applicant's] capital murder trial." Had they been aware of the report, they "would have requested further psychological evaluation to confirm, and more fully develop, the prior diagnosis of mental retardation and organic brain dysfunction." Had that investigation panned out, they would have "argued to the jury that his diminished mental capacity made him less morally culpable for his conduct and constituted a reason to spare his life."

In an effort to meet the prejudice component of the applicant's ineffective assistance claim, habeas counsel conducted the additional psychological evaluation that he contends trial counsel should have done. A Quantified Electroencephalogram revealed dysfunction in the frontal and temporal areas of the applicant's brain. A SPECT study demonstrated the presence of frontal and left temporal lobe impairment. "These abnormal findings support the contention that the [applicant's] brain has been injured." A neuropsychological examination did *not* confirm mental retardation, but the results were "consistent with temporal and associative pathway problems." From these test results, Dr. Windel L. Dickerson, another psychologist,

concluded that "it is clear that [the applicant's] capacity for emotional control and self-inhibition is less than that of an unimpaired person and this condition has a demonstrable physical basis." "These kinds of findings are often linked," according to Dr. Dickerson, "to learning problems of a fairly subtle sort, difficulties with emotional stability and difficulty with impulsive behavior." Moreover, "[t]hese findings could have been developed" at the time of the applicant's trial "had anyone undertaken to seek them out."

In response to the applicant's claim, the State has presented a report from a forensic psychiatrist, Dr. Victor R. Scarano. Dr. Scarano challenged the diagnostic power of a Quantitative EEG to determine brain injury and asserted that a SPECT scan conducted in 1996 would reveal little about the condition of the applicant's brain at the time of the offense in 1988. Dr. Scarano concluded that these tests "do not provide any evidence that [the applicant] suffered from mental retardation, a learning disability, impulse control problems, brain damage, or organic brain dysfunction on or before" the date of the offense. He also gleaned from his review of the police offense reports that the applicant first shot Officer Howard in the back, and then, after an interval, shot him twice more in the head, execution style. Given this scenario, Dr. Scarano concluded that the applicant's killing of Howard was not, in any event, an impulsive act.

The Facts: Disadvantaged Background?

After the State rested its case at the punishment phase of trial, the applicant's trial counsel moved the court to allow the applicant to testify to his disadvantaged background

without being subjected to open-ended cross-examination. He proffered:

> that if [the applicant] was sworn to testify, under oath he would testify that he was raised by a single parent in an impoverished home, impoverished community, by a mother who was addicted to drugs and who was as recent[ly] as 1988 . . . arrested for drug charges at the time he was arrested for this particular offense; that he completed the Ninth Grade and was a poor student in school and whereas he had no learning difficulties, had a very difficult time in – uh – making the grade in school and participating in school and learning what was being taught there.

The trial court denied the motion, and the applicant did not testify. Trial counsel called no other witness who could have testified to these or any other mitigating factors.

The applicant now faults his trial counsel for failing to introduce evidence of his disadvantaged background from other witnesses. He contends that both his mother and his sister could have supplied the same information that he was denied the opportunity to provide in the absence of open-ended cross-examination. Lead trial counsel's affidavit asserts that he interviewed both the applicant and his mother and learned that the applicant "was the product of a disadvantaged background, was raised by a drug-addicted mother, had a limited education, and abused alcohol." But he also admitted that, at the time of the applicant's capital murder trial, in 1989:

> I did not fully appreciate the concept of "mitigating evidence" as it related to the special issues submitted at the punishment stage. As a result, the defense did not conduct a "mitigation investigation" in an effort to discover evidence which could be offered at the punishment stage in support of a sentence less than death.

Both the applicant's mother and his younger sister provided affidavits to habeas counsel substantiating the applicant's disadvantaged background and asserting that trial counsel did not

talk to them "much" about it before trial and failed to ask them to testify, which they would have been willing to do.[14] The applicant has not identified any *other* mitigation witnesses that

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[14] The applicant's younger sister, Carla Jennings, gave an affidavit that said:

> My name is Carla Jennings. I am 34 years old. Robert Mitchell Jennings is my brother.
>
> Our mother, Flora Jennings, became pregnant at age 16 and gave birth to Robert at age 17. She often told him over the years that he was conceived as a result of a "date rape," that he was the reason that she was unable to complete her education, and that she did not want him.
>
> Mother, who lived in Houston, sent Robert to live with her mother and grandmother on a farm in Timpson because she did not want him and could not support him. In 1962, mother got married. A couple of years later, Robert was sent to Houston to live with mother, her husband, and me.
>
> During our childhood, we had little male supervision. Father was seldom at home, and they divorced after several years. During the week, mother lived with and cared for an elderly woman. She left Robert and me at our apartment, supervised only by an older cousin. Mother came home only on the weekends. She used drugs on a regular basis.
>
> We were poor. We usually had the barest of essentials, such as food and clothing. We had little adult supervision or love.
>
> Robert had two head injuries requiring medical treatment during his childhood. Once, he was in an auto accident in which the car rolled over several times. On another occasion, I understand that he was hit in the head with a baseball bat.
>
> Robert dropped out of school in junior high. He had been in special education classes, was doing poorly, and became involved with drugs. From about age 15, he was in and out of reform school and prison. He had no stable influence to guide him when he was at home.
>
> In July of 1988, Robert was arrested and charged with capital murder. Although his lawyers talked to mother and me a couple of times, they did not ask us much about Robert's background, nor did they ask us to testify. We would have testified to the information contained in this affidavit if asked to do so.

his trial counsel may have uncovered to testify to the applicant's disadvantaged background had they conducted a full-blown mitigation investigation.

In 2003, the applicant's lead trial counsel executed a second affidavit, which is attached to the State's response. In it, he averred that he had made a strategic decision not to call both the applicant's mother and his sister as witnesses at the punishment phase of trial. He did not think the applicant's mother was "very sympathetic" to him. He did not think his sister would be a beneficial witness; apparently he believed that she did not have occasion to know very much about the applicant because he had been incarcerated in juvenile or adult correctional facilities for much of her lifetime.

Analysis

It is clear from trial counsel's proffer at the punishment phase of trial that, notwithstanding the claim in his initial affidavit that he did not "fully appreciate the concept" of mitigating evidence in 1989, he had some understanding of the importance of offering evidence of a disadvantaged background at the punishment phase of a capital case. Nevertheless, he has asserted in his later affidavit that his decision not to call the applicant's mother and sister was a strategic one. Was that strategic decision informed by adequate investigation? Lead trial counsel gleaned the information contained in his trial proffer from his interviews with the applicant and his mother. According to the applicant's sister, trial counsel also spoke with her. He must have been aware that they could have testified *at least*

The affidavit of the applicant's mother, Flora Jennings, is almost identical to Carla's.

to the poverty and lack of supervision in the applicant's single-parent home, to his mother's drug abuse, and to the applicant's difficulties in school. Whether or not trial counsel were aware of all of the particulars that have now been brought out (*viz*: that the applicant was an unwanted child with little supervision and no male role model in his life who began to abuse drugs and alcohol at an early age)[15] is of no consequence. The applicant has not shown by a preponderance of the evidence that trial counsel did not know enough of what his mother and sister could tell the jury to make an informed strategic decision not to call them. We cannot say that trial counsel's performance was deficient in this respect.

It is possible that trial counsel's admitted ignorance of the importance of conducting a full-blown mitigation investigation deprived the applicant of *other* witnesses who could and would have testified to the full extent of his disadvantaged background. But because the applicant now identifies no such witnesses, he has failed to prove by a preponderance of the evidence that such witnesses exist or would have been willing to testify at his trial. He has therefore failed to establish that he suffered any prejudice on this account.

Whether the applicant's trial attorneys were deficient in failing to make any attempt to review the State's file is a closer question. Because evidence of prior convictions and the particulars of the underlying misconduct are routinely admitted as relevant to the future-dangerousness special issue, trial counsel had a duty to review any readily available sources of information with respect to those priors. Dr. Bloom's report was publicly available in the

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15 *See* note 12, *ante*.

district clerk's file. Even if Dr. Bloom himself attributed the applicant's test results to malingering, it is arguable that his report should nevertheless have sufficed to alert competent trial counsel that further psychological evaluation would be appropriate.[16] Ultimately, however, we need not determine whether the applicant's trial counsel were deficient in failing (albeit by serendipity, as in *Rompilla*) to discover this avenue of mitigating evidence. In our view, even had the applicant presented his newly developed evidence of brain damage, there is no reasonable probability that the applicant's jury would have relied upon it to recommend a sentence less than death.

In assessing prejudice, a reviewing court must evaluate the totality of mitigating evidence, both that adduced at trial and that adduced during the course of the habeas proceedings.[17] Even if we assume that trial counsel were ineffective for failing to develop the evidence of brain damage that habeas counsel has produced, there is very little mitigating evidence from trial to combine it with in deciding whether the jury would have assessed a different verdict at the punishment phase. That the jail chaplain did not consider the applicant to be incorrigible and did not know of any trouble the applicant had gotten into during his incarceration for this offense has negligible mitigating significance beyond its obvious

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Moreover, from their interviews with the applicant's mother and sister, if not the applicant himself, trial counsel would or should have known about the significant head injuries the applicant suffered growing up. *See* note 12, *ante*. Knowledge of such injuries ought ordinarily to suggest to trial counsel the need for a psychological evaluation for debilitating brain damage.

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Ex parte Gonzales, 204 S.W.3d 391, 398 (Tex. Crim. App. 2006); *Wiggins v. Smith*, *supra*, at 536; *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

relevance to the future-dangerousness special issue. The question boils down, therefore, to whether there is a reasonable probability that the applicant's jury would have answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that the applicant would have received a life sentence instead of the death penalty.

The most evident mitigating significance of any damage to the applicant's frontal and temporal lobes is its debilitating effect upon his impulse control. The relevance to the former first special punishment issue ("whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that . . . death . . . would result") is manifest.[18] A brain-damaged defendant with diminished impulse control is less likely to have acted deliberately than a person with normal self-control.[19] The State challenges the reliability of the applicant's evidence of impaired impulse control, however, citing Dr. Scarano's affidavit. The State also argues that the evidence shows that the applicant acted in such a deliberate manner to cause Howard's death that there is no reasonable probability the jury would have been influenced by evidence of the applicant's impaired impulse control in answering the "deliberateness" special issue. Without passing upon the

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See former TEX. CODE CRIM. PROC. art. 37.071, § b(1).

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We have judicially construed "deliberately" to mean something more than just intent, *viz*: "a conscious decision involving a thought process which embraces more than mere will to engage in the conduct." *Martinez v. State*, 867 S.W.2d 30, 36-7 (Tex. Crim. App. 1993). The applicant's jury was instructed accordingly at the punishment phase.

reliability of the applicant's evidence, we agree with the State that it would not in any event have influenced the jury's decision with respect to deliberateness.

Three witnesses who were present in the bookstore when Howard was shot testified at the guilt phase of trial, including the clerk. According to those witnesses, Howard was standing at the counter of the bookstore filling out paperwork to effectuate the clerk's arrest when the applicant entered the front door about ten to twelve feet away. The applicant approached Howard "fast," according to the clerk. When Howard noticed the applicant, he "kind of froze" and said something like, "Oh, no," or "Stop." There were two shots, after which Howard "struggled" past the applicant toward the door. Before he could get out the door, however, Howard collapsed face-down, moaning. The applicant took several long strides toward Howard, and then pointed his gun down at Howard's head, firing twice more. In all, Howard suffered four gunshot wounds: two to his upper back and shoulder area and two to the head. Both of the back wounds and one of the head wounds would by themselves have proven fatal, according to the medical examiner. The interval between the first two shots and the last two shots was, by best estimates, at least "two to three seconds." Howard never had a chance to draw his weapon, which was found still holstered.

There was obviously nothing impulsive about the applicant's decision to rob the clerk of the bookstore, coming as it did at the end of a robbery spree that even included one incident earlier that same evening. But the applicant had never shot anyone before and apparently chose the establishments he would rob with a view toward minimizing any potential for

collateral damage. It is possible that a jury would find that the applicant was surprised when he unexpectedly encountered a police officer and fired the first two shots without reflection, on impulse. But we do not think there is a reasonable probability that a jury would fail to find that the *second* two shots were deliberate—that is to say, that they were the product of "more than mere will to engage in the conduct."[20] However impulsive it may have been for the applicant to shoot Howard at the outset, his conduct in striding the ten to twelve feet to where Howard subsequently collapsed and targeting his head seems to be an unmistakably deliberate act of murder.

It is possible that the applicant's jury could have regarded whatever impaired impulse control they might have found him to suffer from on account of possible brain damage to have mitigating significance beyond its tendency to negate the deliberateness special issue. Even a concededly deliberate act might be perpetrated more readily by an actor with such brain damage, the jury might reasonably believe, than by a normal person. A rational juror might even believe that an individual growing up with frontal and/or temporal lobe damage has endured a generally more disadvantaged life than one who suffered no such disability. On these bases, a jury exercising its normative function to decide whether mitigating circumstances warrant the imposition of a life sentence on a death-eligible defendant could reasonably enter the fact of the applicant's brain damage and consequent diminished impulse control on the "life" side of the ledger. But in the instant case, the applicant's brain damage

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20 *Id.*

would constitute practically the *only* circumstance to be entered on the side of life; there is precious little other evidence of mitigating value to counteract the substantial, non-statutory aggravating circumstances in this case.[21] We conclude that there is not a reasonable probability—a probability sufficient to undermine confidence—that the applicant's jury, taking Chaplain Burrell's meager testimony at trial together with the evidence developed during the habeas corpus proceedings of the applicant's possible brain damage and consequent lack of impulse control, would have found sufficient mitigating facts to warrant the imposition of a life sentence.[22]

PENRY ERROR?

The Supreme Court's first *Penry* opinion was issued between the time that the applicant's jury was selected and the time that it was sworn in at the inception of the guilt phase of his trial.[23] The applicant's trial counsel requested that the trial court submit an

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See Martinez v. Quarterman, 481 F.3d 249, 258 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 1072 (2008) (reviewing court's job in assessing prejudice from failure to conduct adequate mitigation investigation is to determine whether there is a reasonable probability a jury would find that the balance of aggravating and mitigating considerations did not warrant death); *Ex parte Gonzales*, *supra*, at 398 (reviewing court evaluates "the evidence in aggravation and the available mitigating evidence, in order to determine how a jury might reasonably answer the mitigation special issue").

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E.g., *Martinez v. Quarterman*, *supra*; *Sonnier v. Quarterman*, 476 F.3d 349, 358-60 (5th Cir.), *cert. denied*, 128 S.Ct. 374 (2007); *Keith v. Mitchell*, 455 F.3d 662, 670 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 1881 (2007). *See also Woodford v. Visciotti*, 357 U.S. 19, 25-27 (2002) (California state-court judgment that trial counsel's deficiency in failing to discover evidence of brain damage and family dysfunction was not prejudicial could not be said to be objectively unreasonable for purposes of the Antiterrorism and Effective Death Penalty Act).

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Penry v. Lynaugh, 492 U.S. 302 (1989). Voir dire concluded on June 12, 1989. The Supreme

instruction to the jury that would have authorized it to give effect to his mitigating evidence by answering one of the statutory special issues in such a way that a life sentence would be imposed—a jury nullification instruction.[24] The trial court granted the applicant's request and instructed the jury accordingly. Of course, the Supreme Court later held that such an instruction would not suffice to cure the Eighth Amendment problem.[25] We need not decide whether the applicant waived or invited any *Penry* error by requesting the nullification instruction.[26] We conclude that the jury could give full and meaningful mitigating effect to the evidence that the applicant introduced at the punishment phase of his trial within the scope of the statutory special issues. Under these circumstances, there is no Eighth Amendment

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Court issued its opinion in *Penry* two weeks later, on June 26th, and the guilt phase of trial commenced on July 5th.

[24] Trial counsel's proposed instruction read:

> When you deliberate about the questions posed in the Special Issues, you are to consider mitigating . . . circumstances and factors, if any, supported by the evidence presented in both phases of trial. A mitigating circumstance may be any aspect of the Defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine that, in consideration of this evidence, that a life sentence rather than a death sentence, is an appropriate response to the personal moral culpability of the Defendant, you are instructed to answer the Special Issue under consideration "No."

[25] *Penry v. Johnson*, 532 U.S. 782 (2001).

[26] *See Ex parte Moreno*, 245 S.W.3d 419, 430-31 & n.42 (Tex. Crim. App. 2008) (request for jury nullification instruction was sufficient to alert trial court to *Penry* problem and thus preserve error; the applicant did not "invite" *Penry* error by requesting a flawed curative instruction—at least not when trial court did not *grant* the applicant's request).

deficiency.

The applicant's *Penry* claim is limited to the evidence actually adduced at his trial, and does not include the jury's ability to render a reasoned moral response to mitigating evidence he now claims *should* have been adduced.[27] The only mitigating evidence presented at trial was Chaplain Burrell's testimony with respect to the applicant's behavior and demeanor in the jail. Apart from its ameliorating relevance with respect to the future-dangerousness special issue, however, this evidence had, at best, only the most "tenuous connection . . . to the defendant's moral culpability."[28] That being the case, the Eighth Amendment does not require a new punishment proceeding.[29]

Relief is denied.

Delivered: November 26, 2008
Do Not Publish

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See Ex parte Kunkle, 852 S.W.2d 499, 504 (Tex. Crim. App. 1993) ("we shall not consider mitigating evidence not presented or proffered at trial in determining the merits of" a *Penry* claim); *Miniel v. Cockrell*, 339 F.3d 331, 338 (5th Cir. 2003) (*Penry* claim cannot be predicated on evidence not presented at trial).

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See Abdul-Kabir v. Quarterman, 550 U.S. 233, 127 S.Ct. 1654, 1668 n.14 (2007) ("special instruction is not required when mitigating evidence has only a tenuous connection –'*some* arguable relevance'–to the defendant's moral culpability.").

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Smith v. Quarterman, 515 F.3d 392, 414 (5th Cir. 2008) (testimony that petitioner was "calm and respectful," "non-violent," and "not a drug-user" had only "tenuous connection" to his moral culpability, and therefore did not require special mitigation instruction under the Eighth Amendment, consistent with *Abdul-Kabir*). *See also Franklin v. Lynaugh*, 487 U.S. 164, 177-78 (1988) (plurality opinion) (future-dangerousness special issue sufficient to accommodate "any mitigating impulse that petitioner's prison record might have suggested to the jury as they proceeded with their task").

ROBERT MITCHELL JENNINGS, Appellant

NO. 70,911 v. - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant, Robert Mitchell Jennings, was convicted of capital murder. Tex. Penal Code § 19.03. At the punishment phase of appellant's trial, the jury answered affirmatively the special issues set forth in Article 37.071(b) of the Texas Code of Criminal Procedure. The trial judge then sentenced appellant to death as required by Article 37.071(e). Direct appeal to this Court was then automatic. Tex. Code Crim. Proc. art. 37.071(h). We will affirm appellant's conviction and sentence of death.

Appellant raises twelve points of error. His fifth and sixth points of error are a challenge to the sufficiency of the evidence to support the jury's verdict and will be addressed first. His remaining points will be addressed in the following order: point one contends that the trial court erred in granting one of the State's challenges for cause, points two and four address alleged error in denying two of appellant's challenges for cause, point three complains of error in that the trial court refused to grant appellant additional peremptory strikes after it excused a veniremember who had already been "sworn and accepted" as a juror, point twelve alleges error in not granting appellant's motion for a mistrial since jurors had not been questioned on voir dire concerning their ability "to use the reasonable moral response in assessing the death penalty," point nine complains of the trial court's failure to suppress identification evidence, point eight alleges error in the trial court's denial of appellant's request to examine the jury concerning the reading of newspaper accounts of the trial during the guilt/innocence stage of trial, point seven contends error on the part of the trial court in refusing

appellant's requested charge on self-defense, point ten alleges error in the denial of appellant's request to allow the jury to answer the verdict sheet in a specific manner rather than a general one, and point number eleven maintains that the trial court erred in denying appellant's instruction that his alcohol abuse could be considered as a mitigating factor.

Viewed in the light most favorable to the jury's verdict, the evidence at trial revealed the following facts. Houston police officers Milford Sistrunk and Elston Howard (the latter being the victim in this case) were enforcing a Houston ordinance regulating the licensing and operation of sexually oriented businesses. On the evening of July 19, 1988, Sistrunk, dressed in civilian clothing, entered an establishment known as "The Empire Bookstore."[1] Howard apparently determined that his partner had obtained the information necessary to secure a conviction of the store clerk, Larry Overholt, for being in violation of the ordinance. Howard entered the store carrying a hand-held police radio and wearing a police "raid jacket."[2] Howard identified himself and his purpose to Overholt and proceeded behind the counter to initiate arrest procedures. Sistrunk subsequently left the premises without incident in order to retain his "cover."

At the same time that Howard was obtaining information from Overholt, appellant and his accomplice, David Harvell, drove up to the store. Appellant took Harvell's gun and proceeded into the store alone. When appellant entered the store, Howard turned toward him. Appellant quickly crossed the ten or twelve feet

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[1] Also known as "Mr. Peeper's Bookstore."

[2] A "raid jacket" was described as a blue vinyl jacket with the words "Houston Police" printed in large letters across both the front and the back. The Houston Police badge emblem is also displayed on each shoulder.

between the entrance and the display shelf, pointed his gun toward Howard's head and fired twice.[3] Howard attempted to make his way to the front door, but fell to the floor before he reached the exit. Appellant followed Howard, stood over the victim as he lay face down on the floor, and fired two more shots into the back of his head. Appellant then turned toward Overholt and told him that he would be next. Appellant told Overholt to "[g]ive [him] the money," including the rolls of change which were kept behind a small door and his (Overholt's) wallet. Appellant then fled and Overholt called for help.

When Sistrunk returned to the scene and other help arrived, Sistrunk noticed that Howard's gun was still in its ankle holster. An autopsy showed that he had been shot four times: twice in the upper left back and shoulder area, once in the back of the head, and once in the top of the head. The wounds in the back and shoulder were fired from a distance of one foot or less.

While paramedics were trying to resuscitate Howard, appellant was fleeing with his accomplice and told him that he (appellant) had to shoot someone during the robbery. As the two were fleeing, Harvell, for some reason not explained in the record, took the gun that appellant had placed between the seats of the car and pointed it at appellant. Appellant hit the gun and attempted to jump from the car. He was shot in the left hand as he escaped. Appellant was subsequently admitted to the hospital because of his wound. He was there arrested by the police and consented to several searches, none of which are challenged on appeal.[4] Police later met with

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[3] Appellant's written statement, on the other hand, indicates that appellant crossed to the victim and then a struggle ensued at which time appellant's gun "went off" twice.

[4] Appellant also consented to surgery so the bullet could be removed from his hand and he further consented to the recovery of that bullet by the police.

appellant's girlfriend at her apartment and recovered appellant's clothing and a wallet which later turned out to be Overholt's.

On July 22, 1988, police executed an arrest warrant for Harvell. Later that same day, they again met with appellant, advised him of his rights, and asked if he would give them a statement concerning the offense. Appellant acknowledged his rights, affirmatively waived them, and then gave police a written statement in which he confessed to shooting Howard[5] and admitted that he intended to rob the bookstore[6] even before he entered it. Harvell eventually led the police to the place where he had hidden a handgun which was later determined to be the same weapon used to kill Howard and shoot appellant.

On October 4, 1988, the grand jury of Harris County indicted appellant for the capital offense of murdering a police officer and for the capital offense of committing a murder in the course of a robbery.[7]

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[5] Specifically, he confessed to shooting "a black male . . . wearing a pair of brown pants and a dark shirt."

[6] Appellant could not specifically name the bookstore. However, his description of its location matches the scene in question.

[7] The indictment read in pertinent part:

> [Appellant] . . . did . . . intentionally and knowingly cause the death of [the victim], hereafter styled the Complainant, a peace officer in the lawful discharge of an official duty, by shooting the Complainant with a deadly weapon, namely, a firearm, knowing at the time the Complainant was a peace officer.
>
> It is further presented that . . . [appellant] . . . did then and there unlawfully while in the course of committing and attempting to commit the ROBBERY of LARRY OVERHOLT, intentionally cause the death of [the victim], hereafter styled the Complainant, by shooting the Complainant with a deadly weapon, namely, a firearm.

In his fifth and sixth points of error, appellant challenges the sufficiency of the evidence to support the conviction. Specifically, he alleges that, first, the evidence is insufficient to prove that appellant knew the victim was a police officer, and second, the evidence is insufficient to prove that appellant committed murder while in the course of committing a robbery. In deciding a question concerning the sufficiency of the evidence, this Court must review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Dunn v. State, 721 S.W.2d 325, 327 (Tex.Cr.App. 1986). This standard is the same for both direct and circumstantial evidence cases. Ransom v. State, 789 S.W.2d 572, 577 (Tex.Cr.App. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 3255 (1990).

In the instant case, the application paragraph of the charge on guilt/innocence set out in the disjunctive the alternate theories of capital murder alleged in the indictment. The final page of the charge gave the jury the option to make one of three findings. The jury had the option to find appellant: "not guilty," "guilty of capital murder, as charged in the indictment," or "guilty of murder." The foreperson of the jury signed under the second option that the jury found appellant "guilty of capital murder, as charged in the indictment." As this Court said in Kitchens v. State, 823 S.W.2d 256, 258 (Tex.Cr.App. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2309 (1992).:

> It is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted.

The evidence revealed that the victim was wearing a jacket boldly displaying "Houston Police" across both the front and the back. Plus, a badge emblem was displayed on each of the shoulders. The testimony revealed that the victim turned toward appellant as he entered the store or soon after, thus clearly displaying the wording on the jacket. Since such "raid jackets" are in widespread use among law enforcement and very often displayed to the public among the various forms of media, and since the victim's police radio was in full view on the counter when appellant walked into the store, it was reasonable for a jury to conclude that appellant knew that the victim was a police officer.

Furthermore, appellant, in his written statement, admitted that he intended to rob the bookstore before he entered. This, together with the fact that appellant entered the store with a gun[8], is sufficient to allow a reasonable jury to conclude that the murder occurred in the course of committing or attempting to commit a robbery -- a capital offense. In addition, even though the murder was chronologically committed first, it is reasonable to infer from the facts that appellant had already formed the requisite intent to rob the store manager prior to his killing the victim. See White v. State, 779 S.W.2d 809, 814-16 (Tex.Cr.App. 1989), cert. denied, 495 U.S. 962 (1990). Since either theory of capital murder is sufficiently supported by the evidence, points of error numbers five and six are overruled.

In point of error number one, appellant complains that the State's challenge for cause to veniremember Glynda F. Cumby was improperly granted. Specifically, appellant complains that the

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[8] Plus, other factors corroborated this intent, such as appellant's knowing where the money was kept since he had previously robbed this particular store. Furthermore, corroboration of appellant's statement is not contested on appeal.

challenge was improperly granted for two reasons: 1) that the challenge for cause was based on a ground "permitted only to be raised by the defense,"[9] and 2) that "the question, 'Can you think of some circumstances under which you would answer the Issue to that Question no?'[10] was improper in that the question should have been, 'Can you think of any circumstances under which you would answer it either yes or no?'." Given the somewhat ambiguous record in this case, we will assume, for the sake of argument, that appellant preserved his complaint on this issue and we will address the merits of his complaint.[11]

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[9] See Article 35.16, V.A.C.C.P..

[10] Referring to the answering of the third special issue under Article 37.071(b)(3), V.A.C.C.P..

[11] The record reveals that the State was questioning the venireperson on her views regarding the third special issue (Article 37.071(b)(3)) when the prosecutor made the inartfully worded statement (apparently intended to be a challenge for cause) that "[w]e would make a motion, Your Honor, based on Special Issue Number 3." Immediately after this statement, with no oral comment from the trial court or anyone else, appellant says "[t]hank you" and proceeds to question the prospective juror presumably in an effort to rehabilitate her.

When appellant finished with his questioning of the venireperson, he simply stated, "Thank you, Your Honor. We pass the witness or the venireman." The trial court then proceeded to ask Cumby some questions of its own. During these questions, the venireperson expressed her confusion over the issue involved and her confusion about what exactly was being asked of her. Finally, the judge asked his last question and the following occurred:

> THE COURT: I'm now asking you whether there is any set of circumstances that you can think of where you have found a person guilty of the offense of capital murder that you can answer Special Issue Number 3 no?
>
> THE WITNESS: No.
>
> THE COURT: Granted.
>
> [THE STATE]: Thank you, Your Honor.
>
> THE COURT: Mrs. Cumby, you're going to be excused. Thank you for coming in.
>
> THE WITNESS: Thank you. I'm sorry, I really never did understand the question.

(continued...)

The record reveals that the State was questioning veniremember Cumby in regard to her views concerning the third special issue on provocation[12] when she stated that, "my thought is that . . . it can't be reasonable." The prosecutor then proceeded to attempt to explain "provocation" and to illustrate a hypothetical situation for the venireperson which ultimately resulted in the following colloquy:

> [THE STATE:] So I take it then you can listen to the evidence and answer Special Issue Number 3 either yes or no; is that correct?
>
> [THE VENIREMEMBER:] . . . I don't think I understand what circumstances are that there could be a reason.
>
> [THE STATE:] Okay. So I take it then that in each and every case that you would answer Special Issue Number 3 yes; is that correct?
>
> [THE VENIREMEMBER:] Yes.
>
> * * *
>
> I'm saying under those circumstances I can't see that there ever would be a reason that would be good enough.

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[11](...continued)
[DEFENSE]: Thank you, ma'am.

THE COURT: Do you need a work slip, Miss Cumby?

* * *

THE WITNESS: Oh, yes I do.

THE COURT: All right. Right over here (indicating).
Two o'clock, gentlemen.

[DEFENSE]: Judge, we need to put some matters on the Record.

THE COURT: Proceed.

[DEFENSE]: We can wait until we get back.

THE COURT: Proceed.

[DEFENSE]: At this time we object [to the trial court's granting of the State's challenge for cause of this venireperson].

[12] See Article 37.071(b)(3), V.A.C.C.P..

> [THE STATE:] So I take it then that your answer to Special Issue Number 3 would always be yes; is that correct?
>
> [THE VENIREMEMBER:] Under those circumstances.
>
> [THE STATE:] Okay. Well under any circumstances that you can envision; is that correct?
>
> [THE VENIREMEMBER:] Okay. Not that I know of at this point.
>
> [THE STATE:] Well . . . can you imagine any circumstances wherein it would be reasonable to kill -- a Defendant to kill someone in response to provocation?
>
> * * *
>
> [THE VENIREMEMBER:] Uh, no. I -- I'm envisioning -- I'm thinking about somebody goes into a store would be a horror and the grocery clerk pulled out a gun --
>
> * * *
>
> But my thought is if he went in there to commit the robbery, that that's -- that that person was justified in doing that.

At this point in time, the State made what we have interpreted to have been meant as a challenge for cause and appellant proceeded with his questioning of the venireperson during which Cumby responded that she could, in fact, envision a situation in which the third special issue might be answered either yes or no.

In the trial court's attempt to clarify the arguably vacillating answers of the venireperson, the following transpired:

> THE COURT: Miss Cumby, I want to be sure that I understand your response to this matter. Are you telling the Court that you are able to envision a set of circumstances that would allow you to answer Special Issue Number 3 no, after having found someone guilty of the offense of capital murder?
>
> [THE VENIREMEMBER]: I'm saying that circumstances could make a difference in a yes or a no.
>
> * * *
>
> THE COURT: Could you under any circumstances answer that question no?
>
> * * *
>
> Under any circumstances you can think of.
>
> [THE VENIREMEMBER]: No. Can I say it the way I'm thinking?
>
> * * *

> When you presented me with a case, you presented me with something very specific and I saw it that way and under those circumstances I couldn't see a way that it would be admissible, that it would be okay, that it would be -- that there could be a justification.
>
> But when you presented me with a circumstance, not even thinking about the twelve bullets but, you see, just see in my own mind if I thought there was a possibility of a circumstance where that had to be considered, my answer is yes.
>
> * * *
> * * *
>
> THE COURT: [S]et aside all of the examples that have been given you. Just ignore them. Just forget them.
>
> I'm now asking you whether there is any set of circumstances that you can think of where you have found a person guilty of the offense of capital murder that you can answer Special Issue Number 3 no?
>
> [THE VENIREMEMBER]: No.
>
> THE COURT: Granted.

Appellant first argues that only he and not the State was entitled to make a challenge for cause since the provocation issue is designed to protect the defendant. Article 35.16(b), V.A.C.C.P., says that the State may challenge a venireperson for cause for one of three reasons.[13] This Court stated in Nethery v. State, 692 S.W.2d 686, 691 (Tex.Cr.App. 1985), cert. denied, 474 U.S. 1110 (1986), that the State is permitted to challenge a juror

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[13] Article 35.16(b), V.A.C.C.P., provides that a challenge for cause may be made by the State for any of the following reasons:

> 1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;
>
> 2. That he is related within the third degree of consanguinity or affinity to the defendant; and
>
> 3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

This Court held in Butler v. State, 830 S.W.2d 125, 130 (Tex.Cr.App. 1992), that the list of challenges enumerated in Article 35.16, V.A.C.C.P., is a complete list.

who cannot be fair and impartial because he has a bias against the minimum punishment for murder. In so holding, we said that:

> The State's interest is in fair and impartial jurors, in accord with our legal system's basic tenet to insure that every defendant is accorded a fair and impartial trial. The State seeks, or should seek, to uphold the integrity of the jury system. Therefore, the State is permitted to challenge a juror who cannot be fair and impartial . . . .

The same holds true here in that a juror cannot be fair and impartial who has a bias against the third special issue on provocation. This Court has "never held that a challenge for cause which generally inures to the benefit of a defendant becomes the sole province of the defendant." Derrick v. State, 773 S.W.2d 271, 274 (Tex.Cr.App.), cert. denied, 493 U.S. 874 (1989). Hence, appellant's first contention is overruled.

Secondly, appellant argues that the trial court improperly phrased its questions to the veniremember and, therefore, did not show her to be biased. In reviewing a decision by the trial judge to sustain a challenge for cause, the correct standard of review is "whether the totality of the voir dire testimony supports the trial judge's implied finding of fact that the prospective juror is unable to take the requisite oath and to follow the law as given by the trial judge." Kemp v. State, ___ S.W.2d ___ (Tex.Cr.App. No. 70,403, delivered September 16, 1992), slip op. at 17. Furthermore, we recognize that we are faced with only a cold record on appeal, and, therefore, a prospective juror's bias need not be proven with "unmistakable clarity." As we stated in Kemp, supra:

> Despite . . . lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . this is why deference must be paid to the trial judge who sees and hears the jurors.

(quoting from Wainwright v. Witt, 469 U.S. 412 at 425-26 (1985)). This need for deference is especially critical when the reviewing court is faced with a record that demonstrates uncertainty in the venireperson's responses. Kemp, supra, slip op. at 18.

As can be seen from the quoted excerpts of the voir dire testimony, Cumby seemed to vacillate from one answer to another. She also demonstrated confusion concerning the subject matter and the questions being propounded to her by all parties. As such, we defer to the trial judge as he was present to see and hear the veniremember. See Perillo v. State, 758 S.W.2d 567 (Tex.Cr.App. 1988), cert. denied, 492 U.S. 925 (1989). Point of error number one is overruled.

In points of error two and four, appellant complains that the trial court erred in denying his challenges for cause to veniremembers Richard Donald Markowski and Eileen Schuler, respectively. When the denial of a challenge for cause is at issue, error is preserved for review by this Court only if appellant 1) used all of his peremptory strikes, 2) asked for and was refused additional peremptory strikes, and 3) was then forced to take an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause (or granted him additional peremptory strikes so that he might strike the juror). Demouchette v. State, 731 S.W.2d 75, 83 (Tex.Cr.App. 1986), cert. denied, 482 U.S. 920 (1987). See and compare Long v. State, 823 S.W.2d 259, 264 (Tex.Cr.App. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 3042 (1992), and Harris v. State, 790 S.W.2d 568, 581 (Tex.Cr.App. 1989).

The record reveals that, at the time this appellant exercised a peremptory strike on Markowski, he still had two strikes remaining. However, he still requested and was denied an

additional strike. After several more venirepersons were questioned and appellant used these remaining strikes, he requested and was granted two additional peremptory strikes. Finally, after questioning a number of additional prospective jurors and using these two additional peremptory strikes, appellant questioned venireperson Schuler. At this time, he challenged Schuler for cause. When this challenge was denied by the trial court, appellant requested and was denied another peremptory strike.

In Kemp v. State, ____ S.W.2d ____ (Tex.Cr.App. No. 70,403, delivered September 16, 1992), slip op. at 8-9, this Court stated that:

> On appeal, it will not suffice for an appellant to show only that the trial judge erred in refusing a defense challenge for cause. The appellant must also demonstrate actual harm stemming from the improper denial of his challenge. The appropriate focus of any harm analysis in this context is whether the defendant was forced to leave an unwanted venireperson on the jury that he could otherwise have eliminated if he had not been forced earlier to exercise a peremptory challenge to remove a juror properly challenged for cause. [Citation omitted.] Because of the requirement of actual harm, this Court has held that the wrongful denial of a defense challenge for cause is cured by granting the defense additional peremptory strikes.

Because appellant was granted two additional peremptory strikes, he can show no actual harm suffered from the trial court's denial of his challenge to venireperson Markowski even if such denial was wrongful. Kemp, supra. Point of error number two is overruled.

The situation with regard to Schuler is slightly different, however. In her case, the additional peremptories granted were granted and used before she was called and questioned. Because appellant had again used all of his peremptory strikes, asked for and was refused an additional peremptory, and was thus forced to take an identified objectionable juror, we will address the merits of this contention.

Appellant here complains that Schuler was biased against the law in that she believed that a person convicted of capital murder should always be sentenced to death. Schuler's voir dire testimony indicates that she was a proponent of capital punishment and believed in stronger penalties for certain crimes. However, the discussion involving these beliefs was phrased in terms of what the venireperson thought the law ought to be. The record also indicates that Schuler had been a legal secretary in civil law for many years and understood the necessity of following the law as it is given by the trial court. In fact, Schuler unequivocally stated that she could set aside her personal feelings and follow the law as it was given to her by the trial judge. This Court stated in Hernandez v. State, 757 S.W.2d 744, 750 (Tex.Cr.App. 1988), overruled on other grounds, Fuller v. State, 829 S.W.2d 191, 200 (Tex.Cr.App. 1992), that, "a venireman . . . is not subject to exclusion for cause if he is able to set aside his bias or prejudice for purposes of trial and fairly . . . determine the issues submitted for his consideration." Considering the totality of Schuler's answers and giving due deference to the trial judge, we cannot say that the trial judge abused his discretion in failing to grant appellant's challenge for cause. See Kemp, supra. Point of error number four is overruled.

In point of error number three, appellant claims that he was generally denied equal protection and due process under the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the Texas Constitution in that the trial court denied his request for additional peremptory strikes after excusing a juror who had previously been sworn and accepted as a panel member. He claims that these constitutional rights were violated because he was forced to select jurors using a process dictated by Article 35.15, V.A.C.C.P.. In his entire argument on this point,

however, appellant only cites one case for authority, Sanne v. State, 609 S.W.2d 762, 767 (Tex.Cr.App. 1980), cert. denied, 452 U.S. 931 (1981), stating that the very same issue was raised in that case.

The appellant in Sanne challenged the constitutionality of Article 35.13, V.A.C.C.P.[14], claiming that:

> it violates the equal protection and due process clauses of the state and federal constitutions to require the defendant in a capital case to exercise peremptory challenges upon the examination of individual prospective jurors, and to deny him the right of the defendant in a non-capital felony case to make a sensible and circumspect exercise of his peremptory challenges after examination of the entire venire.

609 S.W.2d at 767. This Court in Sanne assumed, without deciding, that the constitutional challenge was not without merit and proceeded to conduct a harm analysis. However, this Court determined that any harm would be cured by the trial court granting an additional peremptory strike to replace one which appellant had had to use. Id.

The fallacy of appellant's reliance on this case is that Sanne does, in fact, involve appellant's use of a peremptory strike on a venireperson. In the instant case, however, prospective juror, Kaye Stringfield, was questioned, selected as a juror[15], and sworn.[16] Two months later, Stringfield returned to the trial

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[14] Article 35.13, V.A.C.C.P., states that:

> A juror in a capital case in which the state has made it known it will seek the death penalty, held to be qualified, shall be passed for acceptance or challenge first to the state and then to the defendant. Challenges to jurors are either peremptory or for cause.

[15] Stringfield was the fifth juror to be seated.

[16] Article 35.22, V.A.C.C.P., provides in pertinent part that:

> When the jury has been selected, the following oath shall be administered them by the court
>
> (continued...)

court[17] and informed the parties and the judge that, since she had last appeared before the court, she had been charged with the offense of theft. After some brief questions presented by the State and appellant, the trial court excused the juror "for cause" pursuant to Article 35.16(a)(3), V.A.C.C.P..[18] Since appellant did not have to use a peremptory strike, he cannot demonstrate that he was harmed.[19] His assertion of harm being that he had to adjust his trial strategy is of no merit. See Thomas v. State, 701 S.W.2d 653, 659 (Tex.Cr.App. 1985). Point of error number three is overruled.

Appellant alleges in point of error number twelve that the trial court erred in not granting his motion for mistrial made during the punishment stage of trial[20] because veniremembers "were

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[16](...continued)
or under its direction.

(emphasis added). Once this oath is given, then the jury is considered to be sworn. See Garcia Rousseau v. State, 824 S.W.2d 579, 581 (Tex.Cr.App. 1992). The fact that each juror was sworn as he or she was selected is not relevant to our decision in this case.

[17] When she returned to speak with the trial court, nine jurors had been seated.

[18] Article 35.19, V.A.C.C.P., provides for an absolute disqualification, in both capital and non-capital cases, if a veniremember is under indictment or other legal accusation for theft, see Article 35.16(a)(3), V.A.C.C.P., even though the parties may consent to the veniremember being seated on the jury. In Butler v. State, 830 S.W.2d 125, 130 (Tex.Cr.App. 1992), this Court discussed the interplay between Articles 35.16, 35.19, and 35.03, V.A.C.C.P., and we noted that a trial judge *must* excuse a veniremember who suffers from a disability sufficient to absolutely disqualify him. Article 35.19, V.A.C.C.P..

[19] The fact that the trial judge imprecisely cited the basis of the strike and the fact that Stringfield had already been selected as a juror have no impact on our decision.

[20] Appellant states in his brief that his motion was made during the guilt/innocence stage of trial. However, the record reveals that this motion was made in the punishment stage after some five witnesses had already been questioned.

not questioned regarding whether they would be able to use the reasonable moral response in assessing the death penalty." The record reveals that nearly three weeks elapsed between the completion of the voir dire proceedings and the beginning of trial. During that period, the United States Supreme Court delivered the opinion of Penry v. Lynaugh. 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Appellant is now alleging that his motion for mistrial should have been granted because he was not allowed to utilize this opinion and ask individual veniremembers questions concerning whether they "could consider mitigating evidence demonstrating a reasonable moral response."

Appellant bases his argument on Penry, supra, and on Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), in which case the United States Supreme Court held that the sentencer must not be precluded from considering any mitigating evidence in the punishment phase of a capital murder case. Appellant ties this concept into the voir dire stage by relying on the case of Smith v. State, 703 S.W.2d 641 (Tex.Cr.App. 1985). In Smith, 703 S.W.2d at 643, this Court held that if appellant sought to ask a veniremember a proper question, but was prevented by the trial court from asking said question, then harm is presumed because the defendant could not intelligently exercise his peremptory challenges without the information which would have been gained from the answer. 703 S.W.2d at 643.

We first note that appellant couches his point of error in the voir dire stage of trial. Nowhere in this point does he allege that the jury was prevented in any manner from considering mitigating evidence at the punishment stage of trial. In considering appellant's contention that he was prevented from asking the veniremembers proper questions, we find no merit in this argument. We have granted reversals in the past because the trial

judge abused his discretion when he limited voir dire. See McCarter v. State, 837 S.W.2d 117 (Tex.Cr.App. 1992). However, such is not the case here. The trial judge did not limit the voir dire involving questions concerning mitigating evidence. It is entirely conceivable that, if appellant had attempted to ask such questions, he would have been allowed to do so. Finding no reversible error, we overrule point of error number twelve.

In point of error number seven, appellant alleges that the trial court erred in denying his requested charge on self-defense "by way of apparent danger." It is well-settled that, if the evidence raises the issue of self-defense, the accused is entitled, upon timely and proper request, to have it submitted to the jury. Dyson v. State, 672 S.W.2d 460, 463 (Tex.Cr.App. 1984). If the evidence, viewed in a favorable light, does not establish a case of self-defense, an instruction is not required. Id.

Under Texas Penal Code §9.31, a person is justified in using force against another "when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of *unlawful* force." (Emphasis added.)

We established in point of error number five that a rational trier of fact could have found appellant to have known that his victim was a police officer. Pursuant to Tex. Penal Code §2.13, police officers have a duty to intervene to prevent or suppress crime. Thus, the victim officer was not using or attempting to use *unlawful* force against appellant and appellant did not have the right to use deadly force against someone acting lawfully. Consequently, a charge on self-defense was not required and the trial judge did not err in denying such a charge. See Dyson, supra. Point of error number seven is overruled.

Appellant alleges in point of error number eight that the trial court erred in denying his request to examine the jury, during the guilt/innocence stage of trial, concerning the reading of newspaper accounts of the trial. In addition to the facts that appellant did not ask for a proper remedy at trial (i.e. a mistrial) or assert this issue in a motion for new trial[21], appellant has given us no basis for reversible error here.

The record reveals that the trial judge had a fairly standard warning speech about avoiding media coverage[22] which he gave at several instances. The judge gave this warning in his general instructions to each panel of veniremembers before each member thereof was individually questioned; he gave the warning to each individual juror immediately after he or she was selected to serve on the case; and he gave the warning at the close of each day's testimony. While appellant claims to have observed several jurors reading newspapers, he admits that he can only speculate as to whether any of them read the specific articles concerning the instant case.

Instead of making a bill of exceptions to support his position after the trial court denied his request to question the jurors, appellant baldly asserts on appeal that he was harmed. See Barrington v. State, 594 S.W.2d 88, 90 (Tex.Cr.App. 1980). In

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[21] In fact, according to the record, a motion for new trial was never even filed.

[22] The speech, with some variation from time to time, went as follows:

> Now there may or may not be mass-media coverage of this case. I don't know if there will be or not. If there is however, as soon as you find yourself exposed, please break that contact immediately so that you'll make all your decisions based strictly on the evidence presented in the courtroom and from no other source.

fact, in the one case that appellant relies upon in his brief, this Court stated that a showing of harm is mandatory before reversal is required. Id. Since no harm has been shown, we find that no reversible error has occurred. Point of error number eight is overruled.

In point of error number nine, appellant claims that the trial court erred in failing to grant appellant's motion to suppress Overholt's identification evidence. Appellant suggests that the identification process utilized was so impermissibly suggestive that it induced the witness to identify appellant.[23] In Webb v. State, 760 S.W.2d 263, 269 (Tex.Cr.App. 1988), cert. denied, 491 U.S. 910 (1989), this Court stated that:

> A pretrial identification procedure may be so unnecessarily suggestive and conducive to mistaken identification that to use that identification at trial would deny the accused due process of law. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). However, it is the "substantial likelihood of misidentification" that may be engendered by such suggestive procedure that works the deprivation. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Thus, if the totality of the circumstances reveals no substantial likelihood of misidentification despite a suggestive pretrial procedure, subsequent identification testimony will be deemed "reliable," "reliability [being] the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

Furthermore, appellant has a heavy burden to show by clear and convincing evidence that a witness' forthcoming in court

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[23] Appellant implies, although he does not clearly state, that the allegedly suggestive procedure resulted in a violation of due process. He does not, however, distinguish whether he is complaining of the in-court identification of appellant elicited by the State, or of the pretrial lineup identification elicited by appellant on cross-examination. See Cooks v. State, ___ S.W.2d _ (Tex.Cr.App. No. 70,772, delivered September 16, 1992).

identification will be tainted by improper pretrial identification procedures, otherwise the in court identification will be admissible. Smith v. State, 646 S.W.2d 452, 459 (Tex.Cr.App. 1983). Notwithstanding this, however, a finding that a challenged pretrial identification procedure was not, in fact, impermissibly suggestive will obviate the need to assay whether, under the circumstances, it created a substantial likelihood of misidentification.

At a pretrial hearing on the motion to suppress the identification evidence, witness Overholt testified that he was able to observe appellant for about two minutes during the offense and that he later gave the police a description of the perpetrator of the crime. Approximately three days later, Overholt was called down to the police station to observe a lineup consisting of similar appearance and dress.

The witness told the trial court that, prior to his viewing the lineup, the officers conducting the procedure told him that he was free to have the men put on sunglasses, say certain phrases, etc.. Overholt was also told that the individuals would have bags on their hands because one had been shot in the hand. At this time, he immediately narrowed the focus to two of the six individuals presented for review.

After Overholt narrowed it down to two individuals, one of whom was appellant, he left the showup room and informed the officers of his determination. At that point, Overholt was taken upstairs to view a video of the same lineup which depicted the individuals in a slightly brighter light than the actual showup room and which allowed Overholt to see close-ups of the two persons. It was at this time that Overholt ultimately picked appellant as the robber. Overholt also told the trial court during the pretrial hearing that he was never shown any photo spreads of

suspects nor did the officers ask him any questions suggesting that he should identify a certain person out of the lineup. After the pretrial hearing on the suggestiveness of the lineup procedures used, the trial judge made findings of fact and conclusions of law which consisted in pertinent part of the following:

> 2. That prior to conducting the line-up, the Defendant waived his right to have an attorney present during the proceedings, and said waiver is evidenced by the testimony of Sargents [sic] Anderson and Mehl and a writing of such waiver.
>
> * * *
>
> 3. Present at the proceedings to view the defendant in the line-up was Larry Overholt.
>
> In Addition to the above witness there were other persons who viewed the line-up for purposes of seeing whether or not the defendant could be identified in robberies other than the matter before this court.
>
> * * *
>
> 6. To prevent the witnesses present from prematurely viewing the Defendant, Jennings was brought into the line-up facility via a route not open to the public.
>
> * * *
>
> 7.[24] Because of the bagging [of the hands and upper arms], it was not possible to determine whether or not any of the participants had any type of injury or wound.
>
> * * *
>
> 9. [I]t appears to the court that each of the participants were all black males, of the approximate same height, weight, and build and that there was nothing about the appearance of the participants which suggested who the perpetrator may be.
>
> * * *
>
> 11. [Overholt's] identification [of appellant] was based upon being in the presence of the Defendant at the time of the robbery . . . .
>
> 12. No suggestions were made by the police or agents of the State at any time as to whom the viewers should identify.
>
> 13. No witness was interviewed, or asked about his or her identification, or lack thereof, within hearing of any of the other persons who were present to attempt an identification.
>
> 14. The court finds from a totality of the circumstances that the line-up was not so necessarily suggestive and conductive [sic] to irreparable mistaken identification as to amount to a denial of due process of law.

Looking at the totality of the circumstances, we conclude that appellant did not meet his burden to show that the procedures

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[24] Two of the number "7." are used in the trial court's findings. This "7." refers to the second one used.

utilized in his pretrial lineup were unnecessarily suggestive and conducive to mistaken identification. Furthermore, concerning the fact that Overholt was not able to definitively identify appellant until after he viewed the videotape of the lineup, this Court has repeatedly held that the fact that a witness cannot be positive in his identification goes to the weight of his testimony and not to its admissibility. See Moore v. State, 700 S.W.2d 193, 198 (Tex.Cr.App. 1985), cert. denied, 474 U.S. 1113 (1986); see also Sharp v. State, 707 S.W.2d 611, 614 (Tex.Cr.App. 1986), cert. denied, 488 U.S. 872 (1988). Point of error number nine is overruled.

In point of error number ten, appellant complains that the trial court erred in denying appellant's request to have the jury answer the verdict form in a specific rather than in a general manner. As we stated in points of error numbers five and six, this Court stated in Kitchens v. State, supra, that it is appropriate for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the alternate theories submitted to a jury. Furthermore, Article 37.07, Sec. 1(a), V.A.C.C.P., specifically instructs that "[t]he verdict in every criminal action must be general." See also Schad v. Arizona, __ U.S. ___, 111 S.Ct. 2491 (1991). As such, the trial court did not err in refusing to grant appellant's request for a specific verdict form.[25] Point of error number ten is overruled.

In point of error number eleven, appellant complains that the trial court erred in denying his request to include an instruction

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[25] We also note that appellant's requested charge was in the insufficiently specific form of: "We, the jury, find the Defendant guilty of Paragraph One or not and Paragraph Two or not." See Article 36.14, V.A.C.C.P.; see also Almanza v. State, 686 S.W.2d 157 (Tex.Cr.App. 1984).

that his alcohol abuse could be considered a mitigating factor as it pertains to punishment. Appellant acknowledges this Court's recent opinions of Ex parte Ellis, 810 S.W.2d 208, 212 (Tex.Cr.App. 1991), and Ex parte Rogers, 819 S.W.2d 533 (Tex.Cr.App. 1991), in which we decided that evidence of drug abuse did not rise to the level of Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), and, thus, did not require an instruction. However, appellant urges us to adopt the reasoning set forth in the dissenting opinion of the latter case.

While the record does reveal some evidence that appellant consumed some amount of alcohol on the night in question, it does not disclose the degree to which appellant may or may not have been intoxicated and appellant points us to no such evidence. Moreover, assuming appellant was, in fact, intoxicated at the time of the offense, he has pointed us to no evidence indicating why this intoxication would make him less morally culpable than defendants who have no such excuse. See Goss v. State, 826 S.W.2d 162 (Tex.Cr.App. 1992), pet. for cert. filed, (U.S. June 2, 1992) (No. 91-8516). Consequently, we conclude that an instruction was not required outside of the special issues and point of error number eleven is overruled.

The judgment of the trial court is affirmed.

Miller, J.

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DELIVERED: January 20, 1993

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