could have backfired. *See Bell*, 260 F. App'x at 606; *cf. Rompilla*, 545 U.S. at 392, 125 S. Ct. 246. Mr. Gardner cannot prove prejudice.

If the theory of abandonment rage had been presented, it would not have established prejudice. Mr. Gardner's own evidence undermines the argument that his violent behavior is linked with abandonment. The record is replete with examples of Mr. Gardner committing violent acts without real or perceived abandonment. This contradiction does not prove prejudice. *Kitchens*, 190 F.3d at 703. In addition, Mr. Gardner's abandonment rage would merely have provided further evidence that Mr. Gardner could not control his emotions in a non-violent way, leading to the inevitable conclusion that he posed a future danger. Therefore, no prejudice is shown. *See Gray v. Epps*, 616 F.3d 436, 448 (5th Cir. 2010). Finally, the diagnosis of abandonment rage would have been significantly undermined by Mr. Gardner's own statements that he feigned mental health issues to secure his release from the military. 1 SHCR 153. This also does not prove prejudice. *See Shuler v. Ozmint*, 209 F. App'x 224, 231–32 (4th Cir. 2006) (no prejudice where counsel did not introduce a suicide attempt that would have opened the door to evidence that defendant had malingered on previous psychological examinations).

When the undiscovered "mitigating" evidence listed above is compared to the "aggravating" evidence presented at trial, it is beyond doubt that the state court's decision was reasonable. *See Strickland*, 466 U.S. at 695–96. Mr. Gardner shot and paralyzed Rhoda, which eventually resulted in the loss of an unborn child and Rhoda's life. 22 RR 16–20, 77–78. While incarcerated for Rhoda's shooting, Mr. Gardner began a relationship with a married woman, Westmoreland, and then became physically abusive and controlling. 22 RR 33–39. Mr. Gardner threatened the lives of Westmoreland and her family. *See* 22 RR 37. Mr. Gardner emotionally and sexually abused Westmoreland's daughter, Becky. *See* 22 RR 67–70. The relationship with

Westmoreland ostensibly ended when Mr. Gardner physically assaulted Becky. *See* 22 RR 43–49, 71–73; SX 69.

Mr. Gardner's fourth marriage ended in 1999, but in 2001, his ex-wife Sandra applied for a temporary protective order and alleged family violence. SX 72. The protective order was granted for a period of two years. SX 72. Sandra feared Mr. Gardner and was "frantic" when she brought her son to Mr. Gardner's home for visitation. 22 RR 128.

Mr. Gardner murdered his fifth wife after years of abuse against her and her daughter. 22 RR 124–27. Further, Mr. Gardner was arrested at a mall masturbating in his vehicle while women and children were in the area. 22 RR 93–95. He was discovered with illegal weapons in the vehicle. 22 RR 103. Finally, Mr. Gardner was punished multiple times while in the Army, and a psychiatrist noted that Mr. Gardner had an "inadequate, immature, [and] sociopathic personality." SX 74. This evidence outweighed Mr. Gardner's State habeas evidence. The State court's decision that no prejudice was found on the record before the court was reasonable.

4. That the Court of Criminal Appeals rejected finding sixty-seven does not mean that the Court of Criminal Appeals found that the mitigation investigation was impaired.

Mr. Gardner argues that the Court of Criminal Appeals found that the mitigation investigation was impaired because it rejected a proposed finding by the State habeas trial court. Pet. at p. 94. The finding rejected by the Court of Criminal Appeals, finding sixty-seven, reads, "Counsel believed that their mitigation expert, Shelli Schade, was 'overly close' with [Gardner] and his family, but they did not believe that their investigation was impaired." 2 SHCR 393 (Finding 67).

In rejecting finding sixty-seven, Mr. Gardner tries to impute an implicit finding in the court's action. Mr. Gardner suggests that the Court of Criminal Appeals actually believed,

but did not explicitly hold, that counsel's investigation was impeded by the mitigation specialist and, therefore, deficient. Pet. at p. 94 ("The TCCA's September 15, 2010 order implicitly ruled that the mitigation investigation was impaired."); *see Ex parte Gardner*, 2010 WL 3583072, at *1.

This argument is faulty. First, Mr. Gardner provides this court with no authority that the rejection of a proposed finding by the Court of Criminal Appeals gives rise to an implicit, contrary finding. Second, the absence of a finding on whether the mitigation specialist impaired the mitigation investigation does not necessarily make the opposite true. Mr. Gardner's argument is a logical fallacy. *See Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1257 (11th Cir. 2007) (describing the logical fallacy of "argumentum ad ignorantiam" as "the mistake that is committed whenever it is argued that a proposition is true simply on the basis that it has not been proved false…."). Third, the Court of Criminal Appeals could not have intended for its rejection of finding sixty-seven to be the final word on whether there was an impaired mitigation investigation because an earlier finding, finding sixty-four, states that "[c]ounsel thoroughly investigated and prepared for [Mr. Gardner's] trial." 2 SHCR 393 (Finding 64). It is more likely that the Court of Criminal Appeals rejected finding sixty-seven because counsel never expressed a belief about whether the mitigation specialist's relationship with Mr. Gardner and his family affected the mitigation investigation. Finding sixty-seven improperly imputed such a belief to counsel. This belief was not supported by the record. *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007) (describing the legal standard utilized by the Court of Criminal Appeals in its capacity as the "ultimate fact finder").

The Court of Criminal Appeals' rejection of finding sixty-seven means nothing more than the fact that the Court of Criminal Appeals rejected finding sixty-seven. Accordingly, Mr.

Gardner's argument that the Court of Criminal Appeals implicitly found that the mitigation investigation was impaired, and the arguments based upon this premise are meritless.

Mr. Gardner further argues that counsel were ineffective due to their mitigation investigation. Mr. Gardner contends that experts Drs. Allen and Kessner informed counsel that the investigation was inadequate. Pet. at pp. 95–96, 107–09. Mr. Gardner references counsel's State habeas affidavit to prove his point regarding Dr. Allen. Pet. at p. 95. Counsel, in the affidavit, explained that Dr. Allen, after hearing the testimony of the State's witnesses, did not testify "because of [a] lack of information." Pet. at p. 95; *see also* 2 SHCR 345. Mr. Gardner points to Dr. Kessner's State habeas affidavit where she stated that she informed counsel "that there were important corroborating witnesses who were not being located and interviewed for mitigation." Pet. at p. 96; *see also* 1 SHCR 209. This court rejects those arguments. First, the "lack of information" statement is taken out of context. Dr. Allen determined that she should not testify because after hearing the abuse perpetrated by Mr. Gardner on one of his step-daughters, she determined that she lacked truthful information. This possibly put counsel on notice that Mr. Gardner was not truthful, but it does not indicate that there was more information to be uncovered regarding his past. Second, Dr. Kessner's statement that "there were important corroborating witnesses who were not being located" assumes that such witnesses exist. The only "corroborative" witness identified was Lillis, who provided evidence of a single instance of corporal punishment.

Dr. Kessner's statement regarding uncorroborated aspects of Mr. Gardner's background was too vague to serve as a notice to counsel that they had missed certain avenues of investigation. Dr. Kessner's references to corroborative witnesses suggests that counsel had uncovered the important substantive evidence regarding Mr. Gardner's background. These vague statements were

hardly notice of additional, undiscovered background evidence. They do not undermine the reasonableness of the state court's decision.

Third, Mr. Gardner argues that counsel's ineffectiveness is proven through the juror affidavits. Pet. at pp. 105–06, 124–26. This Court may not consider such affidavits as a matter of federal habeas law. And even if it did, a statement the hypothetical effect of a theory when the juror has not been provided with the full scope of the evidence and the State's likely rebuttal evidence and argument does not have an impact on this court's inquiry into constitutional effectiveness.

Mr. Gardner tries to expand review of the State court's decision by attaching documents to his petition that were never reviewed by the State habeas court. Pet. at pp. 97–98; Pet. Ex. 1 (mitigation specialist's billing invoices); Pet. Ex. 2 (counsel's billing invoices). This is impermissible, as federal habeas review looks only to the record before the state court. *Pinholster*, 563 U.S. at 181, 131 S. Ct. at 1398. Section 2254(e)(2) also precludes federal habeas review of such documents. *See Holland v. Jackson*, 542 U.S. 649, 653, 124 S. Ct. 2736, 2738 (2004) ("Those same restrictions [in § 2254(e)(2)] apply *a fortiori* when a prisoner seeks relief based on new evidence without an evidentiary hearing."). These records could have been submitted to the State habeas court. *See Williams*, 529 U.S. at 432–33, 120 S. Ct. at 1488. Accordingly, this court cannot consider the billing invoices of the mitigation specialist or counsel.[4]

[4] The records themselves do not support a deficient investigation. First, the records are incomplete. The earliest billing invoice is from March 1, 2006, where the mitigation specialist bills for eighteen hours of work; however, there is also a note stating "Total Hours to date: 169.75." Pet. Ex. 1 at p. 1. Mr. Gardner makes no attempt to account for approximately four typical work-weeks of investigation, and pays no attention to the other entries regarding communication with possible witnesses. *See*, *e.g.*, Pet. Ex. 1 at p. 4 ("correspondence with family"). Second, Mr. Gardner fails to provide this Court with any basis to conclude that a certain amount of hours are necessary to render an investigation sufficient. The fact that little else turned up during the State habeas proceeding is more probative on this point than a simple hourly cutoff. Third, the billing

Mr. Gardner also argues that the psychosocial history compiled by the mitigation specialist was not detailed enough so any decision made by counsel regarding mitigation was not fully informed and, therefore, ineffective. Pet. at pp. 106, 113. As Mr. Gardner's State habeas mitigation specialist admitted, a timeline was "prepared by someone" although "the dates were vague and the time line did not document what records the information was obtained from." 1 SHCR 125. Instead, "there were various handwritten notes from interviews with [Mr. Gardner], typed interview notes, [Mr. Gardner's] own writings, and e-mails with [Mr. Gardner's] sister" (1 SHCR 124), plus the extensive cache of records compiled by counsel. Mr. Gardner argues that unless a mitigation specialist compiles the information from the investigation in a particular format, counsel is ineffective. This argument is meritless. The query of constitutional assistance of counsel does not delve into such minutiae. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Counsel had the raw information, and counsel compiled the information in a timeline format. The information later provided by Lillis, Stone, and the Reeves would not have affected the outcome of the proceeding.

The arguments proffered by Mr. Gardner do not undermine the State court's decision to deny relief. Counsel investigated Mr. Gardner's background competently, and Mr. Gardner did not produce sufficient evidence in the State habeas court to prove prejudice. Accordingly, the State court's decision on this point is reasonable. This claim is denied.

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invoices are general and obviously do not detail the entirety of the mitigation specialist's work. This is most likely purposeful. *See* Tex. Comm. on Prof'l Ethics, Op. 559, 68 TEX. B.J. 1034 (2005) (explaining that appointed counsel should provide billing invoices that are general unless a client's consent is obtained or a court order compels more). Ultimately, the billing invoices mean little, either because they cannot be considered, or because they have little probative value.

D. The admission of Tammy's 911 call did not violate the Confrontation Clause (Claim Five). Additionally, this claim was not fairly presented, is procedurally barred by an adequate and independent state law ground, and should be judicially estopped.

Mr. Gardner claims that the introduction of evidence regarding the 911 call placed by Mrs. Gardner on the eve of her death violated the Confrontation Clause. Pet. at pp. 129–30. Mr. Gardner contends that the 911 call was not a dying declaration. Mr. Gardner argues that the phone call does not meet the requirements of a dying declaration because Mrs. Gardner did not subjectively know that her death was imminent and because portions of the call were testimonial in nature.

1. The admission of the 911 call did not violate the Confrontation Clause.

At trial, Erin Whitfield, a 911 dispatcher, testified regarding a call she received at 11:58 p.m. on January 23, 2005. 19 RR 22–23. The woman on the line identified herself as "Tammy," and said she needed an ambulance because her husband "had either slapped or shot her." 19 RR 24–25. As the conversation continued, Mrs. Gardner stated that the person who had shot her left in a "white Ford pickup truck with Mississippi plates," and that her husband's name was Steven Gardner. 19 RR 26–27. The call lasted about twenty minutes. 19 RR 28. As the call ended, the dispatcher testified she heard Mrs. Gardner choking and vomiting. 19 RR 28. The State also introduced an audio recording containing a small portion of the twenty-minute 911 call. SX 1; 19 RR 32–34.

Mr. Gardner argues that the State court committed reversible error when it found the 911 call qualified as a dying declaration because: (1) it is a retrospective finding of fact; (2) "[n]o one can read the mind of another, or intuit a subjective belief"; (3) no evidence at trial suggested that Mrs. Gardner subjectively felt that her death was imminent; and (4) the evidence at trial contradicts a belief that Mrs. Gardner thought she was about to die. Pet. at pp. 132–33. Mr. Gardner further claims that the 911 call was testimonial because Mrs. Gardner's statements were made "in response

to questioning by the dispatcher [and] were not necessary to address an on-going emergency." Pet. at p. 134.

Mr. Gardner cannot challenge the correctness of the State court's finding that the 911 call was a dying declaration in federal court. Matters of state law, including the admissibility of evidence under a state's evidence rules, are for a state's courts to decide. *Walker v. Harry*, 462 F. App'x. 543, 545 (6th Cir. 2012) (in raising a Confrontation Clause claim, inmate could not challenge state law ruling that a statement was a dying declaration). Mr. Gardner's challenge to the Court of Criminal Appeals is a complaint that they considered objective evidence to determine whether Mrs. Gardner subjectively believed that she was about to die. *See* Pet. at pp. 131–33. As the Court of Criminal Appeals noted, proof that a declarant believed that death was imminent is not limited to the words of the declarant. *Gardner*, 306 S.W.3d at 289–91. Instead, it can include the "declarant's conduct and the nature of his wounds." *Id.* at 290. Consideration of such evidence to establish a belief of imminent death is proper and in accord with Supreme Court precedent.

In *Mattox v. United States*, 146 U.S. 140, 151, 13 S. Ct. 50, 53–54 (1892), the Supreme Court interpreted the then-common law federal dying declaration hearsay exception as allowing proof of imminent death to come from what the declarant uttered, "the nature and extent of the wounds inflicted," and the conduct of the declarant. *See United States v. Shields*, 497 F.3d 789, 793 (8th Cir. 2007) ("A declarant's serious injuries can support an inference that he believed death was imminent."). While the "findings" of the Court of Criminal Appeals may have been "retrospective," inferential and based on circumstantial evidence, this practice is permissible under Supreme Court precedent.

Accordingly, the Court of Criminal Appeals found that a substantial amount of evidence suggested that Mrs. Gardner knew that her death was imminent:

(1) The single bullet entered her right temple, went through her brain, and exited below her left ear. This was a mortal wound;

(2) Ms. Whitfield testified that [Mrs. Gardner's] voice was very slurred and hard to understand;

(3) [Mrs. Gardner] kept repeating that her head hurt and that she could not hear very well 'because her ears were ringing from the gunshots';

(4) She said that her husband had shot her, there was blood everywhere, and she needed an ambulance;

(5) Before the phone disconnected, Ms. Whitfield heard what sounded like [Mrs. Gardner] choking and vomiting;

(6) When the first deputy arrived, he found [Mrs. Gardner] on the blood-soaked bed, trying to sit up; she appeared to be in shock and was bleeding badly from both the back and top right of head;

(7) There was a trail of blood leading into the bathroom, around the toilet, and in the trash can;

(8) When the paramedics finally arrived, Mrs. Gardner was 'spitting up a lot of blood' and mumbling incomprehensibly;

(9) She was in a vegetative state and died at the hospital two days later.

Gardner, 306 S.W.3d at 291–92.

The decision by the Court of Criminal Appeals in finding that the 911 call was a dying declaration was reasonable. *See, e.g.*, *Mattox*, 146 U.S. at 152; 13 S. Ct. at 54 (a dying declaration was properly admitted into evidence because the statement was elicited within "a few hours" of the injury, "the wounds were three in number, and one of them of great severity," and the declarant was told, by a physician, that his chance of survival was slim). Because the 911 call constituted a dying declaration, it did not violate the Confrontation Clause.

Further, the Confrontation Clause was not violated in this case because the 911 call was not testimonial. In *Davis v. Washington*, 547 U.S. 813, 817–18, 126 S. Ct. 2266, 2271 (2006), the Supreme Court considered whether the 911 call made in that case was testimonial. The caller in

Davis stated that she was involved in a domestic dispute, named her attacker, and then said her attacker fled. *Id.* The court found that the 911 call was not testimonial because (1) the caller described events that were presently occurring; (2) the call was a plea for help; (3) the questions that the dispatcher asked were for the purpose of resolving an emergency; and (4) the setting was "not tranquil or even . . . safe." *Id.* at 827–28, 2276–77.

The facts in Mr. Gardner's case are similar. Mrs. Gardner called 911, provided her name and address, and said "she needed an ambulance" because she had just been shot by her husband. 19 RR 24–25. Mrs. Gardner then provided a physical description of her residence, informed Whitfield that her attacker had just fled "in a white Ford pickup truck with Mississippi plates" when asked if the shooter was still at the premises, and stated that her husband's name was Steven Gardner. 19 RR 26–27.

Mr. Gardner argues that Mrs. Gardner's identification of him and her description of his vehicle are testimonial because the emergency being reported was no longer "on going." Pet. at p. 134. According to *Davis*, a dispatcher's "effort to establish the identity of the assailant" is not testimonial because it aids "the dispatched officers [in knowing] whether they would be encountering a violent felon." *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276. In this case, the dispatcher was doing the same thing. She needed to know the assailant's name to determine whether Mr. Gardner was "a violent felon," and she needed the vehicle description to determine whether Mr. Gardner was still at Mrs. Gardner's residence to ensure the safety of first responders.

There is no reasonable, objective reading of the 911 call transcript that suggests that the dispatcher was questioning Mrs. Gardner to determine past events for purposes of providing proof at a future trial; instead, she was responding to a crisis. The 911 call was therefore not testimonial,