

and its admission did not violate Mr. Gardner's constitutional right to confrontation was not violated. Dying declarations are an exception to the introduction of out-of-court testimonial statements. Further, the 911 call was not testimonial. Relief is not warranted.

Assuming that a Confrontation Clause violation occurred, the error was harmless. "Confrontation Clause violations are subject to harmless error analysis." *Fratta v. Quarterman*, 536 F.3d 485, 507–08 (5th Cir. 2008). Harmless error inquiry of a Confrontation Clause violation can include "whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986).

Although Mr. Gardner argues that his name was testimonial, any error is harmless. Before the dispatcher was aware that the emergency had subsided, Mrs. Gardner had already informed the dispatcher "that her husband had . . . shot her." 19 RR 25. Mr. Gardner's marriage status—that he was Mrs. Gardner's husband at the time of the shooting—was proven with other admissible evidence such as the divorce petition. SX 39. There can be no harm in Mrs. Gardner's statement that her husband's name was "Steven Gardner" when the most inculpatory aspect of the statement was "that her husband had . . . shot her." 19 RR 25. Mr. Gardner's identity was cumulative of other evidence establishing that he was Mrs. Gardner's husband.

Mr. Gardner also argues that the description of the vehicle was testimonial. *See* Pet. at p. 134. Any error here was also harmless. When Deputy William Armstrong arrived at Mrs. Gardner's house, he observed a white pickup truck. 19 RR 42–43. Mr. Gardner's brother-in-law, David Holifield, testified that he had a white Ford F-150 pickup truck that Gardner borrowed on the morning of Mrs. Gardner's shooting (20 RR 20–22) and returned the next day (20 RR 32)

37. When Mr. Gardner returned the vehicle, his sister asked him whether Mrs. Gardner was okay. 20 RR 38. Mr. Gardner responded “yes,” implying that he had recently seen Mrs. Gardner and knew her status. 20 RR 38. In addition, Mr. Gardner’s fingerprints were found inside the pickup truck (19 RR 124–25) along with fibers that were consistent in diameter, color, and chemical composition with those from Mrs. Gardner’s housecoat (20 RR 86–91). Mr. Gardner’s credit card was also used at a Marshall, Texas convenience store on the day of Mrs. Gardner’s shooting (19 RR 273; SX 44) and the cardboard backing of a pair of work gloves (SX 50) sold at the same convenience store (19 RR 272) was found in the pickup truck as well (20 RR 56–57).

The evidence of a white pickup truck bearing Mississippi license plates is corroborative that Mr. Gardner shot Mrs. Gardner. Mrs. Gardner identified Mr. Gardner as the shooter shortly before slipping into unconsciousness. There was also significant additional evidence that Mr. Gardner had used a white pickup truck to travel from Mississippi to Collin County, Texas, including his relatives’ testimony, credit card statements, and fiber analysis. Even if Mrs. Gardner’s statement that Mr. Gardner had fled in a white pickup truck with Mississippi license plates was inadmissible, it was harmless considering that the statement was simply corroborative and relatively unimportant in the host of evidence against Mr. Gardner. This claim does not rise to the level of reversible error.

2. *Alternatively, Mr. Gardner’s Confrontation Clause claim is unexhausted and procedurally defaulted because further attempts to exhaust would be fruitless.*

An inmate must exhaust available state remedies or federal habeas relief must be withheld. 28 U.S.C. § 2254(b). To exhaust, inmates must first seek redress in state court. *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S. Ct. 2364, 2369 (1994). This means that an inmate must provide a state court “a fair” opportunity to review the claim, that is, the inmate must present the issue in a procedural context, which insures that the state court will review the claim solely on the merits.

Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989). Practically, exhaustion is met “when the substance of the federal habeas claim has been fairly presented to the highest state court.” *Parr v. Quarterman*, 472 F.3d 245, 252 (5th Cir. 2006) (citing *Smith v. Dretke*, 522 F.3d 269, 275 (5th Cir. 2001)). The Court of Criminal Appeals is the highest court in Texas for criminal matters. *Richardson v. Procnier*, 762 F.2d 429, 431 (5th Cir. 1985). “Determining whether a petitioner exhausted his claim in state court is a case- and fact-specific inquiry.” *Moore v. Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) (en banc).

On direct review, Mr. Gardner complained that the 911 call was inadmissible hearsay to which no exception applied. Appellant’s Brief at pp. 42–43, *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009) (No. AP-75,582). Mr. Gardner also addressed a possible Confrontation Clause violation but predicated the argument with a concession: “Appellant agrees, therefore, that if the statement made to [the 911 operator] by the caller satisfied Texas’s requirements for a dying declaration, neither the Confrontation Clause nor *Crawford* or *Davis* would bar its admission.” Appellant’s Brief at p. 44, *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009).

The Court of Criminal Appeals, after finding that the 911 call met Texas’s dying declaration hearsay exception, accepted Mr. Gardner’s concession and declined to address the constitutional issue. *Gardner*, 306 S.W.3d at 288 n.20. As such, the Court of Criminal Appeals did not reach the merits of Mr. Gardner’s Confrontation Clause claim. The Court of Criminal Appeals was required to address state law—the admissibility of the 911 call under Texas evidence law—because Mr. Gardner conceded the constitutional issue. Fair presentation requires more and consequently, Mr. Gardner has failed to exhaust this claim.

The Supreme Court has addressed several scenarios where an inmate’s litigation tactics do not suffice to fairly present an issue. For example, merely placing the same facts before both the

state and federal courts does not suffice to fairly present a claim. *See Anderson v. Harless*, 459 U.S. 4, 7–8, 103 S. Ct. 276, 278 (1982); *Picard v. Connor*, 404 U.S. 270, 277–78, 92 S. Ct. 509, 513 (1971). In *Picard*, an inmate complained about the validity of his indictment in state court but did not challenge the indictment on equal protection grounds. *Picard*, 404 U.S. at 277, 92 S. Ct. at 513. The state court, not surprisingly, did not address the Equal Protection Clause in finding that the indictment was valid because it only “dealt with the arguments [the petitioner] offered.” *Id.* The state court could therefore not be faulted “for failing also to consider sua sponte” the equal protection claim, which was not fairly presented. *Id.* As another example, simply giving a state court an opportunity to reach a claim’s merits does not fairly present a claim. *Castille*, 489 U.S. at 351, 109 S. Ct. at 1060. The inmate in *Castille* filed a petition with Pennsylvania’s highest court seeking further review where he raised, for the first time ever, two claims that were later advanced in his federal habeas petition. *Id.* at 347–48, 1058. Such review, however, was only afforded by the Pennsylvania court if “there are special and important reasons therefor.” *Id.* at 351, 1060. The Supreme Court found that the manner in which this inmate presented his claims did not “constitute ‘fair presentation.’” *Id.*

Under established Texas law, an appellate court is not required to address a conceded issue. *See Alameda v. State*, 235 S.W.3d 218, 223 (Tex. Crim. App. 2007) (“Appellant concedes that if the audiotape were admissible, his complaint regarding the admissibility of the transcript of the recorded conversations would be moot. Therefore, because the audiotape was properly admitted, the transcript was also admissible, and we do not need to address Appellant’s second ground for review.”); *In re Estate of Vackar*, 345 S.W.3d 588, 592–93 (Tex. App.—San Antonio 2011, pet. denied) (“Based on Betty’s concession that the trial court’s judgment is not supported by the jury’s finding of undue influence, we need not address Maggie’s issues regarding

undue influence.”).

Texas’s rule is hardly unique. *Brent v. Dominguez*, 234 F. App’x 528, 529 (9th Cir. 2007) (“We do not address the merits of the district court’s dismissal of Brent’s APA claims because, in his reply brief, Brent conceded that the dismissal of those claims was proper.”); *United States v. Agofsky*, 458 F.3d 369, 374, n.4 (5th Cir. 2006) (“Agofsky asserts additional claims solely to preserve them for further review. Inasmuch as Agofsky concedes that these claims are foreclosed by precedent binding on this Court, we do not address them.”).

By conceding the Confrontation Clause claim conditioned on state law admissibility, Mr. Gardner permitted the state court to avoid adjudicating the claim’s constitutional merits. Mr. Gardner’s action of conceding the constitutional issue predicated on state law admissibility is a hybrid of *Picard* and *Castille*. Mr. Gardner placed the same facts before the State court and this court. According to *Picard*, this is insufficient. Mr. Gardner placed the same legal argument before the State court and this Court. According to *Castille*, this is also insufficient. Mr. Gardner was required to present his Confrontation Clause claim in a manner that required adjudication by the Court of Criminal Appeals—opportunity is not enough. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 844, 119 S. Ct. 1732 (1999) (“Section 2254(c) requires only that state prisoners give state courts a fair opportunity to act on their claims.”)

By conceding the constitutional issue, Mr. Gardner did not provide the Court of Criminal Appeals a fair opportunity to act on the claim. Raising a claim on appeal but thereafter shortly conceding the correctness of the lower court’s decision is akin to raising no issue at all. Accordingly, this claim is unexhausted.

If Mr. Gardner files another state application in an attempt to exhaust this claim, it would be dismissed as abusive since he was required to include all available grounds for relief in

his first application save certain, narrow exceptions that Mr. Gardner does not meet. *Nobles v. Johnson*, 127 F.3d 409, 423 (5th Cir. 1997). It is well-settled that abuse of the writ constitutes an adequate and independent state law ground that bars federal habeas review. *Id.*; *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995). It is also well-settled that the Court of Criminal Appeals applies its abuse-of-the-writ rules regularly and strictly. *See Fearance*, 56 F.3d at 642. Where an inmate's failure to exhaust precludes further state review, such unexhausted claims are procedurally defaulted in federal court. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 2557 (1991). Consequently, Mr. Gardner's Confrontation Clause claim is procedurally defaulted.

3. *Mr. Gardner's Confrontation Clause claim is barred from federal review by an adequate and independent State law ground.*

A federal habeas court will not review a claim rejected by a state court "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Beard v. Kindler*, 558 U.S. 53, 55, 130 S. Ct. 612, 614 (2009). Foreclosure of federal review "applies whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729, 111 S. Ct. at 2553–54. When an inmate fails to properly raise a claim in state court he "has deprived the state courts of an opportunity to address those claims in the first instance." *Id.* at 732, 2555.

Accordingly, preventing review of claims decided on state law procedural grounds "ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Id.* A state-law procedural bar is adequate to preclude federal consideration of a claim if it is "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. 362, 376, 122 S. Ct. 877, 885 (2002). The discretionary nature of such a bar does not make it any less "adequate" for a "discretionary rule can be 'firmly established' and 'regularly followed' even if the appropriate

exercise of discretion may permit consideration of a federal claim in some cases but not others.” *Beard*, 558 U.S. at 60-61, 130 S. Ct. at 618. Those situations where a state law ground is found inadequate are but a “small category of cases.” *Kemna*, 534 U.S. at 381, 122 S. Ct. at 888. Decisions by State courts “are independent of federal law [when] they do not depend upon a federal constitutional ruling on the merits.” *Stewart v. Smith*, 536 U.S. 856, 860, 122 S. Ct. 2578, 2581 (2002). In the context of federal habeas, there is no presumption of federal law consideration unless it is first determined that the state court decision “fairly appears to rest primarily on federal law, or to be interwoven with the federal law.” *Coleman*, 501 U.S. at 735, 111 S. Ct. at 2557 (internal citations and quotations omitted). Where there is no “clear indication that a state court rested its decision on federal law, a federal court’s task will not be difficult.” *Id.* at 739–40, 2559.

When a claim has been procedurally defaulted in state court, federal review is only allowed when a petitioner has shown cause and prejudice, or shown that a fundamental miscarriage of justice will occur but for review of the claim. *Id.* at 749–50, 111 S. Ct. at 2564. A petitioner can invoke the miscarriage-of-justice exception only if he can show that he is actually, as opposed to legally, innocent of the crime or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 339–40, 112 S. Ct. 2514, 2519 (1992). Actual innocence of the death penalty looks to eligibility for a sentence of death, not the jury’s discretion in imposing such punishment. *Id.* at 346–47, 2522–2523.

Mr. Gardner’s confrontation claim was adjudicated on an adequate and independent state law ground—the Court of Criminal Appeals accepted the concession of a party. *Gardner*, 306 S.W.3d at 288 n.20. The acceptance of a party’s concession does not implicate federal law, so such action is independent of it. Texas courts have long accepted concessions. *See Trigeant*

Holdings, Ltd. v. Jones, 183 S.W.3d 717, 721 n.1 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Texas courts often deny claims based on a concession, so it is a practice that is regularly followed. *E.g.*, *Alameda*, 235 S.W.3d at 223; *In re Estate of Vackar*, 345 S.W.3d at 592–93. As such, the denial of a claim based on a concession is an adequate and independent state-law ground precluding federal review. Mr. Gardner has not shown cause and prejudice or a miscarriage of justice despite his burden to do so. Therefore, the Confrontation Clause claim is procedurally defaulted as a result.

4. *Alternatively, Mr. Gardner is judicially estopped from taking a position contrary to the one he took on direct appeal.*

Mr. Gardner conceded that the Confrontation Clause issue is contingent on a finding that the 911 call was a dying declaration. Appellant’s Brief at p. 44, *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009) (No. AP-75,582). The Court of Criminal Appeals accepted the concession after it found that the 911 call met Texas’s dying declaration exception and did not decide the constitutional issue. *Gardner*, 306 S.W.3d at 289 n.20. Mr. Gardner’s new argument is judicially estopped.

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.

New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814 (2001). This doctrine protects “the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Id.* at 749–50, 1814 (internal citations omitted).

Several principles guide application of judicial estoppel: (1) “a party’s later position must be clearly inconsistent with its earlier position,” (2) “whether the party has succeeded in

persuading a court to accept that party's earlier position," and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750–51, 1815.

These requirements are met in this case. Mr. Gardner is taking inconsistent positions—he admitted the constitutionality of the 911 call on direct appeal. *See* Appellant's Brief at p. 44, *Gardner v. State*, 306 S.W.3d 274 (Tex. Crim. App. 2009). Mr. Gardner now argues that it is unconstitutional. Pet. at pp. 129–35. Second, he persuaded the Court of Criminal Appeals to accept his concession, so the court did not decide the claim's merits. *Gardner*, 306 S.W.3d at 289 n.20. Third, Gardner is seeking an unfair advantage—he could have determined the constitutionality of his claim on direct appeal and could have allowed the state courts to correct the error, if any. *See Coleman*, 501 U.S. at 732, 111 S. Ct. 2555 (exhaustion requirement exists to provide state courts with the first opportunity to correct error). Instead, he seeks to unravel his conviction several steps down the line, and after declining to use an appropriate forum to litigate his claim. *See Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 3391-3392 (1983) ("Direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."), overruled on other grounds by *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059 (1997). Mr. Gardner has not alleged that appellate counsel was ineffective by conceding the issue on direct appeal. Accordingly, Gardner has forfeited the right to raise his current claim.

E. Mr. Gardner's Supplemental IATC claim is meritless (Claim Six).

During the pendency of this case, opinions in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013) were issued by the Supreme Court. This court appointed independent counsel to

brief any supplemental claims to determine whether Mr. Gardner had any claims procedurally defaulted such that analysis under *Martinez* and *Trevino* is proper.

In supplemental briefing provided by independent counsel, Mr. Gardner alleges that State habeas counsel should have raised the following claim in State court—trial counsel were ineffective for failing “to get the work product of their recalcitrant mitigation specialist, Shelli Schade.” Suppl. Pet. at p. 1. Mr. Gardner argues that the mitigation specialist “refused to share notes from her mitigation investigation and refused to summarize her findings in a report to the attorneys” because “[s]he was overly concerned with what could be discoverable by the State.” *Id.* at p. 4. Mr. Gardner argues that trial counsel were deficient because they did not demand that Schade turn over her notes, which belonged to Mr. Gardner as a matter of agency law. *Id.* at pp. 5–9.

1. Mr. Gardner’s claim was presented and adjudicated in State Court, making Martinez/Trevino inapplicable.

Martinez/Trevino provides no relief for Mr. Gardner because the legal and factual bases of the supplemental IATC claim were before the State court, and the claim was adjudicated on the merits. To exhaust remedies, a petitioner “must ‘fairly present’ his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim.” *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004); *see also Duncan v. Henry*, 513 U.S. 364, 365–66, 115 S. Ct. 887, 888 (1995) (per curiam). State habeas counsel, in State habeas claims three and four, identified the correct federal precedent—*Strickland v. Washington*. 1 SHCR 43–44, 62–63. Accordingly, the legal framework of the supplemental IATC claim was before the state court. *See Baldwin*, 541 U.S. at 32, 124 S. Ct. at 1351 (“A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds . . .”).

The facts supporting the supplemental IATC claim were also before the State court, including (1) trial counsel must conduct, or cause to be conducted, a thorough mitigation investigation (1 SHCR 44–45, 63–64); (2) the defense team members are required “to provide counsel with documentary evidence of the investigation” (1 SHCR 45, 64); (3) despite the document-provision obligation on defense team members, trial counsel “bears ultimate responsibility for the performance of the defense team” (1 SHCR 45, 64); (4) trial counsel performed deficiently because Schade conducted an inadequate mitigation investigation, including the failure to contact corroborating witnesses and to compile and *document* “a complete psycho-social history” (1 SHCR 46–49); (5) because of these inadequacies, “when experts were retained, *the trial attorneys failed to provide the experts with a documented social history*” (1 SHCR 49); (6) specifically, Dr. Kessner stated that she was concerned about insufficient corroboration of information and that “Schade did not provide with notes from any interviews she conducted,” which limited her “ability to present mitigation information” about Gardner (1 SHCR 50–51); (7) after State habeas counsel’s mitigation specialist Toni Knox conducted an adequate mitigation investigation “friends and a church member . . . provided corroborating information to some of [Mr. Gardner’s] history” (1 SHCR 51); and (8) with this “crucial” corroborating information, Dr. Kessner could have developed “a unified theme of abandonment rage and trauma” that would have “supported a verdict other than death” (1 SHCR 52–61, 67–72).

The factual allegations in State court mirror those in the supplemental IATC claim. *Compare* Suppl. Pet. at pp. 4–12, *with* 1 SHCR 44–72. Mr. Gardner essentially concedes that his supplemental IATC claim was before the State court. Suppl. Pet. at p. 2 (“Much of the information presented in the preceding paragraph was presented in Claims 3 . . . and 4” in State court); Supp.

Pet. at p. 12 (“To be sure, there is substantial overlap between Gardner’s *Martinez/Trevino* claim and the nucleus of IATC claims presented both in state habeas and in the opening writ.”).

Mr. Gardner’s numerous citations to the State court record in support of the supplemental IATC claim prove that it was presented in State court. *See, e.g., id.* at p. 4 (citing the trial attorneys’ affidavit before the State habeas court and citing Dr. Kessner’s State habeas affidavit). Thus, the record indicates that both the law and the facts of the supplemental IATC claim were raised in Mr. Gardner’s State habeas application.

Since the legal and factual bases were presented to the state court, this court must inquire as to whether the supplemental IATC claim was adjudicated on the merits. There is a legal presumption that the query was adjudicated. *See Johnson v. Williams*, 568 U.S. 289, 301, 133 S. Ct. 1088, 1096 (2013) (“When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits.”); *Harrington v. Richter*, 562 U.S. 86, 99, 131 S. Ct. 770, 784-785 (2011).

Mr. Gardner points to State court findings addressing the supplemental IATC claim. *See* Suppl. Pet. at pp. 11–12 (citing Findings 32, 64, and 67 of the State habeas trial court’s findings, although the State Court did not adopt Finding 67). The relevant findings are: (1) that the trial attorneys hired Schade (Finding 64), (2) that despite some uncooperativeness on Schade’s part, the trial attorneys did not feel it impeded the overall mitigation investigation (Finding 67), and (3) that there was no prejudice from Dr. Kessner’s revised opinion after a full investigation had been completed by the State habeas mitigation specialist (Finding 32). *Id.* The fact that there are State court findings on which Mr. Gardner relies indicates that state court adjudication of this claim occurred.

Accordingly, as a matter of presumption and of fact, the supplemental IATC claim was adjudicated on the merits in State court. Consequently, because there is State court adjudication of the supplemental IATC claim, *Martinez/Trevino* does not apply to this case. *See Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014) (“We conclude 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.”).

2. *Alternatively, assuming no State court presentment, Mr. Gardner fails to prove a substantial IATC claim or the ineffectiveness of State habeas counsel.*

To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [Mr. Gardner] must show that:

(1) his underlying claims of ineffective assistance of trial counsel are “substantial,” meaning that he “must demonstrate that the claims have some merit,” and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application.

Chanthakoummane v. Stephens, 816 F.3d 62, 72 (5th Cir. 2016) (citing *Preyor v. Stephens*, 537 F. App’x 412, 412 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2821 (2014)). “The petitioner’s failure to establish the deficiency of either attorney precludes a finding of cause and prejudice.” *Chanthakoummane*, 816 F.3d at 72 (quoting *Sells v. Stephens*, 536 F. App’x 483, 492 (5th Cir. 2013), *cert. denied* 134 S. Ct. 1786 (2014)).

a. The supplemental IATC claim does not meet the standard of *Strickland*.

Under *Strickland*, to prove ineffectiveness, an inmate must establish both that the attorney’s actions were deficient and that such deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687, 2064. A failure to prove either results in denial of the claim. *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, 2064.

“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide

range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* at 689, 2065 (internal citations and quotations omitted). 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, 2068.

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). “Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one.” *Richter*, 562 U.S. at 105, 131 S. Ct. at 788.

b. State habeas counsel’s failure to present the supplemental IATC claim was not ineffective.

Assuming that the supplemental IATC claim was not presented in state court, counsel’s failure to raise such a claim is not ineffective, and thus, Mr. Gardner cannot avail himself of *Martinez/Trevino*. First, because there was no merit to the supplemental claim, “habeas counsel was not ineffective in failing to raise the claim at the first state proceeding.” *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013); *see Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012) (“[A state-habeas] counsel would not be ineffective for failure to raise an ineffective assistance of counsel claim with respect to trial counsel who was not constitutionally ineffective.”). Mr. Gardner fails to prove either deficient performance or prejudice as to trial counsel, so state habeas counsel was not ineffective by not submitting this IATC claim in State court.

Second, counsel, including collateral-review counsel, have enormous discretion in their claim- presentation choices. Counsel may disregard “weaker arguments [and focus] on one central issue if possible, or at most on a few key issues.” *Jones v. Barnes*, 463 U.S. 745, 751–52, 103 S. Ct. 3308, 3313 (1983). Counsel “is not required to have a tactical reason—above and beyond

a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether.” *Knowles v. Mirzayance*, 556 U.S. 111, 127, 129 S. Ct. 1411, 1422 (2009).

In Mr. Gardner's case, there are several reasons why State habeas counsel could have made a reasonable decision to omit the supplemental IATC claim from Mr. Gardner's State habeas application. State habeas counsel could have recognized the oral-versus-written distinction mentioned above—that the mitigation specialist, Schade, provided the defense team with the substance of her mitigation investigation, albeit orally. Unless something was actually withheld by Schade, which Mr. Gardner did not demonstrate, State habeas counsel could have recognized that relief on this minor point was unlikely and therefore not have raised it.

State habeas counsel could have also reasonably believed that the failure-to-investigate (claim three) and failure-to-present (claim four) IATC claims fully encapsulated the supplemental IATC claim. In other words, because the asserted prejudice for these two claims fully subsumed any prejudice potentially flowing from mitigation evidence allegedly withheld by Schade, there was no point in separately raising the supplemental IATC claim.

A reviewing court must affirmatively entertain the range of possible reasons that counsel may have had for proceeding as they did. *Pinholster*, 563 U.S. at 195, 131 S. Ct. at 1406. Because a reasonable attorney could have omitted the supplemental IATC claim from Mr. Gardner's State habeas application, Mr. Gardner fails to prove that State habeas counsel's actions were deficient. Further, Mr. Gardner fails to prove that the omission of the supplemental IATC claim from his State habeas application was prejudicial. He fails to prove that it is reasonably probable the State court decision would have been different had he raised the supplemental IATC claim. The allegation that Schade was less than cooperative was actually before the State habeas court, but

the court still denied relief. Simply repackaging these allegations into a separate claim does not make it more likely that relief would have been granted. Mr. Gardner fails to prove that anything was actually withheld by Schade; therefore, it cannot be said that the State court's decision would have differed had the supplemental IATC claim been before it. Mr. Gardner has failed to prove that State habeas counsel was deficient or that such deficiencies resulted in prejudice and he therefore cannot utilize *Martinez/Trevino* to reach the merits of his supplemental IATC claim.

Having addressed the ineffective assistance of trial counsel claim, and having found it without merit, the court concludes that none of the claims is "substantial" for the purposes of *Martinez*. Mr. Gardner has not demonstrated ineffective assistance of State habeas counsel. Mr. Gardner is not entitled to relief under *Martinez* or *Trevino*. In conclusion, Mr. Gardner has not shown that he is entitled to federal habeas corpus relief.

The petition for a writ of habeas corpus is denied.

VI. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Mr. Gardner has not yet filed a notice of appeal, the Court may *sua sponte* address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000)("[T]he district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained

the requirement associated with a “substantial showing of the denial of a constitutional right” in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603 (2000). In cases where a district court rejected a petitioner’s constitutional claims on the merits, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* at 484, 120 S. Ct. at 1604. “When the district court denies a habeas petition on procedural grounds without reaching the petitioner’s underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

In this case, reasonable jurists could not debate the denial of Mr. Gardner’s § 2254 petition on substantive or procedural grounds, nor could they find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); see also *Slack*, 529 U.S. at 484, 120 S. Ct. at 1603. Accordingly, the Court finds that Mr. Gardner is not entitled to a certificate of appealability as to his claims.

VII. CONCLUSION

It is therefore **ORDERED** that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED WITH PREJUDICE**. It is further

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

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

So **ORDERED** and **SIGNED** this 1 day of **March, 2018**.



Ron Clark, United States District Judge