

157 F.Supp.3d 623
United States District Court,
N.D. Texas, Fort Worth Division.

Quintin Phillippe Jones, Petitioner,
v.
William Stephens, Director, Texas
Department of Criminal Justice, [Correctional
Institutions Division](#), Respondent.

Civil Action No. 4:05-CV-638-Y (death-penalty case)

|
Signed January 13, 2016

Synopsis

Background: Petitioner sought habeas relief following conviction for murder, for which he was sentenced to death.

Holdings: The District Court, [Terry R. Means](#), J., held that:

- [1] Sixth Amendment right to counsel had not attached at the time defendant confessed;
- [2] any error in admission of defendant's confession was harmless;
- [3] state court did not unreasonably apply federal law; and
- [4] petitioner was not denied effective assistance of counsel; and
- [5] petitioner was not entitled to additional time or funds to conduct mitigation investigation.

Petition denied.

West Headnotes (26)

[1] **Habeas Corpus**
  [Counsel](#)

Habeas petitioner was procedurally barred from raising claim for violation of Sixth Amendment rights based on court's alleged failure to appoint counsel in a timely manner; claim was not raised

in state trial court or on direct appeal. [U.S. Const. Amend. 6.](#)

[2] **Habeas Corpus**

 [State court decision ambiguous or a denial on both grounds](#)

When a state court rules that a habeas claim is procedurally barred, the fact that the court alternatively reached the merits of the claim does not vitiate the independent and adequate state procedural bar.

[3] **Criminal Law**

 [Right of Defendant to Counsel](#)

Criminal Law

 [Critical stages](#)

Although the Sixth Amendment right to counsel does not depend upon a request by the defendant, this does not mean that counsel must be appointed for a defendant at the moment his right attaches; rather, once the right attaches, a defendant must have counsel present at all "critical" stages of the criminal proceedings. [U.S. Const. Amend. 6.](#)

[4] **Criminal Law**

 [Inquiry, interrogation, or conversation; request for attorney while in custody](#)

Interrogation by the State is a "critical" stage of criminal proceedings, triggering a defendant's Sixth Amendment right to counsel. [U.S. Const. Amend. 6.](#)

[5] **Criminal Law**

 [Offenses, Tribunals, and Proceedings Involving Right to Counsel](#)

The Sixth Amendment right to counsel is offense-specific and does not attach to uncharged offenses. [U.S. Const. Amend. 6.](#)

[6] **Criminal Law**
  [Counsel](#)

Criminal Law

🔑 **Waiver of rights**

Generally speaking, when a defendant is admonished of his rights according to *Miranda* under the Fifth Amendment and agrees to waive those rights, the waiver of his Sixth Amendment rights, including the right to counsel, will be considered a knowing and intelligent one; the waiver may be direct or, in at least some cases, waiver can be clearly inferred from the actions and words of the person interrogated. *U.S. Const. Amends. 5, 6.*

[7] **Criminal Law**

🔑 **Capacity and requisites in general**

Whether there has been a knowing, intelligent, and voluntary waiver of the Sixth Amendment right to counsel depends on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *U.S. Const. Amend. 6.*

[8] **Criminal Law**

🔑 **Counsel**

Criminal Law

🔑 **Waiver of rights**

Waiver of Fifth Amendment *Miranda* rights may not be presumed, but once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. *U.S. Const. Amend. 5.*

[9] **Criminal Law**

🔑 **Effect; revocation**

Criminal Law

🔑 **Inquiry, interrogation, or conversation; request for attorney while in custody**

Defendant's Sixth Amendment right to counsel in capital murder prosecution had not attached at the time he confessed to the murder, or at

the time he confessed to two other unrelated murders, and thus presence of counsel was not required at the time he confessed to the first murder; defendant knowingly waived his Fifth Amendment *Miranda* rights before providing an uncoerced confession to the first murder, which occurred before his initial court appearance. *U.S. Const. Amends. 5, 6.*

[10] **Criminal Law**

🔑 **Acts, admissions, declarations, and confessions of accused**

Any error in admission of defendant's confession to three murders was harmless in capital murder prosecution, where evidence of defendant's guilt, including DNA evidence on the defendant's clothing, defendant's apology for one of the murders while being represented by counsel, and evidence of defendant's future dangerousness, was overwhelming.

[11] **Habeas Corpus**

🔑 **Availability at time of petition**

When a claim has not been exhausted, and the state court to which the petitioner would be required to present his claim in order to meet the exhaustion requirement would now find the claims procedurally barred, the claim is defaulted for purposes of federal habeas review.

[12] **Habeas Corpus**

🔑 **Ineffectiveness or want of counsel**

For unexhausted claims of Sixth Amendment ineffective assistance of trial counsel that are deemed "substantial," the ineffective assistance of state habeas counsel may excuse any procedural bar to habeas relief; a claim is "substantial" if it has some merit. *U.S. Const. Amend. 6.*

[13] **Habeas Corpus**

🔑 **Confessions, declarations, and admissions**

State court's determination, that error in admission of petitioner's unwarned confession

to murder was harmless in capital murder prosecution, was not an unreasonable application of clearly established federal law, and thus petitioner was not entitled to habeas relief on that ground; there was no clearly established precedent that the harmless-error rule did not apply to erroneously admitted unwarned confessions, there was no clearly established precedent that a trial court could not credit mitigating facts contained within the petitioner's confession, and there was no clearly established precedent that *Miranda* required suppression of the "fruits" of an unwarned voluntary statement. [U.S. Const. Amend. 5.](#)

[14] Criminal Law

🔑 **Preparation for trial**

Defense counsel was not deficient in investigating defendant's educational disabilities, how defendant's behaviors manifested on a daily basis, whether defendant's drug dependency was caused by childhood sexual abuse, whether defendant was genetically predisposed to drug and alcohol addiction, whether defendant could successfully argue involuntary intoxication as a defense, whether prison could provide an adequate structured environment if defendant were given a life sentence, as well as whether defendant experienced brain damage due to polysubstance abuse, and thus defense counsel did not render ineffective assistance under Sixth Amendment in capital murder prosecution. [U.S. Const. Amend. 6.](#)

[15] Criminal Law

🔑 **Presentation of witnesses**

Defense counsel was not deficient in failing to call witness, as element of Sixth Amendment ineffective assistance of counsel claim in capital murder prosecution, where defense counsel's investigator contacted witness, but witness refused to speak with investigator. [U.S. Const. Amend. 6.](#)

[16] Criminal Law

🔑 **Presentation of witnesses**

A defendant who alleges Sixth Amendment ineffective assistance of counsel based on an uncalled witness must demonstrate that the witness was available to testify, would have testified, and that the proposed testimony would have been favorable to the defense. [U.S. Const. Amend. 6.](#)

[17] Criminal Law

🔑 **Capacity to commit crime; insanity or intoxication**

Trial counsel was not deficient in failing to investigate defendant's involuntary drug problem and dissociative personality disorder resulting from severe childhood sexual abuse in order to negate mens rea of capital murder, as element of Sixth Amendment ineffective assistance of counsel claim. [U.S. Const. Amend. 6.](#)

[18] Criminal Law

🔑 **Argument and comments**

Trial counsel was not deficient in making a comprehensive mitigation argument at punishment phase of capital murder trial based on evidence of sexual and physical abuse that defendant experienced as a child, leading to defendant's drug abuse and mental illness, as element of Sixth Amendment ineffective assistance of counsel claim in capital murder prosecution. [U.S. Const. Amend. 6.](#)

[19] Criminal Law

🔑 **Presentation of evidence in sentencing phase**

Defendant was not prejudiced by defense counsel's alleged deficiencies in presenting mitigating evidence, in punishment phase, of severe sexual and physical abuse of defendant as a child, failure to present evidence of defendant's alleged low intelligence, failure to present evidence of a family history of mental illness, and failure to present evidence that

defendant would not be a future danger in a structured prison setting, as required element of Sixth Amendment ineffective assistance of counsel claim in sentencing phase of capital murder prosecution. [U.S. Const. Amend. 6.](#)

of defendant's drug abuse as a youth on his brain with regard to mens rea of capital murder, as element of Sixth Amendment ineffective assistance of counsel claim in murder prosecution. [U.S. Const. Amend. 6.](#)

[20] Criminal Law

🔑 Capacity to commit crime; insanity or intoxication

Defense counsel was not deficient in investigating defendant's alcohol addiction in relation to defense of "settled insanity" brought on by withdrawal from alcohol, as element of Sixth Amendment ineffective assistance of counsel claim in capital murder prosecution. [U.S. Const. Amend. 6.](#)

[24] Criminal Law

🔑 Capacity to commit crime; insanity or intoxication

Defense counsel was not deficient in failing to pursue a scientific theory underlying a diagnosis of defendant's dissociative disorder that defendant's own expert did not make, and that was postulated in an article that did not yet exist at the time of trial, as element of Sixth Amendment ineffective assistance of counsel claim in capital murder prosecution. [U.S. Const. Amend. 6.](#)

[21] Criminal Law

🔑 Capacity to commit crime; insanity or intoxication

Defense counsel was not deficient in investigating sexual abuse of defendant as a child and its potential to cause long-term changes in defendant's brain, in order to negate mens rea in capital murder prosecution, as element of Sixth Amendment ineffective assistance of counsel claim. [U.S. Const. Amend. 6.](#)

[25] Criminal Law

🔑 Capacity to commit crime; insanity or intoxication

Defendant was not prejudiced by counsel's alleged failure to pursue a scientific theory underlying the diagnosis of defendant's dissociative disorder that his own expert did not make, and that was postulated in an article that did not yet exist, as element of Sixth Amendment ineffective assistance of counsel claim in capital murder prosecution. [U.S. Const. Amend. 6.](#)

[22] Criminal Law

🔑 Capacity to commit crime; insanity or intoxication

Defense counsel was not deficient in allegedly failing to investigate the effects of defendant's polysubstance abuse on his brain in order to negate mens rea in capital murder prosecution, as element of Sixth Amendment ineffective assistance of counsel claim. [U.S. Const. Amend. 6.](#)

[26] Habeas Corpus

🔑 Time for proceedings; continuance

Habeas Corpus

🔑 Indigent Petitioners

Habeas petitioner was not entitled to additional time or funding to conduct mitigation investigation for capital murder prosecution; defendant failed to provide any new information in excess of what was known to counsel during trial, defendant simply sought to reinvestigate all aspects of counsel's performance, and failed to demonstrate that funds in excess of the statutory maximum were necessary to provide fair compensation. [18 U.S.C.A. § 3599.](#)

[23] Criminal Law

🔑 Capacity to commit crime; insanity or intoxication

Defendant was not prejudiced by defense counsel's alleged failure to investigate effects

Attorneys and Law Firms

*[626 Lydia M.V. Brandt](#), Brandt Law Firm, Richardson, TX, [Michael Mowla](#), Michael Mowla PLLC, Cedar Hill, TX, for Petitioner.

[Jeremy C. Greenwell](#), Office of the Texas Attorney General, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

[TERRY R. MEANS](#), UNITED STATES DISTRICT JUDGE

Quintin Phillippe Jones petitions for a writ of habeas corpus under [28 U.S.C. § 2254](#), contending that his state conviction and death sentence are unconstitutional. The Court previously dismissed the application as time-barred but later reversed its decision based upon a change in the law. *See Holland v. Florida*, [560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 \(2010\)](#). Having reviewed the parties' arguments and the complete record, the Court now denies the petition and dismisses this action with prejudice.

BACKGROUND

I. State-court proceedings

The victim in this death-penalty case was Quintin Phillippe Jones's eighty-three-year-old great aunt, Berthena Bryant, who was beaten to death with a baseball bat in her home on September 11, 1999. After speaking to neighbors, the police sought *[627](#) Jones for questioning about a man named Ricky Roosa, whom Jones had previously recruited to do yard work for Bryant. The police set up surveillance on the home of Jones's girlfriend, Paula Freeman. Jones was arrested on outstanding traffic warrants as he attempted to flee the home in a car driven by Freeman. While in police custody, Jones confessed to Detective Ann Gates that his alternate personality, "James," had murdered Bryant (the "Gates statement"). Nine days later, while still in custody and without a lawyer, Jones made another confession to Texas Ranger Lane Akin that he and Roosa had murdered two men during a drug deal six months earlier (the "Akin statement").

The Gates statement was admitted at trial, along with testimony describing Jones's whereabouts on the night of the murder, DNA evidence, and testimony that Jones had called Bryant's sister from jail and apologized for the murder. The prosecution ("the State") relied upon the Akin statement at sentencing, along with other evidence showing Jones's participation in the double murder, his juvenile criminal history, his gang membership, jail disciplinary infractions, and a diagnosis of [psychopathic personality disorder](#). The defensive theory was that "James," not Jones, participated in the murder. The defense offered testimony that Jones had suffered a dysfunctional childhood and severe childhood abuse, which caused him to develop the alternate personality, drug and [alcohol addiction](#), and severe self-injuring behavior. The jury convicted Jones and sentenced him to death. (3 CR 408.)¹

Jones pursued an appeal through new counsel. (3 CR 459). The Texas Court of Criminal Appeals ("CCA") affirmed the conviction. *Jones v. State*, [119 S.W.3d 766 \(Tex.Crim.App.2003\)](#). The Supreme Court declined review. *Jones v. Texas*, [542 U.S. 905, 124 S.Ct. 2836, 159 L.Ed.2d 270 \(2004\)](#).

Attorney Wes Ball was appointed to file Jones's state application for habeas-corpus relief, but he failed to do so. The CCA relieved Ball, appointed Jack Strickland as substitute counsel, and set a new due date for the application. *Ex parte Jones*, No. (Tex. Crim. App. Dec. 3, 2003) (unpublished order). Strickland filed the application in 2004. (SHR 2.) Strickland filed the application thirty days late, but the CCA accepted it after finding good cause. (1 SHR Supp. 2.) The CCA denied habeas relief in 2005. *Ex parte Jones*, No.,[299-01, 2005 WL 2220030 \(Tex.Crim.App. Sept. 14, 2005\)](#).

II. Federal Proceedings

Jack Strickland was appointed as federal habeas counsel. (Doc. 7.)² Strickland filed the federal petition in 2006, raising two grounds for relief, but the Court dismissed it as time-barred on the Respondent's unanswered motion to dismiss. (Doc. 28.) Strickland did not appeal the dismissal. After receiving communication from Jones that he did not wish to abandon the appeal, the Court appointed Lydia Brandt as substitute counsel in 2008. (Doc. 31.) The Court vacated the judgment of dismissal, and Ms. Brandt filed a response to

the motion to dismiss. (Docs. 43, 55.) The *628 Court again found the petition time-barred, however. (Doc. 59.)

Jones appealed, and the appellate court remanded the case for consideration in the first instance of the Supreme Court opinion in *Holland. Jones v. Thaler*, 383 Fed.Appx. 380 (5th Cir.2010). On remand, the Court held for a third time that equitable tolling was not appropriate even under the less stringent *Holland* standard. *Jones v. Stephens*, No. 4:05-CV-638-Y, 2013 WL 4223968 (N.D.Tex. Aug. 15, 2013). (Doc. 101.)

In a post-judgment motion, however, Jones asserted for the first time that the magistrate judge's order appointing Jack Strickland contained provisions requiring that the petition be timely filed and that the petition demonstrate its timeliness under the statute. (Doc. 103.) After receiving supplemental briefing, the Court concluded that the provisions in the appointment order dictated a different result in the equitable-tolling analysis. The Court vacated the dismissal order and reopened the case. *Jones v. Stephens*, 998 F.Supp.2d 529 (N.D.Tex.2014). (Docs. 106, 113.)

The Court ordered the parties to file amended briefing, as briefing on the substantive issues was nearly eight years old. Jones moved for a continuance, which the Court granted in part, and moved for funding, which the Court denied. The amended petition was filed June 22, 2014, the amended answer was filed November 7, 2014, and Jones's reply was filed February 3, 2015.

THE CLAIMS

Jones raises the following claims for relief:

1. The trial court violated the Sixth Amendment by failing to timely appoint trial counsel.
2. Trial counsel were ineffective under *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) by failing to adequately investigate and present mitigating evidence.
3. Trial counsel were ineffective by failing to investigate and develop “condition-of-the-mind” evidence.
4. Trial counsel were ineffective for failing to seek timely and relevant mental evaluations regarding the reliability of Jones's confession, his competency to stand trial, his

criminal responsibility for capital murder, and his moral culpability and the appropriate punishment.

5. The trial court violated the Fifth Amendment by admitting the Akin statement at sentencing.

Claims 1 and 5 were exhausted in state court. Claims 2, 3 and 4, as well as an unnumbered subclaim in claim 1, are presented for the first time in this Court. The amended petition is subject to the standards set out in 28 U.S.C. § 2254 (“AEDPA”),³ which are addressed where appropriate below.

CLAIMS LITIGATED IN STATE COURT

I. Claim 1: The timeliness of counsel's appointment

Jones contends that the trial court violated the Sixth Amendment by failing to timely appoint counsel after his arrest. The convicting state court ruled that this claim was barred on habeas review because Jones did not complain about the timeliness of counsel's appointment at trial and or on direct appeal. In the alternative, the state court held that the claim lacked merit because: (1) during the time in which Jones was without counsel, formal adversary *629 judicial proceedings had not been initiated, (2) Jones knowingly waived his rights and did not request counsel, and (3) Jones failed to show prejudice. (2 SHR Supp. 38-42). Based on the findings of the convicting court and its own review, the CCA denied habeas relief.

A. Procedural bar

[1] [2] Respondent first contends the claim is barred from federal review. (Doc. 146, p. 38.) The Court agrees. Federal habeas courts do not review a federal claim decided by a state court if the state court decision rests on a state-law ground that is independent of a federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir.2001). The contemporaneous objection rule is an adequate and independent state-law ground that procedurally bars federal habeas review. *E.g.*, *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir.2005); *Rowell v. Dretke*, 398 F.3d 370, 375 (5th Cir.2005). Likewise, the Texas “Gardner rule,” which bars habeas review of record-based claims that were not raised on direct appeal, is also

an adequate and independent bar to federal review. *See Busby v. Dretke*, 359 F.3d 708, 719 (5th Cir.2004); *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex.Crim.App.1996) (op. on reh'g). Furthermore, when a state court rules that a claim is procedurally barred, the fact that the court, as here, alternatively reached the merits of the claim does not vitiate the independent and adequate state procedural bar. *See Cotton v. Cockrell*, 343 F.3d 746, 754 (5th Cir.2003).

Jones does not dispute that claim 1 was not raised in the trial court or on direct appeal. He makes no argument to avoid a procedural bar based on *Coleman*. (Doc. 149, p. 5-32). Claim 1 is procedurally barred. *See Coleman*, 501 U.S. at 729, 111 S.Ct. 2546.

B. § 2254(d) determination

Respondent contends, in the alternative, that the state court's denial of the claim on the merits was not unreasonable. Based on the following discussion, the Court agrees.

A claim adjudicated on the merits in state court may not be relitigated in federal habeas court unless it (1) is "contrary to" federal law then clearly established in the holdings of the Supreme Court or "involved an unreasonable application of" such law, or (2) "is based on an unreasonable determination of the facts" in light of the record before the state court. *See* § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). These determinations are limited to the record that was before the state court that adjudicated the claim on the merits. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). For purposes of § 2254(d)(1), "clearly established federal law" is the Supreme Court precedent that existed when the state conviction became final. *Williams v. Taylor*, 529 U.S. 362, 379-80, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts governing law or confronts facts that are materially indistinguishable from the relevant precedent and arrives at an different result. *Coleman v. Thaler*, 716 F.3d 895, 901 (5th Cir.2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court decision is based on a "unreasonable application" of such law when the state court identifies the correct governing legal principle but applies it unreasonably to the facts of the case. *Id.* at 901-02.

Factual "determinations" in a state court decision are presumed correct, and a petitioner bears the burden of rebutting them by clear and convincing evidence. § 2254(e)(1); *see* *630 *Burt v. Titlow*, — U.S. —, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Titlow*, 134 S.Ct. at 15 (citing *Wood v. Allen*, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). Further, a "decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); § 2254(d)(2).

Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102, 131 S.Ct. 770; *White v. Woodall*, — U.S. —, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014) (stating a merely wrong holding or even "clear error" will not suffice under § 2254(d)(1)). Congress meant these conditions to be difficult to meet, and they stop short of imposing a complete bar on the relitigation of claims already rejected in state proceedings. *Richter*, 562 U.S. at 102, 131 S.Ct. 770.

1. Background facts

Bryant was found dead on the morning of Saturday, September 11, 1999. Detective Ann Gates called on Jones at Freeman's home in an effort to speak to Jones about a man who did yard work for Bryant. When no one answered, Gates left her business card on the door. (4 RR 43, 69, 75, 115-16; 31 RR 109-11, 197.) Jones had outstanding traffic warrants, so Gates instructed police officers to set up surveillance on Freeman's house and arrest Jones if possible. (4 RR 43-44; 31 RR 119-20.) While the police were watching, Freeman drove up in her car, Jones came out of the house, jumped in the back of the car and kneeled down, and Freeman drove away. The police stopped her at a gas station and took Jones into custody. They found a syringe on the back floorboard where Jones had been hiding. Jones was arrested at 4:45 p.m. on the outstanding warrants and for possession of a controlled substance. (4 RR 36-41, 56-59, 70, 157-58; 29 RR 271-74.)

Gates began questioning Jones about 7 p.m. (4 RR 72; 31 RR 123.) Initially, she did not *Mirandize* Jones. But she gave Jones written *Miranda* warnings about 9 p.m., after she

noticed that Jones had no reaction to the news of Bryant's death. (4 RR 74, 76-81; 31 RR 126-27, 183.) The written warnings stated:

- (1) You have the right to remain silent and not make any statement at all, and any statement you make may be used against you at your trial;
- (2) Any statement you make may be used as evidence against you in court;
- (3) You have the right to have a lawyer present to advise you prior to and during any questioning;
- (4) If you are unable to employ a lawyer, you have the right to have a lawyer appointed to advise you prior to and during any questioning;
- (5) You have the right to terminate the interview at any time.

(SX 82; SPX 11.⁴) Jones waived these rights. (4 RR 81.)

Jones then told Gates that he had been visiting various drug houses at the time of the murder. He agreed to show Gates those locations on the following day, Sunday. He agreed to take a polygraph examination on Monday. Additionally, Jones *631 named Ricky Roosa as the person who had done yard work at Bryant's house. (4 RR 76, 87, 89, 92; 31 RR 132-33.) This initial interview ended at 10:30 on Saturday evening. (4 RR 81; 31 RR 133.) Detective Gates then went to Freeman's home to collect the clothing that Jones had worn the previous day. (4 RR 83-86; 30 RR 10; 31 RR 134.) Freeman also gave Gates a photograph of Jones and Roosa. ⁵ (4 RR 86-88, 162-66.)

On Sunday, September 12th, Jones showed Gates the locations that he had named in his alibi. (4 RR 89-91; 31 RR 136.) Gates returned Jones to the jail, and he agreed to talk with her again the next day. (31 RR 137.) Gates then proceeded to inquire at the locations that Jones had identified, and she concluded that his alibi was not checking out. (4 RR 91.) At 8:30 p.m., Jones appeared before a magistrate judge on the drug possession charge. The magistrate set bail and gave him the following written warnings:

- (1) You have a right to hire a lawyer and have him/her present prior to and during any interview and questioning by peace officers or attorneys representing the state.

(2) If you are too poor to afford a lawyer, you have the right to request the appointment of a lawyer to be present prior to and during any such interview and questioning. You may have reasonable time and opportunity to consult your lawyer if you desire.

(3) You have the right to remain silent.

(4) You are not required to make a statement, and any statement you make can and may be used against you in court.

(5) You have the right to stop any interview or questioning at any time.

(6) You have the right to have an examining trial.

(SPX 27.) Jones apparently did not request a lawyer at this time.

At about 9 a.m. on Monday, September 13th, Detective Gates took Jones to the polygraph examination. (4 RR 93.) Meanwhile, his clothes that had been seized from Freeman's home tested positive for blood, and Gates prepared a search warrant for blood and hair samples. (4 RR 93, 127; 31 RR 137; SPX 14.) Gates then learned that Jones had failed the polygraph. (4 RR 95.) She began another interview about 1:22 p.m. with the intention of asking Jones for a written statement. Jones received the *Miranda* rights for the third time and agreed to waive them. He then dictated a written statement to a clerk typist. (4 RR 95-97; 31 RR 138-47; SX 83; SPX 15.) It contained a detailed alibi describing his efforts to find drugs. (SPX 16; SX 84; 31 RR 147-57). In the course of making this statement, Jones verbally affirmed that he understood his right to have an attorney present but wanted to cooperate with the investigation. (31 RR 156; SX 84.) At 3:10 p.m., after the statement was completed, Jones's blood was drawn pursuant to a warrant. (4 RR 99-100; SPX 14.)

Gates and another detective continued speaking to Jones. Gates told Jones that his clothing had tested positive for blood, which would be compared to his aunt's, and she confronted him about the results of his polygraph. Jones began getting emotional, as if the pressure were mounting on him to tell the truth. He cried and said he was not feeling well but declined medical attention. Gates later acknowledged that it was possible Jones was going through drug withdrawal, but she did not know. (4 RR 100-01, 112; 31 RR 158-59, 186-87.) *632 Jones then asked if they thought he needed a lawyer. They told him that it was his decision, and he responded, "I

guess I want one.” (4 RR 102; 31 RR 160.) At this point, Gates informed Jones that they could no longer talk to him, and she got up to leave. But Jones told Gates to stop. He told Gates to stay, asked the other detective to leave, and asked for a third officer, Detective Thornhill, to come into the room. (4 RR 102-03; 31 RR 160-61.) When these conditions were met, Jones proceeded to give a second written statement to Gates. (4 RR 103-04; 31 RR 161-62.)

In this statement, Jones said that he had another personality named James who killed his aunt with a baseball bat when he could not find his aunt's purse. (SX 85; SPX 17; the “Gates statement.”) Jones cried, apologized, and asked for help with his drug problem and mental problems. (31 RR 192.) The statement form provided, for the fourth time, written *Miranda* warnings. Jones signed it at 5:30 p.m. on Monday, September 13th. (4 RR 105, 139; 31 RR 163; SPX 17). Gates then prepared a probable-cause affidavit, and Jones made his initial appearance on the Bryant capital murder charge. (4 RR 107-08; 31 RR 172-73; SPX 18, 19.) The magistrate gave the same written warnings that Jones had received previously during his appearance on the drug charge. Jones signed the warning form, but there is no indication that he requested counsel. (SPX 19.) He remained in the county jail.

Six days later, on September 19th, Jones again appeared before a magistrate judge and bail was revoked on two drug possession charges.⁶ He again received and signed written *Miranda* warnings from the magistrate on each charge. (SX 144, 145.)

Meanwhile, the Texas Rangers had been investigating a double homicide in a neighboring county. (4 RR 195; 34 RR 66-94.) There had been little progress for months. Then Detective Gates received information from the probation officer for Jones's sister, Keisha, that Jones and Roosa were involved. Based upon information obtained from Keisha, Ranger Lane Akin secured a search warrant for Freeman's house, which he executed with her consent in the early morning hours of September 22nd. (SX 131, 132; SPX 28, 29; 4 RR 169-72, 195-96, 247; 34 RR 94-96, 128; 35 RR 92-101.)

Akin left the search on September 22nd to interview Jones. (4 RR 225; 34 RR 134.) He informed Jones that he was investigating the murders of Marc Sanders and Clark Peoples. Jones admitted he knew the victims but denied any involvement. Akin asked Jones what he would say if they told him that Roosa said Jones was the “bad guy” primarily responsible for the murders. At that point, Jones cried and

orally admitted his involvement in the murders. (4 RR 226-29; 34 RR 137-38.) Jones described the murders as Akin wrote down what he said on a statement form, asking questions as they went along. The statement form contained written *Miranda* warnings, however, Akin explained the warnings to Jones only after the statement was written out (but unsigned). (4 RR 230-45; 34 RR 139-43; SX 133; SPX 30 (the Akin statement)).

Over the next two days, September 23rd and 24th, Jones accompanied investigators to the river location where the bodies of Sanders and Peoples had been found. Along the way, Jones spontaneously identified places connected to the crime. (4 RR 255, 275.) *633 Eleven days later, on October 5, 1999, Jones signed a form request-ing counsel. Rex Barnett was appointed that day. (1 CR 15.)

After a two-day hearing, the trial court suppressed the oral statements Jones had made while driving around with Gates and with the investigators of the double murder. (6 RR 17, 21.) The Gates statement was admitted at the guilt stage of trial, and the Akin statement was admitted at sentencing. (SX 85; SX 133; 31 RR 164; 34 RR 143.)

2. Analysis

Jones argues that counsel should have been appointed at each of his magistrations: September 12 (the drug charge), September 13 (Bryant capital murder charge), and September 19 (the two drug charges). He also contends that counsel should have been appointed before the blood draw and all custodial interrogations, as these were “critical stages” of the proceedings. (Doc. 129, p. 47-49; doc. 149, p. 13.) The Court evaluates the state-court ruling on the merits under the deferential standards in § 2254(d).

[3] [4] [5] The controlling Supreme Court precedent states that the Sixth Amendment right to counsel attaches when the adversarial judicial process is initiated, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)); see *Michigan v. Jackson*, 475 U.S. 625, 629, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), overruled on other grounds, *Montejo v. Louisiana*, 556 U.S. 778, 797, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009)⁷. The right to counsel does not depend upon a request by the defendant. *Brewer*, 430 U.S.

at 404, 97 S.Ct. 1232; *Crawford v. Beto*, 383 F.2d 604, 605 (5th Cir.1967). This does not mean, however, that counsel must be appointed for a defendant at the moment his right attaches. Rather, once the right attaches, a defendant must have counsel present at all “critical” stages of the criminal proceedings. *United States v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Interrogation by the State is such a stage. *Massiah v. United States*, 377 U.S. 201, 204–05, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). A blood draw, as Jones concedes in his reply, is not. *Wade*, 388 U.S. at 227–28, 87 S.Ct. 1926; (doc. 149, p. 22, n.2.) Further, the right to counsel is offense-specific and does not attach to uncharged offenses. *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); *Texas v. Cobb*, 532 U.S. 162, 167–68, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (declining to expand Sixth Amendment right to “factually related” offenses). For suspects who are not charged, they retain the ability under *Miranda* to obtain counsel and refuse police questioning. *Cobb*, 532 U.S. at 171, n. 2, 121 S.Ct. 1335.

[6] [7] [8] The right to counsel may be waived, so long as the waiver is voluntary, knowing, and intelligent. *Patterson v. Illinois*, 487 U.S. 285, 292, 292 n. 4, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). Generally speaking, when a defendant is admonished of his rights according to *Miranda* and agrees to waive those rights, the waiver of his Sixth Amendment rights will be considered a knowing and intelligent one. *Id.* at 296, 108 S.Ct. 2389. The waiver may be direct or, “in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.” See *634 *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Whether there has been a knowing, intelligent, and voluntary waiver of the right to counsel depends on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Id.* at 374–75, 99 S.Ct. 1755 (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Waiver may not be presumed, but “once it is determined that a suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.” See *Moran v. Burbine*, 475 U.S. 412, 422–23, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (addressing *Miranda* waiver).

[9] Jones’s Sixth Amendment right to counsel attached in this capital murder case when he made his initial appearance on September 13th. At that time, Jones was formally charged with capital murder. The Gates statement occurred prior to that attachment, as did the blood draw (which is not considered a critical stage anyway). The Akin statement occurred after attachment, but the Akin interrogation involved a different, uncharged offense. There is no suggestion in the record or briefs that law enforcement resorted to physical or psychological pressure to elicit Jones’s statements, nor is there any question about Jones’s comprehension of the *Miranda* warnings, which he had received multiple times, or the potential consequences of a decision to relinquish those rights. (4 RR 95–108, 133–43, 226–48; 31 RR 138–95; 34 RR 135–60.) In fact, the available evidence suggests the opposite. The defense expert testified at sentencing that Jones was not suggestible and that there was no evidence to conclude that “the statements he gave to the police were in any way as a result of some kind of undue susceptibility on his part to their interrogation procedures.” The expert did not think Jones’s statements were in any sense coerced. (35 RR 150, 181.).

The state habeas court was not unreasonable when it concluded that Jones’s Sixth Amendment rights had not attached when he was cooperating with law enforcement and that, even if they had attached, Jones voluntarily, intelligently, and knowingly waived them. See *Montejo*, 556 U.S. at 789, 129 S.Ct. 2079 (holding that “no reason exists to assume that a defendant ... who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present”) (emphasis in original).

Jones argues, however, that *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) is the controlling Supreme Court precedent. He argues that the police violated the Sixth Amendment by arresting him on traffic warrants to create an opportunity to interrogate him without counsel about Bryant’s murder. According to Jones, he was *de facto* arrested for the Bryant murder on the 11th, and his right to counsel was first triggered by his initial appearance before the magistrate on the 12th (for the drug charge). (Doc. 129, p. 45–48.) The Court also understands Jones to rely upon *Moulton* for the assertion that Ranger Akin violated the Sixth Amendment when he interviewed Jones about the Sanders/Peoples murders on September 22nd. (Doc. 149, p. 25–26). The argument here is that Akin’s interrogation was a critical stage in the Bryant capital murder proceedings, as Akin must have known that a confession to the Sanders/Peoples murders