CASE NO. ________ (CAPITAL CASE) (18A1190)

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER DEVON JACKSON,
Petitioner,

v.

LORIE DAVIS, DIRECTOR,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Dated: July 10, 2019

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EXHIBIT
A

United States District Court
Southern District of Texas
FILED

DEC 10 2018

David J. Bradley, Clerk of Court

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 10, 2018
Lyle W. Cayce
Clerk

No. 18-70014

CHRISTOPHER DEVON JACKSON,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CV-208

Before CLEMENT, OWEN, and GRAVES, Circuit Judges.

PER CURIAM:*

Christopher Jackson was convicted and sentenced to death for killing Eric Smith after carjacking the SUV that Smith was driving. Jackson seeks a certificate of appealability ("COA") as to his allegations of ineffective assistance of counsel. Finding his arguments unpersuasive, we DENY his request.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

A jury convicted and sentenced Jackson to death for killing Smith while committing or attempting to commit robbery. The Texas Court of Criminal Appeals ("TCCA") upheld Jackson's conviction. *Jackson v. State*, 2010 WL 114409 (Tex. Crim. App. Jan. 12, 2010). The Supreme Court denied *certiorari*. *Jackson v. Texas*, 562 U.S. 844 (2010).

Jackson then filed a state application for *habeas corpus*. After briefing and a hearing, the trial court recommended that the TCCA deny relief and submitted proposed findings of fact and conclusions of law. Following its own review, the TCCA adopted the trial court's position and denied Jackson's application. *Ex parte Jackson*, 2014 WL 5372347 (Tex. Crim. App. Aug. 20, 2014) (*per curiam*).

Jackson filed a federal petition for *habeas corpus*. After briefing was complete, and limited discovery, the district court denied *habeas* relief and a COA in a memorandum opinion and order. Jackson now requests a COA from this court.

STANDARD OF REVIEW

Jackson's COA request is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We will grant a COA under AEDPA only if Jackson can make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In a death-penalty case, we resolve any doubts over whether a COA is proper in the petitioner's favor. *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

In deciding Jackson's COA question, we must keep in mind the extraordinary deference that AEDPA places around the TCCA's conclusions of law and findings of fact—it is through this deferential lens that the district

court evaluated Jackson's constitutional claims. Under AEDPA, a federal court cannot grant *habeas* relief to a state prisoner on any claim adjudicated on its merits by the state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). And our inquiry is "limited to the record that was before the state court" and "focuses on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

A decision is contrary to federal law when it either reaches a conclusion opposite to that of the Supreme Court on a question of law, or arrives at an opposite result on facts that are materially indistinguishable from those confronted by a relevant Supreme Court case. *Sprouse v. Stephens*, 748 F.3d 609, 616 (5th Cir. 2014). A decision involves an unreasonable application of federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008) (quoting *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000)). The state court's decision must not just be wrong; it must be unreasonable—meaning no "fairminded jurist" could possibly agree with it. *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

On appeal, we review "the district court's findings of fact for clear error and its conclusions of law de novo." *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013). An appellate court "will not disturb a district court's factual findings unless they are implausible in light of the record considered as a whole." *Wiley v. Epps*, 625 F.3d 199, 213 (5th Cir. 2010). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)).

DISCUSSION

In the district court, Jackson argued that his counsel performed ineffectively by failing to investigate and present mitigating evidence during the punishment phase. Jackson had raised the same claim in state court.

Jackson reasserted the claim in the original state petition, along with additional grounds for relief not presented to the state court. The district court held that the new grounds were procedurally defaulted because they had not been exhausted in state court. Aside from a conclusory footnote asserting that the district court should not have "split" his claim, Jackson has offered no argument contesting the procedural default.

Jackson's reply argues that "Respondent[] . . . artificially segregate[es] Mr. Jackson's . . . claim into a supposed 'exhausted' and an 'unexhausted' portion." But Respondent did no such thing; it simply adopted the same framework articulated by the district court. If Jackson had wanted to challenge that framework, he should have done so clearly and explicitly in his opening brief. *Cf. Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1546 n.9 (5th Cir. 1991) ("Customarily we decline even to consider arguments raised for the first time in a reply brief."). Accordingly, any challenge to the procedural default is waived, and we will consider only the rejection of the claims characterized by the district court as properly exhausted. *Summers v. Dretke*, 431 F.3d 861, 870 (5th Cir. 2005) (A failure "to adequately brief . . . issues" results in waiver).

We will consider Jackson's assertion that his trial counsel failed to properly investigate, develop, and present mitigation evidence concerning Jackson's mental health. To succeed under *Strickland*, Jackson must show that counsel's performance was deficient, and that this deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The district court painstakingly reviewed the evidence and arguments Jackson now wishes trial counsel would have presented to the jury. It cogently

explained why the state *habeas* court rejected these claims and, attentive to the deferential standard of review, independently determined that those conclusions were consistent with *Strickland* and its progeny.

There is no reason to repeat that analysis here. In short, trial counsel did not abdicate his responsibility to prepare for and conduct the punishment phase. He hired experts, called family members and a mitigation investigator to the stand to discuss Jackson's background, and made reasoned decisions about what kind of evidence or lines of inquiry he thought would do more harm than good. In other words, he had sufficient familiarity with Jackson's mental-health history and family background to make the tactical decisions that he made about the evidence to put before the jury and the vehicle by which to put it.

And even if the evidence and experts had been presented as Jackson now wishes, the jury would still have had to consider Jackson's long-standing, intensifying, and consistent—even throughout the trial—violent behavior. Given the weight of this overwhelming evidence, Jackson has not shown any reasonable probability of a different result at sentencing.

CONCLUSION

The district court's opinion is thorough and well-reasoned with respect to all of the preserved issues. No reasonable jurist could disagree. Jackson's request for COA is DENIED.

Certified as a true copy and issued as the mandate on Dec 10, 2018

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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NEW ORLEANS, LA 70130

December 10, 2018

Mr. David J. Bradley
Southern District of Texas, Houston
United States District Court
515 Rusk Street
Room 5300
Houston, TX 77002

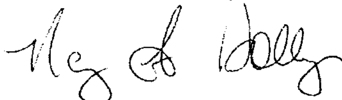
No. 18-70014 Christopher Jackson v. Lorie Davis, Director
USDC No. 4:15-CV-208

Dear Mr. Bradley,

Enclosed is a certified copy of an opinion-order entered on December 10, 2018. We have closed the case in this court.

Sincerely,

LYLE W. CAYCE, Clerk



By: ______________________
Nancy F. Dolly, Deputy Clerk
504-310-7683

Enclosure(s)

cc: Mr. Matthew Birk Baumgartner
Mr. Stephen M. Hoffman

EXHIBIT
B

United States District Court
Southern District of Texas
ENTERED
March 07, 2018
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHRISTOPHER DEVON JACKSON,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. 4:15-CV-208
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

A Texas jury convicted Christopher Devon Jackson of capital murder in 2007. He received a death sentence. Jackson unsuccessfully availed himself of state appellate and habeas remedies. Jackson now seeks federal habeas corpus relief. (Instrument No. 75). Respondent Lorie Davis has moved for summary judgment. (Instrument No. 77).

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") affords a limited and deferential review of a state capital inmate's conviction and sentence. Having considered the pleadings, the record, and the application law – paying special attention to AEDPA's constraints on habeas review – the Court **GRANTS** summary judgment in Respondent's favor and **DENIES** Jackson's federal habeas petition. The Court will not certify any issue for review by the Court of Appeals for the Fifth Circuit.

BACKGROUND

After Hurricane Katrina hit New Orleans in 2005, Eric Smith and his girlfriend moved to Houston, Texas. In the early morning of December 5, 2005, Smith left their apartment in a rented vehicle to buy cigarettes at a nearby convenience store. Smith carried a large amount of cash with him. Smith entered the store, purchased some cigarettes, and gave the attendant

money for gas. A few minutes later, Smith approached the attendant again, saying that he had been robbed. The attendant looked out the window and saw that Smith's rented vehicle was gone. Smith told the attendant that he would call 9-1-1 on his cell phone.

A 9-1-1 call taker received a phone call minutes later from a man who said he had been robbed. The call taker did not obtain the man's name, but as they were talking she heard footsteps on the other end, incomprehensible voices, and then a gunshot. The man never returned to the phone.

A short time later a passerby stopped his car to help a man he had seen lying on the ground. The man, later identified as Smith, was bleeding from a single shotgun wound in the back of his head. He soon died.

The police subsequently found Smith's vehicle at an apartment complex not far from the convenience store. Still, the investigation was at a standstill until the police received information that Wenshariba Gage, Jackson's girlfriend, had been present when Smith was killed. When police met with Gage, she turned over incriminating evidence that implicated Jackson in Smith's murder. Gage described the crime to police officers. The police soon thereafter spoke with Jackson who had previously been arrested for another crime. Jackson's subsequent confession and Gage's testimony would serve as the centerpieces of the prosecution against him.

The State of Texas charged Jackson with intentionally shooting Smith while in the course of a robbery. Clerk's Record at 2.[1] The trial court appointed R.P. "Skip" Cornelius and Hattie Sewel Mason Shannon to represent Jackson at trial.[2] Trial counsel unsuccessfully moved to

[1] The state court proceedings in this case resulted in a voluminous record. The Court will cite the transcript containing trial court motions and docket entries as Clerk's Record at ___. The reporter's record containing the trial court proceedings will be cited as Tr. Vol. ___ at ___, and the record from Jackson's state habeas proceedings as State Habeas Record at ___. The Court will cite any additional records as clearly as possible.

[2] Unless necessary to identify one of his defense attorneys, the Court will refer to Mr. Cornelius and Ms. Shannon jointly as "trial counsel" or by a similar designation.

suppress Jackson's confession. Clerk's Record at 56-58.

At trial, Jackson's confession and Gage's testimony filled in the events that led to Smith's murder. Both Jackson and Gage told the police that they were walking down the street when Jackson approached Smith and stole his vehicle. Jackson drove away, but returned a few minutes later to pick up Gage. As Jackson returned, he saw Smith walking down the road. Jackson jumped out of the car and shot Smith in the head with his shotgun. Jackson told the police that he only shot after Smith lunged at him. Circumstantial evidence confirmed Jackson's identity as the murderer. On his arrest, the police found shotgun shells consistent with the one that killed Smith. Jackson gave Gage the keys to Smith's vehicle, which she in turn gave to the police. Jackson possessed a large amount of cash after the murder, presumably taken from Smith. All told, the State presented a strong case for Jackson's guilt.

The jury found Jackson guilty as charged in the indictment.

A Texas jury decides a capital defendant's sentence by answering special-issue questions. In this case, the special issues asked: (1) will the defendant be a future danger to society; and (2) do sufficient circumstances mitigate against a death sentence? *See* TEX. CRIM. CODE art. 37.071 § 2(b); Clerk's Record at 881-82. The State based its case for a death sentence on testimony and evidence showing Jackson's long and extensive history of lawlessness. As a youth, Jackson committed various bad acts while in the custody of Child Protective Services, including repeated bullying, threatening, and assaulting fellow residents. Jackson also assaulted staff members at the facility. After prosecution for two assault cases, Jackson was put on probation, but further assaults lead to commitment in the Texas Youth Commission ("TYC"). Jackson committed over one hundred violations of TYC rules, including being a danger to others, disrupting the program, failing to follow rules or comply with staff requests, assaults on other youth, assaults on staff

members, sexual contact with others, and vandalism.

Jackson's violence escalated after reaching adulthood. The State presented evidence that Jackson was a member of the Bloods gang, committed assaults, fled from police, possessed weapons, stole weapons, threatened others, robbed, and pointed guns at people. Jackson abused his girlfriend, to the extreme of repeatedly kicking her in the stomach when she was pregnant with, but refused to abort, his baby. Shortly before the murder for which he was convicted, Jackson shot another man in the head during a robbery, but he survived. Jackson also told his girlfriend that he had killed before. While incarcerated before trial, Jackson committed jail infractions including possessing a weapon. Jackson told another inmate that he planned to escape by killing a jail guard. Jurors knew that violence was a constant, and escalating, theme in Jackson's life.

The State presented evidence that, while Jackson had previously been diagnosed with bipolar disorder and schizophrenia, a psychiatrist observed no sign of those disorders after his arrest. The psychiatrist opined that Jackson was malingering[3] symptoms of mental illness, largely to secure favorable benefits for himself.

The defense tried to secure a life sentence for Jackson by presenting significant mitigating evidence and testimony. Jackson had an unstable and chaotic home life. Jackson's grandmother testified that his mother was a poor parent. Lacking parenting skills, Jackson's mother allowed him to shuffle through the households of other family members. When Jackson lived with his aunt as a child, his mother only visited occasionally. Family members remembered Jackson as respectful and helpful. Jackson's mother gave up her parental rights

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[3] The expert defined "'malingering' as a person who for his own purposes wants to appear psychotic and out of touch with reality, but who really is not" and "said that it takes a person who is quite intelligent and clever to try to do that." *Jackson v. State*, 2010 WL 114409, at *6 n.33 (Tex. Crim. App. 2010).

after Jackson's aunt died when he was thirteen. He never saw his mother afterwards and never met his father. As Jackson's behavior worsened, he entered CPS custody.

Jackson's family suffered from mental illness. A clinical social worker, Bettina Wright, testified that Jackson's CPS records indicated that he had been admitted to the Twelve Oaks Medical Center because of suicidal ideation. Jackson admitted to feeling depressed, not being able to sleep, and feeling suicidal. The records indicated that Jackson was "on a record breaking number of psychiatric medications." Tr. Vol. 19 at 26-27.

The jury answered the special-issue questions in a manner requiring imposition of a death sentence.

Jackson raised nine grounds for relief on direct appeal to the Texas Court of Criminal Appeals. [4] The Court of Criminal Appeals rejected Jackson's claims and affirmed on January 13, 2010. *Jackson v. State*, No. AP-75-707, 2010 WL 114409 (Tex. Crim. App. Jan. 13, 2010) (not designated for publication).

Under Texas law, state habeas review proceeds concurrent to the direct appeal. *See* TEX. CODE CRIM. PRO. art. 11.071 §4. Through appointed counsel,[5] Jackson filed a state application for habeas relief raising twelve claims. After holding a hearing, the trial-level habeas court issued factual findings and legal conclusions, ultimately recommending that relief be denied. The Court of Criminal Appeals adopted the lower court's findings and conclusions and, based those determinations and its own review, denied relief on August 20, 2014. *Ex parte Jackson*, No. WR-78,121-01 (Tex. Crim. App. Aug. 20, 2014) (not designated for publication).

Jackson filed a timely federal petition for a writ of habeas corpus. (Instrument No. 24).

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[4] Jerome Godinich represented Jackson on direct appeal from his conviction and sentence.

[5] Danny K. Easterling represented Jackson on state habeas review.

The Court allowed limited discovery in this case. (Instrument No. 36). After engaging in discovery, Jackson filed an amended petition which raises the following grounds for relief:

1. Trial counsel provided ineffective representation in the penalty phase by failing to develop and present additional mitigating evidence.

2. Trial counsel's guilt/innocence phase representation violated constitutional norms in the handling of witnesses and evidence.

3. The prosecution suppressed evidence under *Brady v. Maryland*, 373 US 83 (1963), by not turning over material such as Child Protective Services ("CPS") records, Harris County Jail Mental Health and Mental Retardation Authority ("MHMRA") records, and interviews with a witness.

4. The trial court violated the Eighth and Fourteenth Amendments rights by excluding hospital and CPS records on hearsay grounds.

5. Jackson is actually innocent.

6. Racial bias tainted the choice to charge Jackson's crime as a capital offense.

(Instrument No. 75). Respondent has moved for summary judgment on both procedural and substantive grounds. (Instrument No. 77).[6] Respondent argues that Jackson did not exhaust claims two, three, five, and six in state court. Also, Respondent contends that claim four is barred pursuant to independent and adequate state procedural law. Respondent alternatively argues that all Jackson's claims lack merit.

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[6] Summary judgment is proper when the record shows "that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). A district court considering a motion for summary judgment usually construes disputed facts in a light most favorable to the nonmoving party, but must also view the evidence through "the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The general summary judgment standards hold in habeas only to the extent they do not conflict with AEDPA and other habeas law. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (Rule 56 "applies only to the extent that it does not conflict with the habeas rules"), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004).

Jackson did not file a timely reply to the pending summary judgment motion. After being ordered by the Court, Jackson filed a late summary judgment response entitled Petitioner's Consolidated Response to Respondent Davis's Motion for Summary Judgment and Reply to Respondent's Answer. (Instrument No. 87). Jackson's summary judgment response only addresses Respondent's arguments relating to his first ground for relief.

This matter is ripe for adjudication. The Court will first discuss those claims Jackson has not presented to the state courts before turning to the two claims Jackson exhausted.

JACKSON'S UNEXHAUSTED CLAIMS

As previously mentioned, Respondent argues that Jackson did not litigate the following claims in state court: trial counsel's guilt/innocence phase representation violated constitutional norms (claim two); the prosecution suppressed *Brady* evidence (claim three); Jackson is actually innocent of the crime for which he was convicted (claim five); and racial bias tainted his prosecution (claim six). Jackson does not dispute the fact that he never raised those issues in state court. Because States "hold the initial responsibility for vindicating constitutional rights," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), federalism guarantees that the States have "an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (internal citations and quotations omitted). AEDPA precludes habeas relief on unexhausted claims. *See* 28 U.S.C. § 2254(b)(1) (stating that a federal habeas petition "shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State").

Texas state law would prevent Jackson from litigating his unexhausted claims in a successive habeas application. An inmate who files a petition containing unexhausted claims usually cannot return to state court because Texas' abuse-of-the-writ doctrine (codified at TEX.

CODE CRIM. PRO. art. 11.071 § 5) generally prohibits the filing of successive state habeas applications. This absence of available state remedies results in a federal procedural bar of the unexhausted claims. *See Williams v. Thaler*, 602 F.3d 291, 305 (5th Cir. 2010). Because Jackson cannot raise claims two, three, five, and six in a successive habeas application, a state procedural bar precludes federal consideration of their merits.

Jackson makes no effort to overcome the procedural bar of his unexhausted claims.[7] This Court cannot grant relief on claims two, three, five, and six.

Despite the procedural barriers to federal relief, the Court has reviewed the merits of each unexhausted claim. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). For the reasons given briefly below, the Court would deny relief if the unexhausted claims were fully available for federal review.

I. Ineffective Assistance of Trial Counsel in the Guilt/Innocence Phase (Claim Two)

Jackson claims that his trial attorneys provided deficient representation in the guilt/innocence phase. Under *Strickland v. Washington*, 466 U.S. 668, 686 (1984), a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 387

[7] A procedural default is not an insurmountable barrier to federal review. A federal court may review unexhausted claims if the petitioner shows cause and actual prejudice, or that a fundamental miscarriage of justice will occur. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999). Jackson does not make any effort to overcome the procedural bar of his unexhausted claims. In his summary judgment response, Jackson states that he only addresses his first claim because it "is sufficient alone to defeat summary judgment" but "does not waive any other claims." (Instrument No. 87 at 4). Jackson does not point to any rule or procedure condoning the practice of selectively responding to summary judgment arguments. As a result, this Court must treat Respondent's procedural arguments as unopposed, particularly as the procedural inadequacies in Jackson's unexhausted claims are undisputed. Jackson bears the burden of overcoming the procedural bar, and he has chosen not to explain why that procedural bar should not preclude habeas relief.

(2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). Jackson's pleadings broadly fault all counsel's efforts, stating that his trial attorneys "essentially abdicated their responsibility to prepare for trial" and "failed to interview any of the State's witnesses before cross-examining them." (Instrument No. 75 at 147). Jackson, however only identifies a few specific witnesses trial counsel should have interviewed, either for the purposes of cross-examination or to craft a guilt/innocence defense.[8]

Jackson first argues that trial counsel's lack of preparation resulted in inept cross-examination of prosecution witnesses Wenshariba Gage, Syed Sajjad, and Eddie Matthews. Also, Jackson claims that trial counsel should have interviewed, and presumably called, two individuals who did not testify at trial: Elaine Lurra, a homeless woman who had spoken with the police, and Abdul Folarin, a man who allegedly said that "the word on the street was that Ms. Gage … received some kind of monetary award for [her] role in turning in Mr. Jackson." (Instrument No. 75 at 161).

Jackson, however, does not provide any competent, admissible evidence proving what an investigation into Lurra or Folarin would have revealed. "[C]omplaints of uncalled witnesses are not favored," primarily because "allegations of what a witness would have stated are largely speculative." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). Inmates carry a "difficult burden" of "'nam[ing] the witness, demonstrat[ing] that the witness was available to testify and would have done so, set[ting] out the content of the witness's proposed testimony, and show[ing] that the testimony would have been favorable to a particular defense.'" *Cox v. Stephens*, 602 F. App'x 141, 146 (5th Cir. 2015) (quoting *United States v. Fields*, 761 F.3d 443, 461 (5th Cir.

[8] A petitioner can overcome the procedural bar of a *Strickland* claim by showing that state habeas counsel provided ineffective representation for not raising it. While Jackson argues that state habeas counsel was ineffective for not raising claim one, he makes no similar argument respecting claim two.

2014)). Jackson does not provide any affidavit from Lurra or Folarin, but makes unsupported allegations about what information they could have provided trial counsel. Jackson's petition wholly fails to meet the *Strickland* deficient performance or prejudice requirements regarding the uncalled witnesses.

Jackson similarly fails to show *Strickland* error in the cross-examination of witnesses Gage, Sajjad, and Matthews. Jackson does not provide any affidavit from those witnesses. Instead, Jackson bases his claims of inadequate cross-examination on information found in police reports or on problems with the trial testimony. The prosecutor's files were open to trial counsel's use. Trial counsel presumably used the prosecutor's files in preparation for trial. Counsel's chosen course of cross-examination and selection of witnesses is strategic. Only speculation supports Jackson's argument that asking different questions would have resulted in meaningfully different trial testimony. Even so, it is speculative that highlighting any differences and discrepancies between the police reports and trial testimony would have had any meaningful effect on the jury's consideration of Jackson's guilt.

Without competent evidence about what testimony would have come from calling different witnesses or engaging in different cross-examination, Jackson is only "[s]peculating about the effect of tinkering with the cross-examination questions" and guessing at potential trial testimony which "is exactly the sort of hindsight that *Strickland* warns against." *Castillo v. Stephens*, 640 F. App'x 283, 292 (5th Cir. 2016). Because Jackson's claim relies on nothing more than the "the distorting effects of hindsight," *Strickland*, 466 U.S. at 689, the Court would deny his second ground for relief.

II. *Brady* (Claim Three)

In his third ground for relief, Jackson claims that the prosecution suppressed evidence

which it had a duty to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963). "There are three components to a *Brady* violation. First, the evidence must be favorable to the accused, a standard that includes impeachment evidence. Second, the State must have suppressed the evidence. Third, the defendant must have been prejudiced." *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). Cases often add a fourth requirement: "nondiscovery of the allegedly favorable evidence was not the result of a lack of due diligence." *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003); *see also Graves v. Cockrell*, 351 F.3d 143, 153-54 (5th Cir. 2003). "When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility for failing to conduct a diligent investigation." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002).

Jackson complains that the State suppressed Harris County Jail medical records, CPS records, and information disclosed in additional interviews with witness Gage. Because Respondent's summary judgment motion persuasively refutes Jackson's argument that the State suppressed *Brady* material, and Jackson does not provide any response to Respondent's arguments, the Court will summarily deny this claim.[9]

Only Jackson's argument that the State withheld CPS records warrants additional discussion. Jackson premises his argument on the fact that "[t]he file current counsel received directly from CPS is over 400 pages long. That provided [to trial counsel] by the D.A., in contrast, is only 137 pages long." (Instrument No. 75 at 174).[10] Jackson argues that the CPS

[9] Importantly, Jackson himself would have known the underlying facts relating to much of the allegedly suppressed information, such as that describing his childhood background, his mental health issues, and the treatment he received. Jackson's own personal knowledge provided a basis by which counsel could have discovered, and presented evidence of, the main facts on which Jackson bases his *Brady* claim.

[10] Respondent argued that Jackson had not included for comparison copies of the CPS records possessed by trial counsel and those obtained on federal review. Jackson attached both sets of records to his summary judgment response. (Instrument No. 86, Exhibits 6 and 7). Still, Jackson does not provide any briefing on why summary judgment is not appropriate on this claim.

records available to trial counsel did not include "records of sexual abuse dating back to when Mr. Jackson was only 9," "records of therapy referral and treatment beginning in February of 1998," "diagnoses of psychotic disorder and impulse control dating back to August of 2000," "statements from Tommie Walter that no relatives were available to care for Mr. Jackson," and records describing his relationship with his grandmother. (Instrument No. 75 at 175-76). Respondent, however, persuasively provides several arguments refuting this portion of Jackson's *Brady* claim: the trial record shows that trial counsel knew about the sexual assault allegations, Tr. Vol. 19 at 6-7; counsel had access to mental-health records describing psychological disorders and poor impulse control, Tr. Vol. 26, Defendant's Exhibit 6; counsel presented evidence that Jackson was unwanted by family members, Tr. Vol. 26, Defendant's Exhibit 5; and the defense knew about Jackson's poor relationship with his grandmother, Tr. Vol. 18 at 224. The factual premise of much allegedly suppressed information was known to, and used by, trial counsel. Even to the extent that Jackson procured more CPS records on federal review than those given to trial counsel, Jackson has not shown that his trial attorneys could not have obtained them had they made a request of that agency.

In sum, because much of the alleged *Brady* material is redundant of that presented at trial, was apparently known by Jackson himself, or was possibly available to counsel, Jackson has not shown that his *Brady* claim has merit.[11] Even if a procedural bar did not preclude review, Jackson has not raised a viable *Brady* claim.

III. Actual Innocence (Claim Five)

Jackson argues that he is actually innocent of capital murder. Jackson proclaims his innocence because "the evidence used to convict [him] . . . is unreliable," uncalled witnesses

[11] Importantly, Jackson has not shown a reasonable probability exists that the jury would have answered the special issues differently if trial counsel possessed and used the full CPS records he has obtained on federal review.

could have provided jurors with an alternative construction of the events surrounding the crime, the prosecution coached witnesses, and the State's theory at trial was "improbable if not impossible." (Instrument No. 75 at 183). In essence, Jackson claims that, with his new arguments and evidence, a reasonable jury would have not have convicted him of capital murder.

On federal review, a criminal defendant's claim of actual innocence arises in two distinct contexts, only one of which is actionable: (1) as a noncognizable free-standing claim that the defendant is, as a matter of fact, innocent of the charged offense, *see Herrera v. Collins*, 506 U.S. 390, 404 (1993); or (2) as a gateway to collateral review of a forfeited or procedurally barred constitutional claim, *see Schlup v. Delo*, 513 U.S. 298 (1995). Jackson does not argue that actual innocence should remedy procedural defects, only that his innocence commands habeas relief. The Supreme Court has not accepted actual innocence as a cognizable habeas claim. *See Schlup*, 513 U.S. at 315; *Herrera*, 506 U.S. at 400; *see also Kinsel v. Cain*, 647 F.3d 265, 270 n.20 (5th Cir. 2011); *Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006).[12] The Fifth Circuit has repeatedly and unequivocally held that the Constitution does not endorse an independent actual-innocence ground for relief. *See Kinsel*, 647 F.3d at 270 n.20; *Foster*, 466 F.3d at 367; *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003); *Dowthitt v. Johnson*, 230

[12] In *Herrera*, the Supreme Court stated that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400. Similarly, in *Schlup* the Supreme Court again noted that a petitioner's "claim of innocence does not by itself provide a basis for relief." 513 U.S. at 315. However, "even if a truly persuasive claim of actual innocence could be a basis for relief, the Supreme Court made clear that federal habeas relief would only be available if there was no state procedure for making such a claim." *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003). Unlike federal law, Texas law recognizes an inmate's innocence as a ground for relief. *See Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996); *State ex rel. Holmes v. Court of Appeals for the Third District*, 885 S.W.2d 389 (Tex. Crim. App. 1994). Texas recently created a new habeas remedy for actual innocence claims based on "relevant scientific evidence" that: "(1) was not available to be offered by a convicted person at the convicted person's trial; or (2) contradicts scientific evidence relied on by the state at trial. TEX. CRIM. PRO. CODE art. 11.073. In addition, the Fifth Circuit has also "implied that . . . the availability of clemency in Texas would defeat a freestanding innocence claim." *Coleman v. Thaler*, 716 F.3d 895, 908 (5th Cir. 2013). Jackson has not availed himself of any potential state-court avenue for consideration of his actual-innocence arguments.

F.3d 733, 741 (5th Cir. 2000); *Graham v. Johnson*, 168 F.3d 762, 788 (5th Cir. 1999); *Robison v. Johnson*, 151 F.3d 256, 267 (5th Cir. 1998); *Lucas v. Johnson*, 132 F.3d 1069, 1074-75 (5th Cir. 1998). Accordingly, this Court cannot grant relief on Jackson's actual-innocence claim.

In any event, Jackson has not shown that it is more likely than not that reasonable jurors would not have convicted him in the light of the new evidence. Jackson's "evidence stands in sharp contrast to the examples provided by the Supreme Court of evidence that could potentially make such a showing, such as 'exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eyewitness accounts, and certain physical evidence.'" *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999) (citing *Schlup*, 513 U.S. at 324. The new evidence and arguments may have served as fodder for cross-examination or provided for a different defense theory, but Jackson does not provide any new, reliable evidence that he is innocent. For that reason, Jackson does not raise a strong actual-innocence claim.

IV. Racial Bias (Claim Six)

In his sixth ground for relief, Jackson argues that a decades-long pattern of racial discrimination in Harris County capital prosecutions violates the Constitution. Jackson relies on academic studies of capital punishment in Texas and statistical surveys to show disparities in the treatment of black and white offenders. Jackson, however, did not present this claim to the Texas courts, has not shown that it would meet the statutory criteria for presentation in a successive habeas application, and makes no effort to overcome the resultant procedural bar.

Procedural defects notwithstanding, the Court finds that Jackson has not shown that this claim merits habeas relief. To be sure, the Constitution prohibits prosecutorial discretion in charging capital crimes when "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification[.]" *Wayte v. United States*, 470 U.S. 598, 608 (1985)

(quotations omitted); *see also United States v. Armstrong*, 517 U.S. 456, 465 (1996). The Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), however, held that general statistical studies suggesting race-based disparities in the administration of a State' death-penalty scheme were insufficient to prove purposeful discrimination. The *McCleskey* Court "acknowledged that a statistical study revealed the possibility that juries . . . impermissibly took race into account in making capital sentencing decisions, but declined to hold on the basis of this evidence that the risk was constitutionally unacceptable." *Lincecum v. Collins*, 958 F.2d 1271, 1282 (5th Cir. 1992).

Accordingly, the Constitution's focus is not on generalized arguments, but whether an inmate meets his "burden of proving 'the existence of purposeful discrimination.'" *McCleskey*, 481 U.S. at 293 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). A capital inmate must show that unlawful considerations drove the State's choice to prosecute his as a capital crime. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (requiring "a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully."). Jackson's crime facially fit the statutory requirements for capital murder. Nothing suggests that the prosecutor in this case considered anything other than the severity of Jackson's crime in asking for a severe punishment. The Court, therefore, will deny his claim of racial discrimination.

ANALYSIS OF EXHAUSTED CLAIMS

Jackson exhausted claim four and part of claim one in state court. The exhaustion of remedies has two consequences on federal review. First, federal law limits a court's review of unexhausted claims to the arguments and evidence that the inmate presented in state court. AEDPA codifies "Congress' intent to channel prisoners' claims first to the state courts." *Cullen*

v. Pinholster, 563 U.S. 170, 182 (2011); *see also Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (commenting on the "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance"); *Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."). The "backward-looking language" of AEDPA "requires an examination of the state-court decision at the time it was made." *Pinholster*, 563 U.S. at 182. With that understanding, "the record under [AEDPA] review is limited to . . . the record before the state court." *Id*.

Second, federal law entitles state court judgments to highly deferential federal review. If an inmate has presented his federal constitutional claims to the state courts in a procedurally proper manner, and the state courts have adjudicated their merits, AEDPA allows federal review but limits its depth. A petitioner cannot meet his AEDPA burden by merely alleging constitutional error. Instead, "an inmate must show that the state court's adjudication of the alleged constitutional error "was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (quoting 28 U.S.C. § 2254(d)(1)); *see also Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Bell v. Cone*, 535 U.S. 685, 698 (2002); *Early v. Packer*, 537 U.S. 3, 7-8 (2002). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the inmate "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) ("As a federal habeas court, we are bound by the state habeas court's factual findings, both implicit and explicit.").

I. Exclusion of Records on Hearsay Grounds (Claim Four)

Jackson claims that the trial court violated the Constitution by preventing some defense evidence from coming before jurors. Before calling mitigation investigator Bettina Wright as a witness, trial counsel sought to admit into evidence various CPS records, reports chronicling his treatment at Twelve Oaks Hospital, and records from Harris County Juvenile Probation Department as Defense Exhibits 5, 6, and 7. Tr. Vol. 19 at 5-19. The State objected that portions of the CPS records included hearsay statements from Jackson's mother. Specifically, the records reported that Jackson's mother said she did not want him, she had never wanted him, he was the product of a date rape, and she had relinquished her parental rights. Tr. Vol. 19 at 11-12. Trial counsel argued that the statements should be admitted under the medical diagnosis exception to the hearsay rule. Tr. Vol. 19 at 7-8. In addition, trial counsel asserted that "virtually everything that the State objected to is already in the record anyway by the witnesses that have testified." Tr. Vol. 19 at 8.

The trial court sustained the State's objections with regard to his mother's statements that she did not want him,[13] but overruled the other objections. Tr. Vol. 19 at 12.

The State also objected to a fax sheet describing certain types of drugs mentioned in Jackson's records from Twelve Oaks Hospital. Tr. Vol. 19 at 14-15. The trial court only allowed the defense to mention drugs that Jackson could show were related to his treatment. Tr. Vol. 19 at 17. Wright subsequently detailed the medications Jackson was taking and read a comment in his medical records that he was "on a record-breaking number of psychiatric medications." Tr. Vol. 19 at 28. Trial counsel later cross-examined the State's rebuttal witness

[13] Bettina Wright ultimately testified that the parental rights of Jackson's mother had been terminated. Tr. Vol. 19 at 23.

about medications he had taken. Tr. Vol. 19 at 28, 91.

On direct appeal, Jackson challenged the exclusion of records. Jackson conceded that the trial court had discretion to find that the excluded portions of the records contained hearsay. Jackson based his appellate claim on the Fourteenth Amendment's due process right to present a defense and the Eighth Amendment's right to present mitigating evidence in a death penalty case. The Court of Criminal Appeals found Jackson did not object on those grounds at trial, barring appellate consideration of their merits. Alternatively, the Court of Criminal Appeals found that Jackson's claims did not merit appellate relief.

A. Procedural Bar

As a corollary to exhaustion, the procedural-bar doctrine requires inmates to comply with state procedural law when litigating their claims. *See Dretke v. Haley*, 541 U.S. 386, 392 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A federal procedural bar results when the inmate fails to follow well-established state procedural requirements for attacking his conviction or sentence. *See Lambrix*, 520 U.S. at 523; *Coleman*, 501 U.S. at 732. A federal court may review an inmate's unexhausted or procedurally barred claims only if he shows: (1) cause and actual prejudice; or (2) that "a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent[.]'" *Haley*, 541 U.S. at 393 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Texas barred consideration of Jackson's fourth claim under its contemporaneous-objection rule. The Fifth Circuit "has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999); *see also Norris v. Davis*, 826 F.3d 821, 832 (5th Cir. 2016); *Ramirez v. Stephens*, 641 F.

App'x 312, 319 (5th Cir. 2016); *Cotton v. Cockrell*, 343 F.3d 746, 754 (5th Cir. 2003). Jackson does not acknowledge the procedural default, much less provide any argument to overcome it. A State-imposed procedural bar precludes federal consideration of Jackson's fourth claim.

B. AEDPA

Even if this Court could reach the merits, Jackson has not met the AEDPA standard for habeas relief. The Court of Criminal Appeals alternatively found that Jackson's claim was meritless:

> Even if error had been preserved, however, [Jackson's] claims would fail. Though [Jackson] was unable to introduce his mother's statements about never wanting him, his grandmother, second cousin, and uncle testified that his mother did not want her child and had relinquished her parental rights. In addition, the defense expert testified that [Jackson's] mother's parental rights had been terminated. And as explained above, the trial court did allow evidence of most (if not all) of the medications [he] was taking. In addition, the defense expert read from one of the records a detailed list of some the medications [Jackson] had received and read a notation that [he] was on a "record-breaking number of psychiatric medications." [Jackson] was able to present the substance of the mitigating-circumstances case to which the excluded evidence related. The fact that he was "not able to present his case in the form he desired does not amount to constitutional error."

Jackson v. State, 2010 WL 114409, at *10 (Tex. Crim. App. 2010).

In *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), the Supreme Court held that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *See Simmons v. Epps*, 654 F.3d 526, 542 (5th Cir. 2011). However, the Supreme Court has not voided State rules of evidence and has allowed their operation unless they preclude the admission of reliable evidence that is necessary to the defense. *See Simmons*, 654 F.3d at 543. Federal relief will be warranted only when the excluded evidence "is a crucial, critical, highly significant factor in the context of the entire trial." *Johnson v. Puckett*, 176 F.3d 809, 821 (5th Cir. 1999).

Jackson's briefing only makes cursory arguments relating to the exclusion of evidence.

Jackson does not show error in the Court of Criminal Appeals' finding that the jury heard similar, or identical, testimony from other sources. Jackson makes no effort to show how the state court's rejection of this claim was unreasonable. Even if a procedural bar did not preclude consideration of this claim, Jackson has not shown that he merits habeas relief.

II. Ineffective Assistance in the Punishment Phase (Claim One)

Jackson's reply to the summary judgment motion only discusses his first ground for relief. Jackson's first claim extensively faults trial counsel's representation in the punishment phase. On state habeas review, Jackson challenged his trial attorneys' investigation and presentation of mitigating evidence. Jackson's state habeas claim, however, focused that claim on trial counsel's use of the mitigating investigator and presentation of testimony about medications he had taken. The amount and nature of Jackson's newly adduced evidence, considered in the context of the arguments he has raised in federal and state court, requires the Court to decide whether Jackson has exhausted his first ground for relief. Because Jackson's federal claim exceeds the scope of that presented in state court, the central issue is whether Jackson supplements, or fundamentally alters, the claims raised in state court.

A. Exhaustion of Jackson's *Strickland* Claim

"The exhaustion requirement is satisfied when the substance of the habeas claim has been fairly presented to the highest state court" so that a state court has had a "fair opportunity to apply controlling legal principles to the facts bearing on the petitioner's constitutional claim." *Soffar v. Dretke*, 368 F.3d 441, 465 (5th Cir. 2004). Before 2011, the Fifth Circuit regularly held that "[t]he exhaustion requirement is not satisfied if the petitioner 'presents material additional evidentiary support in the federal court that was not presented to the state court.'" *Lewis v. Quarterman*, 541 F.3d 280, 284 (5th Cir. 2008) (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 745

(5th Cir. 2000)). This case and fact-specific inquiry asked whether the new evidence and arguments "supplements, but does not fundamentally alter, the claim presented to the state courts." *Anderson v. Johnson*, 338 F.3d 382, 387 n.8 (5th Cir. 2003) (quoting *Caballero v. Keane*, 42 F.3d 738, 741 (2d Cir. 1994)).

In 2011, however, the Supreme Court decided *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), which held that AEDPA's "backward-looking language requires an examination of the state-court decision at the time it was made." Under *Pinholster*, federal review "is limited to the record in existence at that same time i.e., the record before the state court" because "it would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id*. at 182-83. The Fifth Circuit has recognized that "[t]he import of *Pinholster* is clear: because [the petitioner's] claims have already been adjudicated on the merits, § 2254 limits [federal] review to the record that was before the state court." *Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012).

Still, the Supreme Court in *Pinholster* did not determine "where to draw the line between new claims and claims adjudicated on the merits." *Pinholster*, 563 U.S. at 182 at n.11. The Fifth Circuit has issued a few cases after *Pinholster* holding that a petitioner's claims "fit into the class of cases in which new evidence renders a petitioner's claims unexhausted." *Sells v. Stephens*, 536 F. App'x 483, 492 (5th Cir. 2013). The Fifth Circuit has outlined the circumstances under which a transformed claim is unexhausted: "where the petitioner provides substantial amounts of new evidence, the claims and allegations before the state court were conclusory and undeveloped, the petitioner offers new evidence that could not have been derived from the state court record, and the petitioner offers new evidence which alters the nature of his claims." *Id*. at 491. The Fifth Circuit considers whether new evidence and arguments place the claim "in a

significantly different and stronger evidentiary posture than it was before the state courts." *Dowthitt*, 230 F.3d at 746 (quoting *Joyner v. King*, 786 F.2d 1317, 1320 (5th Cir. 1986)). In essence, a court must decide whether the federal claim amounts to a "180 degree turn" from that presented in state court. *Campbell v. Dretke*, 117 F. App'x 946, 957 (5th Cir. 2004).

B. The Issues Jackson Raised on State Habeas Review

On state habeas review, Jackson faulted his trial attorneys for not broadening the information about his personal history, family background, and mental health. Specifically, Jackson challenged "six aspects of the punishment-stage defense," State Habeas Record at 32, including: (1) ineffectually addressing the evidence of future dangerousness, (2) not objecting to improper prosecutorial argument, (3) not objecting to comments about Jackson's failure to testify, (4) insufficiently presenting mitigating evidence about his childhood, (5) not adducing evidence about the medication Jackson took, and (6) not seeking a continuance when second-chair counsel experienced personal tragedy. Jackson's federal claim focuses on the fourth and fifth arguments he made in state court.

With particular relevance to the claims raised on federal review, Jackson specified that counsel did not (1) ask sufficient questions of his trial investigator, Bettina Wright, when she testified in the penalty phase and (2) "provide mitigating evidence regarding medication." State Habeas Record at 38-42. Focusing on his "rejection as a child," State Habeas Record at 40, Jackson specifically argued that "by her training and experience" Wright should have been asked "to explain the significance of the fact that [his] mother had not wanted him ever since he was born and [he] never met his father." State Habeas Record at 29. Jackson, however, asked the trial court to hold a hearing that would develop testimony about unpresented mitigation evidence.

State Habeas Record at 38.[14] State habeas counsel asked the habeas court to hold a hearing to determine "(1) how much explanation of mitigation theories Wright was prepared to give, (2) whether that explanation was conveyed to defense counsel so that counsel was aware of what else Wright could have said in her testimony, and (3) why defense counsel passed the witness without ever having Wright provide a mitigation explanation." State Habeas Record at 38. State habeas counsel anticipated that questioning Wright would also expose that trial counsel had not fulfilled the "obligation to investigate and develop mitigation evidence." State Habeas Record at 39.

State habeas counsel also faulted trial counsel for not providing mitigating evidence about the medications Jackson had previously taken. State habeas counsel's argument, however, was not limited to the name of the medications themselves, but faulted counsel for not developing testimony about the underlying mental conditions. State habeas counsel wrote:

> A record in defense counsel's file which referred to a "record-breaking number of psychiatric medications" should have motivated defense counsel to investigate: (1) the clinical diagnoses which would call for each of those drugs, either singly or in combination, and (2) the long-term effects of such a drug cocktail. There is no evidence that such an investigation was conducted. No witness who was qualified to address these sophisticated pharmaceutical issues was called as a defense witness.

State Habeas Record at 42.

Jackson's state habeas and federal claim rely on the same constitutional provisions and same federal law. Stated broadly, both the federal and state claims faulted counsel for not presenting the same general categories of mitigating evidence: his personal background, his

[14] State habeas counsel explained the theories underlying his argument that trial counsel presented insufficient mitigating evidence. State habeas counsel first focused on trial counsel's questioning of defense investigator Bettina Wright. State habeas counsel argued that trial counsel should have asked Wright pursuant to "her training and experience to explain the significance of the fact that [Jackson's] mother had not wanted him ever since he was born and [he] never met his father." State Habeas Record at 38. State habeas counsel argued that "rejection as a child as an example the broad concept that childhood and teenage disadvantages and victimization" provided an excuse for Jackson's "antisocial attitudes and behavior." State Habeas Record at 40.

family history, and his mental-health issues. Without question, Jackson has adduced much more, and greater detailed, evidence on federal review. Jackson's federal habeas petition provides wide-ranging criticism of all trial counsel's efforts to investigate, prepare, and present a trial defense. Much of Jackson's briefing provides background to his *Strickland* claim without tying his criticism to an actionable constitutional violation. For example, Jackson sharply condemns counsel's alleged lack of effort in establishing a lawyer/client relationship, counsel's heavy case load, and the defense's allegedly inadequate time spent on the case. While providing context, that discussion does not in and of itself create viable *Strickland* claims. Apart from cases involving the complete or constructive denial of counsel, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *United States v. Cronic*, 466 U.S. 648, 659 n. 26 (1984).

While Jackson's federal petition raises his punishment-phase *Strickland* issues as one claim, Jackson provides a helpful list of the alleged constitutional violations by summarizing the "mitigating facts" contained in his federal arguments and exhibits "that required investigation and development for presentation at trial":

> (1) Both Mr. Jackson's mother and sister are severely mentally ill, have committed self harm and attempted suicide, have been hospitalized, and have been treated with antipsychotic medication. Mental illness also runs in Mr. Jackson's extended family as well;
>
> (2) Mr. Jackson was sexually abused by a teenager living in his home for a five-year period from the age of four until he was nine or ten. This abuse was severe and continuous, and Mr. Jackson repeatedly brought up this abuse in psychiatric and institutional settings starting at age 12 and continuing through his pretrial incarceration in the Harris County Jail.
>
> (3) Mr. Jackson had been diagnosed with and medicated for various psychotic mental illnesses throughout his life. He started hearing voices at age 11 and was on heavy doses of antipsychotic medication by age 14. Until he got to the Harris

> County Jail, no doctor had ever declared him a malingerer;
>
> (4) Mr. Jackson had been diagnosed with various psychotic mental illnesses while being held in jail pending trial, and was then being treated with antipsychotic medication. He was noted to be "acutely psychotic" and attempted suicide at least twice pre-trial;
>
> (5) Tommie Walter, Mr. Jackson's grandmother, had abandoned a 13-year-old Christopher Jackson to Child Protective Services (CPS) because no family member was willing to care for him. Ms. Walter also physically abused Mr. Jackson by whipping him until he blacked out, and likely sexually abused him as well while he was in her care;
>
> (6) Mr. Jackson spent four years of his life in the Texas Youth Commission's (TYC) Hamilton State School. TYC and Hamilton were known for their violence, abuse, corruption, and gang ties. They were also notoriously understaffed and undertrained and lacked adequate mental health care for the youth;
>
> (7) Many of Mr. Jackson's family members believe that Mr. Jackson's father is not Ronald Wade, but is instead his biological uncle Kevin Jackson, making Mr. Jackson a product of incest, and would have been willing to tell trial counsel about this suspicion had they been interviewed.

(Instrument No. 75 at 45-46). The Court will consider Jackson's enumeration to constitute the arguments he intends to lodge against trial counsel's representation.

Jackson only exhausted some portions of his federal claim in state court. Both federal and state claims accuse counsel of not expanding on the lay testimony before the jury. One main difference between the two claims is the vehicle by which the jury would receive additional mitigating evidence. On state habeas review, Jackson faulted counsel for not presenting additional mitigating theories through investigator Bettina Wright. Jackson's federal claim outlines a defense relying on additional lay and expert witnesses. A secondary difference between the two claims, apparently, is in some particular mitigating facts, even though both claims rely on the same mitigating themes. The third and fourth elements of Jackson's claim fall within the penumbra of the arguments he advanced in state habeas court. While some "instances of alleged substandard conduct cited in this [habeas action] were not explicitly enumerated in

[Jackson's] state habeas petition," the state habeas court considered trial counsel's overarching strategy relating to mitigation and mental-health issues. *Vela v. Estelle*, 708 F.2d 954, 958 (5th Cir. 1983). The state habeas proceedings broadly covered the issues Jackson now raises in the third and fourth subgroupings of his claim. To the extent that Jackson's federal claims challenge trial counsel's investigation, preparation, and presentation of mental-health defensive issues, the Court can only consider arguments and evidence that Jackson presented on state review.[15]

Some difficulty attends deciding whether the remainder of the claim is unexhausted, partially because many of the facts on which Jackson bases his claim were presented at trial in one form or another. The Court, however, finds that Jackson did not exhaust the issues he describes in parts one, two, five, six, and seven.

C. AEDPA Review of the Exhausted Portions

AEDPA governs the state court's adjudication of parts three and four. On federal review, Jackson faults counsel for not presenting evidence of his mental illness that began at a young age. At age eleven, Jackson began hearing voices. At age thirteen, he began seeing a psychiatrist and was diagnosed with Depressive Psychosis. He was soon hospitalized after a possible suicide attempt. Subsequently, he was diagnosed with depression, post-traumatic stress disorder, and substance abuse. Another psychiatrist diagnosed him with bipolar disorder. While hospitalized again for suicidal thoughts, a psychiatrist diagnosed him with depressive psychosis.

[15] Jackson's argument that this Court can consider new arguments and evidence under *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1316 (2012), does not allow federal review of this portion of his federal claim. The Fifth Circuit has held that "*Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted." *Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014); *see also Villanueva v. Stephens*, 619 F. App'x 269, 276 (5th Cir. 2015); *Allen v. Stephens*, 619 F. App'x 280, 290 (5th Cir. 2015). Once a state habeas court has denied a claim on the merits, *Martinez* "may not function as an exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court." *Escamilla*, 749 F.3d at 395. Simply, "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

This pattern of suicidal ideation, hospitalization, and medication continued, resulting in similar diagnoses. By age fifteen, one report stated that Jackson was on a "record breaking number of psychiatric medications." While in TYC custody, a psychologist diagnosed him with non-specific depressive disorder with psychotic features. Jackson was not administered medication during his time at TYC but received counseling to help cope with childhood abuse and depression.

Jackson attempted suicide while incarcerated before trial and was observed to be acutely psychotic. A psychologist found that he manifested "bizarre and disruptive behaviors." Another psychiatrist prescribed medication and diagnosed him with bipolar disorder with psychotic features. Ultimately, Dr. Willard Gold – the State's rebuttal witness who labeled him a malingerer – discontinued his medication. Another psychiatrist, however, later renewed medication. Records showed a history of erratic and bizarre behavior contemporaneous with trial.

Trial counsel presented evidence of Jackson's troubled mental state through mitigation investigator Bettina Wright. Wright explained that the CPS records contained evidence of Jackson's "suicidal ideation, feelings of wanting to harm himself." Tr. Vol. 19 at 23. Wright testified that his psychological records from pre-trial detention also included references to suicide. Wright then listed his medications and read a comment that he had been on a "record-breaking number of psychiatric medications." Tr. Vol. 19 at 28. The prosecution, however, used cross-examination to highlight aggravating factors present in his records, such as his "homicidal ideation," his violent tendencies, his disruptive behaviors, his assaultive attitude toward staff, his failure to follow orders, and his hope to escape custody.

After cross-examining Wright, the State called Dr. Gold as a rebuttal witness. Dr. Gold

testified about Jackson's suicidal tendencies and desire to harm himself. Dr. Gold explained that Jackson had "prior diagnosis of both schizophrenia and bipolar disorder." Tr. Vol. 19 at 67. Dr. Gold himself diagnosed Jackson with a psychotic disorder. Tr. Vol. 19 at 68. Dr. Gold, however, ultimately concluded that Jackson was involved in "too much . . . game playing to qualify as psychosis at all." Tr. Vol. 18 at 72. Jackson would "try[] to appear he's crazy when he wasn't." Tr. Vol. 18 at 74. Trial counsel's cross-examination discussed the various medications that Jackson had been prescribed and the purpose of each one. Trial counsel effectively tried to call into question Dr. Gold's testimony by chronicling Jackson's mental-health history and medication, including his contemporaneous use of two medications. The State, however, closed by asking Dr. Gold, "just because someone has prescribed medication doesn't mean that they need that medication?" Tr. Vol. 19 at 96.

On state habeas review, Jackson argued that trial counsel failed to follow testimony about his "record-breaking number of medications" with testimony about "(1) the clinical diagnoses which would call for each of those drugs either singly or in combination and (2) the long-term effects of such a drug cocktail." State Habeas Record at 42. Jackson also challenged the manner in which trial counsel put mitigating evidence before the jury, though his primary emphasis was on mental-health issues. The trial court granted the State's motion for trial counsel to provide an affidavit in response to the *Strickland* claim. State Habeas Record at 125-26. Trial counsel Cornelius responded to both his use of investigator Wright and the presentation of mitigating evidence concerning Jackson's psychological background. Trial counsel explained on federal review why the defense chose to present mental-health arguments as it did:

> I decided to use Bettina Wright the way I decided to use her because I felt it was our best shot at obtaining a life sentence. I did not feel the expert testimony she was prepared to offer was going to be as helpful to our case as my ability to argue it from our witnesses and the records. We had good witnesses and good records

> and a lot to argue and *my feeling was that a paid expert's opinion was not going to win the day and in fact might give the State more to argue and ultimately be more harmful than help*.

State Habeas Record at 133 (emphasis added). Trial counsel also explained the defense's treatment of Jackson's prior medications:

> Again this was my decision to emphasize this testimony and these records myself without a paid expert's opinion. I believed we had so much to work with in this case that I felt a lay juror would understand it and I feared the repercussions of paid expert testimony. I felt we didn't need it and were better off without it. I could have offered it but chose not to.
>
> It is easy to say today that we should have had this expert testimony or that expert testimony, but in my opinion then and now experts in this case and on those issues would have had no impact on our jury.

State Habeas Record at 133.

State habeas counsel then secured an affidavit from Wright in response to trial counsel's explanation. State Habeas Record at 147-48. Wright's affidavit focused on Dr. Gold's testimony in the punishment phase that Jackson was malingering mental illness. Wright said that she was "shocked by his testimony as to how he reached that diagnosis." Her "interviews with [Jackson] lead [her] to an entirely different diagnosis" because she saw "no other logical diagnosis besides Schizophrenia." Wright explained that she could have provided a "psychologically sound rebuttal" to Dr. Gold's testimony. Wright summarized:

> Christopher Devon Jackson was the most mentally ill defendant I've encountered in 12 years of mitigation work with Harris County and Montgomery County defendants. His psychosis was clearly evident in my interviews with him. Dr. Gold's diagnosis of Malingering was in my professional opinion not based in sound evaluation. I believe Christopher's legal representation did not include all the facts of his mental illness adequately enough to give the jury a clear picture of his condition. If I would have been able to testify on direct examination as well as a rebuttal witness to Dr. Gold it is probable that the jury would have not returned a death sentence.

State Habeas Record at 147-48.

Before the state evidentiary hearing, trial counsel Cornelius submitted a supplemental affidavit outlining his anticipated testimony. Trial counsel stated that Wright "is a competent honest and wonderful professional" who "did raise concerns about Mr. Jackson's mental health" and "want[ed] to testify concerning those concerns." Trial counsel, however, made the decision to use her testimony in a different manner. Trial counsel stated:

> I made the decision to use her to point out to the jury what I considered to be the most important records concerning the atrocious events Mr. Jackson had lived through as a child, and they were atrocious, and then I offered my reasonable assumptions about them to the jury in argument which could not be responded to by a State's expert. Ms. Wright was not happy with this but it was my call to make . . . .

State Habeas Record at 151. Trial counsel provided several reasons for this strategy. First, even though Wright opined that "Jackson was the most mentally ill defendant she had encountered," trial counsel felt that "he was at the very bottom of the scale one of the least mentally ill defendants I have encountered. He had a horrible childhood and it made him mean and angry and he took it out on whoever was in his path, but giving it a psychological name is a conversation I'm not going to win with in trial." State Habeas Record at 152. Second, trial counsel explained that his experience led him to believe that "if you use mental health evidence short of proving actual insanity you run the risk of making the defendant look even more dangerous to the jury." State Habeas Record at 152. Third, "Jackson was a classic malingerer" and the record, some of which trial counsel was able to "ke[ep] out of evidence," were "overwhelming with accounts of malingering." State Habeas Record at 152. Trial counsel worried "that if [he] would have challenged Dr. Gold's opinion of malingering, [he] would have lost all credibility with the jury. [He] was not prepared to do that over malingering. Especially since he was clearly malingering . . . ." State Habeas Record at 152. Fourth, trial counsel worried that, if he had called a mental-health expert, it would "allow the State to prove up from

my own expert how sick the defendant was and possibly establish a basis for diagnosing the defendant as a sociopath, psychopath, or antisocial personality . . . ." State Habeas Record at 152.

On April 18, 2013, the trial court held an evidentiary hearing in which Mr. Cornelius was the only witness. Trial counsel affirmed that he had reviewed Jackson's mental health records, including his history of medication. Writ Hearing at 8-10. Trial counsel did not remember whether he had hired an independent mental-health expert, but knew that Jackson was evaluated before trial. Writ Hearing at 10-11. Still, trial counsel opined that "[t]here was tons of evidence that he was malingering. In my opinion, based on everything I read, he was a classic malingerer." Writ Hearing at 12. Trial counsel "desperately sought to keep [evidence of malingering] out of evidence." Writ Hearing at 12. With that background, trial counsel explained the strategic decision not to emphasize other evidence of mental illness:

> That's an issue that I have in every capital case that I handle or death penalty case that I handle. I'm sure you've dealt with it. I'm sure everybody deals with it. It's a – it's a two-edged sword. If you prove that they have all kinds of mental illness, it makes them more dangerous unless that's controlled. And I don't know how you prove that it will be controlled in the future. So, you better have some really strong mental illness – and I think enough to prove that they're insane for it to be very effective in most cases. I've really – I've really not seen it be effective.

Writ Hearing at 16.

Aside from mental illness, trial counsel decided not to present expert testimony describing "the reasons why his terrible, terrible childhood might have contributed to – to these offenses and the life that he ended up living." Writ Hearing at 16. From his experience, trial counsel knew that the prosecution would have asked the expert to "define . . . what anti-social personality is, what a psychopath is, who a sociopath is." Writ Hearing at 17. Trial counsel feared that the prosecution would then "trot the facts out in this case. And I would have proved

up through my own witness that he's a psychopath, sociopath and anti-social personality. And I don't think that was a very prudent trial strategy and so I didn't use it." Writ Hearing at 17. Anyway, trial counsel did not think that the jury would "need an expert to explain to a jury what effect [Jackson's terrible childhood] would have on somebody." Writ Hearing at 23.

The prosecution's cross-examination undercut Wright's opinion by emphasizing that she had only spent four hours with Jackson but still, using her expertise as a social worker, faulted the evaluation of a psychiatrist who had "examined him daily. He treated him." Writ Hearing at 22.

The state habeas court issued explicit findings and conclusions rejecting Jackson's claim. The state habeas court found trial counsel's affidavit and hearing testimony credible. State Habeas Record at 241. The state habeas court specifically credited trial counsel's strategic decision "not to put on mental health issues" because "psychological evidence is a two-edged sword because proving some type of mental illness can make a defendant appear more dangerous." State Habeas Record at 241. Trial counsel specifically worried that mental-health testimony in response to the State's rebuttal witness "would be running the risk of having the State prove up . . . a basis for diagnosing [Jackson] as a sociopath, psychopath or antisocial personality." State Habeas Record at 242. The state habeas court endorsed trial counsel's strategic decisions based on the "overwhelming records of [Jackson's] malingering" and his own observation that Jackson was "a classic malingerer." State Habeas Record at 242. Also, the state habeas court validated trial counsel's opinion that the State's mental-health testimony had "zero effect on the jury" and that opposing it would have caused the defense to lose credibility. State Habeas Record at 242.

The state habeas court also endorsed trial counsel's decision to "emphasize the evidence

of [Jackson's] horrible childhood through testimony" instead of expert witnesses, especially because the jury did not "need[] expert testimony to understand the effect of events such as [his] mother abandoning him." State Habeas Record at 243. The state habeas court found that trial counsel was "not ineffective based on the strategic decision of how, *i.e.*, through what witnesses to present mitigating evidence" was "not ineffective for not having Wright explain why certain evidence was mitigating." State Habeas Record at 243.

Also, the state habeas court found that trial counsel was not ineffective in the presentation of evidence of Jackson's prior medications:

> The Court finds that trial counsel are not ineffective for not investigating and presenting speculative evidence of possible effects and possible reasons for medication [Jackson] had at the age of fifteen, six years before in the capital murder, in light of the extensive evidence of [his] willful assaultive behavior and his malingering for secondary gain, evidence that [he] was not taking medication the year before the offense and the lack of evidence of [his] taking medication at the time of the offense.

State Habeas Record at 244-45. The state habeas court concluded that Jackson had not shown ineffective assistance on any ground.

Jackson bears a heavy burden on federal review. While "[s]urmounting *Strickland*'s high bar is never an easy task," a federal habeas petitioner's duty to "[e]stablish[] that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "The standards created by *Strickland* and § 2254(d) are both highly deferential, . . . and when the two apply in tandem, review is doubly so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted); *see also Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Here, despite Jackson's arguments on federal review, trial counsel did not abdicate the responsibility to prepare for the punishment phase. Counsel hired an investigator, a dedicated

mitigation investigator, and a forensic psychiatrist. Trial counsel called family members and a mitigation investigator to tell witnesses about Jackson's background. Family members addressed many of the same themes, such as abandonment, possible sexual abuse, and chaotic upbringing, as Jackson raises on federal review, even if the details differ. The record indicates that trial counsel had sufficient familiarity with Jackson's mental-health history and family background to make decisions about the evidence to put before jurors, and the vehicle by which to put it.

The state habeas proceedings extensively discussed trial counsel's choice not to emphasize Jackson's history of mental-illness, particularly his schizophrenia and medication, through expert witnesses. Counsel doubted the existence of severe mental illness, although his prior diagnosis of schizophrenia and bipolar disorder came before jurors in summary fashion through Wright's testimony. Tr. Vol. 19 at 67. Still, counsel feared that accentuating such testimony would lead to protracted testimony showing that Jackson had faked his symptoms. More disconcerting, testimony about Jackson's suicidal behavior and psychological conditions would allow the State to emphasize his homicidal behavior and highly violent actions. The prosecution could turn testimony about mental illness against Jackson, using it to show he would be a continuing future threat. Defense counsel is not deficient for failing to present evidence that is duplicative or double-edged. *See Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999). Such a "tactical decision not to pursue and present potential mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance." *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997); *see also Foster v. Schomig*, 223 F.3d 626, 637 (7th Cir. 2000) (observing that sentencers "may not be impressed with the idea that to know the cause of viciousness is to excuse it; they may conclude instead that when violent behavior appears to be outside the defendant's power of control, capital punishment is

appropriate to incapacitate").

The state habeas court also endorsed counsel's choice to describe Jackson's background through lay witnesses, rather than through an expert witness. Jackson has not shown that the imprimatur of expert testimony would have meaningfully altered the manner in which the jury appraised the special issues. The jury had before it a basic understanding of the neglect, deprivation, turmoil, and pain in Jackson's childhood. The jurors knew that he had been previously medicated for mental illness. Additional information through Wright or a different psychological expert may have put the veneer of expert opinion over those circumstances, yet the jury still had the building blocks to show mercy to Jackson.

In contrast to the testimony Jackson wishes counsel had presented, the jury would still have to consider his long-standing, and intensifying, violent behavior. Jurors knew of early violent and bad behavior which carried through into his periods of detention. Incarceration and medication did not remediate his character; Jackson acted violently while in custody. Jackson was a gang member. While in free society, Jackson committed ruthless acts of violence, even against loved ones, such as when he kicked and stomped on his girlfriend's stomach because she would not abort his unborn child. He also assaulted people, ran from the police, committed robberies, and threatened others. The murder for which jurors convicted Jackson was not an anomaly; Jackson had committed a similar offense shortly before but the victim thankfully lived. Even with the weighty incentive to behave before a trial in which the prosecution would unquestionably emphasize any misbehavior while in custody, Jackson possessed weapons, attacked inmates, and planned an escape. The contrasting evidence of mental illness and familial turmoil would not have significantly changed the way jurors answered the special issues and, in fact, much aggravating evidence would accompany the mitigating features of his psychological

history. When placing the arguments and evidence on state habeas review into a full context of trial, Jackson has not shown a reasonable probability of a different result.

Accordingly, the state habeas court's rejection of the exhausted claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

D. The Unexhausted Issues

As discussed above, Jackson never asked the state courts to consider his complaint that counsel should have presented evidence of mental illness in Jackson's family, particularly that of his mother and sister; that Jackson was sexually abused by a teenager living in his home; that he was abandoned by his grandmother, who also abused him; the difficulty and turmoil he experienced while living in TYC custody; and the possibility that Jackson is actually the son of his biological uncle. Because of the procedural bar that results from Jackson's failure to exhaust his claim, the Court cannot grant relief unless Jackson shows cause and prejudice.[16]

Jackson argues that he can overcome the procedural bar of his unexhausted issues by showing ineffective representation by state habeas counsel under *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 1316 (2012). A federal habeas petitioner bringing an unexhausted *Strickland* claim who relies on *Martinez* to show cause initially must make important showings before the Court can consider the underlying defaulted claim. First, an inmate must show that

[16] Jackson argues that state habeas counsel's representation should serve as a vehicle by which the state courts will consider his *Strickland* claim in a successive habeas application. The Texas Court of Criminal Appeals has traditionally refused to authorize successive habeas proceedings based on the ineffective assistance of habeas counsel. *Ex parte Graves*, 70 S.W.3d 103, 111 (Tex. Crim. App. 2002). Jackson, however, cobbles together statements from dissenting opinions to suggest that the Court of Criminal Appeals may reconsider its jurisprudence. Jackson has not shown that state review is currently open to him or that state law will change. *See Ex parte Alvarez*, No. 62,426-04, 2015 WL 1955072 (Tex. Crim. App. Apr. 29, 2015) (implicitly refusing to overrule *Graves*). Alternatively, Jackson asks the Court to forgive exhaustion because there is an absence of state corrective process. *See* 28 U.S.C. § 2254(b)(1)(B)(i). To the contrary, there was a state corrective process in place. Jackson cannot present his claims in state court "only because, he allowed his state law remedies to lapse without presenting his claims to the state courts." *Magouirk v. Phillips*, 144 F.3d 348, 358 (5th Cir.1998).

"his claim of ineffective assistance of counsel at trial is substantial – *i.e.*, has some merit . . . ." *Cantu v. Davis*, 665 F. App'x 384, 386 (5th Cir. 2016); s*ee also Allen v. Stephens*, 805 F.3d 617, 626 (5th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014); *Preyor v. Stephens*, 537 F. App'x 412, 420-21 (5th Cir. 2013); *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013). A *Strickland* claim is "insubstantial" if it "does not have any merit" or is "wholly without factual support." *Martinez*, 132 S. Ct. at 1318. This "substantiality standard [is] equivalent to the standard for obtaining a [Certificate of Appealability]." *Crutsinger v. Stephens*, 576 F. App'x 422, 430 (5th Cir. 2014). In other words, a petitioner shows his claim is substantial by stating a valid claim of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c). Second, an inmate must "show that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza*, 738 F.3d at 676.

In assessing whether state habeas counsel was ineffective the Court applies traditional *Strickland* jurisprudence. Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. A habeas petitioner "must rebut this presumption by *proving* that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison,* 477 U.S. 365, 384 (1986). In exercising the presumption, courts recognize that habeas counsel "'who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.'" *Vasquez v. Stephens*, 597 F. App'x 775, 780 (5th Cir. 2015) (quoting *Smith v. Robbins,* 528 U.S. 259, 288 (2000)). In order to prove ineffective assistance, the inmate must demonstrate that "'a particular nonfrivolous issue was clearly stronger than issues that counsel did present.'" *Vasquez*, 597 F. App'x at 780 (quoting *Robins*, 528 U.S. at

288); *see also Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.").

The Court observes that Jackson has not raised a strong argument that state habeas counsel raised the wrong challenge to trial counsel's punishment-phase representation. True, Jackson identifies some issues trial counsel did not put before jurors. Jackson supports this claim with affidavits and various documents. The Court, however, finds that many of those documents do not provide viable, admissible material which a trial attorney could have put before jurors.

For example, Jackson relies on a document entitled "Cornelius Family History" – apparently part of the material developed during trial preparation – that contains some recitations similar to the allegations in Jackson's *Strickland* claim. The family history describes abuse Jackson suffered at the hands of another teenager when living with his aunt. (Instrument No. 72, Exhibit 2). Jackson has not shown how the trial defense could present the document itself nor does he verify much of its contents with admissible evidence.

Jackson provides affidavits from family members describing his difficult childhood, apparently wishing that trial counsel had called them to present mitigating evidence. While providing some new details about his family members, the affidavits are long on speculation and hearsay, but short on new and admissible facts. For example, Jackson claims that trial counsel should have presented evidence that Jackson was the product of an incestuous relationship. None of the affiants provide conclusive testimony about his parentage. The best that the affiants can say is that they "suspect" that Jackson's uncle is in reality his father. (Instrument No. 75, Exhibit 8 and Exhibit 9). No affidavit provides more than speculation and surmise on that ground. Additionally, the hearsay statements and speculation exist in contrast trial testimony of other

family members about who his father was. Tr. Vol. 18 at 202; Tr. Vol. 19 at 211, 240-41.[17]

Also, Jackson's grandmother describes how she did not "know at the time [she] testified, but have since learned that [a teenager] was sexually abusing" Jackson at his aunt's house. (Instrument No. 75, Exhibit 6). Aside from not describing how she knows that information, Jackson's grandmother could not have testified at trial about information she did not know. Even to the extent that Jackson presents records mentioning his childhood sexual abuse, the defense put forward records containing a similar level of detail.[18] Jackson's federal evidence contains a similar level of admissible details as the discussion of sexual abuse at trial.

Additionally, the new evidence extensively discusses the background of extended family members, including Jackson's mother. The new information shows that other family members shared somewhat similar experiences and had mental-health issues as Jackson. Mental illness may help to explain somewhat why Jackson's mother abandoned him. Still, much of the evidence about Jackson's extended family members has only marginal relevance to him, if it has any relevance at all. For instance, the criminal records of the man who some relatives now suspect may have been Jackson's father (in contravention of the trial testimony of other family members) would add little to the jury's deliberative responsibilities, if they were even admissible. Jackson provides this Court with extensive criminal and mental-health records for his sister, but jurors would consider his, not her, criminal actions and mental illness in deciding

[17] The records Jackson submits on federal review repeatedly mention that he was the product of a date rape. To some extent, presenting testimony questioning Jackson's parentage would diminish the credibility of other information gleaned from those various records.

[18] Trial counsel submitted records which reported that Jackson had been sexually abused, only some of which specified that it had been by an uncle, but provided no detail about the assaults. Tr. Vol. 26, Defense Exhibit 5. Wright testified briefly about the abuse. Tr. Vol. 18 at 23. The records Jackson submits on federal review do not contain more information about the abuse than that presented to jurors. Similarly, the federal petition accuses Jackson's grandmother of sexually abusing him, but supports that allegation with affidavits containing speculation and surmise.

his sentence. Also, while Jackson provides extensive evidence about the criminal and mental-health problems experienced by Jackson's mother, the jury already knew that she did not want Jackson and had hardly any positive influence in his life. Additional negative information would not have meaningfully changed the jury's perception of the abandonment and worthlessness Jackson felt, it only would have explored his mother's chaotic life. The focus of the mitigation special issue was on Jackson, as opposed to his ancestors or relatives. While some of the evidence was arguably relevant, much of the intergenerational mitigating evidence did not have strong relevance to the special issues.

The records and affidavits do provide some substantiation to Jackson's argument that state habeas counsel should have faulted trial counsel for not telling jurors of the chaotic, unhealthy years Jackson spent in TYC custody. However, given the State's emphasis on the numerous disciplinary infractions he received, a reasonable trial attorney could decide to deemphasize that period of his life. The affidavits on which Jackson bases this argument show how Jackson was the victim of bullying and assaults by other youth in TYC custody. Still, that information exists only in contrast to his extensive improper, and even violent, behavior at the TYC facility. As it was, the prosecution used Jackson's time at TYC to show that he was a future danger by arguing: "when he was placed in a restrictive setting for juvenile offenders at TYC . . . he continued in the same way, the same things, the same pattern that he had followed all his life. He assaulted his peers. He assaulted the staff. He was disruptive." Tr. Vol. 20 at 57. But the state habeas court observed that the State only "briefly mentioned" Jackson's TYC infractions. State Habeas Record at 233. Drawing additional attention to his time at TYC by painting a bleak picture of the circumstances would be double-edged; jurors could understand somewhat Jackson's behavior, but at the expense of allowing the prosecution to detail his

disciplinary infractions and assaults, and then further connect that pattern of violence throughout his life. As state habeas counsel observed in his briefing, "[e]ven without specific encouragement the jury could have viewed . . . the TYC incidents and the charged offense as showing a continuing pattern over several years." State Habeas Record at 21. Presentation of additional testimony about his time in TYC custody would run the risk of turning what the state habeas court termed "the sterile recitation of disciplinary offenses" into a much-more detailed, and aggravating, view into his numerous violations, some of which included "assaults on other youths, assault on staff, sexual contact and vandalism." State Habeas Record at 225. A reasonable habeas attorney could decide to shift the focus away from areas which would open the door to even greater discussions of Jackson's own bad behavior.

In short, Jackson provides much argument about the claims that an attorney may have chosen to raise, but does not prove that a reasonable habeas attorney would have raised such arguments, much less that his trial attorney provided ineffective representation. State habeas counsel chose to attack trial counsel's defense using admissible evidence that became the subject of a state evidentiary hearing. Jackson has not shown that trial counsel ignored a stronger or better-supported claim in choosing to proceed as he did. Jackson has not adduced strong evidence, or in some cases even admissible evidence, on which a reasonable state habeas attorney could have crafted a strong *Strickland* claim. Jackson has not shown that state habeas counsel's representation should serve as cause to overcome the procedural bar of his unexhausted arguments.

Even after showing cause flowing from habeas counsel's representation, an inmate still must demonstrate "actual prejudice." *Canales v. Stephens*, 765 F.3d 551, 571 (5th Cir. 2014); *see also Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013). The Court's ultimate

question is whether a prisoner has shown a reasonable probability that he would have been granted state habeas relief "had his habeas counsel's performance not been deficient." *Newberry v. Stephens*, 756 F.3d 850, 872 (5th Cir. 2014); *see also Barbee v. Davis*, 660 F. App'x 293 (5th Cir. 2016); *Gates v. Davis*, 648 F. App'x 463, 470 (5th Cir. 2016); *Newbury v. Stephens*, 756 F.3d 850, 872 (5th Cir. 2014); *Preyor v. Stephens*, 537 F. App'x 412, 421 (5th Cir. 2013).[19]

For the reasons discussed above, the issues Jackson faults state habeas counsel for not raising are not ones for which the state habeas court reasonably would have granted relief. Aside from inherent weaknesses in Jackson's evidentiary support, and habeas counsel's selection of an equally strong, if not stronger, claim, the state habeas court would have to consider whether trial counsel's representation prejudiced the trial defense. Albeit in outline form, the jury had before it much similar information to that contained in the federal habeas record. Much of the new information is not in a vehicle that could come before jurors. Even so, the state habeas court would have to consider prejudice by placing the new information into the other testimony and evidence from trial. The jury heard extensive evidence about Jackson's lawlessness, violence, and remorselessness. Jackson had committed many crimes, and even had attempted to murder before. A state habeas court plugging the new information into the trial record would not reasonably grant relief.

Jackson has not shown cause or prejudice to overcome the procedurally barred portions of his first ground for relief. The unexhausted portions of claim one are, therefore, procedurally barred from federal review. Alternatively, for the reasons outlined above, the Court finds his

[19] Jackson argues that this Court should limit its analysis of prejudice to the question of whether the claim is substantial. That is not the law in this circuit. *But see Detrich v. Ryan*, 740 F.3d 1237, 1245-46, 1261 (9th Cir. 2013) (finding that "a prisoner satisfies the prejudice prong of the 'cause and prejudice' standard for overcoming a procedural default when the prisoner's claim of trial-level ineffective assistance of counsel claim is substantial").

claim to be without merit. The Court denies claim one.

CERTIFICATE OF APPEALABILITY

Under AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a Certificate of Appealability ("COA"). *See* 28 U.S.C. § 2253(c). Jackson has not yet requested that this Court grant him a COA, though this Court can consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Fifth Circuit holds that the severity of an inmate's punishment, even a sentence of death, "does not, in and of itself, require the issuance of a COA." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). The Fifth Circuit, however, anticipates that a court will resolve any questions about a COA in the death-row inmate's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. On the other hand, a district court that has denied habeas relief on procedural grounds should issue a COA "when the prisoner 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. *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Jackson's petition raises issues worthy of judicial review. Nevertheless, having considered the merits of Jackson's petition, and in light of AEDPA's standards and controlling precedent, this Court determines that a COA should not issue on any of Jackson's claims.

CONCLUSION

For the reasons described above, the Court **grants** Respondent's motion for summary judgment, **denies** Jackson's petition, **denies** all requests for relief, and **dismisses** this case **with prejudice**. The Court will not certify any issue for appellate review.

The Clerk will provide copies of this Order to the parties.

SIGNED at Houston, Texas, this 6th day of March, 2018.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

EXHIBIT
C

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

CHRISTOPHER DEVON JACKSON,	§	
	§	
Petitioner,	§	
	§	
	§	No. 4:15-cv-00208
WILLIAM STEPHENS Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	THIS IS A DEATH PENALTY CASE
	§	
Respondent	§	

DECLARATION OF BETTINA WRIGHT, LCSW, LCDC

1. My name is Bettina Wright. I am over the age of 18, have personal knowledge of the facts described in this declaration, have never been convicted of a felony, and declare under penalty of perjury that the following is true and correct.

2. I am licensed by the State of Texas as a Licensed Clinical Social Worker and a Licensed Chemical Dependency Counselor with a private psychotherapy practice in Houston, Texas. Part of my practice has included mitigation work for criminal cases in Harris County. I estimate that, when I was engaged for Christopher Jackson's case, I had been involved in twelve to fifteen cases as a mitigation specialist to some degree.

3. In June 2006, I was engaged by defense attorney R. P. "Skip" Cornelius as the mitigation specialist for the defense in connection with Mr. Jackson's capital murder trial. . Although I normally conduct a comprehensive investigation of the defendant's life history, including his mental health, his family history, interviewing family members, and reviewing any and all available records, my role in Mr. Jackson's case was much more limited. My role in the

investigation was limited to interviewing Mr. Jackson and reviewing the limited records his trial counsel provided me. Conducting a comprehensive mitigation investigation for Mr. Jackson's trial was not part of my role. Although I testified at Mr. Jackson's trial during the punishment phase, my testimony was limited to reading to the jury some information from some of Mr. Jackson's past medical records that Mr. Cornelius selected. Mr. Cornelius did not elicit any testimony from me regarding mitigation themes in Mr. Jackson's life history.

4. As a mitigation specialist in a capital case, I would spend up to 100 hours conducting a complete mitigation investigation. My work on capital as well as non-capital cases lasted from 6 to 24 months. In my experience, a complete mitigation investigation involves collecting medical, educational, criminal and any other available records for the defendant, and possibly family members; and interviewing people that interacted with the defendant, especially his caregivers and extended family. My findings would be shared with the team in order to support the lead attorney's trial strategy. In my capacity as a mitigation specialist, I normally worked closely with the trial attorneys to determine an effective mitigation strategy for each individual defendant. I was not asked to perform this role on Mr. Jackson's case.

5. Based both on the limited amount of work that I was asked to do on Mr. Jackson's case, and on my professional impression of the mitigation evidence unearthed by Mr. Jackson's current legal team, shown to me by federal habeas counsel Matthew Baumgartner, it is clear to me that Mr. Jackson's trial lawyers never asked me to investigate or provide them a complete understanding of his social and mental health history. At the time of Mr. Jackson's trial, I was not tasked with conducting the complete mitigation investigation necessary to develop the available mitigation evidence.

6. I no longer have Mr. Jackson's file in my archives because my license doesn't require me to keep records longer than five years. However, Mr. Baumgartner has shown me a copy of my final invoice for the case showing that, in total, I worked 24.5 hours on Mr. Jackson's case. Mr. Cornelius engaged me in April 2006, and I remained on Mr. Jackson's case until April 2007, when the trial occurred. According to my invoice, the 24.5 hours of work includes the mitigation investigation (20.5 hours), and preparing and testifying at Mr. Jackson's trial (4 hours). Thus, outside of trial, I only worked for 20.5 hours on the case.

7. In my experience, 20.5 hours is not an adequate amount of time to properly investigate and prepare a mitigation theory or strategy in a capital case. This is especially true of a defendant who is as mentally ill as Mr. Jackson. As I mentioned above, I routinely spend up to 100 hours on a complete mitigation investigation. The limited number of hours I spent on this case reflects Mr. Cornelius's instructions to me. He did not ask me to perform the work necessary to compile a complete social history for the case.

8. When conducting a mitigation investigation, I usually take direction from the lead defense counsel on whom to interview and what records to review. Typically, the attorney engages a private investigator to identify any relatives and friends. Then I consult with the attorney about which people to interview and for what purpose. I also report my findings to the attorneys, which prompts a discussion of what I should do next. There is usually a collaborative relationship between me and the attorneys.

9. In Mr. Jackson's case, I was not asked to help develop the mitigation case at all. I interviewed only one person, Mr. Jackson himself. I did not interview Mr. Jackson's immediate family, caregivers, relatives, friends, or neighbors. I was not asked to interview any of, and in some cases not made aware of, Mr. Jackson's family members in the immediate area, including

his sister, grandmother, uncle, cousins, mother, or any of the family's friends and neighbors. Again, this was not my choice; it reflects the lead trial counsel's decision on the scope of my work.

10. My invoice shows that in 2006-2007, I reviewed Mr. Jackson's mental health records given to me by counsel. However limited those records were I had enough information and insight to discern that Mr. Jackson was mentally ill. My diagnosis of Mr. Jackson based on DSM-IV-TR criteria was Schizoaffective Disorder classified as 295.70. Something that influenced that diagnosis involved being told by guards in the jail that Mr. Jackson couldn't meet with me because he was screaming and smearing feces around his cell. This information was, of course, anecdotal because I didn't witness the events the guard described. I later learned from Mr. Cornelius that Mr. Jackson was brought to court one day in a dirty orange jumpsuit looking very disheveled and disoriented. After this event, Mr. Cornelius told me the judge instructed jail personnel to ensure that Mr. Jackson was medicated at all times pending trial.

11. On July 23, 2015, and again on August 8, 2015, Mr. Jackson's current attorney Mr. Baumgartner showed me much more extensive medical records for Mr. Jackson than those given to me in 2006-2007. Mr. Baumgartner also showed me some medical records he collected for Mr. Jackson's sister, Candace Jackson, as well as a letter Candace wrote to the Harris County court describing her and Mr. Jackson's abuse by Tommie Walter, their maternal grandmother.

12. Mr. Jackson is the most mentally ill defendant I have ever worked with in a legal setting. I never observed Mr. Jackson at a baseline that was functional. I am told that Mr. Cornelius believed that Mr. Jackson was mentally stable and a malingerer. I do not know what he based his opinion on, but it was not anything that I told him.

13. Mr. Baumgartner told me Mr. Cornelius considered the episode in which Mr. Jackson smeared feces in his jail cell to be a tell-tale sign of malingering. I would not qualify that behavior as malingering. It doesn't meet any of the criteria for a diagnosis of Malingering in the DSM IV-TR. In Mr. Jackson's case this behavior should be viewed in the context of his psychosis. In order for Mr. Jackson to do this, he would have been suffering from some level of dissociation and most likely hallucinations. These are symptoms of psychotic disorders.

14. Had Mr. Cornelius asked for my opinion, I would have told him that Mr. Jackson was not malingering, that he was severely mentally ill, and in my opinion, suffering from a psychotic disorder. As a Licensed Clinical Social Worker and Licensed Chemical Dependency Counselor, I am licensed to, and do, make DSM diagnoses as a regular part of my practice. Although it is true, as I explain in other parts of this declaration, that I was not asked to conduct a comprehensive mitigation investigation, I did spend enough time with Mr. Jackson and reviewed enough records to conclude that he suffered from Schizoaffective Disorder. However, Mr. Jackson's trial did not ask for my opinion.

15. The additional medical records Mr. Baumgartner has shown me underscore the presence of many diagnoses during his childhood. Some but not all of those included Major Depressive Disorder, Posttraumatic Stress Disorder, Conduct Disorder, both Childhood Onset and Adolescent Onset, Impulse Control Disorder, Bipolar I Disorder, Severe with Psychotic Features. It is not uncommon for a child who is struggling with severe mental illness to be diagnosed with different disorders at different ages. We have to take into account different doctors were looking at a patient at different times in his emotional and physical development. A lot of the disorders Mr. Jackson was diagnosed with can be precursors of very specific disorders of adulthood. As stated previously, after our meetings, the DSM-IV-TR diagnosis I

gave Mr. Jackson at age 22 was Schizoaffective Disorder, a psychotic disorder the onset of which typically occurs between the late teens and the mid 30's. I noticed in the records Mr. Baumgartner shared with me that Mr. Jackson was diagnosed with that same disorder in prison in January 2008, only 8 months after his death sentence. The criteria for a diagnosis of Schizoaffective Disorder include but are not limited to delusions, hallucinations, hearing voices, disorganized or catatonic behavior, social dysfunction and the presence of a Mood Disorder. The medical records shared with me by Mr. Baumgartner show that, for many years, Mr. Jackson had been hearing voices and having other psychotic symptoms.

16. In conducting a mitigation investigation, it is important to talk to the defendant's family. I've traveled across several states to interview family members of a defendant in a capital case. In this case, Mr. Jackson's family and family friends were living in Harris County. Had I been asked to help develop Mr. Jackson's mitigation case, I would have advised Mr. Cornelius that Mr. Jackson's history of physical and sexual abuse, and his lifetime of mental health problems, could be substantiated by records and the accounts of some family members, in combination with a mitigation specialist and a medical professional. In my experience, expert testimony from a mitigation specialist, when used to supplement and explain the effects of abuse and mental illness described by family members and reflected in the defendant's medical history, can help jurors better understand the effects of mental illness, abuse and abandonment. Again, I was not asked to participate in Mr. Jackson's mitigation case in this capacity.

17. Rather, Mr. Cornelius asked me to read from medical records that he had selected without allowing me to provide any explanation of the mental health issues being described. Mr. Cornelius also did not elicit my opinion as to Mr. Jackson's mental illness based on my review of his file and interviews with him. He did not elicit my opinion about or ask me to investigate,

through research and interviews, whether the physical and sexual abuse Mr. Jackson reported to me were real or fabricated.

18. Talking to Mr. Jackson's family members would have been especially important because their information can strengthen and provide context for Mr. Jackson's account of what I would describe as his terrifying childhood. I could have informed Mr. Cornelius of the mitigation themes at hand in this case which could have been presented to Mr. Jackson's jury.

19. Mr. Baumgartner told me how Mr. Cornelius and his co-counsel, Hattie Mason, located and prepared Mr. Jackson's family members that were called. It's my understanding that one of the family members called was Mr. Jackson's maternal grandmother, Tommie Walter. I was not involved in the decision to call that witness. I was not asked to interview Ms. Walter. Had I been asked I would have expressed my concern about information I had read that would prevent her from being a helpful witness in the punishment phase of Mr. Jackson's trial.

20. Mr. Jackson's current lawyers have shown me a letter from Mr. Jackson's sister Candace indicating that one of the defense's very few mitigation witnesses, Tommie Walter, was in fact one of Mr. Jackson's primary abusers. According to CPS records that I read, Ms. Walter actually drove her grandson to CPS and told them she would no longer take care of him, then left him there. In her court testimony she described the loving and stable family environment she provided. I now have information from Mr. Jackson's sister that Ms. Walter had been physically abusing Mr. Jackson and sexually abusing Candace. Ms. Walter had every incentive to portray herself as loving and him as incorrigible.

21. Tommie Walter's testimony was simply not reflective of Mr. Jackson's childhood reality. Mr. Jackson expressed to me that he did not feel safe after his aunt and main early childhood caregiver, Levada "Louise" Dunn, died. He reported to me that a foster child of

his Aunt Louise had sexually molested him while he was living with her but her house was still the safest place he could remember from his childhood! Had I been allowed to investigate Mr. Jackson's mitigation case, I could have learned of the abuse Mr. Jackson suffered at the hands of Tommie Walter and possibly others. If I had done a complete mitigation investigation, I would have had information, witnesses and records that corroborate Mr. Jackson's description of his childhood, not Tommie Walter's.

22. Had I been asked to look for mitigation themes in Mr. Jackson's case, I would have emphasized his childhood abandonment through witnesses other than Ms. Walter, one of his two primary caretakers who did abandon him. His mother was the other one. I would have emphasized Mr. Jackson's developmental deficits due to abandonment and abuse along with his mental illness by explaining the progression of both from early childhood into his late teens and early 20s. I could have presented a comprehensive argument that Mr. Jackson, with treatment and medication, could have the chance to function in an institutionalized setting without being a danger to himself or others.

23. Had I been asked to participate in the development of the mitigation case, I would also have emphasized that Mr. Jackson was only 21 years old at the time of the crime. Science shows that the human brain is not fully developed until age 22 to 25. The brain's prefrontal cortex where executive decision making develops is the part of the adult brain considered "the seat of good judgment". In early (age 12-17) and late (age 18-early 20's) adolescent brains, decisions are more emotional than rational. The affects of abandonment, neglect, abuse and long term institutionalization can severely affect emotional and psychological development. With comprehensive treatment and pharmaceutical intervention Mr. Jackson would have the opportunity to learn new coping strategies and take responsibility for his behavior while

functioning as a member of the prison population. But again, Mr. Cornelius was not seeking my involvement in this type of mitigation case.

24. Had Mr. Cornelius authorized me to conduct an adequate social history investigation, we would have been able to dispel the State's argument that Mr. Jackson was malingering in order to avoid a death sentence. I would have been able to dispel that theory with an explanation of what Malingering is, and also use Mr. Jackson's medical records and family interviews to underscore his and his family's history of mental illness. Because there is a genetic component to many mental illnesses, including psychotic disorders such as Schizoaffective Disorder, I could have explained to the jury that this family's history of mental illness strengthens the argument that Mr. Jackson's mental health disorders are quantifiable, and that he was not malingering in order to avoid a death sentence. The medical records dating back to when Mr. Jackson was a young teenager that Mr. Baumgartner has now given me show that he was suffering from mental illness long before the trial.

25. However, Mr. Cornelius did not consult with me about the State's argument that Mr. Jackson was malingering. In fact, I did not learn that Dr. Willard Gold testified for the State that Mr. Jackson was malingering until years after the trial was completed.

26. The additional medical records provided to me by Mr. Baumgartner belie any suggestion that Mr. Jackson was malingering. For example, the records show that as a child and teenager Mr. Jackson was on an uncommon amount and variety of medications, including antipsychotics, antidepressants, and sleeping medication. At 14, he was on Haldol, a very strong antipsychotic drug. The records further show that Mr. Jackson was hearing voices at a young age. This, too, is a sign of psychosis. It can be difficult to diagnose psychotic disorders in youths who have been committed to state mental health facilities because such disorders don't

follow a definable course. Psychotic disorders can display intermittent exacerbations and remissions while others remain chronic. In institutional settings, children and/or adolescents may use denial of symptoms in the hopes of being reunited with family. As a child, Mr. Jackson may have concealed his mental illness in an effort to return home, even if home was an unsafe place to be, safety being a relative term to a child. Again, Mr. Cornelius did not consult with me about any of these issues, even though one of my primary areas of expertise is treating trauma and abuse survivors.

27. Finally, medical records from Mr. Jackson's sister showing similar mental health problems as those suffered by Mr. Jackson contradict the theory that he was malingering. Had I been able to perform a comprehensive investigation, this familial mental health history would have been clear to me. I would have been able to inform Mr. Cornelius of the additional evidence available to contradict the State's argument that Mr. Jackson was malingering.

28. Mr. Jackson's medical records, family history as well as his self-reporting indicate prolonged abuse, both physical and sexual, at the hands of those closest to him. Because I was not allowed to conduct a thorough mitigation investigation at the time, this information was never presented to the jury. In fact, it was never considered for presentation at all.

29. I have been told by Mr. Baumgartner that Mr. Cornelius said he did not allow me to testify regarding Mr. Jackson's mental illness because "I'm not going…to allow the State to prove up from my own expert how sick the defendant was and possibly establish a basis for diagnosing the defendant as a sociopath, psychopath or antisocial personality, and this was a real possibility in my mind." First, "sociopath" and "psychopath" are not mental illnesses defined in the DMS-IV-TR. If Mr. Cornelius was concerned about the jury hearing the words "Antisocial

Personality Disorder", he could have asked me to explain the difference between Antisocial Personality Disorder and Schizoaffective Disorder. But again, I was not consulted on this issue.

30. I declare under penalty of perjury that the foregoing is true and correct.

Executed this day, the 19th of August, 2015.

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Bettina Wright, LCSW

Personality Disorder", he could have asked me to explain the difference between Antisocial Personality Disorder and Schizoaffective Disorder. But again, I was not consulted on this issue.

30. I declare under penalty of perjury that the foregoing is true and correct.

Executed this day, the 19th of August, 2015.

Bettina Wright, LCSW, LCDC

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

CHRISTOPHER DEVON JACKSON,	§	
	§	
	§	
Petitioner,	§	
	§	
	§	
	§	No. 4:15-cv-00208
WILLIAM STEPHENS	§	
Director, Texas Department of	§	THIS IS A DEATH PENALTY CASE
Criminal Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

DECLARATION OF VICTOR R. SCARANO, M.D., J.D.

1. My name is Victor R. Scarano. I am over the age of 18, have personal knowledge of the facts described in this declaration, have never been convicted of a felony, and declare under penalty of perjury that the following is true and correct.

2. I am licensed to practice law and medicine in Texas. I am the Director of Forensic Psychiatry Services at Texas Law & Psychiatry, P.L.L.C. and frequently consult with attorneys in criminal cases on matters of forensic psychiatry.

3. In August 2006, I was engaged, as a court appointed defense expert, by defense attorney R. P. "Skip" Cornelius to consult on Christopher's Jackson's capital murder case. At the outset of my engagement, Mr. Cornelius explained that the purpose of my engagement was to give Mr. Cornelius my "professional opinion about [Mr. Jackson's] mental makeup."[1] I understood that to mean that I was to determine whether, in my opinion, Mr. Jackson suffered from any serious mental illness or defect that could provide a defense of insanity or any mental

[1] August 23, 2006 letter from me to Skip Cornelius.

incompetence. At the time of the engagement, I provided Mr. Cornelius with a 17-20 hour "conservative estimate of the time needed" on Mr. Jackson's case, which included "a strong possibility that I might need to meet with Mr. Jackson on more than one occasion."[2] My time estimate of 17-20 hours included 10 hours of review of available medical records. Among the records I requested for review was "The competency evaluation performed by Stephen P. McCrary, Ph.D., dated April 25, 2006" and the "MHMR records regarding Mr. Jackson at the Harris County Jail."[3]

4. When Mr. Jackson's current attorney, Matthew Baumgartner, asked me to look through my file on Mr. Jackson, I found a partially completed draft report that I began preparing for Mr. Cornelius in January 2007. From the draft report, I can tell which documents I reviewed and how much time I spent with Mr. Jackson. I did not complete that report as I now assume with the information I had at the time that Mr. Cornelius told me to stop working on Mr. Jackson's case.

5. The draft report indicates that I did not receive some of the records I requested in my August 23, 2006 letter to Mr. Cornelius. Specifically, I did not receive the psychiatric reports prepared by MHMR doctors while Mr. Jackson was in the Harris County Jail, including Dr. McCrary's competency report of April 25, 2006.

6. On July 23, 2015, Mr. Jackson's current counsel Matthew Baumgartner showed me a copy of Dr. McCrary's April 25, 2006 report stating that Mr. Jackson has in the past been diagnosed as a "schizophrenic" and had been taking anti-psychotic drugs. Mr. Baumgartner also showed me a March 1, 2006 Competency Report by Ramon Laval, Ph.D., stating that Mr. Jackson could not be interviewed at the scheduled time because he was "manifesting bizarre and

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[2] *Id.*
[3] *Id.*

disruptive behaviors." Specifically, Mr. Jackson had "smeared feces over his face and body" and had been urinating and defecating on his cell floor. Dr. Laval's report also states that Mr. Jackson "received a psychiatric assessment on February 7, 2006 and was diagnosed as suffering from Schizoaffective Disorder."

7. From looking at my draft report, it appears that I was not provided any of these records by Mr. Cornelius. The behaviors and diagnoses described in both Dr. McCrary's April 25, 2006 Competency Report and Dr. Laval's March 1, 2006 Competency Report, indicate that Mr. Jackson had been previously diagnosed with a psychotic disorder as well as polysubstance abuse. Those reports (documenting Mr. Jackson's behaviors and his prior diagnoses) would have been highly material if I was asked to continue my evaluation.

8. From my draft report and from Mr. Cornelius's letter to me, it appears that Mr. Cornelius did not ask me to determine whether Mr. Jackson's suffering from real psychosis, or was instead "malingering." Had I known that Mr. Jackson was exhibiting such behavior as smearing his own feces on his face and body, and had I been asked by Mr. Cornelius whether that behavior was a sign of psychosis, I would have told him that it could be and that it is not usually a sign of malingering.

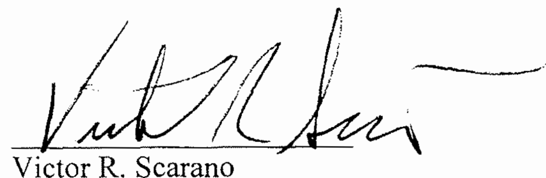
9. I conservatively estimated that I would need 17-20 hours with Mr. Jackson to form a professional opinion about Mr. Jackson's "mental makeup." I have been shown a statement that I sent to Mr. Cornelius on February 7, 2007, after Mr. Cornelius told me to stop working on the case, for a total of $2,100.00. My billing rate in 2006-2007 was $300 per hour, so I spent seven hours total on Mr. Jackson's case. My draft report further reflects that I met with Mr. Jackson only once, on October 9, 2006. This limited amount of work reflects Mr. Cornelius's instruction to stop working on the case. The fact that I spent a total of only seven

hours on Mr. Jackson's case and met with him only once, indicates that an adequate amount of time was not spent on the case to determine such questions as whether Mr. Jackson suffered from any particular form of psychosis.

10. After one meeting with Mr. Jackson for at most 3-4 hours on a single day, I would have told Mr. Cornelius that my assessment of Mr. Jackson would be limited to Mr. Jackson's performance on the competency test I administered on that day and my observations about his behavior that day. If I had continued to meet with Mr. Jackson on other occasions, it is certainly possible that I would have formed different conclusions about Mr. Jackson's past and present mental state. If I had been provided reports indicating Mr. Jackson's observed bizarre and psychotic behavior, or had Mr. Jackson been in a psychotic or manic state during a subsequent meeting, those findings could have affected my conclusions about Mr. Jackson's mental state. As it was, I reported to Mr. Cornelius my observations from the limited time I spent on the case.

11. I declare under penalty of perjury that the foregoing is true and correct.

Executed this day, the 10 of August, 2015.



Victor R. Scarano

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

CHRISTOPHER DEVON JACKSON, Petitioner, WILLIAM STEPHENS Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § § § §	No. 4:15-cv-00208 THIS IS A DEATH PENALTY CASE

DECLARATION OF JAMES RAY HAYS, Ph.D., J.D.

1. My name is James Ray Hays. I am over the age of 18 years, have personal knowledge of the facts as described in this declaration, have never been convicted of a felony, and declare under penalty of perjury that the following is true and correct.

2. I have been licensed as a psychologist in Texas since 1971 and as an attorney in Texas since 1980. The majority of my practice as a psychologist has been with individuals who are chronically and persistently mentally ill in outpatient and inpatient settings with the University of Texas Medical School at Houston at the Harris County Psychiatric Hospital and the Baylor College of Medicine at Ben Taub General Hospital. I have attached my current *curriculum vitae* to this declaration.

3. Matthew Baumgartner, J.D., federal habeas attorney for Christopher Devon Jackson, asked me to review the work of Victor Scarano, M.D., J.D., when he undertook a psychiatric evaluation of Mr. Jackson in August 2006 for the defense of Mr. Jackson in a capital murder case. The work requested by Mr. Baumgartner consisted of review of the materials produced by Dr. Scarano and certain records of the defendant and appellant, Mr. Jackson.

4. The materials I reviewed for this matter included the following:

    a. Declaration of Victor Scarano, M.D., J.D., dated August 10, 2015 (4 pages)

b. "...partially completed draft report" by Dr. Scarano, dated January, 2007 (19 pages)

c. Notes of records review of the defendant by Dr. Scarano, undated (five pages)

d. Invoice by Dr. Scarano for work on State v. Jackson (one page)

e. Invoice of Bettina Wright for mitigation work (one page)

f. Bayou City Medical Center records of Mr. Jackson from December, 1998 (three pages and eight pages)

g. Behavioral Services of Houston records of Mr. Jackson dated July 9, 1998, (19 pages)

h. Records from Twelve Oaks Hospital for an inpatient stay of Mr. Jackson from 12/28/1998 to 1/7/1999 (20 pages)

i. Letter from Candace Jackson, sister of the defendant documenting the sexual and physical abuse of Mr. Jackson as a child

j. Records of the Hamilton State School of a Psychological evaluation of the defendant dated 9/12/2002 (four pages)

k. Records of Mr. Jackson from the Harris County Juvenile Detention Center dated 7/10/1999 (two pages) and medical assessment 9/30/1999, and Psychosocial services referral assessment (10 pages) Psychiatric Consultation 8/13/1999 (11 pages)

l. Mental Health and Mental Retardation Department of Harris County Competency Report of Mr. Jackson by Ramon Laval, Ph.D., dated March 1, 2006 (two pages)

m. Mental Health and Mental Retardation Department of Harris County Sanity Report of Mr. Jackson by Stephen McCary, Ph.D., dated March 25, 2006 (eight pages)

n. Mental Health and Mental Retardation Department of Harris County five axis diagnosis of Mr. Jackson dated 02/2007 (four pages)

o. Texas Department of Criminal Justice Institutional Division, Polunsky Unit, 90 day outpatient assessment of Mr. Jackson dated 06/15/2007 (two pages), triage interview 05/25, 2007 (two pages), death row initial mental health appraisal 4-19-07 (nine pages) Outpatient mental health service 02/25/2008 (two pages), outpatient mental health services 3/04/2009 (three pages)

p. Texas Health and Human Services Commission Medicare billing records for Mr. Jackson, the defendant, when he was a child (23 pages)

q. Texas Department of Criminal Justice Institutional Division, Jester IV Unit, Individualized Treatment Plan for Psychiatry Chronic of Mr. Jackson case dated 1/18/2008 (6 pages)

5. From my review of these documents I have reached the following conclusions about the mental health of the defendant/appellant, Mr. Jackson:

a. Mr. Jackson has a major mental illness, manifested in various ways at various times with such symptoms as auditory and visual hallucinations, paranoid and suicidal thoughts and acts. He was first diagnosed as having a major mental disorder when he was a minor child at age 14 years in 1998. Over his life Mr. Jackson has been variously diagnosed major depression severe with psychotic features, bipolar disorder, post-traumatic stress disorder, schizoaffective disorder, schizophrenia paranoid type, and conduct disturbance.

b. Over the course of his treatment of mental illness, Mr. Jackson has been placed on a variety of powerful neuroleptic medications aimed at dealing with the symptoms he exhibited, including, Paxil, Risperdal, Trazadone, Depakote, Wellbutrin, Verapamil, Zyprexa, and Chlorpromazine.

c. Mr. Jackson, as are most psychiatric patients, was not consistent with the medication regimen prescribed for him by his treating physicians and would refuse medications at times followed by a recurrence of symptoms.

6. Dr. Scarano reviewed some records in this matter but spent only a limited time with Mr. Jackson. Dr. Scarano reported that Mr. Jackson was taking no medication when seen by Dr. Scarano. Medical records from the Harris County Jail are not available from this time period; therefore, there is no objective evidence that Mr. Jackson was not prescribed any medications, if he was refusing to take prescribed medications, or as a third alternative that he, in fact, was taking medications at the time he was seen by Dr. Scarano. Dr. Scarano's notes do not indicate that he reviewed the medical records of the

Harris County Jail for Mr. Jackson contemporaneously with his evaluation of Mr. Jackson.

7. The Competency Report by Ramon Laval, Ph.D., indicated that Dr. Laval was unable to assess Mr. Jackson because of bizarre, disruptive behavior, including the report that Mr. Jackson has smeared feces on the walls of his cell. Such bizarre behavior is characteristic of the most severely psychotic episodes by mentally ill patients.

8. The sanity and competency reports from the evaluations done as part of pre-trial preparation by Stephen P. McCary, Ph.D., indicated that Mr. Jackson was "...competent..." and that he "...does not meet the criteria for the insanity defense."

9. Notwithstanding that Dr. McCary found Mr. Jackson competent for trial and did not meet the criteria for a defense of insanity, Mr. Jackson's history of mental illness and childhood abuse could have been used as mitigation factors to present to a jury.

10. Mental illness is the same as most other chronic disease processes in that it will have excursions in which symptoms are more evident than at other times. When he was seen by Dr. Scarano Mr. Jackson may have had his symptoms under more control than at other times. The absence of medical records prevents a more accurate understanding of the interventions, if any, that were being done for Mr. Jackson at time. Dr. Scarano's diagnosis on page 19 of his psychiatric examination/evaluation report of mental illness/mental retardation is simply not consistent with the history that Mr. Jackson presents. Chronic mental illness does not appear and disappear over short courses of time. Symptom expressions do vary at times but the illness remains. Dr. Scarano's evaluation was incomplete as noted in his declaration. Further, as noted in Dr. Scarano's declaration, had Mr. Jackson's trial attorney provided the medical records from the Harris County Jail contemporary to Dr. Scarano's evaluation of the Mr. Jackson, his findings may "...have affected [his] conclusion about Mr. Jackson's mental state." In my opinion had those records been provided to Dr. Scarano, an accurate diagnosis of Mr. Jackson's chronic and persistent mental illness would have been inevitable.

11. My conclusion from the review of materials in this matter is that Mr. Jackson suffered from and continues to suffer from a chronic and persistent mental illness and suffered physical and sexual abuse as a child. The symptoms and consequences of such mental illness and abuse have a major impact on the life of one who suffers from these problems. Any person's life needs to be examined in light of all the circumstances of that life, including any mental illness that person might have. The nature of Mr. Jackson's illness and his history should have been developed completely in order for a jury to reach a full understanding of the life of Mr. Jackson before that jury passed judgement for

punishment. Such failure to develop fully that aspect of Mr. Jackson's life prevented justice from being done by his defense.

12. I estimate that the time required to perform a complete mental health evaluation of this sort and to prepare the results of that evaluation to explain to a jury or court is approximately 40 hours. At my standard billing rate of $250/hr., I estimate that $10,000 is necessary to complete and report this evaluation.

Executed this day, the 18th of August, 2015.

James Ray Hays, Ph.D., J.D.