No. 19-_____ (CAPITAL CASE)

In the Supreme Court of the United States

MICHAEL DEAN GONZALES,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-70026

MICHAEL DEAN GONZALES,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

Before JONES, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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July 02, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-70026 Michael Gonzales v. Lorie Davis, Director
USDC No. 7:12-CV-126

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Mr. Richard H. Burr III
Ms. Donna F. Coltharp
Mr. Woodson Erich Dryden
Ms. Jennifer Wren Morris
Mr. Tivon Schardl

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-70026

United States Court of Appeals
Fifth Circuit
FILED
May 17, 2019
Lyle W. Cayce
Clerk

MICHAEL DEAN GONZALES,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before JONES, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's denial of an inmate's petition for habeas relief relating to his alleged incompetence to stand trial on capital sentencing, and for a Certificate of Appealability ("COA"). The district court erroneously granted a hearing on the merits of petitioner's claims and denied relief. We deny the petitioner a COA because his claims are procedurally barred and, alternatively, lack merit.

I. BACKGROUND

The petitioner, Michael Gonzales, was convicted of the gruesome murders of an elderly couple and was sentenced to death by an Ector County district court on December 8, 1995. Significant evidence supporting Gonzales's

conviction was a jailhouse confession he gave to a prison guard who also happened to be one of his relatives. The Texas Court of Criminal Appeals ("TCCA") affirmed his conviction and sentence, *Gonzales v. State*, No. AP—72,317 (Tex. Crim. App. June 3, 1998) (not designated for publication), and subsequently denied his initial state habeas petition. *Ex Parte Gonzales*, No. WR-40,541-01 (Tex. Crim. App. Mar. 10, 1999) (not designated for publication).

The following year, Gonzales filed a federal petition for habeas relief in the federal district court. The district court denied relief concerning his conviction, but after the Texas Attorney General's office notified the court about an error that had occurred during the sentencing phase, the district court ordered the state court to grant Gonzales a new sentencing trial. *Gonzales v. Cockrell*, No. 7:99-cv-00073 (W.D. Tex. Dec. 19, 2002) (not designated for publication). Gonzales unsuccessfully appealed the district court's denial of guilt-phase relief to this court. *Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006), *cert. denied*, 549 U.S. 1323, 127 S. Ct. 1909 (Mem.) (2007).

In May 2009, Gonzales was again sentenced to death in a second sentencing trial, presided over by the same judge who oversaw his previous sentencing trial. The second sentencing trial—and Gonzales's conduct throughout it—is the subject of this appeal. The trial court assigned two attorneys, Woody Leverett and Jason Leach, to serve as trial counsel for Gonzales during the sentencing trial. After Leverett and Leach were appointed, Gonzales wrote to them and requested that they secure the services of a New York mitigation specialist named Charles Lanier. Leverett responded that he and Leach had looked into Gonzales's request but learned that Lanier was not a mitigation specialist, but, rather, a mental health expert who opposed the death penalty. Those statements were not accurate. When Lanier

told Gonzales that Leverett's statements were inaccurate, Gonzales petitioned the court to terminate Leverett's position as his court-assigned counsel. Gonzales told the court that he did not "trust [his counsel], plain and simple. When an attorney lies to you one time, he is going to lie to you every time, so my point [is] they aren't worth s***." The court held a hearing and ultimately decided to keep Leverett in his position as trial co-counsel, basing its decision partly on Leverett's qualifications and Leverett's explanation that he had not intended to mislead Gonzales, as well as the court's distrust of Lanier's motives for involving himself.

After the court denied Gonzales's request to remove Leverett, Gonzales stopped cooperating with his counsel entirely and instructed his friends and family members to do the same. Leverett then filed a motion on his own, asking to be replaced as counsel for Gonzales because he had "absolutely no working relationship" with Gonzales, and because Gonzales repeatedly refused to cooperate with his defense team (although Gonzales sometimes reached out to his attorneys for help acquiring items for day-to-day use inside prison). The court denied the motion.

Gonzales's demeanor in court became increasingly hostile and volatile over the course of his sentencing trial. On the first day of testimony, Gonzales's wife was called to testify and was warned by prosecutors that she could be charged as an accomplice if she repeated previous statements she had made to the police. When she appeared confused by the admonishment, Gonzales spoke out:

> GONZALES: If she don't want to testify, leave her alone, man. That's my wife. She has the right to plead the Fifth Amendment. She don't got to testify against nobody. You are harping her, man. You are f***ing with her mind. Leave her alone. She don't want to testify.

> COURT: Retire the jury.
>
> (Jury retired from courtroom).
>
> GONZALES: See how you got her all emotional. You ain't got to testify, Martha. Don't let them get in your head. You have got the right to keep the Fifth Amendment. You should be ashamed of yourself, man.
>
> COURT: Now, where are we?
>
> PROSECUTOR: [Gonzales's wife] has told me that she is frightened, that she is scared of the defendant, and I think she –
>
> GONZALES: Godd*** right she is scared because y'all put her in that f***ing position, man. Just leave her alone. She don't want to testify.

After a recess, Gonzales's wife testified that Gonzales had murdered the victims. Gonzales interrupted her testimony and exclaimed, "[s]ame thing's gonna happen to you, b****. I'm gonna f***ing have somebody kill your ass." After the jury was excused, the court admonished Gonzales for repeatedly interrupting the proceedings and asked if he was aware of the consequences for continuing that behavior. Gonzales said that he was aware of the consequences—that the court could either "remove [him] from the courtroom or gag [him]." The court then asked Gonzales if he was "going to continue to create problems," and Gonzales replied, "whenever my blood rises, I speak my mind."

On the final day of the trial, Gonzales's counsel announced their intent to call several witnesses, including Gonzales's half-sister, his daughter, and an expert witness. But Gonzales adamantly refused to allow the witnesses to testify and threatened to cause a disturbance if they did. Consequently, Gonzales was the last witness the defense called. On the stand, when Leverett asked Gonzales if there was anything he wanted to tell the jury, Gonzales

replied, "[y]eah. Y'all can f***ing kill me. Makes me no f***ing difference. Pass the witness." The prosecution said it had no questions for Gonzales on cross-examination, and the court called Leverett back to the stand for a redirect. When the court called Leverett to conduct the redirect, Gonzales protested, "[n]o, man. I told you yesterday why do I want your f***ing assistance, man? You won't listen to me." Leverett then told the court that the defense rested. Gonzales was subsequently sentenced to death.

Gonzales's second death sentence was upheld by the TCCA, *Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. 2011), and he did not seek state habeas relief. On November 10, 2010, the TCCA issued an order stating that Gonzales had not filed a habeas application, and that any subsequent applications would be reviewed under Texas Code of Criminal Procedure 11.071, Section 5 (governing abuse of the writ) as a result. *Ex Parte Gonzales*, No. 40,541-03 at Order.

Gonzales filed another federal habeas petition on December 27, 2012 and an amended petition on November 5, 2013. Gonzales then moved to stay the federal habeas proceedings while he returned to state court to exhaust his claims. The district court granted the motion in part, and Gonzales filed another state habeas petition. Relying on Gonzales's waiver, the TCCA dismissed his petition as an abuse of the writ. *Ex Parte Gonzales*, 463 S.W.3d 508 (Tex. Crim. App. 2015). Thereafter, Gonzales filed an amended petition in the district court, along with a motion for an evidentiary hearing. The district court overruled the state's contention that all of Gonzales's issues were procedurally barred and further concluded that it could hold a *de novo* hearing on the issues. *But see* 28 U.S.C. § 2254(e)(2). The court accordingly held a seven-day evidentiary hearing, after which it ruled, in a lengthy and careful opinion, that the trial court did not err by not ordering a competency hearing *sua sponte*, that Gonzales was not incompetent to participate in the second

sentencing trial, and that his trial counsel's decision not to raise the issue of Gonzales's competency did not amount to ineffective assistance of counsel. The court also denied Gonzales a COA.

Gonzales has appealed, seeking a COA for issues that he raised for the first time in the state writ application denied as an abuse—his *Pate* claim and his Ineffective Assistance of Trial Counsel ("IATC") claim—and for his contention that the district court's retrospective competency hearing, which he sought to begin with, was inadequate and speculative.

II. STANDARD OF REVIEW

A COA is necessary to appeal the denial of federal habeas relief, 28 U.S.C. § 2253(c)(1), and the requirement is jurisdictional. *Miller- El v. Cockrell*, 537 U.S. 322, 335–36, 123 S. Ct. 1029, 1039 (2003). Federal review of a habeas claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038 (1989). To overcome a procedural bar, a habeas petitioner must show cause for the default and actual prejudice, or that a miscarriage of justice will occur if the federal court does not consider the claim. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991). Failure to raise a claim in an initial state habeas corpus application may not be excused for cause unless the claim was not "reasonably available" at the time of the prior petition. *Fearance v. Scott*, 56 F.3d 633, 636 (5th Cir. 1995) (internal quotation marks and citation omitted). To show cause, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986). To show prejudice, a petitioner must show that the error "worked to his actual and substantial disadvantage." *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)

(emphasis omitted). And a miscarriage of justice in this context means that the petitioner is actually innocent of the crime of which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339–40, 112 S. Ct. 2514, 2519 (1992).

When claims are properly preserved, this court reviews "the district court's findings of fact for clear error and its conclusions of law *de novo*." *Dorsey v. Stephens*, 720 F.3d 309, 314 (5th Cir. 2013) (citation omitted). This court "will not disturb a district court's factual findings unless they are implausible in the light of the record considered as a whole." *Wiley v. Epps*, 625 F.3d 199, 213 (5th Cir. 2010) (citation omitted).

Determining whether a COA should issue "requires an overview of the claims in the habeas petition and a general assessment of their merits," but not "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336, 123 S. Ct. at 1039. To receive a COA for a preserved claim, a petitioner must "show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotation marks and citation omitted).

III. DISCUSSION

Gonzales seeks a COA to advance three arguments to defeat his sentence. First, he contends that the state trial court erred by not conducting *sua sponte* a competency hearing after Gonzales continually displayed bizarre behavior during his second sentencing trial, as required by *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836 (1966). Relatedly, he argues that his trial counsel rendered ineffective assistance by failing to raise the question of Gonzales's competency during the resentencing trial. Finally, he asserts that the seven-day, retrospective competency hearing conducted by the district court was inadequate and yielded a purely speculative competency finding concerning

the decade-earlier trial. We agree with the state, however, that Gonzales's claims are procedurally defaulted. Alternatively, the claims lack merit.

A. Procedural Bar

The district court held that Gonzales's claims were not procedurally barred, because, in its view, the transcript from Gonzales's post-sentencing hearing in state trial court did "not sufficiently support the conclusion that petitioner's waiver of a portion of his post-conviction remedies was fully voluntary and intelligent." The district court further based its decision on the fact that "[t]he state trial court did not make any genuine or sincere effort to advise petitioner of the rights he was waiving by rejecting appointment of state habeas counsel or to ascertain whether petitioner's purported waiver of the right was voluntary." The district court denied the state's motion for reconsideration because it identified "no precedent in which a waiver of state habeas rights in a death penalty case has been recognized upon circumstances analogous to those" in this case.

The district court's ruling was in error. Contrary to its conclusion, we are unaware of any cases that found no waiver of rights following the type of colloquy that occurred here.[1] The TCCA's brief opinion explains plainly why Gonzales's successive state habeas petition was an abuse of the writ. *Ex Parte Gonzales,* 463 S.W.3d at 508. Alluding to the record, the TCCA notes that Gonzales told the state trial court in a post-trial hearing that he did not wish to pursue any appeals or have any counsel appointed on his behalf. Gonzales

[1] From the standpoint of AEDPA, the court should not have disagreed with the TCCA's holding on waiver except under the standards of 28 U.S.C. §§ 2254(d) or (e)(1). Be that as it may, the district court's professed concern about Gonzales's ability to understand and knowingly waive his rights about post-trial procedure is confusing considering the court's finding, based on the testimony of the trial judge from the sentencing trial, that Gonzales, despite his outbursts, had a surprisingly sophisticated understanding of the legal proceedings.

told the trial court: "I would like the record to reflect I want to waive all my appeals and will have execution set as soon as possible." To be more specific about the underlying proceeding, the state court informed Gonzales that an appeal on the merits was mandatory and then appointed counsel for his appeal. The judge then informed Gonzales, "you are entitled for [sic] an attorney to file a Writ of Habeas Corpus in addition to the attorney for the appeal. Now, do you wish that to be done? Do you want an attorney?" Gonzales again stated that he did not wish to file any appeals. Twice more, the state trial court asked Gonzales whether he wanted an attorney for habeas purposes, and both times Gonzales responded, "I don't want no attorney, period." During the exchange, the state court also informed Gonzales: "you may proceed pro se if you desire to."

Federal habeas claims are procedurally barred if the last state court to review the petitioner's claims unambiguously based its denial on a state procedural bar. *See Harris*, 489 U.S. at 264, 109 S. Ct. at 1044. Here, the TCCA unambiguously held that Gonzales's claims were procedurally barred because he had waived his right to habeas counsel and did not file a habeas claim pro se before the deadline expired. *See Ex Parte Gonzales*, 463 S.W.3d at 509. And based on the foregoing record, it had ample reason to so hold. The district court's expressed view that the state's procedural bar might not apply, because there is no precedent analogous to the facts in this case, is unfounded in light of this court's consistent application of the procedural bar when a state court has rejected a claim based on a clearly-explained application of procedural rules.[2] *See, e.g., Garza v. Stephens,*

[2] Gonzales reiterates a similar claim in his reply brief. He acknowledges that "[u]nquestionably, the abuse-of-the-writ rule utilized by the [T]CCA in Gonzales's case is in most cases an adequate state procedural ground" but argues that the procedural bar in his case is inadequate. First, Gonzales alleges that the "representation issue was never properly addressed" by the state trial court. Second, Gonzales argues that the TCCA failed to address

738 F.3d 669, 675 (5th Cir. 2013) ("A federal habeas claim is barred by procedural default when the state court has rejected the claim pursuant to a state procedural rule that provides an adequate basis for the decision, independent of the merits of the claim.") (citations omitted); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010); *Hayes v. Quarterman,* 530 F.3d 336, 342 (5th Cir. 2008).

Because the last state court to consider Gonzales's habeas petition unambiguously based its denial on a state procedural bar, Gonzales's federal habeas claims are procedurally barred. To overcome this procedural bar, therefore, Gonzales must meet the cause and prejudice standard set forth in *Murray*. Gonzales's claims fall short of the high procedural hurdle they must clear. Because Gonzales's failure to seek state habeas relief was caused solely by his refusal to accept habeas counsel[3] and his failure to file a timely pro se petition, he cannot point to a cause external to his defense to excuse his procedural default. *See Murray*, 477 U.S. at 488, 106 S. Ct. at 2645. To the extent that Gonzales might claim that his alleged mental incompetency satisfies the "cause" requirement, that claim fails not only because it is not a cause external to the petitioner,[4] but also as a factual matter, discussed below.

Gonzales's argument that due process does not permit incompetent prisoners to waive state habeas counsel and that he was, in fact, incompetent to waive his state habeas counsel. Finally, Gonzales argues that the TCCA's holding violated due process because it implicitly held "that a prisoner's mental incompetence does not affect the validity of his waiver of state habeas proceedings or waiver of counsel for such proceedings." These arguments are no more than an attempted end run around the TCCA's finding, noted above, that Gonzales was competent and decisive in his rejection of appointed counsel. They do not reflect the "inadequacy" of the procedural bar.

[3] Because Gonzales failed to accept counsel for habeas following the resentencing, he may not avail himself of the *Martinez/Trevino* exception to cause and prejudice, which is contingent on counsel's failings.

[4] This court and others have held that mental impairments are not factors external to the petitioner's defense and do not excuse procedural default. *See, e.g.*, *United States v.*

Even if Gonzales's claims were not procedurally barred, however, they would not merit a COA.

B. *Pate* Claim

Criminal defendants have a substantive right to be competent when sentenced, and that right can only be guaranteed by adequate trial procedures. *United States v. Flores-Martinez*, 677 F.3d 699, 705–06 (5th Cir. 2012). Gonzales contends that the state trial court failed to provide those procedural safeguards by not conducting a hearing *sua sponte* to assess his competency in connection with his second sentencing trial. When deciding whether a *sua sponte* inquiry into a defendant's competency is necessary, a trial court weighs three factors: (1) whether the defendant has a history of irrational behavior; (2) the defendant's demeanor at trial; and (3) prior opinions from medical professionals about the defendant's competency. *Drope v. Missouri*, 420 U.S. 162, 180, 95 S. Ct. 896, 908 (1975). The district court took into account all of the evidence before it in finding Gonzales competent and rejecting Gonzales's *Pate* claim. Nevertheless, Gonzales challenges the district court's findings.

Gonzales argues that the state trial judge, Judge Bill McCoy, was fully aware that Gonzales had cut his attorneys out of his defense for months leading up to his resentencing trial and that communication between Gonzales and his counsel about legal matters had broken down completely. His claim boils down to the assertion that his sustained refusal to cooperate with his attorneys while facing the death penalty, based solely on a single encounter that may have been a miscommunication, was manifestly behavior in which a

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Flores, 981 F.2d 231, 236 (5th Cir. 1993) ("Neither [Petitioner's] illiteracy, nor his deafness, nor his lack of training in the law amounts to cause either, because none of these factors was external to [Petitioner's] defense."); *Schneider v. McDaniel*, 674 F.3d 1144, 1154 (9th Cir. 2012) (holding that petitioner's mental condition could not serve as cause to excuse procedural default).

competent person would not engage. Gonzales argues that his behavior reflected deep, irrational paranoia that satisfies the first prong of the inquiry—a "history of irrational behavior."

The second prong of the analysis, the defendant's behavior at trial, is easily satisfied in Gonzales's view. He argues that the trial court watched him threaten to have witnesses killed, repeatedly use profanity, and threaten to disrupt the proceedings by grabbing a gun if his attorneys allowed three witnesses to testify on his behalf at the close of the trial. According to Gonzales, the behavior the court witnessed was produced by severe mental illness rather than his extremely anti-social attitude.

Gonzales also argues that the trial judge was well aware of his history of mental illness, because the judge had presided over his initial trial, in which multiple mental health experts testified that Gonzales had been diagnosed with schizoaffective disorder at age 16 and had possibly suffered some form of brain damage from childhood head injuries and adolescent substance abuse. Additionally, Gonzales argues that his defense team had made the court aware through various filings that he had developed diabetes in 2003 that was often uncontrolled and that could have contributed to his mental impairment. In sum, Gonzales alleges that the cumulative effect of the evidence, from both before and during the second sentencing trial, is that jurists of reason could debate the district court's conclusion that Gonzales was not deprived of adequate assurances of a fair trial without the court's conducting a *sua sponte* competency hearing.

This court disagrees. The district court understood that a *Pate* inquiry considers whether the trial court was aware of information that "should reasonably have raised a doubt about the defendant's competency and alerted [the court] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in

his defense." *Roberts v. Dretke*, 381 F.3d 491, 497 (5th Cir. 2004) (internal quotation marks, brackets and citation omitted). The district court addressed each of the arguments Gonzales makes here.

To begin, Gonzales's refusal to cooperate with his attorneys does not, alone, demonstrate a longstanding history of irrational behavior that should have cast doubt on his competence to stand trial. In fact, as the district court noted, Gonzales's explanations to the court of his reasons for not cooperating evinced a clear understanding of the proceedings and of the significance of his trial counsel's participation. Gonzales was aware of his circumstances—he simply did not wish for his attorneys to have a meaningful say in the matter. He chose to trust the word of Charles Lanier, who wrote Gonzales a long letter asserting that Leverett was "dangerously incompetent," over the trial judge's assurances that Leverett and his co-counsel were highly capable of assisting his defense. Although perhaps unwise, that decision is not evidence of mental disability. Further, Gonzales's pattern of asking his attorneys for assistance in non-legal matters, such as obtaining items he could not access on his own in prison, shows that he was perfectly capable of cooperating with his attorneys when he felt that doing so was in his best interest.

Gonzales's behavior at trial likewise did not alert the trial court to the need to conduct a competency hearing. Gonzales was explosive, threatening, and uncooperative, but he did not demonstrate an inability to understand the proceedings or to assist in his own defense. *See Flores-Martinez*, 677 F.3d at 708 ("[Petitioner's] conduct, while angry and inappropriate, was not divorced from reality."). To the contrary, Gonzales told the court that he was aware that his outburst could lead to his being gagged or removed from the courtroom. In other words, he was aware of the consequences of his behavior, but simply chose to speak anyway when his "blood [rose]." Gonzales was also clearly aware of the significance of his wife's testimony and of her right against self-

incrimination, as he repeatedly encouraged her to invoke the protections of the Fifth Amendment. To hold that recalcitrant and anti-social behavior at trial constitutes, by itself, evidence in favor of a *Pate* claim would create perverse incentives for future defendants to disrupt court proceedings.

Finally, the district court recognized the limits of Gonzales's contention that the state court judge was aware of his previous diagnoses of mental illness from expert testimony at his 1995 trial. As the state points out, "[t]he flaw in this claim is that Gonzales has conceded he was competent at his 1995 trial." Gonzales's mental health diagnoses have not changed since his initial trial, except for his new claim that diabetes (diagnosed in 2003) may have caused his conditions to worsen. There is no objective evidence showing that to be the case, however.

Gonzales's arguments are largely quarrels with the findings of fact by the district judge, which he has not shown to be clear error. Cumulatively, all of the evidence brought to bear in the district court on the issue of Gonzales's competency in 1995 supports the conclusion that reasonable jurists cannot debate that court's denial of the *Pate* claim.

C. Ineffective Assistance of Trial Counsel Claim

Gonzales pursues a COA that his trial counsel's decision not to pursue a competency hearing during his second sentencing trial was constitutionally deficient. He argues that his attorneys "were bound by professional standards to pursue the issue" of his competency. To succeed on an ineffective assistance of counsel claim, a petitioner must show that his counsel's performance (1) fell below the objective standard of assistance that a reasonable attorney would be expected to provide; and (2) resulted in actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

The district court dismissed Gonzales's claim and denied a COA because it concluded that, "[b]ased on their numerous conversations and

correspondence with [Gonzales], there was . . . nothing before trial counsel to lead them to question [Gonzales's] competency." Indeed, Gonzales's counsel was fully aware that he was capable of interacting and cooperating with them when he felt that doing so would benefit him. Gonzales also clearly explained his reasons, misguided or otherwise, for not cooperating with his counsel during conversations with the court at various points in the trial. Moreover, considering Gonzales's admission that he was competent to stand trial in 1995, the expert testimony from that trial about Gonzales's various mental health conditions did not require his counsel to pursue the matter in his subsequent trial. Although one woman hired as a mitigation specialist by the trial counsel suggested the need for a competency hearing, the district court found counsel's rejection of that idea a rationally grounded tactical decision.

In short, because there was no objective evidence that Gonzales was incompetent other than his recalcitrance, his trial counsel was not deficient for choosing not to pursue that issue at his second sentencing trial. *See McCoy v. Lynaugh*, 874 F.2d 954, 964 (5th Cir. 1989) ("There can be no deficiency in failing to request a competency hearing when there is no evidence of incompetency."). Reasonable jurists could not debate the district court's decision to reject this claim, and a COA was properly denied.

D. Inadequate District Court Retrospective Competency Hearing Claim

Gonzales's disgruntlement with the district court's retrospective competency hearing, which he had demanded, is not only barred but is unfathomable. After failing to persuade the district court on his *Pate* claim, Gonzales now asserts that no adequate conclusion as to his competency in 2009 was possible. But the district court afforded him every opportunity,

particularly in light of its erroneous holding on procedural bar, to develop his claims.

In any event, he did not make this argument on inadequacy to the district court, and it is therefore waived. *See Martco Ltd. P'ship v. Wellons, Inc.,* 588 F.3d 864, 877 (5th Cir. 2009). Moreover, this court lacks jurisdiction to entertain an issue for a COA on which no request for a COA has been made in the district court. *Black v. Davis,* 902 F.3d 541, 545 (5th Cir. 2018) (citing *Brewer v. Quarterman,* 475 F.3d 253, 255 (5th Cir. 2006)).

CONCLUSION

For the foregoing reasons, we **DENY** the application for a COA**.**

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

MICHAEL DEAN GONZALES, TDCJ # 999174,	§	No. 7:12–CV–126–DAE
Petitioner,	§	***DEATH PENALTY CASE***
vs.	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Michael Dean Gonzales initiated this federal habeas corpus action pursuant to 28 U.S.C. § 2254 to challenge the constitutionality of his 1995 Ector County conviction for capital murder and subsequent 2009 punishment retrial wherein he again received a sentence of death. Currently before the Court is Petitioner's Second Amended Petition for Writ of Habeas Corpus (Dkt. # 64), as well as Respondent's Amended Answer (Dkt. # 66), and Petitioner's Reply (Dkt. # 68). Having carefully considered the record and pleadings submitted by both parties, and the evidence presented at the hearings on this matter, the Court concludes Petitioner is entitled to neither federal habeas corpus relief nor a certificate of appealability.

BACKGROUND

I. The 1995 Capital Murder Trial

Petitioner was convicted and sentenced to death for the 1994 murder of his two elderly neighbors, Manuel and Merced Aguirre, in their home in Odessa, Texas. Mr. Aguirre—seventy-three years old and recovering from quintuple bypass surgery the month before—had been stabbed eleven times while sitting in his recliner, while Mrs. Aguirre had been "basically butchered" after receiving stab wounds too numerous to count. Expert testimony established that Mr. Aguirre had been attacked first and was overcome very quickly, whereas numerous defensive wounds to Mrs. Aguirre's hands indicated she fought her attacker even after falling to the floor. Petitioner, a gang member with a criminal history and next-door neighbor to the Aguirres, quickly became a suspect in the ensuing police investigation. Petitioner was arrested fifteen days after the murders and charged with capital murder. The day of his arrest, Petitioner told a guard at the local jail (who also happened to be Petitioner's relative): "They are trying to pin this rap on me, this murder rap on me. They can't do it. They don't have any evidence. Although I did it, you know, but they don't have anything to go on."

Petitioner was convicted of capital murder on December 7, 1995, and, following a sentencing hearing, was sentenced to death. The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence in June 1998 in

an unpublished opinion on direct appeal. Gonzales v. State, No. 72,317 (Tex. Crim. App). The TCCA also denied Petitioner's initial state habeas corpus application in March 1999. Ex parte Gonzales, No. 40,541-01 (Tex. Crim. App.).

In January 2000, Petitioner filed his first petition for writ of habeas corpus in federal court with a supplemental petition following in August 2000. Gonzales v. Cockrell, No. 7:99-cv-072 (W.D. Tex.), Dkts. ## 20, 26.[1] In an order issued January 14, 2003, then-District Judge Royal Furgeson denied Petitioner relief from his capital murder conviction but, based upon a confession of error by the Respondent, vacated his sentence of death and directed Respondent to afford Petitioner a new sentencing hearing. See No. 7:99-cv-072, Dkt. # 90. The Fifth Circuit affirmed the district court's judgment pertaining to Petitioner's conviction in a published opinion issued July 31, 2006. Gonzales v. Quarterman, 458 F.3d 384 (5th Cir. 2006), cert. denied, 549 U.S. 1323 (Apr. 2, 2007).

[1] In those pleadings, Petitioner raised the following claims for relief: (1) the prosecutor denied him due process by concealing the exculpatory negative result of a luminol test for blood; (2) he was denied effective assistance of counsel on direct appeal; (3) he was denied effective assistance of trial counsel at both phases of trial (nine sub-claims); (4) his unwarned confession to the jail guard violated his Fifth Amendment right against self-incrimination; (5) he was denied due process because the prosecutor knowingly failed to correct false testimony that he spontaneously confessed to the guard; (6) he was denied due process by false testimony indicating that his teardrop tattoos meant that he had killed two people; and (7) the State's psychological expert witness testified, unconstitutionally, that race is an indicator of future dangerousness.

II. The 2009 Punishment Retrial

The trial court held a new punishment hearing in May 2009, after which Petitioner was again sentenced to death. At the post-sentencing hearing held the following day, Petitioner informed the trial court he wanted no appeals filed on his behalf and no attorneys appointed to represent him on appeal. The trial court advised him that the direct appeal was automatic and appointed direct appeal counsel, but found that Petitioner had waived the right to have habeas counsel appointed and was therefore proceeding *pro se* for those purposes. Petitioner did not seek state habeas relief. As a result, the TCCA issued an unpublished order on November 10, 2010, holding Petitioner had waived his right to state habeas review and that any future application filed by him or on his behalf would be considered a subsequent application and reviewed under Article 11.071, Section 5. Ex parte Gonzales, No. 40,541-03 (Tex. Crim. App.). On September 28, 2011, the TCCA again affirmed Petitioner's sentence of death on direct appeal. Gonzales v. State, 353 S.W.3d 826 (Tex. Crim. App. 2011).

On December 27, 2012, just prior to the expiration of AEDPA's statute of limitations for seeking federal habeas corpus relief, Petitioner filed his initial federal petition challenging the constitutionality of his latest death sentence.[2]

[2] Specifically, Petitioner raised the following claims for relief: (1) he was incompetent to stand trial due to long-standing mental disorders which left him unable to communicate with trial counsel; (2) the trial court erred in failing to *sua*

(Dkt. # 1.) Counsel was subsequently appointed to represent Petitioner, and an amended federal petition was filed on November 5, 2013.[3] (Dkts. ## 7, 38.) Following the Respondent's answer, Petitioner sought a stay of these proceedings to permit him to return to state court and exhaust available remedies regarding his new claims. (Dkt. # 49.) This Court granted Petitioner's motion to stay on July 31, 2014, and Petitioner returned to state court and filed a subsequent state habeas application on September 9, 2014. (Dkts. ## 53, 57.) On June 3, 2015, the TCCA dismissed the application as an abuse of the writ pursuant to Article 11.071, Section 5(a). Ex parte Gonzales, No. 40,541-04, 463 S.W.3d 508 (Tex. Crim. App.).

Thereafter, on September 1, 2015, Petitioner returned to this Court and filed his second amended federal habeas petition. (Dkt. # 64.) In the petition, Petitioner asserted the same allegations that were raised in his first amended

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sponte hold a competency hearing; (3) he received ineffective assistance of trial counsel by counsels' failure to challenge his competency to stand trial or investigate his background for potential mitigating evidence; (4) false testimony was knowingly presented at his resentencing; and (5) he is factually innocent of the crime for which he was convicted.

[3] In the amended petition, Petitioner reasserted expanded versions of the first three claims raised in his initial petition, in addition to several new claims attacking his original 1995 conviction. Essentially, these new claims argued: (1) he received ineffective assistance of counsel in 1995 for numerous reasons; (2) the State suppressed evidence of a negative Luminol test in violation of Brady v. Maryland, 373 U.S. 83 (1963); and (3) the testimony of his former spouse during his 2009 punishment retrial was so unreliable as to cast doubt upon the validity of his underlying 1995 conviction.

petition—three allegations challenging his 2009 re-sentencing hearing based on his alleged incompetence, and three allegations (not including subparts) attacking his original 1995 conviction. Following the Respondent's answer, Petitioner requested, and was granted, an evidentiary hearing on certain issues raised in his second amended petition. (Dkts. ## 68, 69.) The Court limited the issues to be considered to the following: (1) whether Petitioner was mentally competent to stand trial during his 2009 retrial on sentencing (claim 1); and (2) whether Petitioner's trial counsel rendered ineffective assistance in connection with this proceeding by failing to raise the issue of Petitioner's competency (claim 3). (Dkt. # 69.) A seven-day evidentiary hearing was held July 10-14, 2017, and August 21-22, 2017, concerning Petitioner's competency and trial counsels' performance at the 2009 punishment retrial. This case is now ripe for adjudication.

CLAIMS FOR RELIEF

As raised in Petitioner's second amended petition for federal habeas relief (Dkt. # 64), the following claims are now before the Court:

1. The 2009 punishment retrial violated due process because Petitioner was incompetent to stand trial due to long-standing mental disorders, brain impairment, mood disorders, Post-Traumatic Stress Disorder ("PTSD"), and uncontrolled diabetes which left him unable to communicate with trial counsel;

2. The 2009 punishment retrial violated due process because the trial court did not *sua sponte* inquire into Petitioner's competency or hold a competency hearing;

3. Petitioner received ineffective assistance of trial counsel at the 2009 punishment retrial because counsel failed to pursue questions concerning his competency to stand trial;

4. Petitioner's trial attorneys at the original 1995 trial were ineffective for failing to subject the State's case to meaningful adversarial testing;[4]

5. The State failed to disclose that a luminol test conducted on Petitioner's body shortly after the offense was "negative" rather than "inconclusive"; and

6. As a result of Petitioner's incompetency, the testimony of his former spouse during his 2009 punishment retrial concerning Petitioner's culpability for the murders was not meaningfully challenged and thus provides no confidence in the underlying 1995 conviction.

STANDARD OF REVIEW

The standard of review a federal court applies depends on the state court's treatment of the federal claims. If the claims were adjudicated on the merits, federal courts should apply the deferential standard of review provided by 28 U.S.C. § 2254(d). Under this heightened standard, a writ of habeas corpus

[4] Specifically, Petitioner contends that counsel were "starkly unqualified" and: (claim 4a) failed to test evidence concerning Petitioner's admission to a jail guard; (4b) permitted inadmissible hearsay evidence to be admitted that Petitioner swept dirt between the victims' home and his home; (4c) failed to test evidence that Petitioner's teardrop tattoos represented his commission of the murders; (4d) permitted inadmissible hearsay evidence that peppers found in the victims' home and Petitioner's backyard were "very, very rare" for Odessa, Texas; (4e) permitted inadmissible opinion evidence that a photograph showing a stain on a camper parked between the victims' home and Petitioner's home was a blood transfer stain; and (4f) failed to object to numerous instances of improper argument made by the prosecution at closing.

should be granted only if a state court's adjudication of a claim (1) resulted in a decision that is contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court, or (2) resulted in a decision that is based on an unreasonable determination of the facts in light of the record before the state court. Harrington v. Richter, 562 U.S. 86, 100–01 (2011). This standard is difficult to meet and "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." Id. at 102.

With respect to claims that have not been adjudicated on the merits by the state courts, however, a federal court does not conduct review pursuant to § 2254(d). Instead, the court applies a *de novo* standard of review. See Hoffman v. Cain, 752 F.3d 430, 437 (5th Cir. 2014). In this case, Petitioner raised several of the above claims in a subsequent state habeas application which the TCCA dismissed as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5(a). Ex parte Gonzales, No. 40,541-04, 463 S.W.3d 508 (Tex. Crim. App.). The TCCA specifically noted it was dismissing the application "without considering the merits of the claims." Id. Therefore, because none of the above claims have been adjudicated on the merits in state court, this Court will not apply the deferential scheme laid out in § 2254(d) and will instead

"apply a *de novo* standard of review." Ward v. Stephens, 777 F.3d 250, 256 (5th Cir. 2015); Hoffman, 752 F.3d at 437.

ANALYSIS OF COMPETENCY CLAIMS

It is well settled that due process requires that the trial of an accused be conducted only when he is mentally competent. Cooper v. Oklahoma, 517 U.S. 348, 354 (1996); Drope v. Missouri, 420 U.S. 162, 171 (1975). In a habeas proceeding such as this, the issue of competency may arise in two distinct contexts. United States v. Williams, 819 F.2d 605, 607 (5th Cir. 1987) (citing Johnson v. Estelle, 704 F.2d 232, 238 (5th Cir. 1983)). The first is that the evidence before the trial court presented a "bona fide doubt" as to a petitioner's competency and, therefore, the court was required to hold a competency hearing before proceeding. Id. (citing Pate v. Robinson, 383 U.S. 375, 378 (1966)). Alternatively, a habeas petitioner may collaterally attack his conviction by showing that, at the time of trial, he was incompetent in fact. Id.

Petitioner raises both types of challenges in the instant proceeding. He contends that his contentious relationship with trial counsel prior to the 2009 punishment retrial and his history of mental health issues, along with his disruptive behavior during the trial, should have alerted the court and his counsel that his competency was in doubt. As a result, Petitioner argues his due process rights were violated by the trial court's failure to hold a competency hearing (Claim 2),

and that he received ineffective assistance of trial counsel ("IATC") by counsels' failure to pursue the issue of his competency (Claim 3). Petitioner also raises a substantive claim that he was incompetent to stand trial (Claim 1), arguing that his underlying mental health issues combined to cause him to develop paranoid delusions concerning his defense team which prohibited him from consulting with counsel or assisting his defense in any meaningful way. As discussed below, habeas relief is unwarranted on each of these allegations.[5]

I. The *Pate* Allegation (Claim 2)

The first issue for the Court to address is whether Petitioner was deprived of due process by the trial court's failure to *sua sponte* inquire into Petitioner's competency. Under Pate, a trial court must hold a competency hearing when there is evidence before the court that objectively creates a bona fide question as to whether the defendant is competent to stand trial. 383 U.S. at 385. Petitioner argues his "irrational behavior"—specifically, his refusal to consult with counsel or assist in his defense in any meaningful way—was known to the court and should have triggered an inquiry into his competency when coupled with what the court already knew about Petitioner's longstanding mental health issues. In

[5] In a rather bizarre claim, Petitioner also uses his alleged incompetency in 2009 to somehow challenge his underlying conviction from 1995 (Claim 6). But as discussed later in this opinion, this claim is untimely and barred by AEDPA's one-year limitations period. Regardless, because Petitioner has failed to demonstrate his incompetency in 2009, the claim is rejected on the merits as well.

addition, Petitioner contends his repeated outbursts, gestures, and inappropriate statements at trial also should have indicated to the court that his competency was at issue.

A. Applicable Facts

The facts surrounding Petitioner's contentious relationship with his defense team appear undisputed. Following the appointment of attorneys Woody Leverett and Jason Leach in July 2007, Petitioner wrote to counsel and requested they secure the services of Charles Lanier, a mitigation specialist from New York, to assist on his case. Leverett responded by informing Petitioner that, after looking into the request, they found Lanier had no experience as a mitigation specialist but was instead a mental health expert who advocated against the death penalty. In fact, none of counsel's representations to Petitioner were true. When Petitioner learned directly from Lanier that counsel had never actually sought his services and had misrepresented to Petitioner the specialist's credentials, Petitioner sought to have Leverett removed as counsel. After a hearing in October 2007 on the issue, the trial court refused to remove Leverett as counsel based, in part, on Leverett's qualifications, his explanation that he did not intentionally lie to Petitioner, and the court's skepticism of Lanier's motives.

Thereafter, Petitioner refused to acknowledge his defense team because he no longer trusted them. He also told his friends and family members to

stop cooperating with any members of his defense team, including the investigator and mitigation specialist, and attempted to "fire" trial counsel by letter. In one letter, Petitioner explained his reasons to counsel, referring to counsel having hired an investigator and mitigation specialist without conferring with him, and stating his belief that counsel "have not been honest with me since day one." Petitioner also explained his reasons to the court at a second hearing held in May 2008:

> COURT: Well, we are going to have a trial and we are going to proceed. Now, are you going to cooperate with your lawyers?
>
> DEFENDANT: I don't acknowledge these attorneys that you represented me.
>
> COURT: All right.
>
> DEFENDANT: I addressed this Court last time of my concerns. I don't trust them, plain and simple. When an attorney lies to you one time, he is going to lie to you every time, so my point, they aren't worth shit.
>
> COURT: Okay.
>
> DEFENDANT: Either they are for you or against you. In this case, they have already shown me they aren't for me. Why don't you just issue an execution date right now.

(4 RR 4-5.)[6]

Prompted by his client's refusal to cooperate, counsel filed a motion asking to be replaced as counsel for Petitioner. Counsel later elaborated on his reasons for withdrawal in an amended motion, explaining the defense team had

[6] "RR" refers to the Reporter's Record of Petitioner's 2009 punishment retrial, and is preceded by volume number and followed by page numbers.

"absolutely no working relationship" with Petitioner and concluding that, in almost thirty years of practice, he has "never had a poorer relationship with a client." Despite numerous attempts by counsel and their investigator, Nancy Piette, to consult with him, Petitioner refused to consult with or assist the defense team with his case. However, Petitioner would occasionally speak with counsel about other matters, often seeking assistance with problems that arose at the county jail, facilitating family contacts, or obtaining items he could not obtain on his own. After considering counsels' motion and the affidavits attached thereto, the court denied counsels' request to withdraw as Petitioner's attorneys.

During the punishment retrial, Petitioner continued his antagonistic behavior toward counsel and often interrupted the proceedings with inappropriate gestures or outbursts. On the first day of testimony, Petitioner's wife, Martha Reyes, was called to testify and warned she could possibly be implicated as an accomplice if she testified in accordance with her previous statement to police. After she exhibited some confusion, Petitioner spoke out:

> DEFENDANT: If she don't want to testify, leave her alone, man. That's my wife. She has the right to plead the Fifth Amendment. She don't got to testify against nobody. You are harping her, man. You are fucking with her mind. Leave her alone. She don't want to testify.
>
> COURT: Retire the jury.
>
> (Jury retired from courtroom).

> DEFENDANT: See how you got her all emotional. You ain't got to testify, Martha. Don't let them get in your head. You have got the right to keep the Fifth Amendment. You should be ashamed of yourself, man.
>
> COURT: Now, where are we?
>
> MR. MAU: Ms. Reyes has told me that she is frightened, that she is scared of the defendant, and I think she –
>
> DEFENDANT: Goddamn right she is scared because y'all put her in that fucking position, man. Just leave her alone. She don't want to testify.
>
> MR. MAU: I know she is reluctant to testify because of that, but she has told me she is willing to testify and she is willing to tell the truth and repeat what she has told the police.

(27 RR 55-56.)

After a short recess, Petitioner attempted to explain his outburst to the court outside the presence of the jury:

> DEFENDANT: Your Honor, I only have one thing to say. Being that I haven't acknowledged my attorneys, there is no communication with them and I have told them already I didn't want her to get on the stand. Now, my wife doesn't know she can invoke the Fifth Amendment rights. That is all I was doing was letting her know. These mother fuckers right there, they are getting in her mind telling her she has to do that. She don't got to. She's got that right. She don't got to get on the stand. Don't nobody got to get on that stand. That is what the Fifth Amendment right is for. I was only letting her know that.

(Id. at 56-57.)

Following another recess, Reyes testified that Petitioner was responsible for murdering the Aguirres. On cross-examination, Reyes was asked if

she knew the whereabouts of several other people who used to associate with Petitioner when Petitioner suddenly exclaimed: "Same thing's gonna happen to you, bitch. I'm gonna fucking have somebody kill your ass." The judge immediately retired the jury, but Petitioner continued: "You fucking shit on your own, dumb-ass. Watch. 102 apartment, watch . . . No sense in crying now." (Id. at 83-84.) Once the jury was out of the courtroom, the following colloquy took place:

> COURT: You have continually interrupted the proceedings of the Court.
>
> DEFENDANT: Yes, I have.
>
> COURT: And I am going to once again ask you—
>
> DEFENDANT: You warned me a while ago if there were any outbreaks, I would be removed from the courtroom and you were going to gag me. I already said what I had to say so you have one or two things you can do, remove me from the courtroom or gag me.
>
> COURT: You are absolutely right, you have a grasp on it. So the only way that you are going to get to remain in here is that if you promise the Court that you are going to sit there and quietly conduct yourself in that manner. Are you willing to tell me you are going to do that?
>
> DEFENDANT: I would lie to you if I tell you no.
>
> COURT: Okay. So you're going to tell me you are going to continue to create problems and—
>
> DEFENDANT: No, I am not saying that either. I am just saying that whenever my blood rises I speak my mind.
>
> COURT: Okay.

> DEFENDANT: Now, I cannot say I am going to be quiet, I cannot say I ain't going to be quiet.
>
> COURT: Okay.

(Id. at 87-88.) The trial then continued with Petitioner still present in the courtroom.

On the last day of trial, defense counsel announced that it was their intention to call several more witnesses to the stand, including Petitioner's half-sister, daughter, and an expert. However, Petitioner was adamant that these witnesses not testify and threatened to create a disturbance in court if they were called. Specifically, Petitioner stated he would "go for a firearm" to create a disturbance and would "rather be shot in the courtroom than to have anybody ask for help for him." (30 RR 4-5.) For this reason, the defense only called one more witness—Petitioner—who had repeatedly expressed to counsel his desire to testify. Petitioner then testified as follows:

> DEFENDANT: I won't say so much as address the jury but I wanted to get on the stand and give the prosecution a shot at me.
>
> MR. LEVERETT: Is there anything you want to tell this jury?
>
> DEFENDANT: Yeah. Y'all can fucking kill me. Makes me no fucking difference. Pass the witness.
>
> MR. MAU: No questions, Your Honor.
>
> COURT: Okay, Mr. Leverett.
>
> DEFENDANT: No, man, I told you yesterday why do I want your fucking assistance, man? You won't listen to me.

MR. LEVERETT: Your Honor, the defense rests at this time.

(Id. at 9.)

B. Analysis

To obtain relief on a Pate procedural due process allegation, a petitioner does not have to establish he was incompetent to stand trial; rather, he need only establish that the trial judge should have ordered a hearing to determine his competency. Roberts v. Dretke, 381 F.3d 491, 497 (5th Cir. 2004). The inquiry is whether the trial judge received information which, objectively considered, "should reasonably have raised a doubt about the defendant's competency and alerted [the court] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." Id. (quoting Lokos v. Capps, 625 F.2d 1258, 1261 (5th Cir. 1980)). Although the Supreme Court has not articulated a general standard for the nature or quantum of evidence necessary to trigger a competency hearing, it has focused on three factors that should be considered: (1) the existence of a history of irrational behavior; (2) prior medical opinions; and (3) the defendant's bearing and demeanor at the time of trial. United States v. Flores-Martinez, 677 F.3d 699, 706–07 (5th Cir. 2012); Williams, 819 F.2d at 607. Petitioner carries the burden of showing, by clear and convincing evidence, that a Pate violation occurred. Wheat v. Thigpen, 793 F.2d 621, 629 (5th Cir. 1986).

(1) Irrational Behavior

Petitioner first contends his distrust of, and refusal to work with, counsel demonstrates a history of irrational behavior that should have raised a doubt as to his competency. The record does not support this assertion. To the contrary, Petitioner's correspondence with counsel, along with Petitioner's discussions with the trial court concerning his reasons for refusing to acknowledge counsel, actually demonstrate an understanding of the proceedings and an ability to communicate about the direction of his defense. Petitioner cogently explained his unhappiness with counsel over their refusal to hire Charles Lanier, his preferred mitigation specialist, and their unilateral decision to instead hire Nancy Piette as an investigator and Danalynn Recer as a mitigation specialist without first seeking his approval. Petitioner also explained that he no longer trusted counsel because of Leverett's misrepresentations concerning Lanier's qualifications as a mitigation specialist, accusing counsel of being dishonest "since day one." Thus, far from irrational, Petitioner's obstinate behavior toward his defense team prior to trial simply reflected his sincere distrust of his trial counsel.

(2) Prior Medical Opinion

Conceding the above point, Petitioner contends it was not just the trial court's awareness of his behavior toward counsel, but also the court's awareness of Petitioner's longstanding mental illnesses that should have raised doubts about his

competency. Judge Bill McCoy, who presided over Petitioner's 2009 punishment retrial, also presided over Petitioner's original trial in 1995 and was indeed familiar with Petitioner's mental health issues. At Petitioner's 1995 trial, Judge McCoy heard testimony from Drs. Sam Brinkman and Mark Cunningham who testified at length about these issues. Among other things, Judge McCoy learned Petitioner had been diagnosed at age sixteen with schizoaffective disorder with psychotic features and had received antipsychotic medication to treat this disorder and his polysubstance addiction. He also heard testimony that Petitioner grew up in a neglectful environment and was abused, that he suffered head injuries and abused alcohol and drugs as an adolescent, and likely suffered brain damage as a result. Judge McCoy's knowledge of these issues was then refreshed at a January 2009 hearing on the defense team's motion for a continuance where the team's mitigation specialist, Recer, recounted Petitioner's mental health history to demonstrate that further investigation was needed. In a pleading submitted shortly thereafter, Judge McCoy also learned Petitioner had been diagnosed with adult-onset type-2 diabetes in 2003 which could produce mental health complications if poorly controlled.[7]

[7] Attached to the pleading was a letter from Dr. Arturo Silva, a psychiatrist secured by the defense team, concerning the potential consequences of uncontrolled or poorly controlled diabetes. Dr. Silva did not examine Petitioner, however, and thus never examined the likelihood Petitioner may actually have suffered these consequences.

Because of Judge McCoy's intimate knowledge of Petitioner's physical and mental health issues, Petitioner contends the trial court should have already been concerned with Petitioner's competency, particularly following Petitioner's behavior toward his defense team. According to Petitioner, Judge McCoy simply failed to "connect the dots" between Petitioner's mental health impairments and his reaction to the incident involving Lanier. But in this case, there were no "dots" for Judge McCoy to connect. As discussed previously, there was nothing alarming about Petitioner's obstinate behavior toward his defense team prior to trial, and Petitioner concedes he was able to communicate with his attorneys and had a rational understanding of the proceedings against him. Petitioner's existing mental health issues also did not necessarily raise an objective doubt as to his competency because "the presence or absence of mental illness or brain disorder is not dispositive" as to competency. United States v. Mitchell, 709 F.3d 436, 440 (5th Cir. 2013) (citing Mata v. Johnson, 210 F.3d 324, 329 n.2 (5th Cir. 2000); see also Walton v. Angelone, 321 F.3d 442, 460 (4th Cir. 2003) ("Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.") (citation omitted).

Moreover, contrary to Petitioner's suggestion, there was nothing before the trial court in 2009 suggesting a link between Petitioner's refusal to

cooperate with counsel and his history of mental health issues. Petitioner now claims that his choice not to consult with his defense team was no choice at all—that his mental disorders and physical ailments combined to cause him to develop paranoid delusions toward his defense team that prevented him from assisting in his defense. (Dkt. # 64 at 48; Dkt. # 68 at 37-38.) But this theory is based almost entirely on the declaration of Dr. Cunningham submitted in November 2013, over four years after Petitioner's punishment retrial. (Dkt. # 64-1, Ex. 3.) Tellingly, neither Dr. Cunningham nor Dr. Brinkman, both of whom testified for the defense at Petitioner's original trial, ever raised the issue of competency or spoke of a concern for Petitioner's competency prior to Dr. Cunningham's declaration at the beginning of these federal habeas proceedings. Likewise, neither Petitioner's defense expert (Dr. Silva) nor mitigation specialist (Recer) mentioned competency when asking the trial court for more time to investigate Petitioner's mental health issues for mitigation purposes.

Perhaps more significantly, Petitioner's counsel, Leverett and Leach, never raised the issue of competency prior to trial, and never once expressed any concern about Petitioner's ability to communicate or his understanding of the proceedings against him. This is true despite Leverett's stated concern, as explained at the October 2007 pretrial hearing before the trial court, about Petitioner's refusal to speak with the defense team since the beginning of his

appointment. As trial counsel is often the best source of information about a defendant's competency, this failure to raise any sort of issue concerning Petitioner's competency is persuasive evidence in and of itself that no violation occurred. Medina v. California, 505 U.S. 437, 450 (1992); Reese v. Wainwright, 600 F.2d 1085, 1092 (5th Cir. 1979). Consequently, Petitioner has not established that the trial court's awareness of his mental health issues along with Petitioner's intractable position concerning counsel should have raised a bona fide doubt about his competency. See Mitchell, 709 F.3d at 441 (rejecting Pate claim despite trial court's awareness of Mitchell's irrational behavior and history of mental illness); Dunn v. Johnson, 162 F.3d 302, 305 (5th Cir. 1998) (rejecting allegation of a Pate violation based on Dunn's delusional belief that counsel were involved in conspiracy against him).

(3) Demeanor at Trial

Lastly, Petitioner contends his numerous inappropriate gestures and statements during his 2009 punishment retrial also should have alerted the trial court that competency was an issue. But even a cursory review of the record demonstrates Petitioner was not lacking in an ability to understand the proceedings against him. Quite the opposite, Petitioner's outburst prior to his wife's testimony evinced a keen awareness of his wife's Fifth Amendment right not to incriminate herself. His subsequent outburst following her testimony, while angry and

inappropriate, also was not divorced from reality as it reflected a feeling of betrayal and an appreciation of how damaging her testimony was to his defense. See Flores-Martinez, 677 F.3d at 708 (rejecting Pate allegation in part because defendant's trial outbursts, while angry and inappropriate, were not divorced from reality).

Nor did Petitioner's behavior at trial indicate an inability to effectively communicate with counsel or the trial court. For instance, Petitioner was able to communicate clearly to the court rational, albeit unpersuasive, reasons for blurting out in the middle of trial—his lack of communication with his counsel, his belief that his wife did not understand her Fifth Amendment rights, and his obvious inability to control his temper. Despite his refusal to assist in his defense, Petitioner was also able to communicate to his lawyers his desire to testify and his adamant refusal to allow the jury to hear testimony from an expert or any family member. Thus, Petitioner's outbursts and behavior at trial did not indicate a lack of rationality, understanding, or ability to communicate that should have alerted the trial court to potential competency issues.

What Petitioner's outbursts and behavior *did* indicate was a recalcitrant and highly antisocial person who held little regard for his defense team or the sanctity of the proceedings against him. But the fact that Petitioner genuinely distrusted his defense team and exhibited a blatant disregard for

decorum does not necessarily indicate an inability to understand the proceedings or consult with his attorneys. See United States v. Simpson, 645 F.3d 300, 306 (5th Cir. 2011) (finding a defendant is not incompetent "merely because he refuses to cooperate [with counsel]"). If they did, seemingly any defendant could potentially inject error into their proceedings by refusing to consult with counsel and behaving absurdly in court.

Moreover, the fact that Petitioner's refusal to acknowledge counsel and his inappropriate outbursts were ultimately detrimental to his case is largely irrelevant. This Court's focus is not on Petitioner's legal acumen, but whether there was sufficient information before the trial court that, objectively considered, should have raised a doubt about the defendant's competency. Roberts, 381 F.3d at 497. And the Fifth Circuit has expressly "decline[d] to adopt a per se rule that, as a matter of law, a trial court must doubt a capital punishment defendant's competency, or conclude that such defendant does not understand the proceedings against him or appreciate their significance . . . simply because it is obvious to the court that the defendant is causing his trial to be conducted in a manner most likely to result in a conviction and the imposition of the death penalty." Id. at 498. Thus, the fact that Petitioner possibly made poor decisions prior to and during trial does not mean he was incompetent to stand trial or that the trial court should have held a competency hearing.

In sum, this Court's review of each of the three factors to be considered under Pate indicates that no bona fide question as to Petitioner's competency existed to warrant a competency hearing. Petitioner's second claim for relief is therefore denied.

II. Petitioner Was Not Incompetent to Stand Trial (Claims 1, 6)

In addition to the Pate due process claim, Petitioner also raises a substantive claim that he was incompetent to stand trial in 2009. To obtain habeas relief based on incompetency, a habeas petitioner must show that "the facts are sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to his mental competency at the time of trial." Dunn, 162 F.3d at 306 (internal quotations omitted). Once the petitioner has presented enough probative evidence to raise a substantial doubt as to his competency at the time of trial, he must then prove that incompetency by a preponderance of the evidence. Moody v. Johnson, 139 F.3d 477, 481 (5th Cir. 1998). The Supreme Court has explained that the two-part test for competence is (1) whether a defendant has "a rational as well as factual understanding of the proceedings against him"; and (2) whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Indiana v. Edwards, 554 U.S. 164, 170 (2008) (citing Dusky v. United States, 362 U.S. 402 (1960)).

Petitioner does not dispute that he had a rational and factual understanding of the proceedings against him. Instead, relying on declarations from Dr. Cunningham and the defense team's mitigation expert, Danalynn Recer, Petitioner contends he lacked the capacity to consult with counsel and to assist in preparing his defense. Due to a combination of mental disorders and physical ailments, Petitioner argues he developed paranoid delusions concerning his defense team which prohibited him from consulting with them. In other words, his refusal to consult with counsel or assist in his defense in any meaningful way was not by choice, but rather was driven by mental illness and brain damage over which he had no control. Respondent refutes this assertion, arguing Petitioner, a chronically belligerent and antisocial person, could have assisted the defense at any point but chose not to because of his disdain and distrust for counsel.

Because there were no reliable state court findings or conclusions regarding whether Petitioner was mentally competent at the time of his 2009 punishment retrial, this Court granted Petitioner's request for an evidentiary hearing to develop the allegation (and related IATC claim). (Dkt. # 69.) Over the course of seven days, the Court heard testimony from numerous individuals concerning Petitioner's mental state and competency prior to, and during, the 2009 retrial. This testimony included the following: (1) expert testimony from two forensic psychologists, one forensic psychiatrist, and one neuro-endocrinologist;

(2) testimony from members of his defense team, including both attorneys, his investigator, and mitigation specialist; and (3) several other individuals, including Judge McCoy, who had sustained contact with Petitioner prior to his 2009 retrial.[8]

The Court has now carefully considered this testimony and the numerous exhibits submitted by both parties at the hearing, as well as the record and pleadings already before the Court prior to the hearing. For the reasons discussed below, the Court concludes Petitioner failed to demonstrate his incompetence to stand trial at the 2009 punishment retrial.

A. The Experts

Petitioner in large part relied on the testimony of forensic psychologist Dr. Cunningham at the evidentiary hearing to establish his incompetency in 2009. Dr. Cunningham testified that by the time of Petitioner's original 1995 trial, Petitioner was suffering from a significant neurocognitive disorder (brain dysfunction) as a result of complications at birth, the ingestion of drugs and alcohol as a child and adolescent, and significant head injuries and abuse he suffered as a child. This neurocognitive disorder became worse over time due, in part, to the uncontrolled, type-2 diabetes Petitioner was first diagnosed with as an adult in 2003, a diagnosis which neuro-endocrinologist Dr. Alan Jacobs later

[8] The Court also heard testimony, via deposition, from the two attorneys who prosecuted Petitioner's 2009 retrial, as well as their investigator.

elaborated on during his testimony following Dr. Cunningham.[9] According to Dr. Cunningham, Petitioner's declining neurocognitive status, combined with Petitioner's complex Post-Traumatic Stress Disorder ("PTSD"), resulted in increased paranoia which led him to develop two paranoid disorders—Paranoid Personality Disorder ("PPD") and Delusional Disorder ("DD"). Together, Petitioner's neurocognitive disorder and paranoid disorders rendered Petitioner unable to assist in his defense due to his global distrust of the entire defense team. Dr. Cunningham also diagnosed Petitioner as having Antisocial Personality Disorder ("ASPD"), but stated this disorder alone could not explain Petitioner's irrational and self-defeating behavior toward counsel.

Although compelling, Dr. Cunningham's conclusion that Petitioner was unable to assist in his defense was ultimately undermined by the testimonies of Dr. Timothy Proctor, a forensic psychologist, and Dr. Michael Arambula, a forensic psychiatrist. Both Drs. Proctor and Arambula testified that, contrary to the testimony of Petitioner's experts, there was no reliable evidence in the case to diagnose Petitioner as having significant brain dysfunction or that he suffered from diabetes to the degree or duration necessary to exacerbate any brain dysfunction

[9] Dr. Jacobs is board-certified in neurology but not in psychiatry or forensics, thus his testimony was limited to Petitioner's adult-onset diabetes and its effect on his neurocognitive status, and not to the underlying issue of whether Petitioner was competent to stand trial in 2009.

that may have been present.[10] For instance, much of the evidence Drs. Cunningham and Jacobs relied on to establish Petitioner's pre-1995 brain impairments comes from Dr. Brinkman's 1995 report (for which no raw data exists) or were reported by Petitioner himself, not from other reliable sources. And even assuming Petitioner suffered traumatic events during his childhood, such injuries were likely to heal within a year and would cause little cognitive decline. With regard to Dr. Cunningham's diagnosis of "complex" (or Type 2) PTSD, such diagnosis is not considered valid and is not found in either the DSM-4 or DSM-5, and neither expert found enough characteristics of PTSD to warrant such a diagnosis in Petitioner.

More importantly, Drs. Proctor and Arambula effectively refuted Dr. Cunningham's diagnoses and conclusion that Petitioner suffered from PPD and DD which rendered him unable to assist in his defense. As acknowledged by Dr. Cunningham and the DSM-5, such disorders are "fixed" and "rigid" in nature and do not change simply because circumstances change. As such, a person truly paranoid or delusional toward their counsel would not be able to turn it on and off depending on the topic as Dr. Cunningham asserts—that person would not be able

[10] Both doctors provided several valid reasons to discount the testimony of Dr. Jacobs concerning his diagnosis of diabetes and the role it allegedly played in Petitioner's mental health, including the incomplete and outdated tests he used and the fact he believed effort testing was "kind of a joke." Regardless of this testimony, however, the persuasiveness of Dr. Jacobs' testimony was limited due to the qualified nature of his testimony.

to trust or interact with counsel at all. But that is not what happened in this case.[11] In fact, the record is replete with letters and notes between Petitioner and his trial team concerning his case, and also includes numerous conversations that took place with his trial counsel regarding a wide range of topics, including his trial. In one phone call in particular, Petitioner spoke at length with counsel about obtaining some glasses and a policy manual on use-of-force in jail. Petitioner even demonstrated his knowledge of the case by discussing a proposed continuance, upcoming hearing dates, discovery, subpoenas, the State's investigation and prosecutors, and the level of publicity the trial was getting.[12]

Finding Dr. Cunningham's diagnoses of PPD and DD to be flawed, both Dr. Proctor and Dr. Arambula conducted separate evaluations of Petitioner and came up with the same conclusion: Petitioner simply suffers from a severe form of ASPD and polysubstance abuse which accounts for his belligerent and self-defeating behavior toward his trial team. Dr. Proctor also opined that Petitioner exhibits many of the criteria for a diagnosis of psychopathy, which elucidates the severe nature of his ASPD. Both doctors then concluded that Petitioner had the capacity to engage in rational communication with his defense

[11] Petitioner even concedes in his petition that he occasionally sought the defense team's assistance with various tasks, such as problems that arose in jail, gaining access to certain things he did not have access to, and coordinating social contacts.

[12] Dr. Cunningham admittedly did not listen to this phone call when conducting his evaluation.

team, and his refusal to consult with counsel or assist in his defense was the product of his own choice and not because of mental disease or defect.

After due consideration of the persuasive expert testimony submitted by both parties, the Court finds the elaborate explanation provided by Dr. Cunningham to have less credibility than the testimony and ultimate conclusion propounded by Drs. Arambula and Proctor—that Petitioner, while a severely antisocial and temperamental individual, had the ability to consult with his defense team with a reasonable degree of rational understanding. This finding is only bolstered by the testimony of Petitioner's defense attorneys and investigators discussed in greater detail below.

B. The Defense Team

"Because legal competency is primarily a function of defendant's role in assisting counsel in conducting the defense, the defendant's attorney is in the best position to determine whether the defendant's competency is suspect." Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996); see also Medina, 505 U.S. at 450. Petitioner's trial counsel for the 2009 punishment rehearing, Woody Leverett and Jason Leach, testified about their numerous encounters with Petitioner since their appointment in 2007.[13] During these encounters, Petitioner was always

[13] This testimony is supported by the letters and phone calls between Petitioner and both counsel, as well as Leverett's notes regarding his interactions with Petitioner and the defense team.

lucid and often inquired about various aspects of the case, including potential witnesses, the ongoing investigation, discovery and subpoena requests, and upcoming hearing dates. Soon after their appointment, however, Petitioner became extremely disgruntled and recalcitrant over the Lanier incident and started refusing to consult with the defense team. This behavior was on and off, though, and Petitioner would still discuss with counsel issues involving the case (and external to it) when he felt like it, as evidenced by the recorded phone call between Petitioner and Leverett just a few months prior to trial. Despite being a difficult and headstrong client, neither attorney ever doubted Petitioner's competency to stand trial.

Similarly, Nancy Piette, the defense team's investigator, testified that nothing in her investigation and contact with Petitioner indicated to her that Petitioner may have been incompetent. In fact, her investigation uncovered conversations between Petitioner and a person named Kay Bandell that seemed to indicate an understanding of his legal proceedings and of basic legal concepts such as the law of parties. In one conversation, Petitioner even told Bandell he uncovered research stating that it was an automatic reversal on appeal when a defendant refuses to cooperate with his appointed counsel, so he was going to do the same thing. In her opinion, these phone calls clearly showed Petitioner was competent and knew what he was doing.

The only lay witness to testify that Petitioner may have been incompetent was Petitioner's mitigation specialist, Danalynn Recer, who developed a concern over Petitioner's possible competency issues due to his paranoid tendencies and refusal to work with counsel. Recer met with Petitioner only three times, but allegedly raised her concerns with the trial team several times only to find that counsel was skeptical of the competency issue and wanted instead to focus on the mitigating aspect of Petitioner's mental health issues. Recer's account is contested by Piette, however, who does not believe Recer was as adamant about the competency issue as she now claims to have been.[14]

C. Other Testimony

In addition to the testimony of Petitioner's trial counsel and fact investigator, the opinion of Drs. Proctor and Arambula was also bolstered by the testimony of the trial judge from Petitioner's 1995 and 2009 trial, Judge Bill McCoy. Judge McCoy testified that although Petitioner's demeanor became much more confrontational at his second trial, he never observed anything that would indicate competency was an issue. He did not believe Petitioner's ability to understand the proceedings or consult with counsel had degraded at all in the years

[14] The Court notes that Recer's credibility as a witness in a death penalty case may be clouded by the fact that she has been "fighting the death penalty" for over two decades, as evinced by her biography on the Gulf Region Advocacy Center website. See http://www.gracelaw.org/currentstaff.html (last visited March 28, 2018).

since his first trial. Indeed, following Petitioner's outbursts at trial, Judge McCoy felt Petitioner understood his admonishments and was able to communicate effectively.

Last, the testimony of seven staff members from either the Ector County Jail or TDCJ echoed the testimony concerning Petitioner's ability to communicate. Each of the staff members had spent significant time with Petitioner during his incarceration, and all testified Petitioner was a manipulative and scheming individual who had no problem communicating with others.

D. Conclusion

As the length and depth of the above testimony attests, the issue of a petitioner's competency to stand trial can be quite complex. In this case, Petitioner argues that his underlying neurocognitive disorder combined with his uncontrolled diabetes and undiagnosed complex PTSD resulted in the development of two paranoid disorders (PPD and DD) that prevented him from having the capacity to consult with his attorneys. Although Petitioner has constructed this elaborate explanation for his behavior, the clear weight of the evidence indicates a much simpler reason—Petitioner is a severely recalcitrant and antisocial individual who made a reasoned decision not to consult with his attorneys. In other words, he was capable of communicating and consulting with his defense team but *chose* not to. But a defendant who has it "within his voluntary control to . . . cooperat[e]," is not

incompetent merely because he refuses to cooperate. Simpson, 645 F.3d at 306 (citing United States v. Joseph, 333 F.3d 587, 589 (5th Cir. 2003)). Petitioner has not demonstrated his incompetency to stand trial in 2009; his claim, therefore, is denied.

III. The IATC Allegation (Claim 3)

In his final competency-related allegation, Petitioner contends his trial counsel rendered ineffective assistance by failing to pursue questions concerning his competency to stand trial. According to Petitioner, counsel were obligated to inquire into his competency for the same reasons the trial court was—Petitioner's history of mental illness and brain impairment, his distrust toward counsel and refusal to cooperate with the defense team, and his disruptive behavior during the trial. Such allegations are reviewed under the familiar two-prong test established in Strickland v. Washington, 466 U.S. 668 (1984). Thus, to prevail on his IATC claim, Petitioner must demonstrate (1) his trial counsel's performance was deficient, and (2) this deficiency prejudiced his defense. See, e.g., Rhoades v. Davis, 852 F.3d 422, 431 (5th Cir. 2017) (citing Strickland, 466 U.S. at 687). He does neither.

A. No Deficient Performance

Strickland's first prong "sets a high bar." Buck v. Davis, 137 S. Ct. 759, 775 (2017). Counsel is "strongly presumed to have rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment." Burt v. Titlow, 571 U.S. 12, 17 (2013) (quoting Strickland, 466 U.S. at 690). Indeed, "[a] conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." Cotton v. Cockrell, 343 F.3d 746, 752-53 (5th Cir. 2003). A court must apply a "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Harrington, 562 U.S. at 104 (quoting Strickland, 466 U.S. at 689). This requires the Court to "affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" Cullen v. Pinholster, 563 U.S. 170, 196 (2011).

Petitioner fails to establish that his trial counsels' performance was deficient for the same reasons that the trial court did not violate Pate by failing to hold a competency hearing—Petitioner's behavior toward his defense team was hardly irrational, but rather reflected a severe antisocial personality and distrust of his trial counsel or even the real possibility of a tactical decision on his part. Based on their numerous conversations and correspondence with Petitioner, there was also nothing before trial counsel to lead them to question Petitioner's competency, nor was any concern raised from either of the defense team's experts, Dr. Brinkman or Dr. Cunningham. Although Recer may have raised a concern

about Petitioner's competency at some point, it is clear counsel considered the issue and made the reasonable decision not to pursue the issue. "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." Cotton, 343 F.3d at 752-53.

Finally, this claim of ineffectiveness is undermined by the discussion from the previous section. That is, Petitioner's trial counsel could not have been deficient in failing to discover his alleged incompetence where there has been no satisfactory showing that Petitioner was actually incompetent. "There can be no deficiency in failing to request a competency hearing where there is no evidence of incompetency." Carter v. Johnson, 131 F.3d 452, 464 (5th Cir. 1997) (quoting McCoy v. Lynaugh, 874 F.2d 954, 964 (5th Cir. 1989)). Petitioner thus fails to demonstrate the first prong of the Strickland test.

B. No Prejudice

To satisfy Strickland's second prong, "[t]he defendant must show that there is 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." Strickland, 466 U.S. at 694. As the Supreme Court has explained: "[T]he question in conducting Strickland's prejudice analysis is *not* whether a court can be certain counsel's

performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently." Harrington, 562 U.S. at 111 (emphasis added) (citing Wong v. Belmontes, 558 U.S. 15, 27 (2009)). Rather, the "likelihood of a different result must be substantial, not just conceivable." Id. at 112.

As previously discussed, the Court has made the conclusive determination that Petitioner was competent to stand trial at his 2009 punishment retrial. It necessarily follows that Petitioner was not prejudiced by trial counsels' failure to contest his competency, as he cannot establish the results of his proceeding would have been different had counsel inquired into his competency. See Mays v. Stephens, 757 F.3d 211, 216 (5th Cir. 2014) (finding no prejudice where there is no evidence of incompetency). Petitioner cannot make the showing of prejudice necessary under Strickland's second prong, and he is therefore denied relief on his IATC allegation.

ANALYSIS OF REMAINING CLAIMS

The remainder of Petitioner's allegations seek to challenge Petitioner's underlying conviction for capital murder in 1995, arguing the evidence against him was never subjected to meaningful adversarial testing due to numerous errors committed by trial counsel (Claim 4) and the State's failure to disclose the negative results of the luminol testing conducted less than twenty-four hours after

the murders (Claim 5). Petitioner also contends the testimony of his wife, Martha Reyes, at the 2009 punishment retrial should provide "no confidence in the guilty verdict rendered against him in 1995" because the testimony was not meaningfully challenged due to his incompetence (Claim 6). As discussed below, these allegations are either successive under 28 U.S.C. §2244(b) or barred by the limitations period set forth in § 2244(d)(1), or both, and are therefore dismissed.

I. Claims 4 and 5 are Successive

Petitioner had a full and fair opportunity to contest the validity of his 1995 capital murder conviction during his first federal habeas corpus proceeding in this Court. Gonzales v. Cockrell, No. 7:99-cv-072 (W.D. Tex. 2003). During those proceedings, Petitioner vigorously challenged his conviction by asserting some of the same allegations now raised in his second amended petition that is currently before the Court, including his Brady allegation (Claim 5) and several of his assertions of ineffective assistance (Claims 4a, 4c, and 4f). These allegations were rejected by Judge Furgeson in his January 2003 Order, which was affirmed by the Fifth Circuit on appeal. See No. 7:99-cv-072, Dkt. # 90; Gonzales v. Quarterman, 458 F.3d at 390-96 (rejecting on the merits Petitioner's Brady claim and one of Petitioner's IATC claims). Because these claims have already been litigated on the merits in his original habeas proceedings, they must be dismissed

as successive under the plain language of the AEDPA. See Williams v. Thaler, 602 F.3d 291, 301 (5th Cir. 2010) (citing 28 U.S.C. § 2244(b)(1)).

Similarly, if a petitioner presents a *new* claim in a second or successive habeas corpus application, the Court must also dismiss the claim unless the petitioner has first sought—and obtained—authorization from the Fifth Circuit to file the successive claim. Id. Despite the previous opportunity to litigate challenges to his underlying 1995 conviction, Petitioner now raises three new allegations concerning his 1995 conviction in his current habeas proceedings (Claims 4b, 4d, and 4e) that were not raised in his original habeas proceedings. However, Petitioner has not sought authorization from the Fifth Circuit to file a successive petition, nor has he established that any of the exceptions listed in § 2244(b) apply. See § 2244(b)(2)(A) (exception for claims concerning constitutional rights recognized by the Supreme Court within the last year and made retroactive to cases on collateral review); § 2244(b)(2)(B)(i) (exception for claims where the factual predicate could not have been discovered previously with due diligence). As a result, the Court lacks jurisdiction to address the merits of these claims as well. See §§ 2244(b)(3)(A)–(E).

Citing Justice Kennedy's dissent in Magwood v. Patterson, 561 U.S. 320 (2010), Petitioner contends his claims challenging his 1995 conviction are not successive due to the intervening judgment that occurred following his 2009

re-sentencing hearing. According to Petitioner, the Court's holding in Magwood "allow[s] a challenger [who has received a second judgment following resentencing] to raise any challenge to the guilt phase of the criminal judgment against him in his second application." (Dkt. # 68 at 56 (citing Kennedy, J., dissenting).) Despite his contention that Justice Kennedy's reasoning controls, Petitioner has provided absolutely no support for the proposition that a dissenting opinion can establish a new rule of constitutional criminal procedure. Moreover, the majority opinion emphasized the distinction between the circumstances in that case and the situation currently before this Court:

> The State objects that our reading of § 2244(b) would allow a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction. The State believes this result follows because a sentence and conviction form a single "judgment" for purposes of habeas review. This case gives us no occasion to address that question, because Magwood has not attempted to challenge his underlying conviction.

Id. at 342 (emphases in original).

A petitioner should not be allowed to resurrect challenges to a conviction previously rejected on federal habeas review simply because he was granted a new punishment hearing. Nor should he be entitled to raise such challenges after the appropriate opportunity for litigating such challenges has passed. Not only is such an interpretation contrary to the holding of Magwood, it undermines the necessity of the abuse-of-the-writ doctrine and flies in the face of

the Congressional intent underlying the enactment of the AEDPA. See Caldwell v. Dretke, 429 F.3d 521, 528 (5th Cir. 2005) (explaining that Congress's intent in enacting the habeas corpus reforms of the AEDPA was to "curb the abuse of the statutory writ of habeas corpus," and "address problems of unnecessary delay." (citations omitted)). Petitioner's reliance upon Magwood is therefore misplaced.

In summary, the Fifth Circuit has held that a petition is second or successive when it: "1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ." Hardemon v. Quarterman, 516 F.3d 272, 275 (5th Cir. 2008) (quoting In re Cain, 137 F.3d 234, 235 (5th Cir. 1998)). As shown above, Claims 4 and 5 either were, or could have been, raised in Petitioner's first federal habeas proceedings. Petitioner also failed to obtain permission from the Fifth Circuit in order for certain of the instant claims to proceed properly before this Court. Consequently, Petitioner's efforts to re-litigate the validity of his underlying 1995 capital murder conviction by (1) re-urging claims rejected on the merits during a prior federal habeas corpus proceeding, and (2) urging new claims once more attacking his 1995 conviction for capital murder which was not vacated, set aside, or otherwise abrogated by this Court's Judgment in Petitioner's first federal habeas corpus proceeding are foreclosed by the abuse of the writ principles embodied in 28 U.S.C. § 2244(b).

II. Claims 4-6 are Time Barred

Under the AEDPA, a state prisoner has one year to file a federal petition for habeas corpus, starting, in this case, from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A); Palacios v. Stephens, 723 F.3d 600, 604 (5th Cir. 2013). Petitioner's judgment became final for limitations purposes on December 27, 2011, ninety days after the TCCA affirmed his new sentence and when the time for filing a petition for writ of certiorari to the United States Supreme Court expired. See Sup. Ct. R. 13.1; Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999) ("§ 2244(d)(1)(A) . . . takes into account the time for filing a certiorari petition in determining the finality of a conviction on direct review"). As a result, the limitations period under § 2244(d) for filing his federal habeas petition expired a year later on December 27, 2012. Petitioner's fourth, fifth, and sixth claims for relief—raised for the first time in Petitioner's first amended federal petition (Dkt. # 38) filed November 5, 2013—are therefore untimely unless subject to either statutory or equitable tolling.

A. Statutory Tolling

Petitioner does not satisfy any of the statutory tolling provisions found under 28 U.S.C. § 2244(d). There has been no showing of an impediment created by the state government that violated the Constitution or federal law which

prevented Petitioner from filing a timely petition under § 2244(d)(1)(B). There has also been no showing of a newly recognized constitutional right upon which the petition is based under § 2244(d)(1)(C), and there is no indication that the claims could not have been discovered earlier through the exercise of due diligence under § 2244(d)(1)(D).

Section 2244(d)(2), which provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection," also does not toll the limitations period in this case. As discussed previously, Petitioner's state habeas application, filed September 9, 2014, was filed well after the limitations period expired. As such, it does not toll the one-year limitations period. Scott v. Johnson, 227 F.3d 260, 263 (5th Cir. 2000). Similarly, although Petitioner's initial federal petition (Dkt. # 1) challenging the constitutionality of his latest death sentence was filed on the December 27, 2012 deadline, it did not stop the statute-of-limitation's clock from running with regard to Claims 4-6 because they were not included in the petition. See Duncan v. Walker, 533 U.S. 167, 181-82 (2001) (holding that an application for federal habeas review is not an "application for State post-conviction or other collateral review" as contemplated by 28 U.S.C. § 2244(d)(2)).

B. Equitable Tolling

The Supreme Court has made clear that a federal habeas corpus petitioner may avail himself of the doctrine of equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." McQuiggin v. Perkins, 569 U.S. 383, 391 (2013); Holland v. Florida, 560 U.S. 631, 649 (2010). However, equitable tolling is only available in cases presenting "rare and exceptional circumstances," United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002), and is "not intended for those who sleep on their rights." Manning v. Epps, 688 F.3d 177, 183 (5th Cir. 2012).

Petitioner has not demonstrated that he diligently pursued habeas relief on Claims 4-6 during the limitations period or that any extraordinary circumstances prevented him from raising the claims in a timely manner. Petitioner waited until the end of the limitations period to file his original federal habeas petition (Dkt. # 1), and did not raise the instant claims until over ten months later when he filed his first amended petition (Dkt. # 38). Although Petitioner contends his mental incompetency should justify equitable tolling in this case, as this Court has already determined, Petitioner was not incompetent at the time of his 2009 punishment retrial. There has also been no showing that Petitioner was incompetent during the limitations period for filing a federal petition. Moreover,

through the assistance of counsel, Petitioner was able to assert several other claims for relief in his original, timely petition, just not the claims now being discussed. (Dkt. # 1.) Thus, Petitioner's alleged mental state did not prevent him from pursuing his legal rights as he now asserts. See Hood v. Sears Roebuck and Co., 168 F.3d 231, 233 (5th Cir. 1999) (refusing to apply equitable tolling based on incompetency when plaintiff had retained counsel before the limitations period expired).

"Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999) (internal quotation and citation omitted). Because Petitioner failed to assert any specific facts showing that he was prevented, despite the exercise of due diligence on his part, from timely filing his federal habeas corpus petition in this Court, he is not entitled to equitable tolling.

C. Petitioner's new claims do not "relate back."

Citing Federal Rule of Civil Procedure 15(c),[15] Petitioner argues his new claims should "relate back" to the original timely petition because, similar to

[15] Rule 15(c)(2) instructs that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

the new claims, the original petition raised a claim challenging the integrity of his 1995 conviction. Claims raised in an amendment to a habeas petition, however, do not automatically relate back merely because they arose out of the same trial and conviction. Mayle v. Felix, 545 U.S. 644, 650 (2005). As the Supreme Court explained, "[i]f claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance." Id. at 662. Thus, whether an amended claim relates back to the date of an earlier filed pleading depends on whether that claim asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading. Id. at 650.

Petitioner's new allegations concern trial counsel's alleged ineffectiveness (Claim 4) and the State's alleged failure to disclose evidence (Claim 5). These are completely different claims from the factual innocence claim Petitioner raised in his original federal petition (Dkt. # 1 at 23) and are supported by a totally different set of facts.[16] In fact, the only thing they have in common is they arose from the same trial and conviction. This is not enough. Because Petitioner's new claims are completely unrelated to the factual innocence claim

[16] Petitioner's sixth claim does not even purport to rely on facts from the original conviction, but rather involves a retrospective look at Petitioner's 1995 trial following testimony presented at his 2009 punishment retrial.

raised in the first petition, the new claims do not relate back to this petition and are therefore barred by the statute of limitations.

CERTIFICATE OF APPEALABILITY

The Court must now determine whether to issue a certificate of appealability ("COA"). See Rule 11(a) of the Rules Governing § 2254 Proceedings; Miller–El v. Cockrell, 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a district court rejects a petitioner's constitutional claims on the merits, the petitioner must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). This requires a petitioner to show "that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller–El, 537 U.S. at 336 (citation omitted). A district court may deny a COA *sua sponte* without requiring further briefing or argument. See Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000).

In consideration of the COA, this Court acknowledges that there were a number of factual disputes for which this Court conducted lengthy hearings and determined the weight of the evidence. However, there are no outstanding legal

issues upon which any reasonable jurist would differ. The Court therefore finds that jurists of reason would not debate the conclusion that Petitioner is not entitled to federal habeas relief. As such, a COA will not issue.

CONCLUSION AND ORDER

The Court has thoroughly reviewed the numerous volumes of records and pleadings submitted by both parties in this case, in addition to considering the exhibits and testimony presented at the lengthy evidentiary hearing concerning Petitioner's first and third claims for relief. After evaluating Petitioner's claims under the appropriate *de novo* standard of review, the Court concludes Petitioner failed to establish he was incompetent to stand trial at his 2009 punishment retrial (Claims 1 and 6); failed to establish trial court error for not inquiring into Petitioner's competency *sua sponte* (Claim 2); and failed to establish his trial counsel were ineffective for failing to pursue the issue of competency (Claim 3). Petitioner has further failed to establish his entitlement to relief on his fourth, fifth, and sixth grounds for relief, as these claims are either successive under 28 U.S.C. §2244(b) or barred by the limitations period set forth in 28 U.S.C. § 2244(d)(1), or both. In short, Petitioner's second amended federal habeas corpus petition does not warrant federal habeas corpus relief.

Accordingly, based on the foregoing reasons, **IT IS HEREBY ORDERED** that:

1. Federal habeas corpus relief is **DENIED** and Petitioner Michael Dean Gonzales's Second Amended Petition for Writ of Habeas Corpus (Dkt. # 64) is **DISMISSED WITH PREJUDICE**;

2. No Certificate of Appealability shall issue in this case; and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

DATED: Midland, Texas, April 13, 2018.

DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

APPENDIX D

463 S.W.3d 508 (Mem)
Court of Criminal Appeals of Texas.

EX PARTE Michael Dean GONZALES

WR–40,541–04
|
June 3, 2015

ON APPLICATION FOR WRIT OF HABEAS CORPUS, CAUSE NO. D–23,730, IN THE 358TH DISTRICT COURT ECTOR COUNTY

Attorneys and Law Firms

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ORDER

Per curiam.

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

Applicant was originally convicted of the offense of capital murder in 1995. The jury answered the special issues submitted under Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Gonzales v. State*, No. AP–72,317 (Tex. Crim. App. June 3, 1998). This Court denied relief on applicant's post-conviction application for writ of habeas corpus. *Ex parte Gonzales*, No. WR–40,541–01 (Tex. Crim. App. March 10, 1999).[1] Applicant's federal petition for habeas corpus relief was denied as to his conviction but granted as to punishment, and the case was remanded for a new punishment hearing. ***509** *Gonzales v. Cockrell*, No. MO–99–CA–073 (W. D. Tex. December 19, 2002). The United States Court of Appeals for the Fifth Circuit affirmed the federal district court's judgment. *Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006).

The trial court held a new punishment hearing in May 2009. Based on the jury's answers to the special issues, the trial court sentenced applicant to death on May 7, 2009. On May 8, 2009, the trial court determined that applicant was indigent and asked whether he desired the appointment of counsel for the purpose of filing an application for writ of habeas corpus. Applicant stated that he wanted no appeals filed on his behalf and no attorneys appointed. Because direct appeal cannot be waived, the trial court appointed counsel to represent applicant on direct appeal. For the purpose of Article 11.071, the trial court found that applicant was proceeding *pro se* on habeas.

This Court affirmed the judgment and sentence on direct appeal. *Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. 2011). When applicant failed to timely file a postconviction application for writ of habeas corpus, this Court issued an order stating in pertinent part:

> Because of applicant's expressed desire to waive habeas, the lack of any vacillation of that waiver appearing in the record, and applicant's failure to timely file an application, we hold that applicant has waived his right to the review of an initial Article 11.071 habeas application. Any writ application filed hereafter by applicant or on applicant's behalf will be labeled a subsequent application and reviewed under Article 11.071 § 5.

Ex parte Gonzales, No. WR–40,541–03 (Tex. Crim. App. November 10, 2010).

The record reflects that applicant is currently challenging his conviction in Cause No. 7:12–cv–00126, styled *Michael Dean Gonzales v. Rick Thaler*, in the United States District Court for the Western District of Texas, Midland Division. The record also reflects that the federal district court entered an order staying its proceedings for

applicant to return to state court to consider his current unexhausted claims. Applicant thereafter filed the instant post-conviction application for writ of habeas corpus in the trial court on September 9, 2014.

Applicant presents four allegations in the instant application. We have reviewed the application and find that applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 3rd DAY OF JUNE, 2015.

Yeary, J., filed a dissenting opinion, in which Alcala, J., joined. Newell, J., not participating.

Yeary, J., filed a dissenting opinion in which Alcala, J., joined.

This Court treats this—Applicant's first—post-conviction application for writ of habeas corpus as a subsequent writ application and rejects it as abusive under Article 11.071, Section 5(a). TEX.CODE CRIM. PROC. art. 11.071, § 5(a). It does so because Applicant, proceeding *pro se*, "waived" his right to habeas review by failing to file a timely initial writ application. *See Ex parte Reynoso*, 257 S.W.3d 715, 720 n. 2 (Tex.Crim.App.2008) ("Although Article 11.071 does not expressly provide that an applicant can waive his right to pursue habeas relief, neither does the statute provide for automatic habeas review. [citation omitted.] Thus, we [have] implicitly held that an applicant may 'waive' his right to habeas review. However, ***510** because an applicant can waffle in his decision until the day the application is due, a 'waiver' is not truly effective until after that day has passed."). The Court accepts the convicting court's finding that Applicant intelligently and voluntarily waived his right to state post-conviction habeas proceedings.

Applicant argues that we should treat the present writ application as an original—not a subsequent—post-conviction application because, even though he was incompetent to waive his right to pursue state post-conviction proceedings, neither the convicting court nor this Court made any inquiry into his competency at any time before the period elapsed for filing an initial application.[1] The Court does not address that contention in its order today. I would file and set the cause to do so. Because the Court does not, I respectfully dissent.

BACKGROUND

Applicant was originally convicted of capital murder in 1995. His death sentence was overturned during the course of federal habeas corpus proceedings in 2002. *Gonzales v. Quarterman*, 458 F.3d 384, 389 (5th Cir.2006).[2] A second Texas jury once again assessed the death penalty in 2009. During the retrial on punishment, Applicant refused to cooperate with his trial counsel, cursing and yelling and making obscene gestures in the courtroom. He insisted on testifying, inviting the jury to "fucking kill me. Makes no fucking difference. Pass the witness." The day after being sentenced to death in open court, Applicant insisted that he wanted to waive his appeals and be executed posthaste. When the trial court explained that he also had a right to pursue post-conviction remedies and to the appointment of counsel for that purpose, he replied, "I don't want no appeals filed on my behalf," and "I don't want no attorney, period." In reply to inquiries from this Court why the convicting court had appointed no attorney to represent Applicant in post-conviction habeas corpus proceedings under Article 11.071, Sections 2(a) and (b), the convicting court informed us that Applicant "refused to accept a writ of habeas corpus attorney" and that his "election not to accept an appointed attorney and proceed pro se was intelligent and voluntary." *See* TEX.CODE CRIM. PROC. art. 11.071, § 2(a) ("An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.").[3] When the time expired for Applicant to ***511** file an initial writ application with no application being filed, this Court issued an order stating, "Because of applicant's expressed desire to waive habeas, the lack of any vacillation of that waiver appearing in the record, and applicant's failure to timely file an application, we hold that applicant has waived his right to the review of an initial Article 11.071 habeas application." *Ex parte Gonzales*, No. WR–40,541–03 (Tex.Crim.App.del. Nov. 10, 2010) (not designated for publication) (slip op. at 2).[4] We went on to declare that "[a]ny writ application filed hereafter by applicant or on applicant's behalf will be labeled a subsequent application and reviewed under

§ 5." *Id.* We made no mention of competency.

COMPETENCY TO WAIVE POST–CONVICTION PROCEEDINGS

In this proceeding, Applicant raises four claims, including that he was incompetent to stand trial at the punishment retrial and that his trial attorneys rendered ineffective assistance of counsel for failing to raise an issue of his competency to stand trial at the punishment retrial. Applicant does not presently try to satisfy the criteria of Article 11.071, Section 5. Instead, he argues that we should treat this application as an initial writ application because he was also incompetent to have waived his initial writ application. He argues that due process will not countenance such a waiver. I believe that the Court should address that question.

A little over a month ago, the Fifth Circuit reiterated that, at least for purposes of the waiver of *federal* habeas corpus proceedings stemming from a capital murder conviction and death sentence in state court, a petitioner must be competent to make the waiver. *Lopez v. Stephens*, 783 F.3d 524 (5th Cir.2015). In 2000, the Fifth Circuit explained, "[A] habeas court must conduct an inquiry into the defendant's mental capacity, either *sua sponte* or in response to a motion by petitioner's counsel, if the evidence raises a bona fide doubt as to his competency." *Mata v. Johnson*, 210 F.3d 324, 330 (5th Cir.2000). The Fifth Circuit further explained:

> the procedures employed must satisfy basic due process concerns. In sum, if the evidence before the district court raises a bona fide issue of petitioner's competency to waive collateral review of a capital conviction and death sentence, the court can afford such petitioner adequate due process by ordering and reviewing a current examination by a qualified medical or mental health expert, allowing the parties to present any other evidence relevant to the question of competency and, on the record and in open court, questioning the petitioner concerning the knowing and voluntary nature of his decision to waive further proceedings.

Id. at 331. The issue is whether a petitioner who would waive his collateral attack has the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially ***512** affect his capacity in the premises." *Id.* at 327 (quoting *Rees v. Peyton*, 384 U.S. 312, 314, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966)).

In my opinion, Applicant's present writ application alleges substantial facts to establish a bona fide doubt with respect to his competency to waive state habeas proceedings. If nothing else, the combination of his mental health history (which includes diagnoses as a juvenile with such potentially thought-distorting afflictions as Schizoaffective Disorder and Bipolar Disorder, and treatment with anti-psychotic medications) and his intransigent behavior during the course of the punishment retrial was sufficient to trigger an inquiry into his capacity to understand what he was relinquishing by foregoing post-conviction habeas proceedings. Neither the convicting court nor this Court has made any attempt to determine whether Applicant possessed the requisite capacity to make a rational, non-delusional choice whether to continue post-conviction litigation proceedings.[5] I believe we should address whether we were mistaken to overlook the competency issue before accepting Applicant's waiver.

FEDERALISM

Applicant has already raised his current claims in his initial federal habeas proceedings, but the federal district court has stayed those proceedings and held the cause in abeyance in order to allow this Court to say whether we will pass on those claims, thus exhausting them. If we now decline to review the merits of the claims, when Applicant returns to federal court, he will no doubt argue either that: 1) he has now exhausted those claims; or 2) that there is good reason for the federal courts to excuse his failure to have exhausted them in a timely initial writ application under Article 11.071.[6] His excuse for not exhausting will be that we allowed him to waive that initial writ proceeding without first assuring ourselves

that he was competent to waive it, as due process apparently requires. *See Mata,* 210 F.3d at 331 (specifying minimal procedures for competency-to-waive-habeas-proceedings that would satisfy due process). With respect to procedural default, he will also no doubt argue—for the same reason (an incompetent waiver)—that there is good "cause" for the federal court to excuse his apparent forfeiture. *Cf. Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) (ineffective assistance of initial state habeas counsel may be invoked as "cause" to excuse the forfeiture of a claim of ineffective assistance of trial counsel for purposes of an initial federal habeas review of a capital conviction and death sentence in state court).

I cannot predict whether Applicant will prevail in such an endeavor. But if he does, the federal district court will not only ***513** review his claims, it will likely review them *de novo,* rather than deferentially as it would be constrained to do if we were to pass on the merits of his claims in the first instance. *See* 28 U.S.C. § 2254(d) (requiring that any federal habeas review of state court decisions with respect to claims that are "adjudicated on the merits" be highly deferential). By filing and setting Applicant's present writ application, we could: 1) explain that, in this case, there was no bona fide doubt about whether Applicant was incompetent to waive his state collateral proceedings (raising the possibility that the federal court would treat our conclusion in that regard with some deference); 2) explain why any incompetency on Applicant's part does not invalidate the efficacy of his waiver of state collateral proceedings (thus justifying our holding that he has procedurally defaulted his present state habeas claims); or else 3) explain that Applicant's purported waiver was invalid (in which case we could reach the merits of his present claims and dispose of them, thus ensuring deferential federal review later on). In my opinion, any of these options is preferable to the Court's approach, which is to avoid the issue entirely.

CONCLUSION

Arguably, a capital habeas applicant who is allowed to make an incompetent decision to waive his state post-conviction habeas proceedings has not received the one full and fair opportunity to pursue post-conviction relief that Article 11.071 contemplates. *Cf. Ex parte Medina,* 361 S.W.3d 633, 642 (Tex.Crim.App.2011) (capital habeas applicant was deprived of his "one full and fair opportunity" at post-conviction relief—it was "[n]ot full because he is entitled to one bite at the apple, i.e., one application, and ... [n]ot fair because applicant's opportunity, through no fault of his own, was intentionally subverted by his habeas counsel"). Has the Court determined that there is no requirement under state law that a capital habeas applicant be competent to waive his statutory right to post-conviction collateral attack of his conviction and death sentence? If so, it should say so. Because the Court sidesteps this important issue, I dissent.

All Citations

463 S.W.3d 508 (Mem)

Footnotes

1 Applicant also filed a freestanding motion for stay of execution. *See Ex parte Gonzales,* No. WR–40,541–02. This Court denied that motion on January 11, 2001.

1 By contrast, in Juan Reynoso's case, "Applicant was evaluated by doctors, who found that he was competent to choose to forego his habeas proceeding." *Ex parte Reynoso,* 228 S.W.3d 163, 164 (Tex.Crim.App.2007).

2 "Gonzales filed a supplemental [federal habeas corpus] petition in August, 2000, asserting that the State's psychological expert witness testified, unconstitutionally, that race is an indicator of future dangerousness. The State conceded that this claim is valid and entitled Gonzales to a new sentencing hearing. The district court so ordered, and neither party has appealed its ruling on this point."

3 At a hearing on the record the day after the jury re-assessed the death penalty, on May 8, 2009, Applicant did indeed tell the convicting court (twice), when asked whether he desired appointed counsel for post-conviction habeas corpus proceedings, that "I don't want no attorney, period." There is no express colloquy on the record of the hearing, however, by which the convicting court attempted to determine whether Applicant's choice to forego counsel was intelligent and voluntary, and the convicting court made no finding on the record at the conclusion of the hearing that it was intelligent and voluntary, notwithstanding Article 11.071, Section 2(a)'s requirement.

4 Along the way, we observed, "Applicant emphatically stated that he wanted no appeals filed on his behalf and no attorneys appointed. For purpose of Article 11.071, the court found that applicant was proceeding *pro se* on habeas. *See Ex parte Reynoso,* 257 S.W.3d 715, 720 and n.2 (Tex.Crim.App.2008)." *Ex parte Gonzales, supra* (slip op. at 2). But *Reynoso* is distinguishable because in that case the applicant was expressly found to be competent to execute the waiver. *See* note 1, *ante.* Applicant, in contrast, has not been found competent to waive habeas proceedings and no inquiry has been made to determine whether he might have been incompetent.

5 I do not mean to suggest that the trial court should have been aware of any duty to do so at the time. The trial court did inform the applicant that he was "entitled to an attorney to file a Writ of Habeas Corpus in addition to the attorney for the appeal" and explained that he had the right to "proceed pro se" or to have appointed counsel "[o]n the habeas corpus." I simply point out that the convicting court made no express attempt to ascertain on the record whether Applicant's decision to entirely waive his post-conviction habeas corpus *proceedings* was intelligent and voluntary, notwithstanding the convicting court's recommendation—in response to an inquiry from this Court—that we find that Applicant's waiver of *counsel* was knowing and voluntary.

6 *See* 28 U.S.C. § 2254(b)(1) (requiring the exhaustion of state remedies before federal habeas relief may be granted unless "there is an absence of available State corrective process; or ... circumstances exist that render such process ineffective to protect the rights of the applicant").

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APPENDIX E

FILED AS SUPP

AP-76176

REPORTER'S RECORD

VOLUME 31 OF 31 VOLUMES

TRIAL COURT CAUSE NO. D-23,730

THE STATE OF TEXAS	) IN THE DISTRICT COURT OF
VS.	) ECTOR COUNTY, TEXAS
MICHAEL DEAN GONZALES	) 358TH JUDICIAL DISTRICT

POST SENTENCE HEARING

ORIGINAL

On the 8th day of May, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Bill McCoy, Judge presiding, held in Odessa, Ector County, Texas; Proceedings reported by machine shorthand.

A P P E A R A N C E S

FOR THE STATE:

WESLEY H. MAU
Assistant Attorney General/
Assistant District Attorney
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FOR THE DEFENDANT:

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Attorney at Law
306 West Wall, Suite 1350
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E. JASON LEACH
Attorney at Law
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Odessa, Texas 79762
SBOT NO. 00796938

THE COURT: Let the record reflect that the defendant was sentenced yesterday and that we are here for the purpose of determining -- I assume, Mr. Gonzales, that you are still indigent, you don't have any money?

THE DEFENDANT: Uh-huh. Yes.

THE COURT: And you are not going to hire you a lawyer?

THE DEFENDANT: No. I would like the record to reflect I want to waive all my appeals and will have execution set as soon as possible.

THE COURT: Well, that is fine. But the appeal is mandatory so I am going to appoint you an attorney for the appeal. It will be Mr. David Zavoda who is here in town.

The other thing I need to inquire into about is also from what you have just said, it indicates that, I think -- I guess I know what the answer is, but you are entitled for an attorney to file a Writ of Habeas Corpus in addition to the attorney for the appeal. Now, do you wish that to be done? Do you want an attorney?

THE DEFENDANT: I don't want no appeals filed on my behalf.

THE COURT: All right. So you do not want

an attorney?

THE DEFENDANT: No.

THE COURT: For the habeas corpus hearing?

THE DEFENDANT: I don't want no attorney, period.

THE COURT: Well, as I say, the appeal is mandatory. The law requires it. On the habeas corpus, you may proceed pro se if you decide to or I will appoint you an attorney, whatever you tell me you want to do.

So do you want an attorney for the Writ of Habeas Corpus?

THE DEFENDANT: I don't want no attorney, period.

THE COURT: Okay. Is there anything else?

MR. MAU: Not from the State, Your Honor. I will need to get some documents put together for the clerk but --

THE COURT: All right. Mr. McCleery, would you see if Mr. Gonzales will sign the indigent form.

THE DEFENDANT: I refuse to sign it.

THE COURT: All right. That is well and good. All right. Thank you, gentlemen, very much for your inconvenience this morning. And we will be in

recess.

(Hearing concluded.)

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF ECTOR)

I, Cindy Nelson, Official Court Reporter in and for the 358th District Court of Ector County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid by _____.

WITNESS MY OFFICIAL HAND this the 28th day of July, 2009.

Cindy Nelson

Cindy Nelson, Texas CSR 198
Expiration Date: 12/31/2010
Official Court Reporter
358th District Court
Ector County, Texas
Odessa, Texas

APPENDIX F

Vernon's Texas Statutes and Codes Annotated
Code of Criminal Procedure (Refs & Annos)
Title 1. Code of Criminal Procedure
Habeas Corpus
Chapter Eleven. Habeas Corpus (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 11.071

Art. 11.071. Procedure in death penalty case

Effective: September 1, 2015

Currentness

Sec. 1. Application to Death Penalty Case

Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. Representation by Counsel

(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., ch. 781, § 11.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.[1]

. . . .

Sec. 3. Investigation of Grounds for Application

(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. Filing of Application

(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

> (1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and
>
> (2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. Untimely Application; Application Not Filed

(a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. Subsequent Application

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Credits

Added by Acts 1995, 74th Leg., ch. 319, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1336, §§ 1 to 5, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 803, §§ 1 to 10, eff. Sept. 1, 1999; Acts

2003, 78th Leg., ch. 315, §§ 1 to 3, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 787, § 13, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 965, § 5, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 593, § 3.06, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 781, §§ 2 to 5, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 781, § 11, eff. Jan. 1, 2010; Acts 2011, 82nd Leg., ch. 1139 (H.B. 1646), § 1, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 78 (S.B. 354), § 2, eff. May 18, 2013; Acts 2015, 84th Leg., ch. 1215 (S.B. 1743), §§ 1 to 5, eff. Sept. 1, 2015.

Notes of Decisions (190)

Footnotes

1 V.T.C.A., Government Code § 78.051 et seq.

Vernon's Ann. Texas C. C. P. Art. 11.071, TX CRIM PRO Art. 11.071
Current through the end of the 2019 Regular Session of the 86th Legislature

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