No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

VICTOR HUGO SALDAÑO,
Petitioner

v.

LORI DAVIS, DIRECTOR,
Texas Department of Criminal Justice (Institutional Division),
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED – CAPITAL CASE

At Mr. Saldaño's first death penalty trial, in 1996, an expert for the State of Texas testified that Mr. Saldaño was more likely to present a future danger of criminal acts of violence because he was Hispanic. Eight years on death row followed, most of it in extraordinarily severe isolation, until multiple confessions of error by the State finally led to a new penalty trial. Pretrial, Mr. Saldaño's attorneys then argued that the isolation of death row had left Mr. Saldaño so mentally decompensated that Texas' future dangerousness special issue could no longer be constitutionally applied to him. He would scare the jury, and the statute in his context became so vague that the sentencing decision became unprincipled, with a serious risk of a biased and capricious jury decision. This constitutional claim, while presented in the Texas courts, was never adjudicated on the merits by the Texas Court of Criminal Appeals and was denied a Certificate of Appealability by the U.S. Court of Appeals for the Fifth Circuit.

Buck v. Davis, 137 S. Ct. 759 (2017), requires a certificate of appealability when "jurists of reason could disagree with the district court's resolution of [an applicant's] constitutional claims or . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *id*. at 773. Did the Fifth Circuit contravene this Court's precedent in *Buck* when it denied a certificate of appealability on whether the Texas future-dangerousness special issue fails on vagueness grounds as applied to Mr. Saldaño, as a statute incapable of reasoned application to him in an unbiased and principled manner?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Victor Hugo Saldaño, incarcerated on Texas' death row at the Polunsky Unit of the Texas Department of Criminal Justice, was represented below by the undersigned counsel, Thomas Scott Smith.

The Respondent, Lori Davis, Director of the Correctional Institution of the Texas Department of Criminal Justice, was represented by Texas Assistant Solicitor General John C. Sullivan as Counsel of Record, with Attorney General Ken Paxton, First Assistant Attorney General Jeffrey C. Mateer, and Solicitor General Scott A. Keller appearing on the brief.

The Texas Catholic Conference of Bishops appeared as an *Amicus Curiae*, and was represented by Jared Tyler and Frank Rynd.

The Government of the Argentine Republic appeared as an *Amicus Curiae*, and was represented by Jonathan Miller.

There were no other parties below.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Victor Hugo Saldaño respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished January 8, 2019 order of the Fifth Circuit, denying Mr. Saldaño relief, is attached as Appendix A. The unpublished June 28, 2017 order of the Fifth Circuit, granting a certificate of appealability ("COA") as to two issues and denying as to the remaining issues, is attached as Appendix B. The unpublished July 18, 2016 Memorandum Opinion and Order of Dismissal by the U.S. District Court for the Eastern District of Texas is attached as Appendix C.

STATEMENT OF JURISDICTION

The U.S. District Court had jurisdiction over Mr. Saldaño's habeas cause under 28 U.S.C. §§ 2241 and 2254. The Fifth Circuit had jurisdiction over uncertified issues presented in a motion for a COA under 28 U.S.C. § 2253. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction over all issues presented to the Fifth Circuit under 28 U.S.C. § 2253. On February 26, 2019, Justice Alito granted Mr. Saldaño's Application to extend the time to file a petition for writ of certiorari, making this petition due on July 11, 2019. The petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Eighth Amendments to the United States

Constitution, made applicable to the states through the Fourteenth Amendment. The Fifth Amendment provides in relevant part that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The Eighth Amendment provides in relevant part: "nor [shall] cruel and unusual punishments be inflicted."

This case also involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Saldaño's 1996 capital murder trial was tainted by the same racially biased testimony that the Supreme Court held unconstitutional in *Buck v. Davis*, 137 S. Ct. 759, 778 (2017), with an expert for the State testifying that as an Hispanic, Mr. Saldaño possessed an indicator for future criminal violence. After eight years and multiple confessions of error by the Texas Attorney General, a new penalty trial was finally held in 2004; however nearly eight years on death row, especially in the severe isolation of the Polunsky Unit starting on March 1, 2000, left Mr. Saldaño severely mentally ill, even if marginally competent. His bizarre trial conduct showed someone no longer able to present himself to the jury without seeming a monster. While the 2004 trial was ordered so as to remove the taint of

the 1996 racial bias, severe isolation made it impossible for Mr. Saldaño to present himself as unthreatening, in a new trial for his life where the jury needed to determine his future dangerousness.

A. THE FIRST TRIAL

Mr. Saldaño was indicted for capital murder pursuant to Texas Penal Code Section 19.03(a)(2), and was first sentenced to death on July 15, 1996, but the State deliberately developed and presented racially biased testimony against him during the sentencing phase. To establish the required aggravating circumstance of future dangerousness in TEX. CODE CRIM. PROC. ("CCP") art. 37.071, § 2(b)(1), the prosecution presented testimony by a forensic psychologist that because Petitioner was Hispanic he was more likely to commit future crimes than non-Hispanics. The expert testified that he had encountered "markers or factors that through research have been identified as . . . increasing the probability of future dangerousness," ROA.9332, and specifically noted race as a predictor of future dangerousness, ROA.9338. The prosecutor then referred to this predictor as a category that "in this age of political correctness, that somehow it is an item that we tend to gloss over," ROA.9338. The expert witness affirmed the prosecutor's point, stating that because "blacks and Hispanics are over-represented in the criminal justice system," being Hispanic was a factor indicating future dangerousness, and that Argentines should be considered Hispanic, ROA.9338-ROA.9339. The expert testified that he had offered statistical methodologies in future dangerousness testimony in some 70 capital cases, ROA.9331, ROA.9381-

ROA.9382. Defense counsel never objected to the expert's testimony, but instead cross-examined focusing on who should be included in the Hispanic category given the different "blood lines," ROA.9394, and "mixture of Indian and Spanish blood from Mexico," ROA.9395, that makes up the classification of Hispanics. However the expert clarified that Hispanics includes South Americans, ROA.9395.

B. POLITICAL TENSIONS AND DELAYS

Getting to the point of reversal was a procedural tug-of-war of the District Attorney and the Texas Court of Criminal Appeals ("CCA") versus the Texas Attorney General. When Petitioner raised the racially biased testimony of the first trial as a point of error, the CCA treated the issue as insufficiently fundamental to overcome failure to object at trial. *Saldaño v. State*, No. 72,556, at 9-10 (Tex. Crim. App. Sept. 15, 1999). However, in response to Petitioner's direct appeal to the U.S. Supreme Court for a writ of certiorari, the Texas Attorney General confessed error by admitting that "the infusion of race as a factor for the jury to weigh in making the determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." Resp. to Pet. for Cert. at 7-8, *Saldaño v. Texas,* 530 U.S. 1212 (2000). The Supreme Court accordingly remanded the case to the CCA for further consideration in light of the confession of error. *Id.*

Nevertheless, the CCA then sided with the District Attorney against the Attorney General and ruled that the confession of error was improper. *Saldaño v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002). This odd decision triggered a

public argument between the Attorney General and the CCA, and became an electoral issue for both the Attorney General, who was running for the United States Senate, and for three judges of the CCA, who were up for re-election.[1] The impact for Petitioner was nearly eight years of unnecessary deterioration on death row from the time of his initial sentence until his sentence was finally set aside after multiple appeals by the District Attorney. *Saldaño v. Cockrell*, 267 F. Supp.2d 635 (E.D. Tex. 2003), *aff'd* 363 F.3d 545 (2004), *cert. denied* 534 U.S. 820 (2004). During the last part of this period, after transfer to the harsh isolation of the new Polunsky Unit on March 1, 2000, ROA.350, Petitioner's mental health decompensated rapidly, leading to multiple stays in the Texas Department of Criminal Justice ("TDCJ") mental hospital, the Jester IV unit, including one hospitalization lasting from March 20, 2001 to August 3, 2001. ROA.355. While death row may not affect all inmates equally, Petitioner was severely mentally ill by the time of his punishment retrial in November, 2004.

C. THE PRETRIAL MOTION ON MENTAL DECLINE

Mr. Saldaño's attorneys presented a pre-trial motion on October 21, 2004, ROA.1559-ROA.1585, that forms the basis of the present Petition. That motion argued that the Texas "future dangerousness" special issue, under which the jury must determine "whether there is a probability that the defendant would commit

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[1] *E.g.*, Diane Jennings, *AG, Court Still Simmering*, Dallas Morning News, April 14, 2002, *available at* 2002 WLNR 13698549; *see also Texas' Worst Court Slaps Cornyn, Upholds Nazi-Like Quackery*, San Antonio Express-News, March 22, 2002, *available at* 2002 WLNR 1388602.

criminal acts of violence that would constitute a continuing threat to society," Tex. CODE CRIM. PROC. art. 37.071, § 2(b)(1) (2004), could not be constitutionally applied to Mr. Saldaño on Eighth Amendment grounds. His mental decline in the severe isolation of death row – after a death penalty proceeding tainted by racial bias – meant that any application of the future-dangerousness special issue would be distorted; the passage of time and his deterioration through isolation left the special issue vague and no longer capable of rational application. ROA.4102-ROA.4112. In addition, the motion sought to exclude testimony by death row prison guards of misconduct by Mr. Saldaño, on grounds that the misconduct occurred in the unreal pressures of isolation on death row. ROA.4115-ROA.4116. The motion was supported with two affidavits, one by Dr. Orlando Peccora, a psychiatrist who stated he met with Mr. Saldaño on well over 100 occasions between 1997 and 2001, ROA.4120, and who described Mr. Saldaño's mental decline due to isolation, ROA.4120-ROA.4123, and one by Susan C. Perryman-Evans, a recently retired prison warden who described the extraordinary isolation faced by all death row inmates in their incarceration in the Polunsky Unit, ROA.4124-ROA.4125.

The trial court held a hearing on the pretrial motion on November 5, 2004, ROA.5487; however though present in the courtroom, Dr. Peccora never testified at the pretrial hearing and the motion was effectively denied. The trial court insisted that the State be permitted to have an expert examine Mr. Saldaño before Dr. Peccora could testify, yet critically, also asserted that any examination by the

State could also be used by the State at trial on the separate issue of future dangerousness, regardless of whether the defense opened up the issue with psychiatric testimony, ROA.5519, ROA.5766-ROA.5767. (The Fifth Circuit seems to have ruled for Mr. Saldaño on the trial court's ruling on expert examinations by the State, and on the CCA's closely related approach of procedural default, just leaving the underlying Eighth Amendment issues for consideration in this Petition, *Saldaño v. Davis*, 701 Fed. Appx. 302, 309-310.)

D. THE PUNISHMENT PROCEEDING

1. State's Evidence

During the punishment phase, the State first established the nature of the crime and the manner of the victim's death. Virtually all of the future dangerousness testimony related to how difficult Petitioner was on death row. The State called five prison guards to describe Petitioner's behavior on death row, ROA.5717-ROA.5752, focusing largely on his behavior at the "supermax" Polunsky unit.[2] Much of the prison guard testimony described conduct like going naked, visibly masturbating, and throwing urine and feces, ROA.5178-ROA.5179, ROA.5734, ROA.5744, which is conduct of the sort usually engaged in by mentally ill prisoners.

There was no evidence presented of any prior arrest or prison record for

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[2] Petitioner's serious mental deterioration began after being placed in the isolation of the Polunsky Unit. Ms. Perryman-Evans testified at length about the differences between the former Death Row at the Ellis Unit and the current death row at the Polunsky Unit. ROA.5511.

Petitioner in either the United States or Argentina.

2. Defense Evidence

The defense centered on an intoxication claim that, as presented, had little chance of success. The contention was that Mr. Saldaño and his co-defendant had "partied hard" the night before the murder, woke up and stumbled onto some beer. ROA.5767. The only support came from Mr. Saldaño's co-defendant, who also testified that they were high on crack cocaine. ROA.5810.

Defense counsel failed to call a single witness to describe Petitioner's deterioration while in isolation at Polunsky, or his treatment for severe mental illness while on death row. The jury never learned of his March 20 to August 3, 2001 stay in Jester IV, or his resulting diagnoses of paranoid schizophrenia and auditory hallucinations, ROA.2379-ROA.2380, ROA.2368.

3. Petitioner's In-Court Behavior

During the trial, Mr. Saldaño exhibited bizarre behavior. He rocked in his chair and laughed inappropriately. ROA.5645. He insisted on wearing prison clothing even though he was warned it would likely harm his defense.[3] He read magazines during voir dire and yawned loudly in the presence of a venirperson. ROA.5619. After Mr. Saldaño twice masturbated in court, the trial judge finally admonished him. ROA.5619. But, so extreme was the behavior, that Petitioner's own attorney suggested applying restraints:

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[3] ROA.4478, ROA.4506, ROA.4563, ROA.4618, ROA.4678, ROA.4755, ROA.4784 and ROA.4946.

> It's at my recommendation because of – I – it's in his best interest that he appear not hostile or dangerous or super-weird to the jury . . . .
>
> Judge, the metal restraints will not stop the activity that he's been engaging in. The only restraints that will stop it are the ones that will keep his hands by his side.

ROA.5618. But once restrained the situation got even worse. When the jury left that evening, Mr. Saldaño stood while trussed. ROA.5635, ROA.5644.

The bailiff's testimony on the second masturbation incident is especially poignant:

> Well, he was rocking in his chair; wiping his hair out of his face quite a bit; he was laughing quite often during the witnesses' testimonies. And then I saw him masturbating in – while his hands were in his greens.

ROA.5646. This is a defendant who was living in his own world.

However, though Petitioner demonstrated grossly abnormal behavior, he never tried to aggravate or challenge the court, as shown by the judge's statement:

> [T]he defendant has – during the course of voir dire there have been some other incidents which I've noted on the record which haven't been acting out, as such, but they were things that I – I'm not sure helped. . . . [H]e has not acted out physically; hasn't fought with anyone or tried to be disruptive. In fact, the record will reflect that he's been very – I feel like very friendly with me, for that matter. We've had a fairly friendly exchange at the end of each day when I sought to see if he was satisfied with what was being done for him. And so I haven't got any personal issues with him.

ROA.5619. Essentially, the court perceived Petitioner as weird, but friendly.

Later, during the testimony of a guard, Petitioner abruptly jumped up and startled the jury. His lawyer described it:

> During the testimony of Sergeant Hutchinson, Mr. Saldaño jumped up; and I noticed that the jury reacted in what I perceive to be a startled manner. Mr. Saldaño has stood halfway up on numerous occasions during the trial. This is the first time he has stood all the way up. And I think – it's not helping him before the jury. I think it's scaring the jury.

ROA.5732. As a result, Petitioner's feet were chained to the floor. ROA.5732.

But even chained and cuffed, the weirdness continued. During the first day of the defense portion of the case, the prosecutor observed:

> Judge, I'm – I would like, as an officer of the Court, the record to reflect that, when I was in the middle of my cross-examination of Detective Bennett, Mr. Franklin asked for a sidebar. At that time we came to the side; after saying that he's – he's at it again, meaning Mr. Saldaño was masturbating again, which, when I came back, I turned around and saw those actions. The jury was taken out. We had to wait while Mr. Saldaño got restrained.

ROA.5795. Then, the next day, the prosecutor again alerted the trial court that Petitioner was re-engaged with himself. ROA.5825.

While defense counsel had Mr. Saldaño examined by experts who determined he was competent to stand trial, ROA.5883, it is likely that his competency, and certainly his concentration, were marginal. There were at least four masturbation incidents by an ultimately trussed-up defendant whom the judge did not consider disruptive or unfriendly. On one occasion, Mr. Saldaño also soiled his uniform, which the trial court said may have been involuntary, ROA.5123. And there were many incoherent or confused statements by Petitioner. For example, during one end-of-day conversation in which the trial court sought to confirm if Mr. Saldaño was pleased with his attorneys, the judge and the Petitioner had the following dialogue:

THE DEFENDANT:	(In English) They will improve his performance, they will release me. Right? His job – his job in here is for release me. Right?
THE COURT:	I tell you what, you have to [sic] of the best lawyers –
THE DEFENDANT:	(In English) His job is here is for release me.
THE COURT:	You have two of the best lawyers out there.
THE DEFENDANT:	(In English) According to what I understanding here by the law, they say release.
THE COURT:	Well –
THE DEFENDANT:	Maybe next year. Right.
THE COURT:	If anybody can do it, they will.
THE DEFENDANT:	(In English) Next year I get out. Right? I get out.
THE COURT:	I can't promise you that, Mr. Saldano. But these lawyers are doing a very good job for you, whether you believe it – I know you believe it, because they are doing a good job.

ROA.5160.[4]

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[4] One of the most dramatic examples of Mr. Saldaño's incoherence comes after the bailiff's testimony on his masturbation, when he also has his longest conversation on the record. Mr. Saldaño was asked to respond to the judge's concern about his masturbation in court and he goes on for six pages in the trial record, jumping from unintelligible statements about "the rule of the law" and "the Penal Code of Texas," to talking about the penalty for murder being "five years," to apologizing to the court, then returning to unintelligible statements mixed with references to the Penal Code of Texas and the Supreme Court of Texas, followed by discussion of higher authority, believing in God and Christian values, an apology for the murder of Paul King, and a final discussion of God. ROA.5647-5648. The dialogue concludes with the judge simply thanking Mr. Saldaño for his sentiments, ROA.5648. But the above rambling response does not stand alone. *See e.g.* ROA.4619 (when asked about issues during voir dire Petitioner asks for chicken); ROA.4946 (when asked about the case that day,

One of the oddest statements in the trial transcript comes shortly after the jury delivered its death sentence and Mr. Saldaño asked the judge through the interpreter: "Am I going home now? Am I going home now, sir?" ROA.5881. It could be that Petitioner had no clue as to what the jury had just decided.[5]

The trial ended with a new death sentence against a severely mentally ill man.

E. HOW THE FEDERAL QUESTION WAS RAISED BELOW

The Question Presented in this Petition combines Issues 4 and 5 from Appellant's Amended Brief Supporting Application for Certificate of Appealability. The Federal Question may be tracked in Petitioner's State court and Federal habeas presentations as follows:

1) 199th Judicial District Court of Collin County, Texas, *Texas v. Saldaño*, No. 199-80049-96 – Motion filed October 21, 2004 at 7-13, ROA.4099 at ROA.4107-4113;

Petitioner offers a series of statements the court reporter labels "unintelligible" followed by something about "protect the Constitutional rights of inmates" followed by "More money. Right?"); ROA.5411 (Petitioner twice calls his lawyers "funny guys"). Outside the courtroom, returning from lunch, Mr. Saldaño also apparently rambled to the bailiff: "I killed three people in Oak Cliff, " and "I've got some guns," until his rambling became incomprehensible to the bailiff – statements about killings and guns that were probably fanciful, and certainly rather odd statements to make returning from lunch during one's death penalty trial if one has any conception of what is happening. ROA.5755; ROA.5757.

[5] In conversations with the judge, Mr. Saldaño consistently showed he did not comprehend that the only possible outcomes for him were a death sentence or life imprisonment with no parole consideration for forty years. ROA.4879 ("I hope they get me out. Right?"); ROA.5133 ("I hope they release me;" "I be release;" "I hope to be release very soon. Right"); ROA.5196 ("I hoping to be released;" "Released legal process (unintelligible)"); ROA.5306 ("They going to release me. Right?").

2) Texas Court of Criminal Appeals, *Saldaño v. Texas*, No. AP-72,556 – Amended Brief for Appellant at 17-21, ROA.940 at ROA.986-ROA.990;

3) U.S. District Court for the Eastern District of Texas, Beaumont Division, *Saldaño v. Quarterman*, Civil Action No. 4:08cv193 – Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus at 50-55, 92-96, ROA.80 at ROA.135-ROA.140, ROA.177-ROA.181;

4) U.S. Court of Appeals for the Fifth Circuit, *Saldaño v. Davis*, No. 16-70025 – Appellant's Amended Brief Supporting Application for Certificate of Appealability at 29-37.

The Fifth Circuit's decision indicates that Mr. Saldaño waived Issue Four from his Appellant's Amended Brief Supporting Application for Certificate of Appealability for failing to raise this issue before the District Court. *Saldaño v. Davis*, 710 Fed. Appx. 302, 311 (5th Cir. 2017). This is simply incorrect, since the issue appears in Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus at 50-55; ROA.135-140. The Fifth Circuit does, however, go on to consider this issue on the merits, 710 Fed. Appx. at 311.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Mr. Saldaño spent eight years isolated on death row, due to a 1996 death sentence to which the State confessed error because it was tainted by racially-biased expert testimony. As a result of the uniquely severe isolation that characterizes death row in Texas, he fell into an abyss of mental illness and decay. By the time he was re-sentenced in 2004 he was not the same individual.

The Fifth Circuit failed to grant a certificate of appealability on the question of whether the Texas future dangerousness special issue violates the Eighth Amendment as vague when applied to Mr. Saldaño. The Fifth Circuit seems to agree that Mr. Saldaño suffered enormous mental decline as a result of his years on death row, and to the extent that the Fifth Circuit has not explicitly resolved the question, a reasonable jurist would certainly find the decline likely. The Supreme Court is therefore faced with the comparatively straightforward question of whether the Texas future dangerousness special issue can be constitutionally applied to someone who has psychologically decompensated on Texas' death row because of its severe isolation and because a racially biased proceeding sent him there. The Eighth Amendment requires principled decision-making, which requires a jury to engage in both an unbiased evaluation of the defendant for the purpose of applying the Texas special issue, and to be able to coherently apply the language of the special issue to the case at hand.

It becomes extraordinarily difficult for a jury to evaluate and predict an individual's future propensity for violence when he has mentally decompensated after years of isolation, and it becomes particularly perverse to allow the State to permit such an analysis by jurors when the State itself is the cause of the mental decline. A reasonable jurist would consider the issue to require the consideration of a full appeal, especially when the initial wrong involved racially biased conduct by the State.

REASONS FOR GRANTING THE WRIT

Not all errors require the same remedy, but race discrimination in the judicial process, admitted by the State, requires a particularly thorough one. Especially given the history of Mr. Saldaño's case, jurists of reason could find that Texas' death penalty special issue, that the jury find the defendant likely to "commit criminal acts of violence that would constitute a continuing threat to society," Tex. Code Crim. Proc. art. 37.071, §2(b)(1) (2004) (often referred to as "future dangerousness"), was unconstitutionally vague and incapable of reasoned application under the 8th and 14th Amendments as applied to him. After racially biased testimony that required a new penalty proceeding, Mr. Saldaño suffered mental decompensation on death row during years of isolation, leaving the Texas special issue vague and incapable of reasoned application to his case. A jury reaching a verdict beyond a reasonable doubt can hardly apply the special issue in a principled, unbiased manner to such a seriously deteriorated defendant, and the language of the special issue fails to guide jurors when it offers no direction on the hypothetical place and hypothetical dangers they must consider in a mentally ill defendant whose principal dangerous conduct involved throwing urine and fees in severe isolation. The Fifth Circuit failed in its obligation to establish full appellate jurisdiction through a certificate of appealability.

I. Remedying Admitted Race Discrimination in the Judicial Process Requires Exceptional Care to Fully Eliminate the Effects of Racially Biased Conduct.

Many of the concerns present in *Buck v. Davis*, 137 S.Ct. 759 (2017) are

present here. In *Buck*, the Supreme Court not only found that the Fifth Circuit improperly denied a Certificate of Appealability, but gave Mr. Buck relief under FED. R. CIV. P. 60(b)(6) given the extraordinary circumstances of his case. In that case, as in Mr. Saldaño's, Walter Quijano, a former chief psychologist of the Texas prison system, ROA.9328, offered testimony "that minorities, Hispanics and black people, are over represented in the Criminal Justice System," 137 S.Ct. at 769, indicating that being Hispanic or Black was a factor "know[n] to predict future dangerousness," *id*. But this Court responded in *Buck* that "[o]ur law punishes people for what they do, not who they are" and that "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id*. at 778.

More importantly, this Court in *Buck* emphasized the "extraordinary nature" of the case, *id*., because "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process. *Id*. (quoting *Davis v. Ayala*, 135 S.Ct. 2187, 2208 (2015). Race discrimination in cases like *Buck*, "injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Id*. (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). It was likewise this Court's concern for the "systemic injury to the administration of justice" from racial bias, *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017) and its "duty to confront racial animus in the justice system," 137 S.Ct. at 867, that led the Court to establish a special exception to the no-impeachment rule when a juror's statements indicate a racial

animus as a significant factor in finding guilt, 137 S.Ct. at 869. A concern for racial animus was also presumably what the Supreme Court alluded to in *Tharpe v. Seller*, 138 S.Ct. 545 (2018) when it referred to that case's "unusual facts" (an affidavit by a juror displaying racial animus) as requiring the granting of a certificate of admissibility. 138 S.Ct. at 546.

Mr. Saldaño's case is the case that laid the foundation for *Buck v. Davis*, 137 S.Ct 759 (2017). As this Court noted in *Buck*, Duane Buck's initial habeas petition made no mention of his defense counsel's introduction of an expert who testified that his race was an indicator of future dangerousness. 137 S.Ct. at 769. It was Mr. Saldaño's petition for certiorari, asking for revocation of his death penalty due to Dr. Quijano's testimony that as a Hispanic he possessed a factor indicating future dangerousness, that led to Texas Attorney General John Cornyn's confession of error, and to his identification of eight more cases where Dr. Quijano had testified that being Black or Hispanic was an indicator of future dangerousness. 137 S.Ct. at 770. However the Attorney General's admission did not lead to a quick new trial for Mr. Saldaño. While this Court remanded the case in light of the confession of error, *Saldaño v. Texas*, 530 U.S. 1212 (2000), the Texas Court of Criminal Appeals insisted that the confession of error was improper and reinstated the judgment. *Saldaño v. State*, 70 S.W.3d 873, 884-890 (Tex. Crim. App. 2002). The new sentencing trial, which began on November 10, 2004, ROA.5590, only came after Mr. Saldaño spent nearly eight years on death row.

Mr. Saldaño filed a pretrial motion on October 21, 2004, ROA.4099-

ROA.4125, shortly before his second trial, that argued that he had mentally declined so severely during eight years on death row that no jury could constitutionally apply the Texas special issue to find a likelihood that he would commit future "criminal acts of violence that would constitute a continuing threat to society" TEX. CODE CRIM. PROC. art. 37.071, §2(b)(1) (2004). ROA.4107-4113. The statute is inherently vague and incapable of principled application when applied to someone who has suffered severe mental decline while on death row, and the vagueness issue is inextricably intertwined with what the Fifth Circuit quotes as his fourth issue, that:

> It violates basic notions of fairness for a State to impose a death sentence tainted with racist testimony, battle for eight years to prevent its being set aside while the prisoner mentally decompensates in severe isolation, and then to subject the now mentally ill defendant to a new death penalty sentencing where the key issue is the defendant's future dangerousness.[6]

Saldaño v. Davis 701 Fed. Appx. 302, 311 (5th Cir. 2017).

The Fifth Circuit felt that Mr. Saldaño's argument "flies in the face of the well-established rule that the government may retry persons whose convictions have been overturned due to constitutional error in prior proceedings." 701 Fed. Appx. at 311 (citing *United States v. Tateo*, 377 U.S. 463, 468 (1964)). Mr. Saldaño does not dispute that ordinarily a retrial after constitutional error is fully

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[6] The Fifth Circuit's decision indicated that Mr. Saldaño failed to raise this issue before the District Court. *Saldaño v. Davis*, 710 Fed. Appx. 302, 311 (5th Cir. 2017). However the issue is fully developed in Petitioner Victor Hugo Saldaño's Petition for Writ of Habeas Corpus at 50-55; ROA.135-140.

appropriate, but not all errors by the State have the same consequences,[7] and some issues by their nature "deserve encouragement to proceed further" for a full appellate analysis, *Buck*, 137 S.Ct. at 773. As discussed in the next section, Texas' special circumstance requiring a finding of future dangerousness creates unique problems when applied to Mr. Saldaño's case. In considering the appropriateness of a certificate of appealability, the Fifth Circuit should have considered the unique nature of the Texas court's initial error in 1996, the role of Texas in delaying resolution of the issue, and the extraordinarily debilitating nature of the death row that Texas has created.

Racially biased testimony by the State's expert at Mr. Saldaño's 1996 sentencing led to a very appropriate response by Texas' Attorney General before this Court, with his confession of error and recognition that "it is inappropriate to

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[7] The Supreme Court often engages in balancing that considers the degree to which the State is responsible for a situation that compromises a defendant's ability to defend himself. For example, in the context of the Sixth Amendment right to a speedy trial, this Court has weighed the conduct of both the prosecution and the defendant, treating the situation differently according to whether the prosecution acted deliberately to hinder the defense, acted merely negligently, or had a valid reason for the delay, and also separately considers the degree of prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 531-532 (1972); *see also California v. Trombetta*, 467 U.S. 479, 485-489 (1984) (describing a balancing whereby the prosecutors have an absolute obligation to provide defendants with evidence material to their guilt, but absent bad faith, have no duty to preserve evidence not expected to play a significant role in a suspect's defense). As common sense would dictate, the greater the intentionality of the State's conduct to prejudice the defendant and the greater the prejudice, the more likely this Court has been to give defendant a remedy. Moreover, the prejudice to the State is far less in the present case, where the State may always opt for a life sentence instead of death, compared to a situation where the State risks allowing a culpable and perhaps dangerous individual to go free.

allow race to be considered as a factor in our criminal justice system," *Buck*, 137 S.Ct. at 770; and this Court remanded, *Saldaño v. Texas*, 530 U.S. 1212 (2000). But the confession of error did not in itself provide a remedy. The response of the Texas Court of Criminal Appeals was to rule that Attorney General Cornyn's confession of error was improper, *Saldaño v. State*, 70 S.W. 3d 873, 891 (Tex. Crim. App. 2002), and multiple appeals by the District Attorney meant that Mr. Saldaño's death sentence was not definitively set aside until 2004, *see Saldaño v. Cockrell*, 267 F.Supp. 2d 635, 642-645 (2003), *aff'd* 363 F.3d 545 (5th Cir. 2004), *cert denied* 534 U.S. 820 (2004), in spite of a new confession of error by Texas' Attorney General in Federal habeas corpus. Mr. Saldaño reacted poorly to his nearly eight years on death row from 1996 to 2004, much of it in an isolated nine by six foot cell with virtually no opportunity for human contact, *see* Testimony of Kevin Fisher, ROA.5720; Affidavit of Susan Perryman-Evans, ROA.4124-4125; Affidavit of Dr. Orlando Peccora, ROA.4120-ROA.4121, leading to multiple stays at the TDCJ mental hospital, including one hospitalization from March 20, 2001 to August 3, 2001, ROA.355. Texas' Polunsky Unit, established in late 1999 and early 2000, is perhaps the most severe death row in the country judged by the isolation it imposes on its inmates. *See Solitary confinement: Two decades in a concrete box*, THE ECONOMIST, June, 8, 2018 at 30, also available at 2019 WLNR 17383047; The University of Texas School of Law Human Rights Clinic, DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS ON TEXAS' DEATH ROW, 13, 18-20 (April, 2017). Mr. Saldaño's pre-trial motion of October 21, 2004,

arguing severe mental decline, essentially anticipated the mental decompensation that he demonstrated at trial with multiple incidents of masturbation, ROA.5618-ROA.5619, ROA.5795, ROA.5619; refusal to shave or cut his hair, ROA.4506; insistence on wearing prison clothes, ROA.4478, ROA.4506, ROA.4563, et al; rocking in his chair and laughing inappropriately, ROA.5645; jumping up and startling the jury, ROA.5732; insisting on rising when the bailiffs escorted the jury into and out of court even though the jury could see his restraints, ROA.5635; reading magazines in spite of suggestions from the judge that he not, ROA.5098; and incoherent speech, ROA.5647-5648 – all in a context where the judge felt that he was not trying to be disruptive, but was friendly towards the court, ROA.5619.

In the context of a State that has a special issue of future dangerousness, the race discrimination of the first trial was never cured in the second trial. Denial of a certificate of appealability with a pat reference to the right of government to retry individuals whose convictions have been overturned is not sufficient. Mr. Saldaño's certificate of appealability needed to be examined in the context of his unique history and the extraordinary responsibility of the State.

II. A Reasonable Jurist Could Question the Texas Special Issue of "a Probability that the Defendant Would Commit Criminal Acts of Violence that Would Constitute a Continuing Threat to Society" on Vagueness Grounds, as Incapable of Reasoned Application in an Unbiased and Principled Manner, as Applied to Mr. Saldaño.

The Supreme Court's Eighth Amendment vagueness jurisprudence requires guidance for juries to ensure "neutral and principled" decision-making that guards against "bias and caprice" in sentencing. *Tuilaepa v. California*, 512 U.S. 967,

973 (1994). This language makes clear the need to avoid unfairness through the sentencing standard, and application of the future dangerousness standard in Mr. Saldaño's case could certainly appear to jurists of reason to fail the *Tuilaepa* approach.

As the Supreme Court explained in *Tuilaepa*, the Court's Eighth Amendment vagueness cases address two different parts of the decision-making in capital cases, the eligibility decision and the selection decision. *Id*. at 971-972. Originally the Texas requirement that a jury find "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," Tex. Code Crim. Proc. art. 37.071, § 2(b)(1), was the vehicle through which Texas juries considered mitigating evidence – the selection decision –, and it was held constitutional in *Jurek v. Texas,* 428 U.S. 262 (1976) as Texas' mitigation vehicle, 428 U.S. 262, 272, 276 (1976) (emphasizing that what was essential was that through the future dangerousness special issue the Texas Court of Criminal Appeals required that juries receive all possible relevant information about the defendant for sentencing). But subsequently, the Texas legislature added Tex. Code of Crim. Proc. art. 37.071, § e(1), which explicitly requires the jury to consider mitigating circumstances, 1999 Tex. Sess. Law Serv. Ch.149 (S.B. 39) (Vernon's). This was in response to the Supreme Court's decision in *Penry v. Lynaugh*, which held the future dangerousness special issue insufficient as applied under certain jury instructions, since it did not require the jury to consider the defendant's mental retardation and childhood abuse in mitigation, 492 U.S. 302,

323-325 (1989); *see also Penry v. Johnson*, 532 U.S. 782, 796-797 (2001). The addition of § e(1) eliminated any need for the § 2(b)(1) requirement of "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" as a vehicle for mitigation. Rather than functioning as the sentencing's mitigation vehicle, a showing of future dangerousness became a necessary eligibility element – the future dangerousness being a necessary aggravating circumstance for the State to prove under its statutory scheme. As an aggravating circumstance, the concern is not that the special issue be expansive enough to accommodate all relevant mitigating evidence, but that it answer a question with a factual nexus to the crime or to the defendant that is rationally reviewable, *Tuilaepa*, 512 U.S. at 973.

However, even though proof by the State of an aggravating circumstance is a separate task from mitigation analysis, there is a common overall concern. "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa*, 512 U.S. at 973. Avoiding arbitrary and capricious action is the "controlling objective when we examine eligibility and selection factors for vagueness." *Id*. Vagueness in the Eighth Amendment context has nothing to do with notice and whether reasonable persons would know that their conduct puts them at risk of prosecution. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Instead, the concern is with limiting juror and appellate discretion. *Maynard*, 486 at 361-362 (1988). The concern is especially great when a factor must be answered as a yes or no answer to a specific

question. *See Tuilaepa*, 512 U.S. at 975. A yes or no answer to a required special issue does not allow other aggravating circumstances to step in as the necessary aggravating circumstance if the special issue is disallowed, and is also not a situation of one factor among a group of factors determining an issue, which might allow the other factors to take up the slack if one factor is improper. *Id.*

Reasonable jurists could find that application of the future dangerousness special issue to Mr. Saldaño became arbitrary once the severe mental decline he suffered in the isolation of death row got carried into the courtroom through the testimony of prison guards and through Mr. Saldaño's own bizarre conduct in front of the jury. The verdict form at the 2004 trial asked jurors to find whether there was a probability that Mr. Saldaño "would commit acts of violence that would constitute a continuing threat to society," ROA.4309, a question precisely matching the language of Art. 37.071, § 2(b)(1). Yet asking the question in the context of how Mr. Saldaño appeared to jurors the courtroom in November 2004 was very different from asking it with respect to his courtroom appearance in July 1996. There are two different ways the analysis becomes inherently capricious. First, if the State contributed to Mr. Saldaño's mental decline by placing him in severe isolation for eight years in the unreal pressure cooker of death row, and particularly after March 1, 2000, in the debilitating conditions of its Polunsky unit, Testimony of Susan Evans, ROA.5511, ROA.5513, then it becomes unfair to the point of arbitrary to allow the State to apply the Art. 37.071, § 2(b)(1) special issue in the context of his case. Second, the very phrasing, of the Art. 37.071, § 2(b)(1)

special issue, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," becomes unprincipled and biased.

First, on the question of inherent capriciousness, certainly reasonable jurists could find unfairness to the point of arbitrariness in the State causing the mental decline of a prisoner so that he is grossly degraded in his ability to defend himself, even if mentally competent. The jurors charged with applying the special issue find themselves applying the concept of future dangerousness to a distorted image. Concerned with impressions on jurors, the Supreme Court held in *Deck v. Missouri* that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial," 455 U.S. 622, 629 (2005), a decision that noted an earlier holding that a defendant may not generally be made to appear before a jury in prison garb, 455 U.S. at 628 (citing *Estelle v. Williams*, 425 U.S. 501, 503, 505 (1976)).[8] Also comparable are the Supreme Court's concerns with the effect on a capital defendant's demeanor of the involuntary administration of antipsychotic medication, *Riggins v. Nevada*, 504 U.S.137-138 (1992); *see also Sell v. United States*, 539 U.S. 166, 185 (2003); and the Court's insistence that antipsychotic medication only be administered after a

[8] These are concerns surprisingly close to the present case, since Mr. Saldaño's mental decompensation led to the jury seeing the physical restraints the trial court used to avoid his masturbation, ROA.5635; and to his wearing prison clothes, ROA.4478, ROA.4506, ROA.4563, et al.

careful balancing of medical appropriateness, alternatives and need, *Riggins*, 504 U.S. at 135.

Both the United States District Court and the Fifth Circuit criticized the above argument, saying "Saldaño's challenge focuses on how Texas law is unfair rather than explaining how Texas law is vague," *Saldaño v. Davis*, 701 Fed. Appx. 302, 311 (2017) citing *Saldaño v. Director*, 2016 WL 3883443 at 25, ROA.821-ROA.822, but the sort of fairness concerns expressed in cases like *Deck*, *Estelle v. Williams*, and *Riggins* are very similar to the concerns for caprice and unprincipled decisionmaking expressed in *Tuilaepa*. A jury can hardly make a principled decision on future dangerousness without an understanding of who the defendant is, and in Mr. Saldaño's case, the State has made that impossible. As *Riggins* notes in analogous circumstances, "[e]ven if [the lower court] was right that expert testimony allowed jurors to assess [the defendant's] demeanor fairly, an unacceptable risk of prejudice remained." 504 U.S. at 138. It makes no sense to say as the Supreme Court did in *Riggins* that jurors cannot be trusted to evaluate a capital defendant given antipsychotic medication, yet to fail to recognize in Mr. Saldaño's case that similar risks exists may reasonably be found due to severe mental decline in a State where the defendant is specifically evaluated by the jury as to the probability that he will commit violent criminal acts in the future.

But second, and aside from any issue of prejudice that leads to capricious decisionmaking, particularly in Mr. Saldaño's case, jurors were left with no clear idea of how to apply the language "whether there is a probability that the defendant

would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. art. 33.071, § 2(b)(1). Jurors received the text of the statute on the verdict form with no instruction that narrowed the language. *See* ROA.4303-ROA.4309. The instructions and the verdict form did not clarify whether the threat of criminal acts of violence that is a continuing threat to society should be considered in the context of a defendant in a prison setting with severe isolation, an ordinary prison setting, or outside of prison. Further, there is no clarification of the sorts of acts of violence that might be involved (something especially relevant for the sorts of misconduct death row guards testified Mr. Saldaño engaged in when in isolation, such as trying to throw urine at the guards through the mesh grating, ROA.5717, ROA5719 and ROA5734, and which does not commonly occur in ordinary prison settings, Affidavit of Susan Evans at ROA.1585). Mr. Saldaño objected to the failure of the charge to clarify that criminal acts of violence refers to serious criminal activity, Objection #2, ROA.4311, to its failure to exclude property crimes, Objection #8, ROA.4312, and, most importantly, to its failure to clarify the hypothetical setting, in prison or out, under which the Defendant was to be evaluated, Objection #14, ROA.4313. The Texas Court of Criminal Appeals denied the appeal on these points of error noting merely that "the trial court submitted a charge consistent with applicable state statutes, which have withstood numerous constitutional challenges," 232 S.W. 2d 77, 107 (Tex. Crim. App. 2007).

Moreover, the phrase "whether there is a probability that the defendant

would commit criminal acts of violence that would constitute a continuing threat to society," lacks a common sense meaning in the case of someone who has suffered severe mental decline due to isolation on death row – unless read literally in an unprincipled fashion. Presumably an aggravating circumstance seeks to evaluate the individual who committed the crime. But after severe mental decline due to isolation, Mr. Saldaño was no longer the same person. Evaluating someone who becomes mentally ill after the severe isolation on death row would hardly seem to match a legislative purpose of reserving the death penalty for those who are truly the most morally blameworthy and the worst offenders, and it lacks any imaginable social justification. The evaluation becomes unprincipled. And even if Mr. Saldaño was to be evaluated as of the time of his second trial, what sort of reconstruction by the jury would have been appropriate? Was Mr. Saldaño to be hypothetically evaluated according to what he might have been like had he lived in an ordinary prison setting over the previous period and not in the isolation of the Polunsky unit, or as the State helped make him after severe isolation?

Predicting future dangerousness is an exceptionally difficult task to impose on a jury. *Jurek*, 428 U.S. at 274. Oregon is the only State besides Texas that requires jurors to affirmatively find a probability that a capital defendant will commit future violent crimes. OR. REV. STAT. § 163.150 (2015). In most States, future dangerousness plays no role at all in their capital sentencing schemes, and in

the others, it is a factor among others for the jury to consider[9] – which as mentioned, is a much less problematic vagueness circumstance according to *Tuilaepa,* since the jury or the reviewing court may focus on alternative factors. 512 U.S. at 975. Admittedly *Jurek* states that while future dangerousness determinations are difficult, 428 U.S. at 274, that does not mean they cannot be made, 428 U.S. at 274-275. However *Jurek* was primarily concerned with the eligibility (mitigation) decision, which is why it concludes: "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." 428 U.S. at 276. A large literature has developed questioning the ability of juries and experts to make predictions of future illegal, violent conduct in a principled fashion. *See e.g.* Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CAL. L. REV. 693, 749 (1974); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 98-99 (1984); Randy K. Otto, *On the Ability of Mental Health Professionals To "Predict Dangerousness ": A Commentary on Interpretations of the "Dangerousness " Literature*, 18 L. &

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[9] Virginia requires jurors to find either the conduct in the murder at issue was of a particular character or that the defendant would be a continuing threat to society. VA. CODE ANN. § 19.2-264.2 (2015). Three additional states consider future dangerousness in their capital sentencing statutes. *See* IDAHO CODE § 19-2515 (9) (h) (2004); OKLA. STAT. ANN. Tit. 21, § 701.12 (7) (West 20004); WYO. STAT. ANN. § 6-2-102(h)(xi) (2003). Idaho, Oklahoma, and Wyoming specifically treat future dangerousness as a statutory aggravating factor. Carla Edmondson, *Nothing Is Certain But Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857, 873, 873 n.118 (2016).

PSYCH. REV. 43, 62-63 (1994) (summarizing research suggesting that predictions of future dangerousness may be reliable approximately 50% of the time); Mark D. Cunningham, Thomas J. Reidy, & Jon R. Sorensen, *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct*, 32 LAW & HUM. BEHAV. 46 (2008) (comparing frequency rates of misbehavior among federal high security inmates and finding no correlation to previous government assertions of future dangerousness as an aggravating factor); Carla Edmondson, *Nothing Is Certain But Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, LEWIS & CLARK L. REV. 857, 904-06 (2016). Texas jurors are expected to determine beyond reasonable doubt an issue that experts struggle with. Mr. Saldaño does not question future dangerousness as a special issue in all capital cases, but when an already difficult issue for experts gets mixed with the unique complexity of his situation, he at least has a reasonable argument that the Texas special issue is unconstitutional as applied to him. While *Jurek* notes that there are a variety of situations where the criminal justice system must determine an individual's dangerousness, such as with bail and many sentencing and parole decisions, 428 U.S. at 275, those decisions are not made by jurors, do not need to be made "beyond a reasonable doubt" and almost always involve factual circumstances far less complicated than Mr. Saldaño's.

III. The Fifth Circuit Seems to Accept that Mr. Saldaño Suffered Severe Mental Decline Due to His Isolation on Death Row, Leaving a Comparatively Straightforward Legal Question.

The Fifth Circuit seems to agree with Mr. Saldaño that he suffered severe mental decline while on death row between 1996 and 2004 due to severe isolation, as a result of a death penalty proceeding in which the State engaged in racial bias. However addressing the issue as a matter of law, it incorrectly takes the position that jurists of reason, even in the death penalty context, could not find the Texas future dangerousness special issue vague as applied.

The Fifth Circuit, after correctly noting that Mr. Saldaño must make "a substantial showing of denial of a constitutional right" *Saldaño v. Davis*, 710 Fed. Appx. 302, 308 (2017) (*quoting* 28 U.S.C. § 2253(c)(2)) also correctly quotes *Buck v. Davis* for the proposition that "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *id*. (*citing Buck v. Davis*, 137 S.Ct. at 773). The Fifth Circuit generally also takes the position that "the standard a Petitioner must meet to be granted a COA in a death penalty case is less burdensome than in a non-capital case." *Escamilla v. Stephens*, 749 F.3d 380, 387 (5th Cir. 2014); *see also Clark v. Thaler*, 673 F.3d 410, 425 (5th Cir. 2012). However, as already discussed in the preceding section, the Fifth Circuit was unwilling to consider what seem to be cogent, if innovative, legal

arguments.[10]

The Fifth Circuit's failure to grant a certificate of appealability does not seem to be due to factual disagreement on whether Mr. Saldaño suffered severe mental decline due to his isolation on death row. The Fifth Circuit granted a certificate of appealability on what Mr. Saldaño would have thought were the much more difficult issues of whether the trial judge should have ordered a competency hearing *sua sponte*, 710 Fed. Appx. at 313, and whether there was ineffective assistance of counsel due to failure of defense counsel to request a competency hearing, *id*. at 315-316. The Fifth Circuit notes that "ample evidence supports an inference of incompetency," *id*. at 312, and points out:

> For example, Saldaño's repeated masturbation in the courtroom, refusal to wear nonprison clothes, lack of attention during voir dire, laughter during testimony, and rocking back and forth in his chair suggest that he may not have understood the nature of the proceedings. Saldaño's broken and sometimes incoherent speech suggests that he may not have been able to communicate effectively. Indeed, one of Saldaño's own trial attorneys, John Tatum, stated in an affidavit that Saldaño lacked sufficient ability to consult with counsel and did not understand the proceedings.

Id. If the Fifth Circuit felt that a reasonable jurist would have questioned the failure of the trial judge to call a competency hearing because of *bona fide* doubt of competency, then presumably the Fifth Circuit agrees that Mr. Saldaño at the very

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[10] The Texas Court of Criminal Appeals, unlike the Fifth Circuit, never ruled on the constitutional issues that emerge from mental decline in the context of the future dangerousness special issue, probably because it assumed that Dr. Peccora's unpresented testimony was a necessary element for the analysis, *see Saldaño v. State*, 232 SW3d at 90 (testimony which as the Fifth Circuit notes, should probably have been allowed as a matter of Fifth Amendment law without risk of Fifth Amendment waivers at trial, 701 Fed. Appx. at 309-310).

least suffered serious mental decline during his eight years on death row. There was no evidence of mental instability at Mr. Saldaño's first trial, in 1996, and, as the Fifth Circuit recognized, there was plenty of evidence of mental instability at his second trial. At the 1996 trial, Mr Saldaño's mother, Lidia Guerrero, testified that she found him essentially the same as when he left home seven years before, ROA.9511-ROA.9512, and that "he seemed very calm and serene," ROA.9512. At his second trial, she wanted to testify that she found her son severely mentally ill. ROA.5882-ROA.5883.

Certainly there was more than enough evidence of mental decline for the purposes of a certificate of appealability. Mr. Saldaño's pretrial motion on mental decline was accompanied by two affidavits. One affidavit was by Dr. Orlando Peccora, a psychiatrist who stated he saw Mr. Saldaño on over 100 occasions from late 1997 or early 1998 through early 2001 while he was employed by the Texas Department of Criminal Justice on the staff of its Jester IV psychiatric hospital, ROA.4119-ROA.4120, and one by Susan C. Perryman-Evans, a former senior warden for the Texas Department of Criminal Justice - Institutional Division, ROA.4124. The Fifth Circuit deals with the events that led to Dr. Orlando Peccora not testifying pre-trial on Mr. Saldaño's mental decline as likely involving a misunderstanding of 5th Amendment protections by the Texas courts, 701 Fed. Appx. at 309-310. While the Fifth Circuit treats the failure of the trial court to hear Dr. Peccora's testimony as harmless error, it seems to do so because it regards the testimony already in the record as sufficient to prove severe mental decline, not

because it questions whether the mental decline occurred. *See* 701 Fed. Appx. at 310. Although the Fifth Circuit notes that there was an expert affidavit offered by the State, *id*., that affidavit could hardly have been grounds for doubting Mr. Saldaño's mental decline. The affidavit, by Dr. Jack Randall Price, the only affidavit offered by the State on Mr. Saldaño's mental condition, points to testing at the time of the first trial by Dr. James McCabe that indicated that Mr. Saldaño suffered from "an antisocial personality disorder," ROA.4299, but Dr. McCabe testified at the first trial that he was very much unable to say that Mr. Saldaño had an antisocial personality, ROA.9442, and he testified that he did not find Mr. Saldaño manipulative, *id*.[11] Further, Mr. Saldaño's prison expert testified that all of Mr. Saldaño's serious disciplinary violations occurred either on occasions of solitary confinement when in the old, pre-March 2000 death row, or when in the isolation all death row inmates face in the Polunsky unit. Testimony of Susan C. Perryman-Evans, ROA.5515-ROA.5516.

The Fifth Circuit is correct that there is abundant additional evidence in the record of Mr. Saldaño's mental decline, given the testimony of former warden Susan Perryman Evans, ROA.5515-ROA.5516, and a simple comparison of Mr.

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[11] Dr. Price's additional assertion, without citation, that experimental studies showed that any effects of long-term, severe isolation on Mr. Saldaño would have been short-term, ROA.4286, would also seem highly controversial, and hardly the sort of statement that definitively rebuts the evidence of Mr. Saldaño's mental decline. *See generally*, Craig Haney, *Mental Helath Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124 (3002); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 NYU Rev. L. & SOC. CHANGE 477 (1997) (offering an extensive literature review from that period).

Saldaño's conduct at the 1996 trial compared with 2004. Mr. Saldaño would have had to have been one of the most brilliant of screen writers to design the conduct that the Fifth Circuit describes, 701 Fed. Appx. at 305-306, 312, and then to have responded to the jury verdict through the interpreter:

Am I going home now? Am I going home now, sir?

ROA.5881.

In short, the Fifth Circuit has reduced the case to a fairly straightforward issue. Could a jurist of reason, particularly in the context of a death penalty case where a racial taint placed Mr. Saldaño in isolation on death row for the better part of eight years, find that the consequences of that isolation made the Texas future dangerousness special issue unconstitutionally vague under the Eighth Amendment in his case. Or in more relaxed form, the question becomes whether "the issues presented are adequate to deserve encouragement to proceed further," *Buck* 137 S.Ct. at 773. If only because of the inherent arbitrariness of allowing the State to make someone mentally ill and then put him to death for being mentally ill, the answer needs to be yes.

CONCLUSION

For the foregoing reasons, Mr. Saldaño asks this Court to grant his petition for a writ of certiorari to resolve the Question Presented.

Respectfully submitted,

/s/ Thomas Scott Smith

By:_____

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 8, 2019
Lyle W. Cayce
Clerk

No. 16-70025

VICTOR HUGO SALDANO,

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 Eastern District of Texas
USDC No. 4:08-CV-193

Before CLEMENT, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:*

Victor Saldaño appeals the district court's denial of his petition for habeas relief. This court previously granted Saldaño a certificate of appealability (COA) on three issues, all related to his competency at his punishment retrial. *Saldano v. Davis*, 701 F. App'x 302 (5th Cir. 2017). We affirm the district court's ruling.

* 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.

FACTS AND PROCEEDINGS

In July 1996, Saldaño was convicted of capital murder and sentenced to death. That sentence was ultimately overturned, and Saldaño was granted a new punishment trial. *See Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004); *Saldano v. Cockrell*, 267 F.Supp.2d 635 (E.D. Tex. 2003).

The punishment retrial occurred in November 2004, and Saldaño's apparent mental deterioration was an issue throughout. Saldaño engaged in various incongruous behaviors throughout the trial: insisting on wearing jail clothes, reading magazines, repeatedly standing up in front of the jury while shackled, soiling himself, laughing during testimony, and masturbating at least four times. In light of this behavior, Saldaño's counsel had him examined by experts three times, and reported to the trial judge that he had been found competent each time. The judge had numerous in-court dialogues with Saldaño and stated near the end of the proceedings that he had no reason to question Saldaño's competency. Saldaño's attorneys never requested, and the trial judge never ordered, a competency hearing. As at his first trial, Saldaño was sentenced to death.

Saldaño filed a motion for a new trial, which was denied. That denial was upheld on direct appeal. *Saldano v. State*, 232 S.W.3d 77, 82 (Tex. Crim. App. 2007). Saldaño then filed for a writ of habeas corpus in state court, raising a number of grounds for relief. The state court issued 511 findings of fact and conclusions of law and recommended denying relief on all of Saldaño's claims. The Texas Court of Criminal Appeals adopted all the relevant state court findings. *Ex Parte Saldano*, No. WR-41,313-04, 2008 WL 4727540 (Tex. Crim. App. Oct. 29, 2008).

Saldaño then filed his federal habeas petition, raising fifteen claims. The district court denied relief on all of the claims but dismissed without prejudice

Saldaño's claim that he was incompetent to be executed because it was premature. The district court also declined to issue a COA on any of Saldaño's claims. Saldaño appealed, and this court granted a COA as to three claims: (1) whether Saldaño was incompetent to stand trial; (2) whether the trial court should have held a competency hearing; and (3) whether Saldaño's attorneys' failure to request a competency hearing constituted ineffective assistance of counsel. *Saldano*, 701 F. App'x at 316.[1]

STANDARD OF REVIEW

The district court's factual findings are reviewed for clear error and its legal conclusions are reviewed de novo. *Roberts v. Dretke*, 381 F.3d 491, 497 (5th Cir. 2004). Saldaño's federal habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which provides in relevant part that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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[1] Saldaño has abandoned his first claim regarding actual incompetency. He contends that the now nearly 15-year gap between the trial and any decision on his petition "is too long for a retrospective competency determination" and so "the only issue in the present appeal [aside from the ineffective assistance of counsel claim] is whether the trial court failed in its obligation to *sua sponte* hold a competency hearing." Therefore, this claim will not be addressed. *See Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (claims not pursued are deemed abandoned).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). A state court's "factual findings are 'presumed to be correct' unless the habeas petitioner rebuts the presumption through 'clear and convincing evidence.'" *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (quoting 28 U.S.C. § 2254(e)(1)). Even if reasonable minds "reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (alteration in original) (quotation omitted).

DISCUSSION

I. Due Process

Saldaño contends that he was denied due process when the trial court judge did not *sua sponte* conduct a competency hearing. He argues that the state habeas court's denial of this claim was based on an unreasonable determination of the facts and that the objective evidence presented to the trial court was sufficient to raise a bona fide doubt as to his competency.

It is unconstitutional to try a mentally incompetent individual.[2] *See Indiana v. Edwards*, 554 U.S. 164, 170 (2008). A defendant is incompetent if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

[2] We note that Saldaño also brought a habeas claim that he could not be executed because he was incompetent. *See* TEX. CODE CRIM. PROC. ANN. art. 46.05; *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). Both the state habeas and district courts held that this claim was premature because no execution date has been set.

"A state court must conduct an inquiry into the defendant's mental capacity *sua sponte* if the evidence raises a bona fide doubt as to competency." *Mata v. Johnson*, 210 F.3d 324, 329 (5th Cir. 2000); *see also Pate v. Robinson*, 383 U.S. 375, 385 (1966). "In determining whether there is a 'bona fide doubt' as to the defendant's competence, the court considers: (1) any history of irrational behavior, (2) the defendant's demeanor at trial, and (3) any prior medical opinion on competency." *Mata*, 210 F.3d at 329; *see also Drope*, 420 U.S. at 180. If the court received objective evidence that should have raised a bona fide doubt and failed to make further inquiry, "the defendant has been denied a fair trial." *Mata*, 210 F.3d at 329. The inquiry must only be "adequate . . . to resolve" the question of competency. *Curry v. Estelle*, 531 F.2d 766, 768 (5th Cir. 1976) (per curiam).

Saldaño asserts that there should have been a bona fide doubt as to his competency because of: (1) evidence of his prior irrational behavior while incarcerated; (2) evidence of hospitalizations in the prison psychiatric hospital; (3) his in-court demeanor and behavior; and (4) affidavits from trial observers who were convinced of his incompetence.

Saldaño has failed to offer clear and convincing evidence to rebut the state habeas court's factual determination that there was insufficient evidence to raise a bona fide doubt as to competency. The doctor's affidavit Saldaño relies on as evidence of prior irrational behavior also specifically states that "his mental state did not deteriorate to the level of incompetency." And his behavior on death row before the retrial—including throwing his feces and publicly masturbating—is not conclusive evidence of his ability to understand his trial rationally and factually. Saldaño's hospitalizations are similarly not clear or convincing. He was hospitalized for four months in 2001 following a suicide attempt and was diagnosed with depressive and schizoaffective disorders. Following a second hospitalization in 2003, however, he was

discharged with only a diagnosis of antisocial personality disorder. Even if the hospitalizations are evidence of possible mental illness, a "defendant can be both mentally ill and competent to stand trial." *Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014).

Further, evidence of Saldaño's in-court behavior does not rebut the presumption of the correctness of the state court's finding that, after seven weeks of observing and interacting with Saldaño, the trial judge had no reason to question his competency. Importantly, in response to his disruptive and bizarre behavior during the retrial, Saldaño's attorneys had him examined for competency three times; each time he was deemed competent. And defense counsel repeatedly represented to the trial judge that Saldaño was competent. Finally, Saldaño has not rebutted the state court's finding that the after-the-fact affidavits did not provide evidence that would have required a hearing.

The state habeas court's factual determination that there was not sufficient evidence to raise a bona fide doubt as to Saldaño's competency was not unreasonable in light of the evidence presented.

II. Ineffective Assistance of Counsel

Saldaño contends that his trial attorneys were constitutionally ineffective because they failed to request a competency hearing. To establish ineffective assistance of counsel, Saldaño must show both that his "counsel's performance was deficient" and that this "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, counsel's performance was deficient only if it "fell below an objective standard of reasonableness." *Id.* at 688. Under the second prong, to show prejudice there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Trial counsel has a duty to investigate "when he has reason to believe that the defendant suffers from mental health problems." *Roberts*, 381 F.3d at 498. A failure to request a competency hearing constitutes deficient performance where "there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency." *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001). To show prejudice, Saldaño must show a reasonable probability that the trial court would have found him incompetent had counsel requested a competency hearing. *Felde v. Butler*, 817 F.2d 281, 282 (5th Cir. 1987).

The state habeas court found that Saldaño was competent to stand trial and that Saldaño's own counsel had conducted contemporaneous expert competency evaluations showing the same, and so any request for a competency hearing would have been futile. Therefore, the attorneys' performance was not deficient. Saldaño argues that, based on the same evidence he relies on for his due process claim, there were sufficient indicia of incompetence to give objectively reasonable counsel doubt as to his competency. We have already held that this evidence is insufficient to rebut the state habeas court's findings concerning the trial judge. It is similarly insufficient with respect to Saldaño's counsel. Saldaño has not shown that the state habeas court's determination that his attorneys' performance was not deficient was unreasonable in light of the evidence presented.

CONCLUSION

The district court correctly concluded that Saldaño was not entitled to habeas relief. Accordingly, the district court's ruling is AFFIRMED.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70025

United States Court of Appeals
Fifth Circuit
FILED
June 28, 2017
Lyle W. Cayce
Clerk

VICTOR HUGO SALDAÑO,

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 Eastern District of Texas
USDC No. 4:08-CV-00193

Before CLEMENT, PRADO, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Victor Hugo Saldaño was convicted of capital murder and sentenced to death in 1996. Texas later confessed constitutional error in the punishment stage—namely, introduction of racist testimony to support a finding of future dangerousness. Saldaño was again sentenced to death in 2004. He now appeals the district court's denial of habeas relief. We GRANT a certificate of

* 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.

appealability ("COA") on two issues: whether Saldaño was denied due process because he was not competent to stand trial and because the trial court failed to hold a competency hearing, and whether trial counsel was ineffective in failing to request a competency hearing. We DENY a COA on all other issues raised by Saldaño in his petition for habeas corpus.

I. BACKGROUND

A. Saldaño's First Trial

Saldaño, a citizen of Argentina, faces the death penalty for murdering Paul King in November 1995. A jury convicted Saldaño of capital murder in July 1996. As required by Texas law when the state seeks to impose the death penalty, the trial court then held a separate proceeding in which the jury considered two special issues: (1) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; and (2) whether mitigating circumstances warranted life imprisonment instead of death. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1), (e). During this proceeding, the state elicited testimony from Dr. Walter Quijano, a clinical psychologist, about the likelihood of Saldaño's future dangerousness. Dr. Quijano testified that Saldaño's race (Hispanic) made him more likely to commit acts of violence in the future. The jury found that (1) there was a probability that Saldaño would commit criminal acts of violence constituting a threat to society, and (2) mitigating circumstances did not warrant life imprisonment rather than the death penalty. Accordingly, the trial court sentenced Saldaño to death.

On direct appeal, Saldaño challenged Dr. Quijano's racist testimony. The Texas Court of Criminal Appeals ("TCCA") affirmed the sentence. After the Texas Attorney General confessed error, however, the Supreme Court vacated the judgment and remanded the case back to the TCCA for further consideration. *Saldano v. Texas*, 530 U.S. 1212 (2000). On remand, the TCCA

again affirmed the sentence. *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002).

Saldaño then filed a federal habeas petition. After the Attorney General again confessed constitutional error, the district attorney responsible for prosecuting Saldaño tried to intervene in order to defend the death sentence. *See Saldano v. Roach*, 363 F.3d 545, 550 (5th Cir. 2004). The district court denied this motion to intervene and granted Saldaño's habeas petition, finding that "the admission of and reference to expert opinion testimony to the effect that a person is more likely to be dangerous in the future because he is a member of a racial or ethnic group that happens to be over-represented in the prison population is constitutional error." *Saldano v. Cockrell*, 267 F. Supp. 2d 635, 642 (E.D. Tex. 2003). This Court affirmed the district court's denial of the motion to intervene and dismissed the district attorney's appeal of the order granting habeas relief. *Saldano*, 363 F.3d at 556. Accordingly, Saldaño was granted a new punishment trial.

B. Saldaño's Punishment Retrial

Saldaño's punishment retrial took place in November 2004. By that time, Saldaño's mental health had appeared to deteriorate. For example, Saldaño attempted to commit suicide in 2001; his behavior grew erratic and his speech disorganized; he often refused to shower; he reported hearing voices; and he ate his own feces. Saldaño started misbehaving as well: among other things, he started fires in his cell; masturbated in public; and threw feces at prison guards.

Mental health professionals disagreed on why Saldaño's mental state had appeared to deteriorate. Dr. Orlando Peccora, a psychiatrist who treated Saldaño at the Jester IV Psychiatric Facility of the Texas Department of Criminal Justice ("TDCJ"), submitted a declaration in which he diagnosed Saldaño with depression which "sometimes involved psychotic ideations,

hallucinations and delusions." Dr. Peccora also noted Saldaño's "diminished cognitive ability" and "diminished ability to react in emotionally appropriate fashion to events around him," although he did not believe Saldaño was incompetent. Dr. Peccora attributed Saldaño's misbehavior on death row to his mental deterioration, and attributed his mental deterioration to the isolation of death row. Some TDCJ doctors diagnosed Saldaño with forms of psychosis—specifically, schizophrenia and schizoaffective disorder, which involve cognitive and behavioral dysfunction. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 99–101, 105–07 (5th ed. 2013). Other TDCJ doctors, however, diagnosed Saldaño with antisocial personality disorder. In their opinion, the hallucinations, delusions, and suicidal ideations Saldaño reported were fabricated in order to obtain drugs.

Saldaño's mental state was a recurring issue throughout the punishment retrial. Indeed, the record reflects Saldaño's abnormal behavior during voir dire and the trial itself: Saldaño masturbated inside his prison clothes before the jury on several occasions; he refused to wear nonprison clothes; and during voir dire, he read magazines and at one point yawned loudly. In addition, Saldaño did not always speak coherently. For example, the following exchange occurred after the first masturbation incident:

> [THE COURT:] So, having said all that, [counsel] has said that you intend not to act out anymore in the courtroom. Is that correct?
>
> THE DEFENDANT: (No audible response)
>
> THE COURT: You intend to do—
>
> THE DEFENDANT: (In English) Well, according—according by the Supreme Court of the United States, the rules of the law will be provided in this case, according by—according by the rule of the law.
>
> THE COURT: I'm not—go ahead.
>
> THE DEFENDANT: (In English) You believe in the Texas Penal Code is (unintelligible).

> THE COURT REPORTER: I can't understand what he's saying, Judge.
>
> THE COURT: I'm sorry. I could not understand either.
>
> THE DEFENDANT: (unintelligible)
>
> THE INTERPRETER: Five years for murder; for manslaughter.
>
> THE DEFENDANT: (In English) According by the—by the rule—the Texas Penal Code, so at this point what I—I agree with everything you do right. You do everything right. I—
>
> THE COURT: Well, I appreciate that.

The trial transcript is littered with other instances of incoherent or disordered speech.

The record also reflects the judge's and counsel's concerns about Saldaño's mental state. During voir dire, on October 5, 2004, Saldaño's counsel raised the issue of competency with the court after receiving Dr. Peccora's declaration and noting Saldaño's strange behavior. The judge gave defense counsel authority to seek a competency evaluation. The judge inquired about the status of this evaluation a couple days later. Defense counsel again requested a competency evaluation after one of the masturbation incidents. But the two psychiatrists who examined Saldaño a total of three times during the trial found him competent each time.[1] Therefore, defense counsel never requested a competency hearing, and the judge indicated near the end of the trial that he had no reason to believe Saldaño was legally incompetent.

Although defense counsel never argued that Saldaño was incompetent, counsel did argue in a pretrial motion that (1) retrying Saldaño after years of mental deterioration while on death row was unconstitutional, and

[1] The results of the examinations are not in the record. Moreover, it is unclear whether the psychiatrists actually examined Saldaño in person; when defense counsel first brought up the issue of competency on October 5, defense lawyer John Tatum stated that they would direct a psychiatrist "to make the inquiry, evaluation, solely based on this affidavit of a treating psychiatrist"—seemingly referring to Dr. Peccora's declaration.

(2) evidence of Saldaño's misbehavior while on death row (which featured prominently in the state's case for future dangerousness) should be excluded. At the November 5, 2004 hearing on this motion, the defense sought to put Dr. Peccora on the stand. But the trial court ruled that under *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997), the state must have an opportunity to examine Saldaño with its own expert before the defense expert could testify about Saldaño's mental state. Defense counsel expressed concern that a *Lagrone* examination "could actually be used against [Saldaño] at trial"; accordingly, counsel invoked Saldaño's Fifth Amendment right and refused to give the state an opportunity to conduct a *Lagrone* examination.

Defense counsel later filed a motion seeking to limit the scope of a *Lagrone* examination, which the trial court denied on November 12, 2004. At that time, the trial court clarified that if Dr. Peccora were to testify on Saldaño's behalf, then the state would be able to introduce its own expert testimony "about anything relevant to his mental state, including future dangerousness." Defense counsel again chose not to put Dr. Peccora on the stand. Likewise, defense counsel declined to put Saldaño's mother before the jury because she too intended to testify about Saldaño's mental state. The defense's case for mitigation focused on Saldaño's intoxication when he committed the crime, his lack of a prior criminal record, and the fact that it was his co-defendant's idea to commit the crime. As in the first trial, the jury answered the two special issues such that the court imposed the death penalty.

Defense counsel then filed a motion for a new trial, which the trial court denied. On direct appeal, the TCCA affirmed Saldaño's sentence. *Saldano v. State*, 232 S.W.3d 77, 82 (Tex. Crim. App. 2007).

C. Habeas Petitions

Saldaño filed a petition for habeas corpus in state court on February 15, 2007. He raised a number of grounds for relief, including ineffective assistance

of trial counsel, incompetency to stand trial, and the trial court's failure to hold a competency hearing. Saldaño offered several affidavits in support of his petition, including one by psychiatrist Dr. Robert Cantu who opined that Saldaño was incompetent at the punishment retrial. The state trial court issued 511 findings of fact and conclusions of law and recommended denying relief. The TCCA adopted the state trial court's findings except for the findings that Saldaño forfeited his competency claim by failing to raise it on direct review. *Ex parte Saldano*, No. WR-41,313-04, 2008 WL 4727540, at *1 (Tex. Crim. App. Oct. 29, 2008) (per curiam) (not designated for publication). Saldaño filed a second petition in state court on October 30, 2007, claiming ineffective assistance of counsel for failure to preserve issues related to *Lagrone*; the TCCA denied this petition as an abuse of the writ. *Ex parte Saldano*, No. WR-41,313-03, 2008 WL 152732, at *1 (Tex. Crim. App. Jan. 16, 2008) (per curiam) (not designated for publication).

Saldaño filed his federal habeas petition on October 26, 2009. He raised fifteen claims, including ineffective assistance of counsel, incompetency to stand trial, and claims related to the trial court's application of *Lagrone* and Texas's future dangerousness inquiry as well as the trial court's failure to hold a competency hearing. The district court denied relief on all grounds but dismissed without prejudice Saldaño's claim that he may not be executed on account of present incompetency. The court also declined to issue a COA on any of Saldaño's claims.

II. STANDARD OF REVIEW

Saldaño's habeas petition is governed by provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, a federal court may not grant habeas relief to a state prisoner whose claim was adjudicated on the merits in state court unless the state court's decision was either (1) "contrary to, or involved an unreasonable application of, clearly established

Federal law" or (2) "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).

Before a state prisoner may appeal a district court's denial of his habeas petition, he must first obtain a COA. 28 U.S.C. § 2253(c)(1). The court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The required substantial showing of the denial of a constitutional right must have some footing in the law." *Ruiz v. Davis*, 850 F.3d 225, 228 (5th Cir.), *cert. dismissed*, 137 S. Ct. 1393 (2017).

The Supreme Court has recently cautioned that "[t]he COA inquiry . . . is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). If the district court dismisses a claim on procedural grounds, a COA should only issue if (1) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "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). "Where the petitioner faces the death penalty, any doubts as to whether a COA should issue must be resolved in the petitioner's favor." *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Allen v. Stephens*, 805 F.3d 617, 625 (5th Cir. 2015)).

III. DISCUSSION

A. *Lagrone* Issues

The first three issues raised on appeal concern the state trial court's application of *Lagrone*. On direct appeal, the TCCA found that Saldaño failed to preserve his *Lagrone* claims by not making contemporaneous objections. *Saldano*, 232 S.W.3d at 88. Accordingly, the district court held that these claims are procedurally barred. The district court also found that Saldaño's *Lagrone* claims "involve nothing more than the application of state law."

Saldaño first challenges the district court's finding that his *Lagrone* claims are procedurally barred. Second, Saldaño argues that the trial court's application of *Lagrone* violated his Fifth and Sixth Amendment rights, an issue that the district court did not address on the merits. Third, Saldaño argues that the district erred in finding that his *Lagrone* claims involve nothing more than the application of state law. At the COA stage, all three of these issues hinge on whether Saldaño "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This he has failed to do.

We address Saldaño's Sixth Amendment claim first. Saldaño argues that the trial court violated the Sixth Amendment when it failed to inform defense counsel about the scope of the state's *Lagrone* examination. This claim is based on *Powell v. Texas*, 492 U.S. 680 (1989) (per curiam). There, the trial court ordered a psychiatric examination to determine the defendant's competency and sanity. *Id.* at 681. The state later used evidence from this examination to show future dangerousness. *Id.* at 682. The Court held that this was error because defense counsel was not informed that the examination would be used for this purpose. *Id.* at 686. Accordingly, "the evidence of future dangerousness was taken in deprivation of petitioner's right to the assistance of counsel" under the Sixth Amendment. *Id.* (citing *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Estelle v. Smith*, 451 U.S. 454 (1981)). Here, however, *Powell* is

inapposite because defense counsel was clearly aware of the potential scope of a *Lagrone* examination. Counsel noted at the pretrial hearing that a psychiatric examination by the state "could actually be used against him at trial. Faced with that possibility, we can't have . . . our defendant examined for the purposes of this pretrial motion. It's just a risk that we can't run." Moreover, the judge later clarified that Dr. Peccora's testimony at trial "would probably open everything up," meaning the state's "witness would be entitled to testify about anything relevant to [Saldaño's] mental state, including future dangerousness." Thus, reasonable jurists would not debate that Saldaño has failed to state a valid claim of the denial of his Sixth Amendment right to effective assistance of counsel.

Saldaño's Fifth Amendment claim challenges the trial court's refusal to limit the scope of the *Lagrone* examination. It is well-established that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Smith*, 451 U.S. at 468. But "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." *Id.* at 472. "If a defendant requests an examination on the issue of future dangerousness or presents psychiatric evidence at trial, the defendant may be deemed to have waived the fifth amendment privilege." *Vanderbilt v. Collins*, 994 F.2d 189, 196 (5th Cir. 1993). Nonetheless, "testimony based on a court-ordered psychiatric evaluation is admissible only for a 'limited rebuttal purpose.'" *Kansas v. Cheever*, 134 S. Ct. 596, 603 (2013) (quoting *Buchanan v. Kentucky*, 483 U.S. 402, 424 (1987)).

Here, Saldaño intended to offer Dr. Peccora's testimony in support of two legal arguments made in a pretrial motion: (1) the future dangerousness inquiry was unconstitutional as applied to Saldaño; and (2) the state should

not be able to use evidence of Saldaño's misbehavior on death row to show future dangerousness. Defense counsel did not intend to offer this testimony at the trial itself. The trial court held that under *Lagrone*, the state must have an opportunity to rebut Dr. Peccora's testimony by having its own expert examine Saldaño.[2] The trial court also indicated that the state would be able to use the *Lagrone* examination in the trial itself to show future dangerousness. So defense counsel opted not to submit Saldaño to a psychiatric examination by the state, and Dr. Peccora was unable to testify in support of Saldaño's pretrial motion.

The trial court may have erred in suggesting that submitting to a *Lagrone* examination for purposes of the pretrial motion would open up the issue of Saldaño's mental state at the trial itself. A state may not use evidence from a compelled psychiatric examination for any purpose whatsoever because "[s]ubmitting to a psychiatric or psychological examination does not itself constitute a waiver of the fifth amendment's protection." *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981); *see also Lagrone*, 942 S.W.2d at 611 (noting that "the defendant has not actually waived his Fifth Amendment rights until he has actually presented expert testimony on the issue of future dangerousness at trial"). Instead, "testimony based on a court-ordered psychiatric evaluation is admissible only for a 'limited rebuttal purpose.'" *Cheever*, 134 S. Ct. at 603 (quoting *Buchanan*, 483 U.S. at 424). The scope of a Fifth Amendment waiver is also "limited to the issue raised by the defense." *Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987) (citing *Vardas v. Estelle*, 715 F.2d 206, 209–10 (5th Cir. 1983)). If Saldaño had not introduced psychiatric testimony at trial

[2] We have previously held that requiring a defendant "to undergo a psychiatric examination as a condition upon his offering psychiatric evidence" does not violate the Fifth Amendment. *United States v. Hall*, 152 F.3d 381, 400 (5th Cir. 1998), *abrogated on other grounds by United States v. Martinez-Salazar*, 528 U.S. 304 (2000).

(again, he had no intention to do so), then the state would have nothing to rebut. Accordingly, merely submitting to the *Lagrone* examination may not have opened up the issue of Saldaño's mental state at trial.

Nevertheless, Texas offers an additional reason to reject Saldaño's constitutional claims: the trial court's error, if any, was harmless. Under the "actual prejudice" test set out in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), habeas "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict,'" *Davis v. Ayala*, 135 S. Ct. 2187, 2197–98 (2015) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). "There must be more than a 'reasonable possibility' that the error was harmful." *Id.* (quoting *Brecht*, 507 U.S. at 637).

Texas argues that the trial court's *Lagrone* rulings were harmless "because Dr. Peccora's testimony would not have led to a different ruling on Saldaño's pretrial motion." We find that all reasonable jurists would agree. Had he testified, Dr. Peccora would have attributed Saldaño's bad acts while on death row to his mental deterioration, which in turn he would have attributed to the isolation of death row itself. This testimony was not absolutely critical to Saldaño's motion; Saldaño presented another witness—Susan Perryman-Evans—who also suggested that Saldaño's bad acts were caused by the severe isolation of death row. Additionally, Dr. Peccora, having treated Saldaño from 1997 or 1998 to 2001, could offer only a snapshot of Saldaño's mental health. As a state psychiatrist noted in his November 12, 2004 affidavit, a psychiatric evaluation from 1996 indicated that Saldaño suffered from an antisocial personality disorder even before his time on death row. The state could have used this fact to rebut Dr. Peccora's testimony. Finally, the claims made in Saldaño's pretrial motion, which are essentially identical to the future dangerousness issues discussed below, lacked legal

support. We find that jurists of reason would agree that there is no reasonable probability of a different result had the trial court properly limited the scope of a *Lagrone* examination. Thus, reasonable jurists would not debate that the trial court's error was harmless and that Saldaño has failed to state a valid claim of the denial of his Fifth Amendment right against self-incrimination. We deny a COA on Saldaño's first three issues.

B. Future Dangerousness Issues

Saldaño's fourth, fifth, and sixth issues all relate to Texas's future dangerousness inquiry. As to Saldaño's fourth issue, he claims that "[i]t violates basic notions of fairness for a State to impose a death sentence tainted with racist testimony, battle for eight years to prevent its being set aside while the prisoner mentally decompensates in severe isolation, and then to subject the now mentally ill defendant to a new death penalty sentencing where the key issue is the defendant's future dangerousness." Although this was one of the grounds upon which Saldaño's pretrial motion (discussed above) was based, Saldaño failed to raise this claim before the district court. Thus, we find that it is waived. *See Johnson v. Quarterman*, 483 F.3d 278, 288 (5th Cir. 2007).

On the merits, we note that Saldaño cites no applicable law in support of his fourth claim. He merely analogizes this case to other situations, such as the forced administration of antipsychotic drugs, *see Riggins v. Nevada*, 504 U.S. 127 (1992), and the state's failure to provide a speedy trial, *Doggett v. United States*, 505 U.S. 647 (1992). These analogies fall short of "[t]he required substantial showing of the denial of a constitutional right," which "must have some footing in the law." *Ruiz*, 850 F.3d at 228. Additionally, Saldaño's argument against a punishment retrial flies in the face of the well-established rule that the government may retry persons whose convictions have been overturned due to constitutional error in prior proceedings. *United States v. Tateo*, 377 U.S. 463, 468 (1964). We deny a COA on Saldaño's fourth issue.

As to Saldaño's fifth issue, he claims that Texas's future dangerousness inquiry is unconstitutionally vague in his case. The district court rejected this claim on the merits. The district court noted, and Saldaño concedes, that this Court has upheld Texas's future dangerousness special issue against facial attacks. *See, e.g.*, *Scheanette v. Quarterman*, 482 F.3d 815, 827–28 (5th Cir. 2007); *Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005). Moreover, Saldaño's challenge focuses on how Texas law is unfair rather than explaining how Texas law is vague. As the district court found, "whether it was fair for the jury to consider [evidence of bad acts on death row] has nothing to do with whether the statute is unconstitutionally vague." We deny a COA on Saldaño's fifth issue.

As to Saldaño's sixth issue, he articulates a fruit of the poisonous tree argument. He argues that admitting evidence of Saldaño's bad acts on death row violated the Fourteenth Amendment because this evidence "was obtained through the State's own misconduct"—namely, the prosecution's use of racist testimony to sentence him to death.[3] The district court found that this claim (like the *Lagrone* claims discussed above) is procedurally barred and involves nothing more than the application of state law. Even if reasonable jurists could disagree on the district court's procedural holdings, reasonable jurists would not debate that Saldaño's sixth claim fails on the merits. Saldaño analogizes this case to the Fourth Amendment exclusionary rule, *see Wong Sun v. United*

[3] Separately, Saldaño suggests that it was error to reveal that Saldaño's bad acts were committed *on death row*. But Saldaño did not raise this claim below. He did point out that "[a]llowing the jury to hear of his incarceration on Death Row and his conduct therefrom is the equivalent of allowing the jury to hear of an invalid prior conviction," but did so in connection with the argument that admitting evidence of his bad acts while on death row was prejudicial. Because Saldaño did not claim that allowing the jury to hear of his prior sentence of death was error in and of itself, we find that this argument is waived on appeal. *See Johnson*, 483 F.3d at 288. Moreover, we note that defense counsel, over the state's objection, chose to introduce Saldaño's presence on death row to the jury.

States, 371 U.S. 471 (1963), but points to no court that has extended the exclusionary rule to this context. And Saldaño's discussion of Texas Rule of Evidence 403 is neither tethered to any federal constitutional right nor supported by Texas state law. Accordingly, while Saldaño's argument sounds in constitutional principles, it has no firm basis in the law. We deny a COA on Saldaño's sixth issue.

C. Competency

Saldaño's seventh issue pertains to his competency to stand trial and the trial court's failure to hold a competency hearing. The state habeas court found that Saldaño was competent to stand trial and that the trial court was not obligated to hold a competency hearing. The district court agreed that the trial court was not obligated to hold a competency hearing, and held that the state habeas court's finding on Saldaño's competency was reasonable.

It is axiomatic that "the Constitution does not permit trial of an individual who lacks 'mental competency.'" *Indiana v. Edwards*, 554 U.S. 164, 170 (2008). A person lacks mental competency if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Additionally, a trial judge must sua sponte hold a competency hearing "[w]here the evidence raises a '*bona fide* doubt' as to a defendant's competence to stand trial." *Pate v. Robinson*, 383 U.S. 375, 385 (1966). "In determining whether there is a 'bona fide doubt' as to the defendant's competence," a trial court should consider "(1) any history of irrational behavior, (2) the defendant's demeanor at trial, and (3) any prior medical opinion on competency." *Mata v. Johnson*, 210 F.3d 324, 329 (5th Cir. 2000). "[E]ven one of these factors standing alone may, in some circumstances, be sufficient" to raise a bona fide doubt. *Drope*, 420 U.S. at 180.

Here, as the district court and state habeas court discussed, several facts support an inference of competency. First, two psychiatrists examined Saldaño a total of three times during the trial and found him competent every time. Second, prison records show that Saldaño was examined by a number of psychiatrists while on death row; some of these psychiatrists found that Saldaño was malingering, i.e., his psychotic symptoms were faked in order to obtain drugs. Third, the trial judge indicated near the end of the trial, after interacting with Saldaño for several weeks, that he had no reason to believe Saldaño was incompetent.

At the same time, ample evidence supports an inference of incompetency. For example, Saldaño's repeated masturbation in the courtroom, refusal to wear nonprison clothes, lack of attention during voir dire, laughter during testimony, and rocking back and forth in his chair suggest that he may not have understood the nature of the proceedings. Saldaño's broken and sometimes incoherent speech suggests that he may not have been able to communicate effectively. Indeed, one of Saldaño's own trial attorneys, John Tatum, stated in an affidavit that Saldaño lacked sufficient ability to consult with counsel and did not understand the proceedings. Juan Carlos Vega, an Argentine attorney who attended the trial, agreed that Saldaño was incompetent to stand trial. Vega also noted that during his personal interview with Saldaño in jail, Saldaño's "words were incongruous and every three minutes he would say: 'May the Lord be welcome.'" Additionally, Saldaño had a long history of irrational behavior, including eating his own feces and masturbating in public. Joe MacLoughlin, an employee of the Argentine consulate who met with Saldaño on numerous occasions, noted Saldaño's mental deterioration during his time on death row. According to MacLoughlin, Saldaño appeared mentally stable in 1999 and 2000; starting in 2001, however, Saldaño began to exhibit "thought disorders and irrational speech" and other

"signs of mental illness and apparent psychotic behavior." Some TDCJ doctors even diagnosed Saldaño with schizophrenia or schizoaffective disorder. Based on these records as well as personal interviews, Dr. Cantu expressed the opinion that Saldaño suffered from psychosis and was incompetent to stand trial in 2004.

In determining that the trial court was not obligated to hold a competency hearing, the state habeas court focused on two facts: (1) two experts who examined Saldaño during the trial deemed him competent; and (2) the trial judge stated he had no reason to believe Saldaño was incompetent. There are several potential issues with the state habeas court's analysis. First, the results of the psychiatric examinations upon which the court relied are not in the record. Indeed, as discussed above, it is possible that these psychiatrists did not even examine Saldaño in person. Second, the state habeas court essentially disregarded prior diagnoses of psychosis, holding that these diagnoses "do not, alone, require a competency hearing." The court also found these diagnoses "specifically discredited" by other TDCJ doctors, but did not explain why it regarded some diagnoses as superior to others. Third, the state habeas court regarded Saldaño's courtroom behavior as "inappropriate . . . but not bizarre" without explaining why the distinction mattered. Finally, the state habeas court appeared to ignore Saldaño's history of irrational behavior. Reasonable jurists would debate whether the state habeas court's factual findings were unreasonable in light of the evidence, and whether the court unreasonably applied *Pate* and *Drope* by not weighing Saldaño's history of irrational behavior, demeanor at trial, and prior diagnoses of psychosis against the opinions of the trial judge and the experts who examined Saldaño during trial.

In determining that Saldaño was competent, the state habeas court found that Saldaño could consult with counsel and understand the nature of

the proceedings. The numerous instances of Saldaño's incoherent or disordered speech, his strange behavior, and the affidavits of several individuals who interacted with Saldaño around the time of trial belie the court's findings. Reasonable jurists would debate whether the state court's factual findings are unreasonable in light of this evidence.

Accordingly, we grant a COA on Saldaño's seventh issue.

D. Ineffective Assistance of Counsel

Saldaño's final issue relates to ineffective assistance of trial counsel. Saldaño argues that trial counsel was deficient in (1) failing to present mitigating evidence to the jury, (2) failing to preserve for appellate review objections to the trial court's application of *Lagrone*, and (3) failing to request a competency hearing.

The Sixth Amendment guarantees a criminal defendant's right to counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, Saldaño must show both that "counsel's performance was deficient" and that this "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong of the *Strickland* test, counsel's performance was only deficient if it "fell below an objective standard of reasonableness." *Id.* at 688. We "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.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). To show prejudice under the second prong of the *Strickland* test, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

1. Failure to Introduce Mitigating Evidence

With regard to mitigating evidence, Saldaño argues that trial counsel should have (a) introduced mental health evidence at trial, (b) put Saldaño's mother, Lidia Guerrero, on the stand, and (c) moved for a continuance so that Saldaño's sister Ada could testify,[4] or in the alternative deposed her.[5]

The state habeas court found that trial counsel "made a reasonable strategic decision" not to introduce evidence of Saldaño's mental deterioration because doing so would allow the state to introduce evidence suggesting that Saldaño was merely malingering. The state could point to diagnoses of antisocial personality disorder made by treating physicians as well as observations of manipulative, drug-seeking behavior. Trial counsel Rick Harrison further explained that they did not put Guerrero on the stand because she intended to testify that Saldaño was mentally ill—again opening the door to the state's evidence of malingering. Reasonable jurists would agree that trial counsel's choice not to introduce mental health evidence or put Guerrero on the stand was reasonably strategic and therefore not deficient under *Strickland*.

The state habeas court found that Ada Saldaño's testimony was not clearly mitigating. Ada could have testified about Saldaño's troubled youth, but Saldaño does not explain how Ada's testimony would bear on the future dangerousness inquiry. Jurists of reason would agree there is no reasonable probability that Ada's testimony would have changed the jury's verdict.

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[4] At the time, Ada was pregnant and unable to travel to the United States in order to testify at her brother's punishment retrial.

[5] Saldaño also suggests that the trial counsel should have put an Argentine consular employee, Joe MacLoughlin, on the stand. But Saldaño did not make this argument before the district court; accordingly, we find that it is waived. Moreover, it is unclear what MacLoughlin would have testified about, other than Saldaño's mental decline.

2. Failure to Preserve* Lagrone *Issues for Appellate Review

Saldaño next argues that trial counsel was ineffective in failing to preserve *Lagrone* issues for appellate review. The district court held that this claim is procedurally defaulted because the TCCA dismissed the claim as an abuse of the writ. *Saldano*, 2008 WL 152732. As discussed above, reasonable jurists would not debate that Saldaño's *Lagrone* claims are largely meritless. And reasonable jurists would agree that the one claim that does have merit—his Fifth Amendment claim—fails because the trial court's error was harmless. Thus, jurists of reason would agree there is no reasonable probability that preserving the *Lagrone* issues for appellate review would have changed the outcome of this case.

3. Failure to Request a Competency Hearing

Finally, Saldaño argues that trial counsel was ineffective in failing to request a competency hearing. The state habeas court found that requesting a competency hearing would have been futile because two experts opined that Saldaño was competent during trial. The district court agreed, and also noted that trial counsel appropriately and sufficiently investigated Saldaño's competency.

Trial counsel has a duty to investigate a defendant's mental health if "he has reason to believe that the defendant suffers from mental health problems." *Roberts v. Dretke*, 381 F.3d 491, 498 (5th Cir. 2004); *see also Bouchillon v. Collins*, 907 F.2d 589, 595–97 (5th Cir. 1990) (counsel was ineffective in failing to investigate defendant's competency in light of defendant's known history of institutionalization). The Third Circuit has held that where "there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency," counsel is deficient if he fails to request a competency hearing. *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001); *accord Burt v. Uchtman*, 422 F.3d 557, 569 (7th Cir. 2005) (concluding "that in light

of the overwhelming evidence of [defendant's] psychological problems and heavy medication, counsel's failure to request a new competency hearing was deficient performance"). But "[t]here can be no deficiency in failing to request a competency hearing where there is no evidence of incompetency." *McCoy v. Lynaugh*, 874 F.2d 954, 964 (5th Cir. 1989). Moreover, "the Sixth Amendment does not require counsel to continue searching until they find an expert willing to provide more beneficial testimony on their behalf." *Dowthitt v. Johnson*, 230 F.3d 733, 745 n.10 (5th Cir. 2000).

Here, Saldaño's history of irrational behavior, his demeanor at trial, and Dr. Peccora's report gave defense counsel reason to believe Saldaño suffered from mental health problems. Trial counsel did investigate these problems by having Saldaño examined by mental health experts three times during the trial, and these experts deemed Saldaño competent. Based on these facts, Texas argues that counsel's failure to request a competency hearing was not deficient. But the results of the psychiatric examinations commissioned during trial are not in the record, and it is possible that the psychiatrists did not even examine Saldaño in person. Additionally, at least one of the trial lawyers—John Tatum—believed that Saldaño was incompetent to stand trial. And ample evidence, from prior diagnoses of psychosis to Saldaño's behavior at trial, supported this belief. In light of this evidence, there may have been "sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency." *Jermyn*, 266 F.3d at 283. We find that reasonable jurists would debate the state habeas court's finding that trial counsel's failure to request a competency hearing in light of this evidence was not deficient.

To show prejudice, Saldaño must demonstrate a reasonable probability that the trial court would have found him incompetent had counsel requested a competency hearing. *Felde v. Butler*, 817 F.2d 281, 282 (5th Cir. 1987); *accord Burt*, 422 F.3d at 567 ("Where a defendant argues that he should have received

a fitness hearing, we have interpreted the prejudice inquiry as asking whether there is a reasonable probability the defendant would have been found unfit had a hearing been held."). We have already found that reasonable jurists would debate the state habeas court's finding that Saldaño was competent. Likewise, reasonable jurists would debate whether there is a reasonable probability that the trial court would have found Saldaño incompetent had counsel requested a competency hearing. We grant a COA on Saldaño's eighth issue, though only with respect to counsel's failure to request a competency hearing.

IV. CONCLUSION

For the foregoing reasons, we GRANT a COA on Saldaño's competency claim—including both whether he was incompetent to stand trial and whether the trial court should have held a competency hearing—and his claim of ineffective assistance with respect to counsel's failure to request a competency hearing. Counsel for Saldaño should submit a merits brief on these two issues within 30 days. Counsel for the state should respond within 15 days thereafter. We DENY a COA on Saldaño's other claims.

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION

VICTOR HUGO SALDAÑO, #999203 **Petitioner,**	§ § §	
v.	§	**CIVIL ACTION NO. 4:08-cv-193**
DIRECTOR, TDCJ-CID, **Respondent.**	§ § §	

MEMORANDUM OPINION AND ORDER OF DISMISSAL

Petitioner Victor Hugo Saldaño ("Saldaño"), an inmate confined in the Texas prison system, filed the above-styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Saldaño is challenging his capital murder conviction and death sentence imposed by the 199th Judicial District Court of Collin County, Texas, in Cause Number 199-80049-96, in a case styled *The State of Texas vs. Victor Hugo Saldano, aka Victor Rodriguez*. For reasons set forth below, the Court finds that the petition is not well-taken and that it will be denied.

I. PROCEDURAL HISTORY OF THE CASE

Saldaño is in custody for murdering Paul King on November 20, 1995. He was sentenced to death on July 15, 1996. The Texas Court of Criminal Appeals affirmed the conviction and sentence. *Saldaño v. State*, No. AP-72,556 (Tex. Crim. App. Sept. 15, 1999). The United States Supreme Court remanded the case to the Texas Court of Criminal Appeals for further consideration in light of a confession of error by the Solicitor General of Texas. *Saldaño v. Texas*, 530 U.S. 1212 (2000). On remand, the Texas Court of Criminal Appeals once again affirmed the conviction. *Saldaño v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002). In federal habeas corpus proceedings before this Court, the

Director confessed error during the punishment phase of the trial and joined in Saldaño's request for relief; thus, the petition was granted. *Saldaño v. Cockrell*, 267 F.Supp. 2d 635 (E.D. Tex. 2003). The Fifth Circuit dismissed the Collin County District Attorney's attempt to appeal the judgment granting habeas relief. *Saldaño v. Roach*, 363 F.3d 545, 556 (5th Cir. 2004). The Supreme Court denied certiorari. *Roach v. Saldaño*, 543 U.S. 820 (2004).

A punishment retrial was conducted in November 2004. Based on the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, the trial court sentenced Saldaño to death on November 18, 2004. The Texas Court of Criminal Appeals affirmed the conviction. *Saldaño v. State*, 232 S.W.3d 77 (Tex. Crim. App. 2007). The Supreme Court denied certiorari. *Saldaño v. Texas*, 552 U.S. 1232 (2008).

Saldaño has filed two post-conviction applications for a writ of habeas corpus in state court. The initial post-conviction application was filed on February 15, 2007. An evidentiary hearing was conducted on March 28, 2008. The state trial court issued 511 findings of fact and conclusions on law on April 21, 2008. The Texas Court of Criminal Appeals issued a written opinion adopting all but six of the findings and denied relief. *Ex parte Saldaño*, No. WR-41,313-04, 2008 WL 4727540 (Tex. Crim. App. Oct. 29, 2008). While the first application was pending, Saldaño filed another application, which was dismissed as an abuse of the writ. *Ex parte Saldaño*, No. WR-41,313-03, 2008 WL 152732 (Tex. Crim. App. Jan. 16, 2008).

Saldaño began the present proceedings on June 2, 2008. He filed a petition for a writ of habeas corpus (Dkt #21) on October 26, 2009. The Director filed an answer (Dkt #31) on July 9, 2010. Saldaño filed a reply (Dkt #37) on November 10, 2010. An amended reply (Dkt #39) was filed on November 17, 2010. Additional pleadings were filed with respect Saldaño's cumulative error claim (Dkt ## 46-50, 53 and 56). The case was transferred to the undersigned on May 17, 2016.

II. FACTUAL BACKGROUND OF THE CASE

On November 20, 1995, Paul King drove his car to a Sack 'n Save grocery store in Plano, Texas. While walking to the entrance of the store, he was intercepted by Saldaño and co-defendant Jorge Chavez. Saldaño and Chavez forced King into his car, and they drove to a secluded country road. Saldaño shot King five times, took his watch and wallet, and left his body by the roadside. The kidnappers drove King's car for a short time before abandoning it. Saldaño was arrested within a few hours of the killing. The basic facts of the offense are not in dispute. *See* Petition at 8.

III. GROUNDS FOR RELIEF

Saldaño presents the following grounds for relief:

1. By failing to guarantee that a *Lagrone*[1] examination by the State on Saldaño's mental decline would not be used by the State to prove future dangerousness, the trial court erroneously barred Saldaño's expert from testifying to support his motion to dismiss;

2. By failing to guarantee that a *Lagrone* examination by the State on Saldaño's mental decline would not be used to prove future dangerousness, the trial court erroneously permitted the State to introduce evidence of misconduct by a "psychologically decompensated" Saldaño while on death row;

3. The state courts' application of *Lagrone*, which prevented the presentation of significant mitigating evidence, violated the *Lockett*[2] doctrine;

4. Saldaño was denied effective assistance of counsel by trial counsel's failure to present critical mitigating evidence to the jury;

5. Saldaño was denied effective assistance of counsel by trial counsel's failure to preserve appellate issues relating to the application of the *Lagrone* decision;

6. Saldaño was denied effective assistance of counsel by trial counsel's failure to request a competency hearing;

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[1] *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App.), *cert. denied*, 522 U.S. 917 (1997).

[2] *Lockett v. Ohio*, 438 U.S. 586 (1978).

7. Saldaño's punishment retrial denied him due process because it was conducted while he was incompetent;

8. As applied to Saldaño, the legislative failure to address the time at which a defendant is to be examined for future dangerousness and the circumstances under which his potential for future dangerousness must be viewed, makes the future dangerousness requirement unconstitutionally vague;

9. Under evolving standards of decency, Saldaño's death penalty trial and future execution would violate the 8th and 14th Amendments to the United States Constitution because of his mental illness;

10. Saldaño's due process rights were violated by the trial court allowing the State to present evidence which the defense did not have a meaningful opportunity to rebut;

11. The trial court's failure to allow evidence of the co-defendant's life sentence as mitigating evidence violated Saldaño's constitutional rights;

12. The Texas death penalty statute is unconstitutional because it allows a jury unbridled discretion to determine who should live or die;

13. The Texas death penalty statute, which instructs the jury that ten of them must agree in order to answer special issue no. 1 with a "no" answer, is unconstitutional because it fails to inform jurors that the effect of the jury's failure to reach a unanimous verdict on any issue at the punishment phase would result in a life sentence;

14. The State's failure to provide meaningful appellate review of the sufficiency of the evidence to support the jury's verdict concerning mitigating evidence violates Saldaño's constitutional rights; and

15. The cumulative effect of these constitutional violations denied Saldaño due process of law, even if no separate infraction by itself rose to that magnitude.

IV. STANDARD OF REVIEW

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92

F.3d 1385, 1404 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997). In the course of reviewing state proceedings, a federal court does "not sit as a super state supreme court to review error under state law." *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007) (citations omitted), *cert. denied*, 552 U.S. 1314 (2008); *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983), *cert. denied*, 466 U.S. 984 (1984).

The petition was filed in 2009, thus review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). "By its terms § 2254 bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). AEDPA imposes a "highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation and internal quotation marks omitted). With respect to the first provision, a "state court decision is 'contrary to' clearly established federal law if (1) the state court 'applies a rule that contradicts the governing law' announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts." *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (en banc) (quoting *Mitchell v. Esparza*, 540

U.S. 12, 15-16 (2003)), *cert. denied*, 551 U.S. 1141 (2007). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011). As such, "evidence later introduced in federal court is irrelevant." *Id.* at 184. "The same rule necessarily applies to a federal court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged." *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 105 (2012). With respect to § 2254(d)(2), the Supreme Court has found that a Texas court's factual findings are presumed to be sound unless a petitioner rebuts the "presumption of correctness by clear and convincing evidence." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (citing § 2254(e)(1)). The "standard is demanding but not insatiable; . . . [d]eference does not by definition preclude relief." *Id.* (citation and internal quotation marks omitted). More recently, the Supreme Court held that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (citation omitted). The Supreme Court has explained that the provisions of AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas corpus relief is not available just because a state court decision may have been incorrect; instead, a petitioner must show that a state court decision was unreasonable. *Id.* at 694. Finally, when a state court provides alternative reasons for denying relief, a federal court may not grant relief "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Wetzel v. Lambert*, 565 U.S. ___, ___, 132 S. Ct. 1195, 1199 (2012) (emphasis in original).

V. DISCUSSION AND ANALYSIS

1. **By failing to guarantee that a *Lagrone* examination by the State on Saldaño's mental decline would not be used by the State to prove future dangerousness, the trial court erroneously barred Saldaño's expert from testifying to support his motion to dismiss.**

2. **By failing to guarantee that a *Lagrone* examination by the State on Saldaño's mental decline would not be used to prove future dangerousness, the trial court erroneously permitted the State to introduce evidence of misconduct by a "psychologically decompensated" Saldaño while on death row.**

3. **The state courts' application of *Lagrone*, which prevented the presentation of significant mitigating evidence, violated the *Lockett* doctrine.**

The first three grounds for relief concern *Lagrone v. State*, where the Texas Court of Criminal Appeals held that a trial court may "order criminal defendants to submit to a state-sponsored psychiatric exam on future dangerousness when the defense introduces, *or plans to introduce*, its own future dangerousness expert testimony." *Lagrone*, 942 S.W.2d at 611 (emphasis in original).[3] Saldaño had resided on death row for eight years by the time the punishment retrial began in 2004. His death row disciplinary record was presented to the jury. The record revealed that he had repeatedly engaged in acts of misconduct, which the Texas Court of Criminal Appeals described as follows:

> [Saldaño's] death-row misconduct includes assaulting and threatening to kill guards, throwing urine and feces at guards, and setting fires. A death-row guard testified that [Saldaño's] death row misconduct was a "daily thing."

Saldaño, 232 S.W.3d at 82 n.2. His misconduct "resulted in him being placed in the most restrictive and isolated level of death row." *Id.* The State presented the evidence of his misconduct to address the issue of future dangerousness.

[3]The Fifth Circuit subsequently denied Lagrone's request for a certificate of appealability when he challenged the order compelling him to submit to a state-sponsored psychiatric examination on the issue of his future dangerousness. *Lagrone v. Cockrell*, No. 02-10976, 2003 WL 22327519 (5th Cir. Sept. 2, 2003), *cert. denied*, 540 U.S. 1172 (2004).

The defense desired to counter the evidence of misconduct with testimony from Dr. Orlando Peccora, M.D., a prison psychiatrist who treated Saldaño "on well over 100 occasions" from "late 1997 or early 1998" until "early 2001." *Id.* at 82. Dr. Peccora apparently would have testified that the conditions on death row caused Saldaño to suffer from psychological deterioration and caused him to misbehave. *Id.* at 83. In the petition, Saldaño asserts that his condition had declined to the point where he appeared disheveled and unfocused, masturbated distractedly while the jury was in the room, stared inappropriately, and ultimately had to be restrained. "The State claimed, and the trial court agreed, that the defense could not present Peccora's testimony without first having [Saldaño] examined by a state psychiatric expert pursuant to [*Lagrone*]. [Saldaño] would not submit to a *Lagrone* examination, and Peccora's testimony was not presented." *Id.* Although Dr. Peccora did not testify, the defense submitted a declaration as to his findings.[4]

Saldaño claims that the trial court's failure to guarantee that a *Lagrone* examination by the State would not be used to prove future dangerousness (1) led the court to erroneously bar Dr. Peccora from testifying, (2) led the court to erroneously permit the State to introduce evidence of misconduct by a "psychologically decompensated" Saldaño while on death row, and (3) erroneously prevented the presentation of significant mitigating evidence in violation of the *Lockett* doctrine.

The Texas Court of Criminal Appeals found that Saldaño did not preserve his *Lagrone* claims for appeal. *Saldaño*, 232 S.W.3d at 88. The Court's detailed discussion about the factual basis of its legal conclusion included the following:

> The record reflects that the *Lagrone* issue first arose rather late in the proceedings during a November 5, 2004, hearing on a written motion that [Saldaño] had filed on October 21, 2004, in the middle of individual voir dire. . . . [Saldaño]

[4]Dr. Peccora's declaration was included in the Clerk's Record ("CR") at pages 1579-1583 and as Defendant's Exhibit 6 as an offer of proof. It was also attached to the petition as Exhibit A.

claimed at the November 5, 2004, hearing on this motion that the State should not be permitted to seek another death sentence or, alternatively, not be permitted to use any evidence of [Saldaño's] death-row misconduct after his 1996 trial because of the procedurally defaulted claim of prosecutorial misconduct at [Saldaño's] 1996 trial. [Saldaño] evidently claimed that he would not have misbehaved on death row but for this "misconduct" by the State. To support these claims, [Saldaño] stated that he intended to introduce Peccora's testimony at the hearing to show [Saldaño's] mental decline on death row since his 1996 trial. . . .

The State claimed that [Saldaño] should not be permitted to present Peccora's testimony without the State having an opportunity to have [Saldaño] examined by a state psychiatric expert, and the trial court agreed.

> [THE COURT]: Let me get something up front here.
>
> I have had a chance to read, during some of that testimony, that *Lagrone* case, and I believe the State has a right to have [Saldaño] examined if the State's—if the defense is going to offer the evidence along the lines set out in [Peccora's] affidavit, which I've now reread.

The defense would not agree to a *Lagrone* examination "for the purposes of this pretrial motion" because of the risk that [Saldaño's] "examination to a psychiatrist of the State could actually be used against him at trial."

> [DEFENSE LAWYER # 1]: Well, let me—let me make this even more clear.
>
> The reason that we're putting that into evidence at this point is, we are not going to allow [Saldaño] to be looked at by a psychiatrist.
>
> [THE COURT]: I gotcha.
>
> [DEFENSE LAWYER # 1]: He'll invoke his Fifth Amendment right.
>
> [DEFENSE LAWYER # 2]: Your Honor, may I add?
>
> I'd like to point out that we're being placed in a situation risking that [Saldaño's] testimony—[Saldaño's] examination to a psychiatrist of the State could actually be used against him at trial. Faced with that possibility, we can't have the—our client examined for the purposes of this pretrial motion. It's just a risk that we can't run.

The record, therefore, reflects that [Saldaño] took the position at this November 5, 2004, hearing that any evidence obtained by the State during a *Lagrone* examination might be used by the State on any issue at the punishment hearing (including future dangerousness). At this point, [Saldaño] had not alerted the trial court to any claim

> that the trial court should guarantee that a *Lagrone* examination be limited to rebutting any testimony by Peccora on [Saldaño's] mental decline and not to prove future dangerousness.
>
> On Friday, November 12, 2004, the State rested its punishment hearing case-in-chief during which the State had presented evidence of [Saldaño's] death-row misconduct. On Monday morning, November 15, 2004, [Saldaño] filed another written motion requesting that the trial court reconsider its earlier ruling on the *Lagrone* issue. In this November 15, 2004, motion, [Saldaño] offered for the first time to submit to a *Lagrone* examination. [Saldaño] also specifically alerted the trial court for the first time to the claim that this *Lagrone* examination should be limited to rebutting any testimony by Peccora on [Saldaño's] mental decline. . . .
>
> [Saldaño's] November 15, 2004, motion contained no claim that the trial court's earlier ruling on the *Lagrone* issue was effectively preventing [Saldaño] from presenting constitutionally relevant mitigating evidence to the jury in the form of Peccora's testimony concerning [Saldaño's] mental decline. And, [Saldaño] made no claim that he wanted to present Peccora's testimony to the jury at the punishment hearing. . . .
>
> The trial court held a hearing on [Saldaño's] November 15, 2004, motion on the morning that it was filed. At this hearing, the defense agreed with the trial court that it was requesting the trial court to reconsider its earlier ruling on the *Lagrone* issue. . .
>
> The State claimed at this hearing that the defense was "only stalling and asking for a delay in tactics." The State also stated that it wanted to make it "crystal clear" that it had never requested the trial court to bar Peccora's testimony, and that, in the pretrial context in which Peccora's testimony was initially offered at the November 5, 2004, hearing, the State had requested a *Lagrone* examination "to present controverting evidence if the defense presented that evidence." The State also requested the trial court to deny [Saldaño's] motion because it was, among other things, "untimely."
>
> The trial court expressed the view that a *Lagrone* examination "would probably open everything up" about "anything relevant to [Saldaño's] mental state, including future dangerousness, which is the defense concern." . . . The trial court ultimately denied [Saldaño's] request to limit a *Lagrone* examination to rebutting Peccora's testimony on [Saldaño's] mental decline. [Saldano] made no claim that this effectively prevented him from presenting constitutionally relevant mitigating evidence in the form of Peccora's testimony. [Saldaño] again would not submit to a *Lagrone* examination, and he did not offer Peccora's testimony at the punishment hearing or any other hearing.

Saldaño, 232 S.W.3d 83-88 (footnotes omitted).

The Texas Court of Criminal Appeals found that the record was clear that Saldaño did not alert the trial court of the claim that it should guarantee that a *Lagrone* examination be limited to rebutting Dr. Peccora's testimony on mental decline until after the State had rested its case-in-chief. *Id.* at 88. The Court accordingly held that it "was too late for [Saldaño] to have preserved for appeal the claims presented" in his first two grounds. *Id.*; *See* Tex. R. App. Proc. 33.1(a)(1)(A) (to preserve error for appeal, complaining party must timely present claim to trial court with sufficient specificity to make the trial court aware of complaint). The Court further found that Saldaño completely failed to preserve for appeal his allegation that he was prevented from presenting relevant mitigating evidence because he did not bring the claim in either motion before the trial court or during the hearings on the respective motions. *Id.*

The Director argues that Saldaño's *Lagrone* claims are procedurally barred in light of the holding by the Texas Court of Criminal Appeals. Under the procedural default doctrine, federal courts are precluded from granting habeas relief where the last state court to consider the claims raised by the petitioner expressly and unambiguously based its denial of relief on an independent and adequate state law procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999). When a state court explicitly relies on a procedural bar, a state prisoner may not obtain federal habeas relief absent a showing of cause for the default and actual prejudice. *Coleman*, 501 U.S. at 750. A petitioner who fails to satisfy the cause and prejudice standard may still be entitled to habeas corpus relief if he can show that the imposition of the procedural bar would constitute a fundamental miscarriage of justice; in other words, that he was actually innocent of the crime. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992); *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001).

The Fifth Circuit has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent ground that procedurally bars federal habeas review of a petitioner's claims. *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir.), *cert. denied*, 551 U.S. 1193 (2007); *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005), *cert. denied*, 548 U.S. 925 (2006); *Dowthitt v. Johnson*, 230 F.3d 733, 752 (5th Cir. 2000) ("[T]he Texas contemporaneous objection rule is strictly or regularly applied evenhandedly to the vast majority of similar claims, and is therefore an adequate procedural bar."), *cert. denied*, 532 U.S. 915 (2001). Saldaño disputes the finding by the Texas Court of Criminal Appeals that he did not preserve the *Lagrone* claims, but the finding is supported by the record. Saldaño has not shown cause and actual prejudice for the default nor a fundamental miscarriage of justice. His *Lagrone* claims are procedurally barred.

The *Lagrone* claims must be rejected for the additional reason that they involve nothing more than the application of state law. The Supreme Court has repeatedly stated that "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* at 67-68. In the course of reviewing state proceedings, a federal court does "not sit as a super state supreme court to review error under state law." *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007), *cert. denied*, 552 U.S. 1314 (2008). When the *Lagrone* case went to federal court, the district court found that the rule established by the state court did not unreasonably apply federal law and the Fifth Circuit found that the district court's assessment of the claim was "neither debatable nor wrong." *Lagrone*, 2003 WL 22327519, at *10. Federal courts have subsequently likewise found that the *Lagrone* rule is neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court. *See, e.g., Brewer v. Quarterman*, 475 F.3d 253, 257 (5th Cir. 2006), *cert. denied*, 552 U.S. 834 (2007).

The rule established by the Texas Court of Criminal Appeals in *Lagrone* is a state-law question, and the application of the rule is not a federal issue. Federal habeas relief is unavailable on the first three grounds for relief.

4. Saldaño was denied effective assistance of counsel by trial counsel's failure to present critical mitigating evidence to the jury.

Saldaño next argues that his attorneys were ineffective for failing to present critical mitigating evidence to the jury regarding his mental health for fear that the State would rebut the evidence. It was noted that neither the jury nor the trial court heard any testimony that could have explained Saldaño's bizarre behavior. Saldaño made the argument that no outside observer - aware of the omitted mental health evidence - would believe that Saldaño's trial produced a just result. He admitted that in light of the overwhelming evidence presented by the State regarding his behavior while already on death row, and his own grotesque behavior during the trial, there was little doubt that the jury would find him to be a danger in the future. He added that given the overwhelming probability that the jury would have answered the future dangerousness question in the affirmative, there was no risk in presenting the mental health evidence. Without the benefit of an explanation, by way of mental illness, the jury was without the tools to do anything but answer the mitigation question in the negative.

In support of the claim, Saldaño complains that counsel did not present critical evidence from the following three sources: (1) the testimony of his mother, Lidia Guerrero; (2) the testimony of his sister, Ada Saldaño; and (3) certain documentary evidence. It was noted that Guerrero testified on behalf of her son during the punishment phase of the first trial and was ready and available to testify at the punishment retrial. She was set to testify about her son's background and upbringing. Saldaño notes that his sister, Ada Saldaño, was interviewed by the defense mitigation expert, Dr. Kelly Goodness. She would have provided additional testimony about her brother's background and

upbringing. However, due to the late term of her pregnancy, she was unable to travel and be present during the punishment retrial, but she would have come voluntarily had the trial been postponed or would have been willing to give testimony by deposition. Saldaño observes that there is no indication in the record that his attorney filed either a motion for a continuance or a motion to take a deposition in order to secure his sister's testimony. Saldaño finally complains that documents submitted during his first trial were not submitted. Documents regarding his upbringing in Argentina included school records, birth records, records of religious confirmation, and Naval school records. His school records purportedly showed a student who was regular in attendance, well behaved, and diligent enough in his studies to be promoted from one grade to the next.

Saldaño's attorneys during the punishment retrial were Richard Franklin, John Tatum and Rick Harrison. At the close of the punishment retrial, Franklin testified *in camera* as to why he did not call Lidia Guerrero as a witness. 31 RR 96-100.[5] He testified that Guerrero was interviewed for four hours on November 14, 2004. She wanted to make an issue of her son's mental health. She insisted on telling the jury that he was mentally ill, that he could not function, and that he was incompetent. The attorneys told her that if she presented such testimony, then the State would call psychiatrists and psychologists to testify that Saldaño had an antisocial personality disorder and that he was not mentally ill. Moreover, there would be testimony that he was faking his mental illness for the purpose of getting drugs and other medication. Guerrero told the attorneys that she did not care if other psychiatrists and psychologists testified because she wanted all of the evidence to be "in the open." 31 RR 96-97. She believed that "her statement that he was mentally ill would probably carry the day, because she was

[5] "RR" refers to the trial transcript from the punishment retrial, preceded by the volume number and followed by the page number(s).

his mother." 31 RR 97. Franklin testified that her insistence on testifying that Saldaño was mentally ill was the reason that she was not called as a witness:

> So that's why we didn't call her as any kind of witness, because we were afraid we would open up the mental-illness question, and the State would respond with at least three psychologists and one psychiatrist who would testify about the antisocial disorder.

31 RR 98. He added that Dr. Kelly Goodness, his mental expert, has a doctorate in psychology and that she interviewed Saldaño and was of the opinion that he was competent. 31 RR 99. When questioned by the trial court, Franklin testified that the defense team explored the issue of mental retardation and that there was "no evidence of even borderline mental retardation." *Id.* He acknowledged that the trial court provided experts early on in the proceedings in order to make that determination. 31 RR 100.

The issue of ineffective assistance of counsel was fully developed during the state habeas corpus proceedings in *Ex parte Saldaño*, No. WR-41,313-04. Franklin provided an affidavit in response to allegations of ineffective assistance of counsel. SHCR-03 at 1124-25.[6] Rick Harrison likewise provided an affidavit. *Id.* at 1122-23. Franklin explained his strategy during the course of the punishment retrial as follows:

> The four questions of trial counsel contained in the Court's Order dated 8/31/07 will be answered in light of the fact that [Saldaño] was confined on death row for eight years and committed various crimes and bad acts while so confined which were admissible at his re-trial. Further, [Saldaño] was unable to develop a mitigation theory of diminished capacity or outright insanity due to his illegal confinement on death row because of trial court rulings.
>
> 1) [Saldaño's] mother could not testify because she insisted his confinement on death row made him mentally ill. This testimony would have been rebutted by the State's psychiatrist. There was no indication that Ada Saldaño would have testified any differently regarding his mental status. She had stated to Dr. Goodness that her

[6] "SHCR" refers to the state habeas transcript followed by the volume and page number(s).

> brother was not on drugs, was intelligent, was raised in good homes and always did his homework and housework without complaint. She never came up with anything that was clearly mitigating.
>
> 2) There was no reason to take the deposition of Ada. There was nothing she could testify about that would help under the facts available to the State in the re-trial.
>
> 3) All of this evidence was introduced at the first trial. It had no significance then and would have even less at the re-trial. The fact that [Saldaño] was born and baptized, went to school, and joined the navy could not explain or mitigate his throwing feces at prison guards as well as all of the other bad acts committed by [Saldaño] while on death row.
>
> 4) The only strategy left by court rulings was to demonstrate that the prison system could contain [Saldaño] and keep him from harming others. That is its function. The co-defendant was used to show that [Saldaño] was intoxicated at the time of the offense and they had no intention of hurting anyone.

Id. at 1124-25.

Mr. Harrison provided essentially the same discussion in his affidavit. He specifically noted that records from the prison psychiatric ward described Saldaño as "having antisocial personality disorder, being a manipulator, and faking symptoms to gain drugs. We had two doctors examine Saldaño three different times, up until the trial began, and none would term him insane or suffering from mental illness." *Id.* at 1122. His responses to the four questions asked of counsel were essentially the same responses as provided by co-counsel Franklin. *Id.* at 1122-23.

The state habeas court conducted a writ hearing after the affidavits were submitted. The attorneys for both sides presented oral arguments based on the evidence that had been gathered. The trial court then issued 511 findings of fact and conclusions of law. SHCR-04 at 1244-1339. Findings 18-175 relate to the present ground for relief. The findings relating to trial counsel's decision not to call Guerrero to testify include the following:

23. The Court finds that Guerrero attended [Saldaño's] re-sentencing trial and was available to testify there. Writ Exhibit D at 10-11.

24. The Court finds that trial counsel decided not to call Guerrero to testify at [Saldaño's] 2004 re-sentencing trial.

25. The Court finds that after they decided not to call Guerrero as a witness, [Saldaño's] trial counsel stated the reasons for their decision on the record. 31 RR 96-98.

26. The Court finds that trial counsel's stated reasons for deciding not to call Guerrero to testify as a witness are credible, and the Court accepts those stated reasons as true.

38. The Court finds that [Saldaño's] trial counsel decided not to call Guerrero to testify because they believed her testimony would have opened up the issue of [Saldaño's] mental health and the State would have been able to respond with witnesses who would have testified about [Saldaño's] antisocial personality disorder. 31 RR 98; Franklin Affidavit at 1; Harrison Affidavit at 1.

39. The Court finds that, at the time trial counsel decided not to open the door to the issue of [Saldaño's] mental health, the State had not offered [Saldaño's] prison records or any other evidence that [Saldaño] had an antisocial personality disorder or was malingering.

40. The Court finds that it was reasonable for [Saldaño's] trial counsel to conclude that if Guerrero testified she would carry out her stated intentions of testifying about [Saldaño's] mental state.

41. The Court finds that it was reasonable for [Saldaño's] trial counsel to conclude that, if Guerrero testified about [Saldaño's] mental state, the jury would hear rebuttal evidence that [Saldaño] had an antisocial personality disorder and had been "faking," "drug seeking," "feigning psychiatric symptoms for secondary gain," "malingering," and engaging in "manipulative behavior" while in prison.

42. The Court finds that evidence that [Saldaño] had an antisocial personality disorder and was malingering could have damaged him by corroborating the State's claim that [Saldaño] was a future danger.

43. The Court finds that evidence that [Saldaño] had an antisocial personality disorder and was malingering could have damaged [Saldaño] by weighing heavily against and undermining any claim that he possessed qualities that mitigated against a sentence of death.

44. The Court finds from the evidence that [Saldaño] would "fake" mental illness symptoms even to his mother who had traveled from Argentina to support him

in a trial that had already caused deep emotional anguish (Writ Exhibit E at 3), the jury could have concluded that [Saldano] was unfeeling and depraved. And that conclusion could have been damaging to [Saldaño].

47. The Court finds that the State's anticipated rebuttal to Guerrero's testimony could have been highly damaging to [Saldaño].

48. The Court finds that the State's potential rebuttal evidence was relevant to both the issue of future dangerousness and the issue of mitigation.

49. The Court finds that it was reasonable for [Saldaño's] trial counsel to choose for the jury not to hear the damaging rebuttal evidence.

50. The Court finds that even Guerrero's "mitigating" testimony contained a potential to harm [Saldaño].

51. The Court finds that, considering the possibility of significant harm from the State's rebuttal evidence along with the mixed effect of Guerrero's testimony, trial counsel's decision not to call Guerrero to testify at [Saldaño's] re-sentencing trial was a reasonable strategic decision based on full knowledge of the relevant facts.

59. The Court finds that [Saldaño] has failed to prove by the preponderance of the evidence that his trial counsel were deficient for failing to call Guerrero to testify at his re-sentencing trial.

61. The Court concludes that [Saldaño] has failed to meet the deficiency prong of *Strickland*.[7]

62. The Court finds that, if Guerrero had testified at [Saldaño's] 2004 re-sentencing trial, she would have provided the same testimony she provided at [Saldaño's] 1996 trial. Writ 7-8.

63. The Court finds that even with Guerrero's testimony at [Saldaño's] 1996 trial, [Saldaño] was sentenced to death. 21 RR-96 308.

66. The Court finds that Guerrero's testimony was even less likely to result in a life sentence at [Saldano's] 2004 re-sentencing trial since it would have opened the door to highly damaging rebuttal evidence that was relevant to both the issue of future dangerousness and mitigation.

67. The Court finds that [Saldaño] has failed to prove by a preponderance of the evidence that there is a reasonable probability that, if Guerrero had testified,

[7] *Strickland v. Washington*, 466 U.S. 668 (1984).

> the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.
>
> 68. The Court concludes that [Saldaño] has failed to meet the harm prong of *Strickland*.

SHCR-04 at 1249-57.

The findings relating to trial counsel's decisions concerning the use of Ada Saldaño as a witness include the following:

> 82. The Court finds that [Saldaño] has not provided evidence that Ada Saldaño would have testified to different mitigation evidence than Guerrero would have testified to or that Ada Saldaño could have testified in more detail than Guerrero. Franklin Affidavit at 1.
>
> 83. The Court finds that Ada Saldaño could not attend the trial because she was in the advanced stages of pregnancy, and she informed [Saldaño's] trial counsel of that fact thirty days before trial was set to begin. Writ Exhibit E at 9.
>
> 84. The Court finds that [Saldaño] claims his trial counsel were deficient because they did not request a continuance of his 2004 re-sentencing trial until Ada Saldaño could attend. Writ at 13.
>
> 87. The Court finds that until three days before the re-sentencing trial ended, when counsel interviewed Guerrero and realized they could not take the risk of putting her on the stand (31 RR 96), counsel had another witness - Guerrero - who could have provided the same testimony as Ada Saldaño about [Saldaño's] family background and childhood.
>
> 88. The Court finds that Ada Saldaño's testimony would have been cumulative of testimony that would have been presented by Guerrero. Franklin Affidavit at 1.
>
> 89. The Court finds that it likely would have been futile for trial counsel to seek a continuance prior to trial to secure Ada Saldaño's testimony.
>
> 90. The Court finds that [Saldaño] has failed to prove by a preponderance of the evidence that his trial counsel were deficient for failing to seek a continuance prior to trial to secure Ada Saldaño's testimony.
>
> 91. The Court concludes that trial counsel was not deficient for choosing not to take the futile action of seeking a continuance prior to trial to secure Ada Saldaño's testimony.

92. The Court concludes that [Saldaño] has failed to meet the deficiency prong of *Strickland*.

100. The Court finds that, if Ada Saldaño had testified at [Saldaño's] re-sentencing trial, she would have testified in accordance with what she told Kelly Goodness. Writ Exhibit E at 9.

101. The Court finds that Ada Saldaño would not have provided evidence that was clearly mitigating. Franklin Affidavit at 1; Harrison's Affidavit at 1.

107. The Court finds that [Saldaño] has failed to prove by a preponderance of the evidence that his trial counsel were deficient for failing to seek a continuance during trial to secure Ada Saldaño's testimony.

109. The Court concludes that [Saldaño] has failed to meet the deficiency prong of *Strickland*.

117. The Court finds that [Saldaño] has failed to prove by a preponderance of the evidence that his trial counsel were deficient for failing to depose Ada Saldaño.

118. The Court finds that trial counsel were not deficient for failing to depose Ada Saldaño.

119. The Court concludes that [Saldaño] has failed to meet the deficiency prong of *Strickland*.

120. The Court concludes that [Saldaño's] trial counsel did not render ineffective assistance by failing to depose Ada Saldaño.

124. The Court finds that, if background evidence Ada Saldaño would have testified to did not result in a life sentence in the 1996 trial it likely would not have resulted in a life sentence in a trial that presented even stronger reasons for imposition of a penalty of death.

126. The Court finds that [Saldaño] has failed to prove by a preponderance of the evidence that there is a reasonable probability that, if Ada Saldaño had testified, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

128. The Court finds that [Saldaño] has failed to meet the harm prong of *Strickland*.

129. The Court finds that, as to this claim of ineffective assistance, [Saldaño] has failed to prove both the deficiency and the harm prongs of *Strickland*.

130. The Court concludes that [Saldaño's] trial counsel did not render ineffective assistance of counsel by choosing not to seek a continuance of [Saldaño's]

trial, before or during trial, to secure Ada Saldaño's testimony or by failing to depose Ada Saldaño.

SHCR-04 at 1259-67.

The findings relating to trial counsel's decision not to submit certain documentary evidence include the following:

132. The Court finds that at [Saldaño's] 1996 trial his trial counsel introduced into evidence: report cards from [Saldaño's] first through eighth grades; his birth certificate; his certificates of baptism and confirmation; a certificate from the Argentine Navy Mechanic School from 1989; and a letter from the Argentine Consulate General stating [Saldaño] did not have any police records in Argentina. 20 RR-96 239, 256, 274.

134. The Court finds that the introduction of those documents at [Saldaño's] 1996 trial did not result in him receiving a life sentence.

135. The Court finds that trial counsel in [Saldaño's] 2004 re-sentencing did not seek to admit those documents.

136. The Court finds that trial counsel in [Saldaño's] 2004 re-sentencing trial chose a different strategy of seeking to establish that [Saldaño] was intoxicated at the time he killed Paul King and diminishing his responsibility in the murder. 31 RR 36-41, 48; Franklin Affidavit at 2; Harrison Affidavit at 2.

137. The Court finds that trial counsel had [Saldaño's] co-defendant Chavez brought from the Texas Department of Corrections, where he is serving a life sentence. 29 RR 1-4.

138. The Court finds that Chavez did not testify at [Saldaño's] 1996 trial.

139. The Court finds that trial counsel elicited testimony from Chavez that the day of the murder the men drank six bottles of beer and smoked a "fistful" of crack cocaine rocks. 30 RR 21-23, 53.

142. The Court finds that in his closing argument, counsel described the co-defendants' day as "[t]hey smoke that morning; smoke crack. It's gone. They bought 90 bucks worth the night before; it's gone. Last rock, whatever. Grab some beer; steal those; drink those." 31 RR 41. Counsel told the jury, "I submit to you, folks, if somebody smokes cracks [sic] and drinks those beers in the morning, they're going to be stoned bejesus." 31 RR 38.

143. The Court finds that trial counsel urged the jury to consider evidence of intoxication as mitigating, saying "it goes against the grain [the prosecutor]

tries to portray of a cold-blooded killer that just did it methodically and well-thought out." 31 RR 38, 39.

149. The Court finds that trial counsel told the jury that except for an attempted robbery four days before the murder, [Saldaño] had "[n]othing in a [sic] America; nothing in South America; nothing in Mexico. Nothing." 31 RR 35. Another time he told the jury, "If Victor Saldaño had an extensive criminal record a mile long, which some of you, I'm sure, expected, I could understand [the State seeking the death penalty]. . . . We don't have that. He's got no criminal record until that day. Zero." 31 RR 31.

151. The Court finds that, in preparing for [Saldaño's] 2004 re-sentencing trial, trial counsel could look back to the 1996 trial with the benefit of hindsight. Trial counsel could see that a trial strategy dependent on showing the jury that in [Saldaño's] early years he did "normal" things like go to school, get baptized and confirmed, and join the military was insufficient to persuade the jury to give [Saldaño] a life sentence. Moreover, counsel likely knew they could not rely simply on re-using the mitigation evidence from the 1996 trial because the State now possessed even more evidence of [Saldaño's] future dangerousness. And they also had available [Saldaño's] co-defendant Chavez, who did not testify at the first trial.

152. The Court finds that it was reasonable for [Saldaño's] counsel to develop a different trial strategy than the one that had failed in 1996.

153. The Court finds that it was reasonable to develop a new strategy around the new resource they had in co-defendant Chavez and to take advantage of his ability to present mitigating evidence of [Saldaño's] intoxication and diminished responsibility as a follower of Chavez with limited intent of tying King up.

154. The Court finds that trial counsel's strategy in [Saldaño's] 2004 re-sentencing trial was reasonable and that it was competently executed.

155. The Court finds that it was reasonable for trial counsel to emphasize only their new strategy and not to dilute it by introducing evidence supporting a different strategy.

156. The Court finds that [Saldaño's] trial counsel were not deficient for choosing the reasonable strategy of emphasizing [Saldaño's] intoxication and diminished responsibility for the murder.

157. The Court finds that [Saldaño] has failed to prove by a preponderance of the evidence that his trial counsel were deficient for choosing not to admit the documentary evidence that was used at [Saldaño's] 1996 trial.

158. The Court finds that [Saldaño's] trial counsel were not deficient for choosing not to admit the documentary evidence that was used at [Saldaño's] 1996 trial.

159. The Court concludes that [Saldaño] has failed to meet the deficiency prong of *Strickland*.

163. The Court finds that, if the documents have any mitigating value, it is relatively insignificant when compared to the mitigating evidence elicited from Chavez.

164. The Court finds that admitting the documents would therefore not have resulted in a life sentence even when added to Chavez's testimony.

165. The Court finds that [Saldaño] has failed to prove by a preponderance of the evidence that the absence of any particular document resulted in a sentence of death in his 2004 re-sentencing trial.

170. The Court concludes that [Saldaño] has not proved by a preponderance of the evidence that he would have received a life sentence if trial counsel had introduced the documentary evidence, or any particular document, in his [ ] 2004 re-sentencing trial.

172. The Court finds that [Saldaño] has failed to meet the harm prong of *Strickland*.

173. The Court finds that, as to this claim of ineffective assistance, [Saldaño] has failed to prove both the deficiency and the harm prongs of *Strickland*.

174. The Court concludes that [Saldaño's] trial counsel did not render ineffective assistance of counsel by choosing not to introduce the documentary evidence, or any particular document, from [Saldaño's] 1996 trial.

175. The Court concludes that this ground of ineffective assistance of counsel should be denied.

SHCR-04 at 1267-1274. The Texas Court of Criminal Appeals subsequently considered and adopted all of the aforementioned findings of fact and conclusions of law in denying relief. *Ex parte Saldaño*, 2008 WL 4727540, at *1.

Saldaño argues that his attorneys were ineffective for failing to present critical mitigating evidence to the jury, in violation of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides a two-pronged standard, and a petitioner bears the burden of proving both prongs. 466 U.S. at 687. Under the first prong, a petitioner must show that counsel's performance was deficient. *Id.*

To establish deficient performance, he must show that "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, . . ." *Id.* at 689 (citations omitted). "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 professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks omitted). Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697.

The Supreme Court recently discussed the difficulties associated with proving ineffective assistance of counsel claims as follows:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466

> U.S., at 689–690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.,* at 689, 104 S. Ct. 2052; see also *Bell v. Cone,* 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland,* 466 U.S., at 690, 104 S. Ct. 2052.

Richter, 562 U.S. at 105. In a separate opinion issued on the same day, the Court reiterated that the "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from the best practices or most common custom." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (citing *Strickland*, 466 U.S. at 690).

In the context of § 2254(d), the deferential standard that must be accorded to counsel's representation must also be considered in tandem with the deference that must be accorded to state court decisions, which has been referred to as "doubly" deferential. *Richter*, 562 U.S. at 105. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* "If the standard is difficult to meet, that is because it was meant to be." *Id.* at 102. *Also see Morales v. Thaler*, 714 F.3d 295, 302 (5th Cir.), *cert. denied*, 134 S. Ct. 393 (2013).

Saldaño's ineffective assistance of counsel claim concerns the use of mitigating evidence. In a capital sentencing proceeding, "defense counsel has the obligation to conduct a "reasonably substantial, independent investigation' into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983)). *See also Woods v. Thaler*, 399 F. App'x 884, 891 (5th Cir. 2010), *cert. denied*, 563 U.S. 991 (2011). In assessing whether counsel's performance was deficient, courts look to such factors as what

counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. *Neal*, 286 F.3d at 237. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "[C]ounsel should consider presenting . . . [the defendant's] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stated in *Wiggins* that the "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.*

In the present case, Saldaño is not complaining that his attorneys failed to take steps to discover all reasonably available mitigating evidence; instead, the focus of his complaint concerns trial counsels' decisions about which evidence to submit to the jury. He complains that counsel did not offer known critical mitigating evidence that could have been provided by his mother, sister and the documents that were offered at his 1996 trial. His claim is essentially a complaint about the trial strategy employed by his attorneys. The Supreme Court fully discussed the approach that must be employed regarding trial strategy in *Strickland.* The Court observed that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690-91. Federal courts "will not question a counsel's reasonable strategic decisions." *Bower v. Quarterman*, 497 F.3d 459, 470 (5th Cir. 2007), *cert. denied*, 553 U.S. 1006 (2008). In applying

Strickland, the Fifth Circuit has held that "the failure to present a particular argument or evidence is presumed to have been the result of strategic choice." *Taylor v. Maggio*, 727 F.2d 341, 347-48 (5th Cir. 1984). Because of the risk that hindsight bias will cloud a court's review of counsel's trial strategy, "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.

The state trial court thoroughly discussed trial counsel's decisions regarding Guerrero, Ada Saldaño and the documents presented during the 1996 trial in terms of trial strategy. The strategy employed in 1996 did not work, and Saldaño was sentenced to death. Trial counsel thus chose to employ a different strategy this time around. The trial court appropriately found that it was reasonable for trial counsel to employ a different strategy during the 2004 punishment retrial. It was also reasonable for trial counsel to utilize co-defendant Chavez, who was not available in 1996, in an effort to show that Saldaño was intoxicated and had diminished responsibility at the time of the offense with the limited intent of tying up King. Guerrero's anticipated testimony, on the other hand, would have undermined this trial strategy. Her testimony would have permitted the State to offer rebuttal evidence that Saldaño had an antisocial personality disorder, that he engaged in feigned psychiatric symptoms for secondary gain, that he engaged in manipulative behavior and that he was a malingerer. The trial court reasonably found that the State's anticipated rebuttal to Guerrero's testimony could have been highly damaging to Saldaño. With respect to Ada Saldaño, the state trial court reasonably found that trial counsel was not ineffective for failing to make a futile request of seeking a continuance. *See Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002), *cert. denied*, 538 U.S. 926 (2003); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). The trial court ultimately found that trial counsel's

strategy in the 2004 punishment retrial was "reasonable and that it was competently executed." The trial court found that trial counsel's choices did not amount to deficient representation, that Saldaño had not shown harm, and that he did not prove that his attorneys were ineffective. The Texas Court of Criminal Appeals adopted these findings.

Saldaño argues in his reply to the answer that the defenses were not mutually exclusive, but Saldaño's desire to have a specific defensive theory presented does not satisfy his burden of showing ineffective assistance of counsel. *Johnson v. Cockrell*, 301 F.3d 234, 239 (5th Cir. 2002) (quoting *Strickland*, 466 U.S. at 689), *cert. denied*, 538 U.S. 1001 (2003). The "failure to present mitigating evidence, if based on informed and reasoned practical judgment, is well within the range of practical choices not to be second-guessed under *Strickland*." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992) (internal quotation marks and citation omitted), *cert. denied*, 509 U.S. 921 (1993). Trial counsel's decisions regarding Guerrero, Ada Saldaño, and the documents submitted at the 1996 trial were based on informed and well-reasoned practical judgment, which may not be second-guessed. Saldaño has not shown that his attorneys' representation in this matter was deficient or that he was prejudiced by such deficient representation. He failed to satisfy his burden of proving ineffective assistance of counsel as required by *Strickland*. Saldaño also failed to show, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded to his trial attorneys in light of both *Strickland* and § 2254(d). *See Richter*, 562 U.S. at 105. The fourth ground for relief lacks merit and should be denied.

5. Saldaño was denied effective assistance of counsel by trial counsel's failure to preserve appellate issues relating to the application of the *Lagrone* decision.

Saldaño argues in his fifth ground for relief that he was denied effective assistance of counsel by trial counsel's failure to preserve the *Lagrone* issues for appeal. Stated differently, he is linking his first three grounds for relief to an ineffective assistance of counsel claim. He claims that the first three grounds for relief were procedurally defaulted due to counsel's failure to timely and properly preserve the issues for appellate review.

In his answer, the Director argues that Saldaño cannot show that he was prejudiced as a result of trial counsel's failure to preserve these issues. He further argues that the ground for relief is procedurally barred. He notes that Saldaño first raised this particular ineffective assistance of counsel claim in his second state habeas application, which the Texas Court of Criminal Appeals dismissed based on an independent state procedural bar. Indeed, Saldaño acknowledges in his petition that the Texas Court of Criminal Appeals dismissed his second application for a writ of habeas corpus for the following reason: "We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071 § 5. Accordingly, the application is dismissed as an abuse of the writ. Art. 11.071 § 5(c)." *Saldaño*, 2008 WL 152732, at *1.

The procedural default doctrine was discussed in conjunction with Saldaño's first three grounds for relief. As was previously noted, under the procedural default doctrine, federal courts are precluded from granting habeas relief where the last state court to consider the claims raised by the petitioner expressly and unambiguously based its denial of relief on an independent and adequate state law procedural ground. *Coleman*, 501 U.S. at 729-30. When a state court explicitly relies on a procedural bar, a state prisoner may not obtain federal habeas relief absent a showing of cause for the default and actual prejudice or a fundamental miscarriage of justice. Dismissals pursuant to abuse of writ principles have regularly been upheld as a valid state procedural bar foreclosing federal habeas review.

See Moore v. Quarterman, 534 F.3d 454, 463 (5th Cir. 2008); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008), *cert. denied*, 556 U.S. 1239 (2009); *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006), *cert. denied*, 549 U.S. 1343 (2007). Most recently, the Fifth Circuit reiterated that Texas' abuse-of-the writ doctrine is an "independent and adequate state procedural rule." *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014). In *Reed*, the federal courts rejected as procedurally barred petitioner's ineffective assistance of counsel claims raised in his third state habeas application that had been dismissed by the Texas Court of Criminal Appeals "as an abuse of the writ." *Id.*

Saldaño's present ineffective assistance of counsel claim was similarly dismissed by the Texas Court of Criminal Appeals "as an abuse of the writ." Saldaño attempts to establish cause by arguing that there was no basis for bringing the claim in the first state habeas petition. He notes that the finding that the *Lagrone* claims were not preserved was raised *sua sponte* by the Texas Court of Criminal Appeals on direct appeal, which was after the first habeas petition was filed; thus, the factual basis for the claim "simply did not exist." The Director correctly observes that the exact same argument was presented to the Texas Court of Criminal Appeals in Saldaño's subsequent application for a writ of habeas corpus, which was dismissed as an abuse of the writ. Indeed, the written decision by the Texas Court of Criminal Appeals clearly identified the ineffective assistance of counsel claim and dismissed it as an abuse of the writ. *Saldaño*, 2008 WL 152732, at *1. The Director persuasively argues that, for this reason, Saldaño has not established cause. He also correctly observed that Saldaño failed to show prejudice or a fundamental miscarriage of justice.

Saldaño argues in his reply to the answer that the ground for relief is not barred by an independent or adequate state procedural ground. He asserts that the bar does not apply when a state court decision is ambiguous. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). He correctly

observed that the Fifth Circuit has held that "the boilerplate dismissal by the CCA of an application for abuse of the writ is uncertain" if it is unclear whether the decision was based on state law or federal law. *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007). However, the written decision by the Texas Court of Criminal Appeals in this case makes it clear that Saldaño was attempting to raise an ineffective assistance of counsel claim based on "trial counsel's failure to preserve certain issues raised in his direct appeal," which did not satisfy the subsequent application rules of "Article 11.071 § 5." *Saldaño*, 2008 WL 152732, at *1. The decision is not ambiguous. The dismissal of the application was based on state law. The distinction that Saldaño is attempting to make lacks merit.

Saldaño has not satisfied his burden of showing cause and prejudice or a fundamental miscarriage of justice. Until just recently, there would been no further inquiry into this ground for relief. However, the Supreme Court opened the door slightly for a showing of cause and prejudice to excuse the default in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). In *Martinez*, the Supreme Court answered a question left open in *Coleman*: "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." 132 S. Ct. at 1315. These proceedings were referred to as "initial-review collateral proceedings." *Id.* The Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320. *Strickland* standards apply in assessing whether initial-review habeas counsel was ineffective. *Id.* at 1318.

The Supreme Court extended *Martinez* to Texas in *Trevino*. Although Texas does not preclude appellants from raising ineffective assistance of trial counsel claims on direct appeal, the Court held

that the rule in *Martinez* applies because "the Texas procedural system - as a matter of its structure, design, and operation - does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921. The Court left it to the lower courts to determine on remand whether Trevino's claim of ineffective assistance of counsel was substantial and whether his initial state habeas attorney was ineffective. *Id.*

The Fifth Circuit summarized the rule announced in *Martinez* and *Trevino* as follows:

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim[s] ha[ve] some merit," *Martinez*, 132 S. Ct. at 1318; and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application. *See id.*; *Trevino*, 133 S. Ct. at 1921.

Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2821 (2014). "Conversely, the petitioner's failure to establish the deficiency of either attorney precludes a finding of cause and prejudice." *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1786 (2014). The Fifth Circuit recently employed this approach once again in *Reed*, 739 F.3d at 774. The Fifth Circuit has also reiterated that a federal court is barred from reviewing a procedurally defaulted claim unless a petitioner shows both cause and prejudice. *Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1760 (2014). To show actual prejudice, a petitioner "must establish not merely that the errors at a trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* (citations omitted) (emphasis in original).

In the present case, trial counsel wanted to counter the evidence of Saldano's misconduct in prison with testimony from Dr. Peccora, who would have discussed Saldaño's mental decline. Counsel filed a motion regarding such evidence on October 21, 2004. A hearing was conducted on November 5, 2004, in the middle of individual voir dire. The State claimed, and the trial court agreed,

that the defense could not present Dr. Peccora's testimony without first having Saldaño examined by a state psychiatric expert pursuant to *Lagrone*. At that time, trial counsel faced a dilemma. He had a choice of deciding whether to place Dr. Peccora on the stand, which would require Saldaño to be examined by a state psychiatrist, or forego placing Dr. Peccora on the stand. Based on the dilemma posed by *Lagrone*, he chose to forego placing Dr. Peccora on the stand and not having Saldaño examined. The choice he made was reasonable because of the potential damaging testimony that could have been submitted by the State if Saldaño had been examined by a state psychiatrist. His decision was within the scope of reasonable trial strategy that cannot be second-guessed. On November 15, 2004, after the State rested it's case-in-chief, Saldaño's attorneys reasonably renewed their motion and asked the trial court to reconsider the decision regarding *Lagrone*. Counsel tried to limit the use of the evidence that would be obtained in an examination by a state psychiatric expert, but his efforts did not succeed. The trial court would not reverse itself and again observed that a *Lagrone* examination would open up everything and anything about Saldaño's mental state. Trial counsel acted reasonably in his efforts to handle this matter. There was certainly no indication of incompetence. The facts of this case do not give rise to an inference that the representation provided by Saldaño's attorneys was deficient.

The Court observes that *Lagrone* presents a difficult dilemma for defenses attorneys. Faced with the dilemma, defense attorneys regularly make the same choice as Saldaño's attorneys, as noted by the Fifth Circuit as follows:

> That was a strategic decision. One of [Petitioner's] attorneys stated to the trial court, "Based on my experience in the past, there's probably no way on God's green earth that we're going to do anything to allow the State to examine our client with one of their own experts. If that's an indication of what our intent is, then so be it."

Yowell v. Thaler, 442 F. App'x 100, 102 n.1 (5th Cir. 2011). *See also Mays v. Director, TDCJ-CID*, No. 6:11-CV-135, 2013 WL 6677373, *13 (E.D. Tex. Dec. 18, 2013); *Crutsinger v. Thaler*, No. 4:07-CV-703-Y, 2012 WL 369927, at *5 (N.D. Tex. Feb. 6, 2012); *Galloway v. Quarterman*, No. 3:04-

CV-0234-G, 2008 WL 5091748, at *10 (N.D. Tex. Dec. 3, 2008). The problem is compounded by the requirement that a criminal defendant submit to a *Lagrone* psychiatric examination in order to preserve it for appellate review. *Hernandez v. State*, 390 S.W.3d 310, 322 (Tex. Crim. App. 2012). Nonetheless, as was noted in *Yowell*, a defense attorney's choice in this type of situation is a strategic decision, and Saldaño does not have a basis for a potentially successful ineffective assistance of counsel claim based on his attorneys' reasoned strategic decisions in this case regarding *Lagrone*.

Saldaño's fifth ground for relief is procedurally barred. He has not shown cause and prejudice or a fundamental miscarriage of justice in order to overcome the bar. The decisions set forth in *Martinez* and *Trevino* do not help because his underlying claim of ineffective assistance of trial counsel lacks any merit.

6. Saldaño was denied effective assistance of counsel by trial counsel's failure to request a competency hearing.

7. Saldaño's punishment retrial denied him due process because it was conducted while he was incompetent.

Grounds for relief six and seven concern whether Saldaño should have been afforded a competency hearing. In ground number six, Saldaño alleges that his attorneys were ineffective for failing to request a competency hearing. In ground number seven, he alleges that the trial court denied him due process because the punishment retrial was conducted while he was incompetent. He opined that the competency issue simmered throughout the trial. The record reveals that the trial court was advised on the first day of testimony that Saldaño was masturbating in court, and the trial court made references to bizarre incidents that had occurred during voir dire. Nonetheless, his attorneys did not ask for a competency hearing, and the trial court failed to *sua sponte* order a competency hearing. Saldaño submitted an affidavit from Dr. Robert E. Cantu, M.D.,[8] who expressed the opinion that

[8] Petitioner's Exhibit J.

Saldaño was incompetent at the time of the 2004 retrial. Dr. Cantu added that he examined Saldaño in June of 2006 and concluded that he was suffering from psychosis. It was noted that the frequency of Saldaño's inexplicable courtroom behavior led the prosecution to voice its concern on the fourth day of testimony. Saldaño observes that Dr. Peccora stated in his affidavit that he suffered from Schizoaffective Disorder. Saldaño stresses that it is axiomatic that a criminal defendant must be mentally competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). He argues that there was not any conceivable tactical reason for counsels' decision not to request a competency hearing nor any reason why the trial court failed to conduct a competency hearing.

The record reveals that the issue of Saldaño's competency was fully addressed during both the 2004 punishment retrial and the state habeas proceedings. The issue was initially raised in court during the individual questioning of prospective jurors. 5 RR 224. Trial counsel noted Saldaño's bizarre behavior and asked for a psychiatric examination out of an abundance of caution. *Id.* at 224-225. The trial court agreed and observed that the issue would have to be developed if the examination revealed that Saldaño was incompetent. *Id.* at 227. The trial court subsequently questioned the trial attorneys about the psychiatric examination. 7 RR 106-108. During the course of the trial, Saldaño was examined by two doctors a total of three times, and each time he was found to be competent. 7 RR 106-08; 27 RR 1; 31 RR 99; Harrison Affidavit at 1.

In addition to having Saldaño examined by doctors, trial counsel called two bailiffs on November 11, 2004 to testify regarding their observations about Saldaño's behavior outside of court. Chief Bailiff Brian Burnett expressed the opinion that Saldaño acted normally outside of court and was "just playing games." 27 RR 7. Bailiff Eric Palmer Giles, a transport officer, testified that Saldaño knew what was going on, that he was coherent and that he was competent. 27 RR 10-11. On

November 17, 2004, trial counsel raised the issue once again and informed the trial court that Dr. Kelly Goodness found that he was competent. 31 RR 99.

During the state habeas proceedings, Rick Harrison, co-counsel for Saldaño, addressed this issue in his affidavit as follows:

> [T]here were a number of records and reports generated from the prison psychiatric ward by various doctors who described Saldaño as having antisocial personality disorder, being a manipulator, and faking symptoms to gain drugs. We had two doctors examine Saldaño three different times, up until the trial began, and none would term him insane or suffering from mental illness. In fact, they echoed the findings of the prison doctors.

SHCR-03 at 1122. Prison records provided to trial counsel revealed that prison doctors found that Saldaño had antisocial personality disorder and was "faking," "drug seeking," "feigning psychiatric symptoms for secondary gain," "malingering," and engaging in "manipulative behavior."

With respect to the claim that trial counsel was ineffective for failing to request a competency hearing, the state habeas court's findings included the following:

> 414. The Court finds that during his trial [Saldaño's] trial counsel had him examined for competency by two doctors a total of three times, and each time [Saldaño] was found competent. 7 RR 106-108; 27 RR 1; 31 RR 99; Harrison Affidavit at 1.
>
> 415. The Court finds that, toward the end of trial, [Saldaño's] trial counsel had two bailiffs testify that [Saldaño] was not incompetent but, based on their observations of [Saldaño] outside the courtroom, [Saldaño] was simply acting out in the courtroom. 27 RR 4-5, 7, 10-11.
>
> 416. The Court finds that counsel's discussions with [Saldaño] concerning his courtroom appearance were met with understanding (3 RR 2-3; 4 RR 3-5), and counsel was able to observe [Saldaño's] engagement with the trial judge and understanding of the legal process throughout trial. 2 RR 3-5; 7 RR 10; 14 RR 2-6 (discussions about the translator); 4 RR 201; 5 RR 133-35, 221; 10 RR 106; 11 RR 160; 15 RR 88; 20 RR 112; 22 RR 228 (interactions during voir dire); 4 RR 203; 6 RR 121, 218; 7 RR106; 8 RR 165; 10 RR 132; 11RR 241-43; 12 RR 251; 15 RR 91-92; 17 RR 92, 94; 18 RR 147; 19 RR 126; 20 RR 140-41; 22 RR 228; 22 RR 251-52; 24 RR 143; 27 RR 262; 30 RR 201 (end-of-day discussions with the court); 13 RR 180-81; 27 RR 16-17 ([Saldaño's] prolonged apology).

417. The Court finds that counsel had access to, and was aware of the contents of, [Saldaño's] prison records that are replete with notations about [Saldaño] "faking" his mental illness, "malingering," and engaging in "manipulative" behavior for secondary gain. Writ Exhibit N; Appendix A to State's Answer.

418. The Court recognizes that trial counsel is not ineffective for failing to make futile requests. *See Chandler*, 182 S.W.3d at 356.

419. The Court finds that, before testimony began in the trial, [Saldaño's] counsel had obtained an expert opinion that [Saldaño] was competent to stand trial, and counsel obtained the same opinion two more times throughout the trial. 7 RR 106-108; 27 RR 1; 31 RR 99; Harrison Affidavit at 1.

420. The Court finds that, knowing that [Saldaño] *was* competent, it was wholly reasonable for counsel not to request a competency hearing where they could only prevail if they could prove that [Saldaño] was *not* competent.

421. The Court finds that a request for a competency hearing at [Saldaño's] re-sentencing trial would likely have been futile.

422. The Court finds that counsel should not be required to request a hearing on an issue that has already been determined adversely to the position they would have to take at the hearing.

423. The Court finds that trial counsel was not ineffective for failing to request a competency hearing where they would not have prevailed. *See Jackson v. State*, No. 05-04-00623-CR, 2005 WL 1022517, at *2 (Tex. App. - Dallas May 3, 2005, no pet.) (declining to find counsel ineffective for failing to file a motion for a competency hearing where there was no evidence in the record raising the issue of incompetency); *Brown v. State*, 129 S.W.3d 762, 767 (Tex. App. - Houston [1st Dist.] 2004, no pet.) (claim of ineffective assistance of counsel fails when no evidence in the record demonstrated the defendant was incompetent or insane).

424. The Court finds that the general record of [Saldaño's] trial evidences that [Saldaño] was competent to stand trial.

425. The Court finds that [Saldaño] has not proved by a preponderance of the evidence that he was incompetent to stand trial.

427. The Court finds that trial counsel is not deficient for not being able to secure an opinion from the experts that was contrary to their findings. *See Dowthitt v. Johnson*, 230 F.3d 733, 745 n.10 (5th Cir. 2000) (noting counsel is not required to continue searching for experts "until they find an expert willing to provide more beneficial testimony on their behalf").

428. The Court finds that [Saldaño] has failed to meet his burden of proving by a preponderance of the evidence that his trial counsel were deficient for failing to request a competency hearing.

429. The Court finds that [Saldaño] has failed to meet his burden of proving by a preponderance of the evidence that he was harmed by trial counsel's failure to request a hearing, where he could not have prevailed.

430. The Court finds that trial counsel were not deficient, and [Saldaño] was not harmed, by counsel's failure to request a hearing.

SHCR-04 at 1322-25.

The state habeas court also issued findings concerning Saldaño's claim that he was denied due process when he was tried while incompetent. As would be expected, many of the findings duplicated the findings with respect to Saldaño's ineffective assistance of counsel claim. The salient, non-repetitive findings include the following:

261. The Court finds that [Saldaño's] trial counsel had [Saldaño] examined for competency by two different doctors a total of three times. Harrison Affidavit at 1.

262. The Court finds that trial counsel contacted a psychiatrist the first week of October 2004 to have [Saldaño] examined as soon as possible. 7 RR 108-108; *see also* 15 RR 90 (on October 25, 2004 the court approved a bill for a doctor counsel had hired).

263. The Court finds that trial counsel made the trial court aware of this examination. 7 RR 106-108; 15 RR 90.

264. The Court finds that [Saldaño] was examined for competency the morning of November 11, 2004 for a third time and was found competent. 27 RR 1; 31 RR 90.

265. The Court finds that trial counsel made the trial court aware of this examination. 27 RR 1; 31RR 99.

266. The Court finds that each time [Saldaño] was examined for competency, the doctors found him competent. 31 RR 99; Harrison Affidavit at 1 (neither doctor "would term [Saldaño] insane or suffering from mental illness").

267. The Court finds, therefore, that the doctors who examined [Saldaño] for competency "echoed the findings of the prison doctors." Harrison Affidavit at 1.

268. The Court finds that the prison doctors found that [Saldaño] had an antisocial personality disorder and was "faking," "drug seeking," "feigning psychiatric symptoms for secondary gain," "malingering," and engaging in "manipulative behavior." Writ Exhibit M; Appendix A to State's Answer.

270. The Court finds that at no time prior to or during [Saldaño's] trial did [Saldaño's] trial counsel assert that [Saldaño] did not have a sufficient present ability to consult with his counsel with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him.

274. The Court finds that throughout his trial, [Saldaño] declined to assert that he was incompetent to stand trial or to request a competency inquiry or hearing.

276. The Court notes that at the hearing [on November 5, 2004] [Saldaño's] counsel informed the trial judge that they were not raising the issue of [Saldaño'] competency: "we're not arguing he's not competent to stand trial; we're only arguing a significant decline in cognitive ability and emotional stability" (23 RR 6); "[w]e're also not arguing competence either" (23 RR 13); "I also wanted to make it clear that [defense psychiatrist Dr. Peccora] would not be testifying that Victor Saldaño is psychotic today or incompetent to stand trial." 23 RR 132-33.

277. The Court finds that, two days before the trial ended, the trial judge noted on the record that as of that date, neither [Saldaño], [Saldaño's] counsel, nor any other witness had given the judge anything that made him question whether [Saldaño] was competent to stand trial. 29 RR 6.

278. The Court finds that the trial judge's statement is correct and accepts it as true.

279. The Court finds that two days before the trial ended, the court agreed with the State that [Saldaño] was competent:

> I agree . . . that I have seven - now seven weeks that I've been in the same courtroom with Mr. Saldaño on a nearly daily basis, that, other than some behavior on his part which I don't think was in his best interest, and neither did his own attorney, he and I have had conversations about what's going on, and *I haven't had any belief based on any of his responses that he was not understanding me and*

> *communicating with me* . . . long and short of it is, *I don't have any reason to raise the question of his competency right now*.
>
> 29 RR 7 (emphasis added).

299. The Court finds that [Saldaño] was not incompetent but was simply acting out in the courtroom.

302. The Court finds that [Saldaño's] behavior did not reflect incompetency but, rather, a disregard for the authority of the court and the proceedings.

SHCR-04 at 1291-1297. The state habeas court went on to thoroughly discuss Texas law concerning the issue of competency and the trial court's obligations in assessing whether a criminal defendant is incompetent to stand trial. It was particularly noted that "where a defendant has been examined and found competent to stand trial, the trial court does not abuse its discretion in failing to conduct a competency hearing." *Id.* at 1305. The Texas Court of Criminal Appeals subsequently adopted all of these findings. The only findings that were not adopted were those where the state habeas court found that Saldaño forfeited his competency claim by failing to raise it on direct appeal, which were findings 310, 312, 313, 316, 317 and 318. *Ex parte Saldaño*, 2008 WL 4727540, at *1.

The legal analysis of the sixth and seventh grounds for relief should start with the proposition noted by Saldaño that it is axiomatic that a criminal defendant must be mentally competent to stand trial. *Drope*, 420 U.S. at 171. In federal cases, the test of incompetence "is whether a criminal defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 172 (internal quotation marks and citation omitted). Most recently, the Supreme Court reiterated the basic principle that the criminal trial of an incompetent defendant violates due process. *Ryan v. Gonzales*, 133 S. Ct. 696, 703 (2013). This basic principle is likewise contained in Tex. Code Crim. Proc. Ann. art. 46B.003.

The Fifth Circuit has made it clear that a defense attorney's failure to investigate a criminal defendant's competency to stand trial constitutes ineffective assistance of counsel, particularly if counsel knew that the defendant had a history of mental problems. *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). Moreover, trial "judges must depend to some extent on counsel to bring [such] issues into focus." *Id.* (citing *Drope*, 420 U.S. at 176-77). In the present case, Saldaño's attorneys were concerned about his competency due to his behavior. They appropriately raised the issue with the trial court and obtained permission to have Saldaño examined. They sought to have Saldaño examined out of an abundance of caution. Saldaño was examined by two doctors a total of three times, and each time he was found to be competent to stand trial. The Fifth Circuit has opined that "the Sixth Amendment does not require counsel to continue searching until they find an expert willing to provide more beneficial testimony on their behalf." *Dowthitt*, 230 F.3d at 745 n.10. Saldaño's attorneys fulfilled their duty to pursue the issue of competency when it appeared necessary. Moreover, the findings by these two doctors were consistent with the conclusions expressed by prison doctors. It is further noted that Saldaño's condition was never in such a state that trial counsel felt compelled to inform the trial court that Saldaño did not have a sufficient present ability to consult with them with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him. Finally, in order to fully develop the record on this issue, Saldaño's attorneys went so far as to put on testimony from the bailiffs regarding his out of court behavior. Saldaño's trial attorneys were not deficient with respect to the issue of his competency. They fully explored and developed this issue. Saldaño now argues that his attorneys should have filed a motion for a competency hearing, but they were not ineffective for failing to request a competency hearing where they could not have prevailed. Counsel was not required to make frivolous or futile motions.

Johnson, 306 F.3d at 255; *Koch*, 907 F.2d at 527. This ineffective assistance of counsel claim is devoid of merit.

The ineffective assistance of counsel claim should be denied for the additional reason that Saldaño has not shown, as required by 28 U.S.C. § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Saldaño also presents his competency claim in terms of trial error. He argues that he was denied due process because the trial was conducted while he was incompetent. In the state habeas corpus proceedings, the claim was discussed in terms of whether the trial court should have *sua sponte* conducted a competency hearing. On habeas, a petitioner may collaterally attack his conviction by showing that "the facts are sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to his mental competency at the time of trial." *Dunn v. Johnson*, 162 F.3d 302, 306 (5th Cir. 1998) (internal quotations omitted), *cert. denied*, 526 U.S. 1092 (1999); *Carter v. Johnson*, 131 F.3d 452, 460 (5th Cir. 1997), *cert. denied*, 523 U.S. 1099 (1998). The threshold burden is "extremely heavy." *Johnson v. Estelle*, 704 F.2d 232, 238 (5th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984). A criminal defendant is entitled to a competency hearing if there is a "bona fide doubt" as to his competence. *Pate v. Robinson*, 383 U.S. 375, 385 (1966); *McInerney v. Puckett*, 919 F.2d 350, 351 (5th Cir. 1990) (Under *Pate*, a trial court should inquire into a criminal defendant's competency *sua sponte* if the evidence raises a bona fide doubt as to his competency.). The legal question a reviewing court must ask is whether the trial judge received "information which, objectively considered, should reasonably have raised a doubt about defendant's competency and

alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980) (internal citations omitted); *see Medina v. California*, 505 U.S. 437, 438 (1992) (The key is whether the defendant had "the capacity to participate in his defense and understand the proceedings against him."). The Fifth Circuit has held that a trial court does not violate *Pate* if a petitioner fails to raise a bona fide doubt as to his competency and, thus, does not hold a competency hearing. *Chenault v. Stynchcombe*, 546 F.2d 1191, 1193 (5th Cir.), *cert. denied*, 434 U.S. 878 (1977).

In the present case, trial counsel raised the issue of Saldaño's competence out of an abundance of caution. The trial court, in turn, appropriately approved the request to have Saldaño examined and placed Saldaño's attorneys on notice that the issue may have to be developed further depending on the findings of the doctors. Saldaño was examined by two doctors a total of three times, and each time he was found to be competent to stand trial. The trial court also had access to prison records that revealed that prison doctors similarly expressed the opinion that Saldaño simply had an antisocial personality disorder and was "faking,' "drug seeking," "feigning psychiatric symptoms for secondary gain," "malingering," and engaging in "manipulative behavior." During the punishment retrial, the trial court regularly made inquiries concerning whether Saldaño was competent. The trial court questioned both trial counsel and Saldaño. Based on Saldaño's responses to his questions, the trial judge expressed the opinion that he had no reason to conclude that Saldaño was not understanding him or unable to communicate with him. The trial judge expressed the opinion that there was no evidence before him that made him question whether Saldaño was competent to stand trial. The record reveals that the trial court complied with its obligation to inquire into Saldaño's competency. The evidence did not raise a bona fide doubt as to his competency. Moreover, Saldaño has not shown that the evidence before the trial court positively, unequivocally and clearly generated a real, substantial and

legitimate doubt as to his mental competency at the time of trial. Consequently, the trial court was not obligated to hold a competency hearing. The state habeas court reasonably found that Saldaño was not incompetent and that he was simply acting out in the courtroom, which was the product of his disregard of the authority of the court and the proceedings. Saldaño has not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. *See Roberts v. Dretke*, 381 F.3d 491, 498 (5th Cir. 2004), *cert. denied*, 544 U.S. 963 (2005). Saldaño has not shown that he is entitled to relief on his sixth and seventh grounds for relief.

8. As applied to Saldaño, the legislative failure to address the time at which a defendant is to be examined for future dangerousness and the circumstances under which his potential for future dangerousness must be viewed, makes the future dangerousness requirement unconstitutionally vague.

In his eighth ground for relief, Saldaño argues that the statute that provides for the future dangerous special issue is unconstitutionally vague as it applies to him. Texas law requires juries in capital murder cases to answer special issues during the punishment phase of a trial, which will determine whether the defendant will receive a death sentence or life imprisonment. Article 37.071 § 2(b)(1) of the Texas Code of Criminal Procedure establishes that in order for the death penalty to be imposed, the jury must find that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." This is the future dangerousness special issue. The jury in the present case was charged in accordance with the statutory provision, and the jury answered in the affirmative.

Saldaño argues that Article 37.071 § 2(b)(1) is unconstitutionally vague as applied to him. He stressed that the statute did not address the period of time in which he should have been evaluated for future dangerousness. He noted that this issue does not arise in a typical death penalty case. In his case, however, his mental health deteriorated during the eight year period of time he spent on death row. He asserts that he was a totally different person in 2004, as compared to 1996. In support of his claim, he observes that the Supreme Court established that a state capital sentencing system must (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). Saldaño argued that the "future dangerousness requirement is no longer capable of reasoned application to [him] because it requires reference to his present condition."

The Texas Court of Criminal Appeals rejected the claim on direct appeal. *Saldaño*, 232 S.W.3d at 91 (citing *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976); *Sells v. State*, 121 S.W.3d 748, 767-68 (Tex. Crim. App. 2003); *Murphy v. State*, 112 S.W.3d 592, 606 (Tex. Crim. App. 2003)). The Supreme Court subsequently denied his petition for a writ of certiorari.

In analyzing this ground for relief, the Court initially notes that the presentation of the claim is internally inconsistent. At times, Saldaño argues that the statute is vague as to the period of time in which he should have been evaluated for future dangerousness. At other times, he complains that the application of the statute required reference to his present condition, in other words, as it was in 2004. In either case, the ground for relief lacks merit.

Saldaño's assertion that Article 37.071 § 2(b)(1) is unconstitutionally vague as applied to him ignores clearly established case law by both the Supreme Court and Fifth Circuit. The vagueness

concept used in capital cases is a term of art. The Supreme Court observed that a State's capital punishment "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Gregg*, 428 U.S. at 195 n.46. States must take steps to make sure that jury instructions are not so vague in their application so as to lead to arbitrary and capricious results. The special issues used in the Texas capital punishment scheme have repeatedly been upheld by the Supreme Court despite allegations of vagueness. *See Jurek*, 428 U.S. at 272; *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Johnson v. Texas*, 509 U.S. 350, 373 (1993). The Fifth Circuit has likewise rejected arguments that Texas' future dangerousness special issue is unconstitutionally vague. *Scheanette v. Quarterman*, 482 F.3d 815, 827-28 (5th Cir. 2007); *Turner*, 481 F.3d at 299-300; *Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006). The Supreme Court observed that the issues posed in sentencing proceedings in Texas are not vague since they have a "common-sense core of meaning." *Pulley v. Harris*, 465 U.S. 37, 49 n.10 (1984); *Milton v. Procunier*, 744 F.2d 1091, 1095-96 (5th Cir. 1984), *cert. denied*, 471 U.S. 1030 (1985).

Saldaño's claim that the future dangerousness special issue is vague as applied to him because of his special circumstances is disingenuous. The statute is abundantly clear. It distinguishes between evidence of a defendant's conduct up until the time of the commission of an offense and his subsequent conduct. Since Saldaño had been found guilty of capital murder, the jury was free "to consider a myriad of factors to determine whether death is the appropriate punishment." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) (citations omitted). The jury had "unbridled discretion." *Id.* The jury was entitled to consider all of the evidence available in evaluating Saldaño's future dangerousness, both aggravating and mitigating. Despite Saldaño's claims to the contrary, the jury was perfectly capable

of employing a reasoned application of the statute to him. The thrust of Saldaño's claim is that he did not want the jury to be informed about his misconduct while confined in prison. He does not believe that it was fair for the jury to consider this evidence because he allegedly spent "eight years wrongfully incarcerated on death row," particularly since the State confessed error. This line of argument is inconsistent with *Tuilaepa*. The issue of whether it was fair for the jury to consider this evidence has nothing to do with whether the statute is unconstitutionally vague. The statute is clear. Saldaño is trying to create an artificial distinction where none exists. The claim lacks merit.

Finally, the Director correctly argued that relief is foreclosed by the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 316 (1989). *See also Rowell v. Dretke*, 398 F.3d 370, 377-78 (5th Cir.), *cert. denied*, 546 U.S. 848 (2005). Shortly after the present petition was filed, the Fifth Circuit cited *Teague* in rejecting yet another attack on the future dangerousness special issue as vague, saying "[b]ecause no court has previously found the wording of Texas's future dangerousness special issue to be unconstitutionally vague, [Petitioner] is not entitled to relief." *Kerr v. Thaler*, 384 F. App'x 400, 404 (5th Cir. 2010), *cert. denied*, 562 U.S. 1142 (2011). *Teague* likewise applies in this case. Saldaño has not shown that he is entitled to relief based on his eighth ground for relief.

9. Under evolving standards of decency, Saldaño's death penalty trial and future execution would violate the 8th and 14th Amendments to the United States Constitution because of his mental illness.

The ninth ground for relief focuses on Saldaño's argument that he should not be executed because of mental illness. Alternatively, he argues that his death sentence should not be carried out because he is incompetent. He once again refers to the evidence of his mental decline while confined on death row. He correctly observes that the Supreme Court has created categorical exceptions from execution: *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibits the execution of the mentally retarded); *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibits the execution of people who committed capital

offenses before their eighteenth birthday); *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (prohibits the execution of the insane). He acknowledges that other than incompetency, he does not presently fall within any categorical exemption from execution. He argues, however, that Eighth Amendment jurisprudence in this area is rapidly evolving and that it should encompass mental illness.

Both issues were fully developed during the state habeas corpus proceedings. With respect to the issue of whether mental illness renders a defendant ineligible for execution, the state habeas court made the following finding:

> 201. The Court recognizes that federal courts and other state courts have similarly rejected the argument. *See In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (finding that *Atkins* did not exempt mentally ill inmates from execution); *In re Woods*, 155 Fed. Appx. 132, 136 (5th Cir. 2005) (same); *Haynes v. Quarterman*, No. H-05-3424, 2007 WL 268374, slip. op. at 8 (S.D. Tex. Jan. 25, 2007); *State v. Johnson*, 207 S.W.3d 24, 50-51 (Mo. 2006) (noting "both federal and state courts have refused to extend *Atkins* to mental illness situations"); *State v. Hancock*, 840 N.E.2d 1032, 1059-60 (Ohio 2006).
>
> 220. The Court finds and concludes that [Saldaño's] claim that he is categorically immune from execution is without merit and should be denied.

SHCR-04 at 1278, 1281. The Texas Court of Criminal Appeals subsequently adopted the finding by the state habeas court. Saldaño has not shown that, as required by 28 U.S.C. § 2254(d)(1), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. The Court would add that the Fifth Circuit's more recent decisions have regularly rejected claims that the mentally ill may not be executed. *ShisInday v. Quarterman*, 511 F.3d 514, 521 (5th Cir. 2007), *cert. denied*, 555 U.S. 815 (2008); *Turner v. Epps*, 460 F. App'x. 322, 328 (5th Cir.), *cert. denied*, 132 S. Ct. 1306 (2012); *Ripkowski v. Thaler*, 438 F. App'x 296, 303 (5th Cir. 2011),

cert. denied, 132 S. Ct. 1544 (2012). Relief is unavailable in light of clearly established case law in this Circuit.

The second issue raised by the ground for relief is the claim that the State may not carry out the execution because Saldaño is incompetent. The state habeas court recognized that incompetent death row inmates may not be executed, but "*Ford*-based claims of incompetency to be executed 'remain unripe at early stages of the proceedings.'" SHCR-04 at 1282 (citing *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007)). The court went on to find that there was no reason to believe that Saldaño's execution date would be set any time in the near future; thus, his claim of incompetence was premature. *Id.* Once again, the Texas Court of Criminal Appeals adopted the findings. Saldaño has not shown that, as required by 28 U.S.C. § 2254(d)(1), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. Indeed, federal case law clearly supports the conclusion that Saldaño raised this issue prematurely. *See Panetti*, 551 U.S. at 947; *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998); *ShisInday*, 511 F.3d at 521-22. The issue of whether Saldaño is incompetent to be executed becomes ripe only after an execution date is set, which has not occurred in this case, and then he must exhaust the issue in state court before raising it in federal court. *ShisInday*, 511 F.3d at 521-22. This issue is not ripe for consideration. The claim of mental incompetence should be dismissed without prejudice. *Green v. Thaler*, 699 F.3d 404, 408 (5th Cir. 2012).

10. Saldaño's due process rights were violated by the trial court allowing the State to present evidence which the defense did not have a meaningful opportunity to rebut.

The tenth ground for relief relates to a statement Saldaño made to Officer Poindexter, a transportation officer, during the course of the trial. Officer Poindexter reported that Saldaño told him that he "killed three people in Oak Cliff." As would be expected, Poindexter reported the statement. The State, in turn, requested a hearing, outside of the jury's presence, to give the defense notice of the statement Saldaño allegedly made to Poindexter, in accordance with Tex. R. Evid. 404(b). The defense objected to this testimony as irrelevant and argued that the prejudicial nature of the testimony was outweighed by its probative value. Tex. R. Evid. 403. Defense counsel referred to the statement as "babble." Nonetheless, Poindexter was permitted to testify before the jury. Saldaño argues that "[a] state violates a capital defendant's right to due process under the fourteenth amendment when it uses evidence at the sentencing phase of the trial which the defendant does not have a meaningful opportunity to rebut." *Blackmon v. Scott*, 22 F.3d 560, 566 (5th Cir. 1994) (citing *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality)).

The Texas Court of Criminal Appeals fully addressed the issue on direct appeal as follows:

> In point of error twenty-three, [Saldaño] again complains that "the trial court erred in overruling [Saldaño's] objection to oral statements made by [Saldaño] while he was in custody." In point of error twenty-four, [Saldaño] complains that "the trial court erred when it permitted the State to present testimony of a confession by [Saldaño] to prior murders as a prior bad act, since the State failed to name the alleged victim of the crime, or indicate when or where it occurred, and left [Saldaño] with too little time and information to respond."
>
> The record reflects that, as [Saldaño] was being transported back to the court house from jail after a lunch break during the punishment hearing, [Saldaño] spontaneously told a county detention officer (Poindexter) that he had "killed three people in Oak Cliff." [Saldaño] objected to the admission of this evidence on hearsay grounds. The State responded that it was a "party opponent admission" and not hearsay. The trial court overruled [Saldaño's] objection. Poindexter provided the following testimony before the jury.

> Q. [STATE]: Now, on your way over back to the courtroom after lunch today, did you have a conversation with [Saldaño]?
>
> A. [POINDEXTER]: Yes, ma'am.
>
> Q. And what was the nature of that conversation?
>
> A. I was asking him from where about in Argentina he was, as we were walking through the tunnel.
>
> Q. And during the course of this conversation, did the—did [Saldaño] make any statements that alarmed you?
>
> A. Yes, ma'am. He stated kind of in a—we were talking about Argentina, and then there was a pause, and out of nowhere he just kind of turned and looked at me and said, You know I killed three people in Oak Cliff.
>
> We decide that the trial court did not abuse its discretion to admit this evidence. The trial court would not have abused its discretion to decide that the very fact that [Saldaño] would make such a statement (without regard to its truthfulness) in the course of his capital-sentencing proceeding would have some relevance to both special issues.

Saldaño, 232 S.W.3d at 104.

The ground for relief focuses, in part, on Rule 403 of the Texas Rules of Evidence. Saldaño argues that the prejudicial nature of the evidence was outweighed by its probative value. However, federal habeas corpus relief ordinarily is unavailable when a petitioner challenges an evidentiary ruling. The Fifth Circuit provided the following explanation:

> Due process is implicated only for rulings "of such magnitude" or "so egregious" that they "render the trial fundamentally unfair." It offers no authority to federal courts to review the mine run of evidentiary rulings of state trial courts. Relief will be warranted only when the challenged evidence "played a crucial, critical, and highly significant role in the trial."

Gonzales v. Thaler, 643 F.3d 425, 430 (5th Cir. 2011).

In the present case, Saldaño's statement was a peripheral matter. He was not being tried for murders that may have been committed in Oak Cliff. The evidence was not being offered for the truth

of the matter being asserted. Instead, it was offered because he made such a statement, regardless of whether he was speaking truthfully. The Texas Court of Criminal Appeals found that the statement was admissible under these circumstances under Texas law, and the Director persuasively argued that the court should defer to the Texas Court of Criminal Appeals' determination of Texas law. *Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998), *cert. denied*, 526 U.S. 1148 (1999); *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995). For purposes of federal habeas proceedings, Saldaño has not shown that the admission of the statement was improper or that the admission of the statement was so egregious that it rendered the whole trial fundamentally unfair. Moreover, as a peripheral matter, it did not play a crucial, critical and highly significant role in the trial.

The ground for relief also focuses on the Fifth Circuit's decision in *Blackmon*. Saldaño correctly notes that the Fifth Circuit held that there is a due process violation when the state uses evidence during the sentencing phase of the trial "which the defendant does not have a meaningful opportunity to rebut." *Blackmon*, 22 F.3d at 566. The statement, however, must be considered in the context in which it was made. Blackmon alleged that the State hid two witnesses and did not give him adequate access to a third. The case was remanded for development of the facts and whether the petitioner was prejudiced. *Id.* The facts of this case are entirely different. Saldaño made the statement to Poindexter during the course of the trial. Poindexter reported Saldaño's statement. The State then gave notice to the defense team about the statement. The defense had access to both Saldaño and Poindexter. There was no attempt to hide witnesses. Saldaño was not prejudiced by the State trying to hide witnesses. Saldaño was not denied a meaningful opportunity to rebut the evidence. *Blackmon* does not provide any basis for relief.

Finally, Saldaño argues that the use of a courtroom officer, Poindexter, as a witness was a perfect example of testimony that would "encourage resolution of material issues on an inappropriate

basis." *Wilson v. State*, 179 S.W.3d 240, 254 (Tex. App. - Texarkana 2005, no pet.). He notes that calling a bailiff as a witness involves a delicate balancing of "the extent of the bailiff's association with the jury and the importance of the testimony." *Reed v. State*, 974 S.W.2d 838, 840 (Tex. App. - San Antonio 1998, pet. ref'd). In response, the Director appropriately noted that the Supreme Court found that a defendant's due process rights were subverted when a State's key witnesses were bailiffs who had continuous contact with the jury during a three day trial. *Turner v. Louisiana*, 379 U.S. 466, 473 (1965). Years later, the Supreme Court observed that its decision in *Turner* did not establish a rigid *per se* rule requiring an automatic reversal when a State's witness comes into contact with the jury. *Gonzales v. Beto*, 405 U.S. 1052, 1054 (1972) (concurring opinion). Instead, to determine whether a defendant's due process rights were violated, a court must assess both the extent of the bailiff's association with the jury and the importance of his testimony. *Id.* In *Reed*, the court found that the defendant was not denied due process because the officer in question performed "bailiff-like" duties in a limited capacity and had minimal contact with the jury. *Reed*, 974 S.W.2d at 840. In the present case, there is no evidence that Poindexter had any association with the jury; instead, his role was limited to transporting Saldaño back and forth between the jail and courtroom. Furthermore, Poindexter was not a key witness. Saldaño was not denied due process under these circumstances. He is not entitled to federal habeas corpus relief on his tenth ground for relief.

11. The trial court's failure to allow evidence of the co-defendant's life sentence as mitigating evidence violated Saldaño's constitutional rights.

In his eleventh ground for relief, Saldaño complains that he was not permitted to present evidence that co-defendant Chavez received a life sentence. He noted that a sentencer in a capital case must not be precluded from considering, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis of a

sentence less than death." *Lockett*, 438 U.S. at 604. The Supreme Court subsequently reiterated that evidence, even if not "relate[d] specifically to the petitioner's culpability for the crime he committed" must be treated as relevant mitigating evidence if it serves "as a basis for a sentence less than death." *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (citing *Lockett*, 438 U.S. at 604). Later still, the Court specified that "States cannot limit the sentencer's consideration of any relevant evidence that could cause it to decline to impose the death penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). Saldaño argues that the case law supports his claim that he was entitled to submit evidence that his co-defendant received a life sentence as mitigating evidence. *See Parker v. Dugger*, 498 U.S. 308, 314 (1991); *Lankford v. Idaho*, 500 U.S. 110 (1991); *Bolender v. Singletary*, 16 F.3d 1547, 1565 n.27 (11th Cir. 1994).

The case law, however, does not support Saldaño's claim. In *Lockett*, the Supreme Court added that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604 n. 12. The Fifth Circuit has repeatedly held that evidence of a co-defendant's lesser sentence does not amount to constitutionally relevant mitigating evidence. *Miniel v. Cockrell*, 339 F.3d 331, 337 n.1 (5th Cir. 2003) (citing *United States v. Ives*, 984 F.2d 649, 650 (5th Cir. 1993)); *Cordova v. Johnson*, 157 F.3d 380, 383-84 (5th Cir. 1998); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986). The Director also appropriately pointed out that Saldaño's reliance on *Parker* is misplaced. The Supreme Court merely found that the Florida courts had not considered all of the mitigating evidence in the record. *Parker*, 498 U.S. at 322-23. There was no requirement that the co-defendant's lesser sentence be considered.

On direct appeal in this case, Saldaño argued that the rule in Texas precluding the introduction of such evidence was impliedly overruled by *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Tennard*,

the Supreme Court reiterated that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Tennard*, 542 U.S. at 285 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)). The Texas Court of Criminal Appeals appropriately observed that "these cases still require that the proffered evidence relate to the defendant's '*own* circumstances.'" *Saldaño*, 232 S.W.3d at 100 (emphasis added). The decision was in accordance with current case law. Neither Texas nor Fifth Circuit case law entitles a defendant to introduce evidence of a co-defendant's lesser sentence as mitigating evidence. The eleventh ground for relief lacks merit.

12. The Texas death penalty statute is unconstitutional because it allows a jury unbridled discretion to determine who should live or die.

Saldaño argues in his twelfth ground for relief that the Texas death penalty statute under which he was convicted is unconstitutional because it allows a jury unbridled discretion in determining who should live or die. He opines that the evolution of the death penalty has come full circle because, under the present Texas statute as applied to him, the jury has once again been given unfettered discretion that both invites and permits arbitrary application of the ultimate penalty. *Cf. Gregg v. Georgia*, 428 U.S. at 189.

Saldaño's argument, however, has been repeatedly rejected by the Fifth Circuit. The Supreme Court distinguished between two aspects of the capital sentencing decision; more specifically, the eligibility decision and the selection decision, in *Tuilaepa*, 512 U.S. at 971-72. The Court has upheld the constitutionality of Texas' procedures for determining the existence of aggravating circumstances to make eligibility decisions. *See Jurek*, 428 U.S. at 276. In making the selection decision, the jury must be allowed to make "an *individualized* determination" by considering "relevant mitigating

evidence of the character and record of the defendant and the circumstances of the crime." *Tuilaepa*, 512 U.S. at 972. A jury "may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" *Id.* at 979-80 (quoting *Zant v. Stephens*, 462 U.S. 862, 875 (1983)). Citing *Tuilaepa*, the Fifth Circuit has regularly rejected complaints that juries in Texas have unbridled discretion to determine who should live or die. *See, e.g., Turner*, 481 F.3d at 299; *Woods v. Cockrell*, 307 F.3d 353, 359 (5th Cir. 2002); *Moore v. Johnson*, 225 F.3d 495, 506-07 (5th Cir. 2000) ("Texas followed Supreme Court instructions to the letter"), *cert. denied*, 532 U.S. 949 (2001). More recently, since Saldaño filed his brief in this case, the Fifth Circuit rejected an identical claim raised by his current attorney in *Adams v. Thaler*, 421 F. App'x 322, 337 (5th Cir.), *cert. denied*, 132 S. Ct. 399 (2011). The ground for relief lacks merit.

13. The Texas death penalty statute, which instructs the jury that ten of them must agree in order to answer special issue no. 1 with a "no" answer, is unconstitutional because it fails to inform jurors that the effect of the jury's failure to reach a unanimous verdict on any issue at the punishment phase would result in a life sentence.

Saldaño next argues that the Texas capital punishment scheme is unconstitutional because it fails to inform the jury about the effect of a non-unanimous verdict on the special sentencing issues. He contends that the Eighth and Fourteenth Amendments require jurors to be instructed that a life sentence is automatically imposed if the jury is unable to respond unanimously to the special issues. Saldaño relies on the Supreme Court's decisions in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990). The Fifth Circuit, however, has repeatedly rejected such arguments. *See, e.g., Dreury v. Thaler*, 647 F.3d 535, 542-43 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1550 (2012); *Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005), *cert. denied*, 546 U.S. 1177 (2006); *Miller v. Johnson*, 200 F.3d 274, 288-89 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000). More

recently, since Saldaño filed his brief in this case, the Fifth Circuit rejected an identical claim raised by his current attorney in *Adams*, 421 F. App'x. at 335. Relief on this claim is foreclosed by Fifth Circuit precedent. The thirteenth ground for relief lacks merit.

14. The State's failure to provide meaningful appellate review of the sufficiency of the evidence to support the jury's verdict concerning mitigating evidence violates Saldaño's constitutional rights.

Saldaño next complains that the Texas Court of Criminal Appeals has rejected every opportunity to review a challenge to the sufficiency of the evidence to support a negative answer to the mitigation special issue. On direct review in this case, the Texas Court of Criminal Appeals declined Saldaño's "invitation to review" its past decisions on the issue. *Saldaño*, 232 S.W.3d 108-09. Saldaño acknowledges that his argument was rejected by the Fifth Circuit in *Rowell v. Dretke*, 398 F.3d at 378. He states that he is raising the claim in order to preserve it in the event he is granted a new sentencing hearing in order to present his mitigating evidence. The Court notes that the Fifth Circuit has rejected the claim in several cases in addition to *Rowell*. *See, e.g.*, *Woods*, 307 F.3d at 359-60; *Moore*, 225 F.3d at 506-07. Moreover, the Fifth Circuit rejected the identical claim presented by Saldaño's current attorney in *Adams*, 421 F. App'x at 336-37. Relief on this claim is foreclosed by Fifth Circuit precedent. The fourteenth ground for relief lacks merit.

15. The cumulative effect of these constitutional violations denied Saldaño due process of law, even if no separate infraction by itself rose to that magnitude.

Saldaño's final ground for relief is a cumulative error claim. He argues that the constitutionality of a trial can be compromised by a series of events none of which individually violated his constitutional rights. The ground for relief must be rejected for two reasons. First of all, the claim is unexhausted and procedurally barred. Saldaño has not shown cause and prejudice or a fundamental miscarriage of justice in order to overcome the procedural bar. Saldaño referenced the

Supreme Court's decision in *Trevino*, but he failed to show that the standards announced in *Martinez* and *Trevino* apply in this case. More specifically, he failed to show underlying claims of ineffective assistance of counsel that are substantial and that his initial state habeas counsel was ineffective for failing to present those claims in his first state habeas application.

The ground for relief must be rejected for the additional reason that the Fifth Circuit has regularly rejected cumulative error claims while noting that federal habeas relief is available only for cumulative errors that are of constitutional dimension. *Coble v. Quarterman*, 496 F.3d 430, 440 (5th Cir. 2007); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir.), *cert. denied*, 522 U.S. 880 (1997); *Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993). The Fifth Circuit has emphasized that "[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) (citing *Derden v. McNeel*, 978 F.2d 1453, 1461 (5th Cir. 1992)), *cert. denied*, 519 U.S. 1094 (1997). Saldaño has not shown a violation of his constitutional rights based on cumulative errors. He has not shown that he is entitled to relief based on his final claim.

In conclusion, Saldaño has not shown that he is entitled to federal habeas corpus relief. The petition for a writ of habeas corpus should be denied.

VI. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Saldaño has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made

a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition 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." *Id.*

In this case, reasonable jurists could not debate the denial of Saldaño's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, the court finds that Saldaño is not entitled to a certificate of appealability as to his claims. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. It is further

ORDERED that Saldaño's claim that he is presently incompetent and may not be executed is premature and **DISMISSED** without prejudice. It is further

ORDERED that a certificate of appealability is **DENIED**. It is finally

ORDERED that all motions not previously ruled on are **DENIED**.

SIGNED this 18th day of July, 2016.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE