such, "evidence later introduced in federal court is irrelevant." *Id.* at 184. "The same rule necessarily applies to a federal court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged." *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 105 (2012). With respect to § 2254(d)(2), a Texas court's factual findings are presumed to be sound unless a petitioner "rebuts the presumption of correctness by clear and convincing evidence." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). " The standard is demanding but not insatiable . . . deference does not by definition preclude relief." *Id.*

The Supreme Court stated that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (quoting *Richter*, 562 U.S. at 101). The Supreme Court has explained that the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that State court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas corpus relief is not available just because a State court decision may have been incorrect; a petitioner must show that a State court decision was unreasonable. *Id.* at 1850.

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). In the course of reviewing state proceedings, a federal court does "not sit as a super state supreme court to review error under state law." *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983).

V. ANALYSIS

A. Mr. Gardner's running objections are meritless.

Mr. Gardner states several objections to the State court's Findings of Fact. Mr. Gardner incorporates these objections into each claim for relief in his Petition. (Dkt. # 17, at pp. 28–34). For the following reasons, these objections are meritless.

1. The State court's findings of fact are entitled to a presumption of correctness, regardless of whether a live hearing was held in State court.

Mr. Gardner argues that a "full and fair" hearing in State court is necessary before this Court can presume that the State court's findings of fact are correct under 28 U.S.C. § 2254(e)(1). (Dkt. # 17, at pp. 20–22). Mr. Gardner contends that for a hearing to be "full and fair," there must be a live hearing with discovery. (Dkt. # 17, at p. 21). He points to *Panetti v. Quarterman*, 551 U.S. 930 (2007) and *Wiley v. Epps*, 625 F.3d 199 (5th Cir. 2010). (Dkt. # 17, at pp. 20–22). 28 U.S.C. 2254(e)(1) does not refer to a hearing in state court as a precondition for its application, and Mr. Gardner offers no case law on point to support such a broad proposition (Dkt. # 17, at p. 21).

The Fifth Circuit has stated otherwise. *See Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001) ("[W]e hold that a full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to State habeas court findings of fact nor to applying § 2254(d)'s standards of review."). Other circuits share this view. *See Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010) ("AEDPA does not make deference to state court fact-finding dependent on the adequacy of the procedures followed by the state court."); *Teti v. Bender*, 507 F.3d 50, 59 (1st Cir. 2007) ("As Professors Fallon, Meltzer, and Shapiro have noted, these changes suggest that 'the presumption of correctness now applies across the board.'") (quoting R. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1355 (5th ed. 2003)); *Lambert v. Blackwell*, 387 F.3d 210, 238 (3d Cir. 2004) ("The habeas statute no longer explicitly conditions federal deference to state court factual findings on whether the state court held a hearing."); *Mendiola v. Schomig*, 224 F.3d 589, 592–93 (7th Cir. 2000)

("[I]f the state court's finding is supported by the record, even though not by a hearing on the merits of [the] factual issue, then it is presumed to be correct.") (internal quotations omitted).

Mr. Gardner relies on the holdings in *Panetti* and similar cases to support his assertion that a live evidentiary hearing is a prerequisite to presuming that a state court fact-finding is correct. *Panetti* itself is founded on *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986), and *Ford* simply confirmed that a death-sentenced inmate had a constitutional right to competence at the time of execution. *See Panetti*, 551 U.S. at 949 ("Justice Powell's opinion in *Ford* constitutes 'clearly established' law for purposes of § 2254."). An inmate challenging his competency to be executed has a constitutional right to certain procedures, should he make a requisite showing in state court that he is categorically exempt from the death penalty. In the context of a claim of mental retardation, the Fifth Circuit has found a constitutional basis in the procedures afforded an inmate if they make a prima facie showing of mental retardation in state court. *See Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007).

Mr. Gardner presented only claims of ineffective assistance to the State habeas court; these are not allegations of absolute immunity from the death penalty possibly triggering additional procedural due process protections. Mr. Gardner is not entitled to the additional protections sometimes afforded to inmates who present substantial evidence that they are unconditionally exempted from execution. 28 U.S.C. § 2254(e)(1) therefore applies to his case. *See Hines v. Thaler*, 456 F. App'x 357, 360–64 (5th Cir. 2011) (distinguishing *Panetti*, *Wiley*, and *Rivera*, and upholding AEDPA deference despite no live hearing in state court).

A decision based on a review of the complete record by the same judge who sat at trial, is a full and fair hearing. *See*, *e.g.*, *Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000) ("We have repeatedly found that a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying his claims, especially where as here, the trial court and the state

habeas court were one and the same."). This court concludes that the fact-findings of the State habeas court will be presumed to be correct.

2. The Court of Criminal Appeals credibility findings are relevant to an ineffective assistance of counsel claim.

Mr. Gardner objects to certain findings of fact made by the State habeas court regarding counsel's experience, credibility, and the court's recollection of the events at trial. (Dkt. # 16, at p. 22); *see also* 2 SHCR 385–86 (Findings 11–16). Mr. Gardner argues that the findings of credibility do not impact the query of effectiveness. (Dkt. # 16, at p. 22). A claim alleging ineffectiveness of counsel requires some factual inquiry as "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Facts pertinent to such a claim can include whether counsel made "strategic choices . . . after thorough investigation of law and facts relevant to plausible options," which sometimes requires "inquiry into counsel's conversations with the defendant." *Id.* at 690–91. Ineffective assistance of counsel claims are fact-based inquiries typically premised on counsel's explanation of his or her acts or omissions, at least as far as the performance inquiry is concerned. *Id.* Any time an explanation is given before a fact-finder, credibility is relevant. *Cf.* Fed. R. Evid. 607 ("Any party, including the party that called the witness, may attack the witness's credibility."). Mr. Gardner's disagreement with a credibility finding does not render it irrelevant. Mr. Gardner's "objections" to the state court's credibility fact-findings carry no weight, and those findings will be considered by this court in addressing the State court's decision.

3. Submission of an affidavit by counsel to the State habeas court did not create a conflict of interest.

Mr. Gardner objects to any finding by the State habeas court that relied upon the affidavit of counsel. (Dkt. # 16, at p. 22–23). He argues that a finding of ineffectiveness creates

a conflict of interest for an attorney who admits deficiency because he will be removed from the capital appointment list under article 26.052 of the Texas Code of Criminal Procedure. (Dkt. # 16, at p. 23).

Mr. Gardner's objection is overruled for several reasons. First, an attorney's admission of deficiency is not a legal finding of ineffectiveness. An attorney's belief that he erred is a subjective determination; *Strickland* requires that an attorney's actions be reviewed under "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *see also Richter*, 562 U.S. at 110. Accordingly, an attorney's admission of deficient representation does not require a finding of deficiency under *Strickland*, nor automatic removal from the capital appointment list.

Further, an admission that an attorney erred does not mandate a finding of prejudice. Prejudice is necessary for a determination of ineffectiveness. *Strickland*, 466 U.S. at 692. Although it is not uncommon for an attorney to make an error during the course of a trial, only those errors which substantially affect the outcome of trial implicate a constitutional violation. *Richter*, 562 U.S. at 110 ("Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities."). Admitting an error does not require a finding of prejudice or removal from the capital appointment list.

Article 26.052 does not create a conflict of interest. Representation of Mr. Gardner by trial counsel ended when appellate counsel was appointed. 2 CR (219-81121-06) 632. This is not a situation where counsel are actively representing opposing interests. *See* Tex. Disciplinary R. Prof'l Conduct 1.06(b)(1). To the extent that counsel's own interests are impacted by potential removal from the capital appointment list, a conflict arises from such a scenario only

when such personal interests "have [an] adverse effect on representation"—active representation. Tex. Disciplinary R. Prof'l Conduct 1.06(b)(2) & cmt. 5. Because trial counsel no longer represented Mr. Gardner or owed any duty to him, save a duty of confidentiality, which Mr. Gardner waived by challenging their representation, no conflict arose in this case.

Mr. Gardner presented his allegation of an alleged conflict of interest to the State habeas court. 1 SHCR 79–81. The State habeas court considered and rejected this challenge, finding trial counsel to be credible. 2 SHCR 386 (Finding 16). This discrete fact-finding is entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e)(1). Mr. Gardner has not proffered clear and convincing evidence to counter this finding. Accordingly, this court will consider the explanations proffered by counsel to the State habeas court.

4. Mr. Gardner was not denied due process when the State Court found the juror affidavits to be inadmissible.

Mr. Gardner submitted affidavits of five jurors. 1 SHCR 95–107. This was an attempt to expose the jury's deliberations and to show the effect of the new evidence that counsel should have supposedly presented at trial. *See* 1 SHCR 29. The State habeas court found, pursuant to Rule 606(b) of the Texas Rules of Evidence, that such affidavits were inadmissible and did "not consider them for any purpose." 2 SHCR 385 (Findings 8–10). Mr. Gardner complains that the State court interpreted state law incorrectly and that the State court relied on the juror affidavits despite explicitly saying otherwise, resulting in a judicial inconsistency and violating due process. (Dkt. # 16, at p. 24). Mr. Gardner then requests that this court consider the affidavits in reviewing the reasonableness of the State court's decision regardless of the State court's treatment of the juror affidavits. (Dkt. # 16, at pp. 24–26).

The State court interpreted state law in striking the juror affidavits. 2 SHCR 385 (Finding 9). This court may not disturb that finding because "[i]t is not the province of a federal habeas

court to reexamine state-court determinations on state-law questions." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)); *see also Charles v. Thaler*, 629 F.3d 494, 500–01 (5th Cir. 2011) ("A federal court lacks authority to rule that a state court incorrectly interpreted its own law. When, as here, a state court's legal conclusions are affirmed by the highest court in that state, those conclusions *are* state law."). Accordingly, Mr. Gardner's argument that the State court erred in its interpretation of state law is not cognizable.

Despite the decision by the State court to strike the juror affidavits, Mr. Gardner nonetheless asks this court to consider them in finding the State court's decision unreasonable. (Dkt. # 16, at pp. 24–26). Because these affidavits are not part of the considered, adjudicative record, this court will not consider them in deciding the reasonableness of the state court's decision. *Pinholster*, 563 U.S. at 180-181. Further, and independent of the AEDPA, this court may not consider the juror affidavits because Rule 606(b) of the Federal Rules of Evidence independently precludes their consideration as well. *See Adams v. Thaler*, 421 F. App'x 322, 328 n.2 (5th Cir. 2011) (an affidavit stating how a juror "would have" reacted to new evidence was not admissible).

Striking the juror affidavits, does not a present a constitutional issue for Mr. Gardner. *See Tanner v. United States*, 483 U.S. 107, 116–27 (1987) (upholding Rule 606(b) of the Federal Rules of Evidence against a Sixth Amendment fair-jury claim); *Salazar v. Dretke*, 419 F.3d 384, 399–405 (5th Cir. 2005) (rejecting claim that striking juror affidavit violated due process).

Finally, this court cannot consider the juror affidavits because *Strickland* requires an objective determination regarding prejudice; this determination is not achieved through speculation of what actual jurors might have done if they had considered the new evidence. *Strickland*, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.").

The juror affidavits are inadmissible and irrelevant for this court's analysis of the State court decision. The court will not consider them.

B. Mr. Gardner was afforded constitutionally effective assistance of counsel (Claims One and Two).

Mr. Gardner presents several claims regarding ineffective assistance of counsel. The court finds these claims meritless.

1. The State Court's decision that counsel were not ineffective for failing to advance the abandonment rage theory at the guilt-innocence phase of trial is not objectively unreasonable (Claim One).

Mr. Gardner complains that counsel were ineffective for failing to present a theory of abandonment rage to negate the retaliation manner and means of capital murder. (Dkt. # 16, at pp. 27, 34–55). Under Mr. Gardner's theory, the murder was committed because "of abandonment rage predicated on attachment disorder" and not because Mrs. Gardner was going to be a witness in the divorce proceeding. (Dkt. # 16, at p. 34). Mr. Gardner argues that "he abused or killed his spouses, not because of their status as prospective witnesses who would testify against him . . . but because they were leaving him." (Dkt. # 16, at p. 42).

Mr. Gardner's argument is based on a speculative conjecture that counsel could have proved Mr. Gardner's subjective intent behind the killing through psychological evidence. He does not show deficiency or prejudice, or that the State court's decision to deny relief on this point was contrary to, or an unreasonable application of, Supreme Court precedent.

Strickland v. Washington, 466 U.S. 668 (1984), governs ineffective assistance of counsel claims. To prove ineffectiveness, an inmate must establish that counsel's actions were deficient and that such deficiency prejudiced the defense. *Id.* at 687, 2064. To establish deficient performance an inmate must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A "strong presumption" that counsel's representation was within

the "wide range" of reasonable professional assistance applies. *Id.* at 689. An inmate's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Concerning prejudice, an inmate must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough . . . to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. In determining whether an inmate has shown prejudice, a reviewing court must "consider *all* the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path— not just the . . . evidence [the inmate] could have presented, but also the . . . evidence that almost certainly would have come in with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

"Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Richter*, 562 U.S. at 105. Under the AEDPA, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). As such, "[e]stablishing that a state court's application of *Strickland* was unreasonable . . . is all the more difficult. The standards created by *Strickland* and [AEDPA] are both 'highly deferential,' . . . when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105.

In preparing for trial, counsel employed several experts: an investigator (Randi Ray), a mitigation specialist (Shelly Schade), a consulting mental health expert (Dr. Kristi Compton), a testifying mental health expert (Dr. Kate Allen), and a risk assessment expert (Dr. Gilda Kessner). 1 SHCR 112, 204; 2 SHCR 338–39, 342, 345. No investigator or expert raised the issue of abandonment rage as possibly explaining Mr. Gardner's murderous actions. 2 SHCR 338. Not surprisingly, counsel did not consider that defensive theory in preparation for trial. 2 SHCR 338.

The State habeas court found that neither Dr. Kessner nor any of Mr. Gardner's other multiple experts informed counsel about abandonment rage. 2 SHCR 387 (Findings 23 & 24). Accordingly, the State habeas court found that counsel were not deficient. 2 SHCR 387 (Finding 24). This is not a finding that unreasonably applies Supreme Court precedent. Case law is consistent in that counsel is not deficient when, after retaining pertinent experts and providing them with the relevant background material, such experts do not discover the underlying mental health issue that should have supposedly been presented at trial. *See Couch v. Booker*, 632 F.3d 241, 246 (6th Cir. 2011) ("Trial counsel may rely on an expert's opinion on a matter within his expertise when counsel is formulating a trial strategy."); *McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) ("McClain's counsel reasonably relied on Dr. Maish's opinion that McClain suffered from 'Antisocial Personality Disorder' but did not suffer from a frontal lobe disorder or from any 'significant emotional disorder.'"); *Sims v. Brown*, 425 F.3d 560, 585–86 (9th Cir. 2005) ("[A]ttorneys are entitled to rely on the opinions of mental health experts, and to impose a duty on them to investigate independently of a request for information from an expert would defeat the whole aim of having experts participate in the investigation.") (internal quotations and citations omitted); *Dowthitt v. Johnson*, 230 F.3d 733, 747–48 (5th Cir. 2000) (stating that counsel may rely upon their retained experts and need "not canvass[] the field to find a more favorable