No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES WILLIAM HORNSBY-PETITIONER

VS

LORIE DAVIS, DIRECTOR - RESPONDENT

On Petition for a writ of certiorari to

the United States Court of Appeals for the Fifth Circuit

APPENDIX

James W. Hornsby
TDCJ No. 1072184
French Robertson Unit
12071 FM 3522
Abilene, TX 79601
Petitioner, Pro Se

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40351

JAMES WILLIAM HORNSBY,

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 Eastern District of Texas

O R D E R:

James William Hornsby, Texas prisoner # 1072184, was convicted of murder and sentenced to 50 years of imprisonment. He moves this court for a certificate of appealablity (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition, arguing that his due process rights were violated when the trial court denied his motion for a continuance, communicated with the jury foreperson, and interfered with his witnesses at a hearing on his motion for a new trial; that the prosecution used perjured testimony; and that counsel was ineffective because he failed to investigate adequately Hornsby's prior brain injuries.

Hornsby has not briefed, and has therefore abandoned, his claims that the trial court erred when it denied his motion to suppress; that the evidence

was insufficient to convict him; that the prosecutor engaged in misconduct with respect to photographs from the crime scene and Anthony Benjamin's testimony; and that counsel rendered ineffective assistance regarding the admissibility of exhibits, the prosecutor's statements during closing, and the trial court's communication with the jury foreperson. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

To obtain a COA to appeal the denial of his § 2254 petition, Hornsby must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy that burden, he must show 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), or that the issues he presents "are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Because Hornsby has not made the requisite showing, his COA motion is DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40351

JAMES WILLIAM HORNSBY,

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 Eastern District of Texas

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.

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UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

JAMES WILLIAM HORNSBY,	§	
	§	
Petitioner,	§	
	§	
versus	§	CIVIL ACTION NO. 1:11-CV-501
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

This action came on before the Court, Honorable Marcia A. Crone, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and **ADJUDGED** that the above-styled petition for writ of habeas corpus is **DENIED** and **DISMISSED**.

All motions by either party not previously ruled on are **DENIED**.

SIGNED at Beaumont, Texas, this 22nd day of March, 2018.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

JAMES WILLIAM HORNSBY, §
§
Petitioner, §
§
versus § CIVIL ACTION NO. 1:11-CV-501
§
DIRECTOR, TDCJ-CID, §
§
Respondent. §

MEMORANDUM ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner James William Hornsby, an inmate at the Stiles Unit, proceeding *pro se*, brought this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends this petition be denied and dismissed.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and pleadings. No objections to the Report and Recommendation of United States Magistrate Judge were filed by the parties.

Furthermore, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the petitioner need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented

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are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, the petitioner has not shown that any of the issues raised by his claims are subject to debate among jurists of reason. The factual and legal questions advanced by the petitioner are not novel and have been consistently resolved adversely to his position. In addition, the questions presented are not worthy of encouragement to proceed further. Thus, the petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Therefore, a certificate of appealability shall not be issued.

ORDER

Accordingly, the findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

SIGNED at Beaumont, Texas, this 22nd day of March, 2018.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

JAMES WILLIAM HORNSBY	§	
VS.	§	CIVIL ACTION NO. 1:11cv501
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner James William Hornsby, an inmate at the Stiles Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Discussion

On October 24, 2001, following a trial by jury after a plea of not guilty in the Criminal District Court for Jefferson County, Texas, petitioner was convicted of Murder, Cause No. 84675. Petitioner was sentenced to a to a term of fifty years' confinement in the Texas Department of Criminal Justice, Correctional Institutions Division. On appeal, the Ninth Court of Appeals affirmed the trial court's judgment on January 16, 2008. *See Hornsby v. State*, 2007 WL 4723242 (Tex. App. - Beaumont 2008, pet. ref'd). On December 16, 2009, the Texas Court of Criminal Appeals refused petitioner's petition for discretionary review.

On February 9, 2010, petitioner filed a state application for writ of habeas corpus challenging his conviction. On March 9, 2011, the Court of Criminal Appeals issued a written order denying

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petitioner's state application. However, in the order, the Court of Criminal Appeals declined to adopt those findings of the trial court that relied on counsel's October 25, 2010 affidavit because counsel incorrectly responded that applicant's claims were procedurally barred.

The Petition

Petitioner brings this petition asserting the following grounds for review: (1) he was convicted by use of an involuntary statement procured through an unconstitutional custodial interrogation; (2) he was denied the effective assistance of counsel due to counsel's failure to investigate in preparation for the motion to suppress hearing; (3) he was denied effective assistance of counsel due to counsel's failure to call expert testimony during the motion to suppress hearing; (4) he was denied due process as a result of the trial court's denial of his motion for continuance; (5) he was denied effective assistance of counsel due to counsel's failure to prepare for trial; (6) he was denied effective assistance of counsel due to counsel's failure to call expert testimony at trial and during the punishment phase; (7) he was denied effective assistance of counsel due to counsel's failure to object to exhibits; (8) he was denied due process as a result of prosecutorial misconduct during closing argument; (9) he was denied effective assistance of counsel due to counsel's failure to object to the prosecutor's alleged misconduct during closing argument; (10) he was denied due process due to the trial court's failure to comply with state criminal procedure; (11) he was denied effective assistance of counsel due to counsel's failure to object to the trial court's due process violations; (12) he was denied due process when the clerk of court interfered with counsel's preparation of witnesses for the live hearing; (13) he was denied effective assistance of counsel due to the clerk's interference with counsel's preparation of witnesses; (14) he was denied due process when the trial court denied his motion for new trial based on the clerk's alleged interference with counsel's preparation of witnesses; (15) he was denied due process when the prosecutors coached

the testimony of witnesses Edward Charles Holland and Anthony Benjamin; (16) he was convicted by the use of perjured testimony; (17) the state used the testimony of Anthony Benjamin to improperly bolster the testimony of Edward Holland; (18) he was denied due process due to prosecutorial misconduct when the prosecutor repeatedly referred to perjured testimony during closing argument; and (19) the evidence was legally insufficient to support his conviction.

The Response

The respondent has filed a response to the court's order to show cause why relief should not be granted. The respondent asserts that petitioner's grounds for review are without merit. Further, the respondent asserts that petitioner has failed to show the state court resolution of petitioner's claims resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, the respondent asserts that the petition should be denied and dismissed with prejudice.

Factual Background

The factual background as set forth in the respondent's response is as follows:

> Deborah Hardy dropped her daughter Teri off at Melissa Frasier's house at around 4:00 in the afternoon on July 12, 2001. 3 RR 10, 11. That evening Deborah Hardy spoke to Teri four or five times to find out when would be a good time to pick her up. 3 RR 13. At one point Deborah Hardy spoke to James Hornsby who told her that he would bring Teri home. 3 RR 14. When Teri didn't come home the next day, Deborah Hardy called the police and reported her missing. 3 RR 14-15. She drove by Melissa Frasier's house twice. Id. The second time, at around 6:30 p.m. she spoke to Melissa who said Teri had left with a man named John. 3 RR 16.
>
> Two days later, on July 14 police officers for the City of Port Arthur responded to a report of a body floating in a canal waterway. 3 RR 25, 28-29, 53. The police determined that the body was Teri Hardy's based on a report that she was missing and a tattoo on her leg, and then later her fingerprints. 3 RR 32, 37, 68, 80.

The morning that police discovered the body, they spoke to Melissa Frasier at her apartment. 3RR 38. Melissa told the police the same story she had told Teri's mother, that Teri had left with someone named John at around 9:00 the evening before. 3 RR 39. After receiving an anonymous tip, police returned to Melissa's apartment to investigate further. Id. The apartment door had been forced opened, and the door was secured by a metal hasp and padlock. 3 RR 40, 45. Suspecting there may have been a burglary, the officers contacted the City of Groves police department. 3 RR 40. An officer responded and checked the apartment and found no one was inside. Id. Port Arthur police were unsure if a burglary had occurred and so left and returned later with a search warrant. *Id.*

At that point police had Melissa Frasier in custody for an aggravated assault charge and she, as well as Kevin Coffey, who was also present during Teri's murder had provided statements to police concerning Teri Hardy's murder. 3 RR 165, 184. Detectives Harrison and Robertson of the Port Arthur Police Department went to arrest Hornsby at Casa Ole in Central Mall where he was attending a family birthday party. 3 RR 109, 121, 202-203. They took him back to the police department where he gave them a statement. 3 RR 110.

Defendant's counsel Mike Laird had filed a motion to suppress the statement and, prior to its admission, a hearing was held outside of the jury's presence. CR 34. Kimberly Stelly, Hornsby's sister, testified at the motion to suppress hearing and at trial, that Hornsby had been drinking beers and taking valiums in the hours leading up to his arrest. 3 RR 126-127, 201-206. But, Detective Harrison testified that Hornsby did not appear to be intoxicated or under the influence of narcotics when he arrested him. 3 RR 113115. He said he would not have taken the statement if Hornsby had appeared to be under the influence. 3 RR 115. Harrison said that Detective Robertson read Hornsby his Miranda rights, and Hornsby appeared to understand them. 3 RR 111-112, 118. He stated that Hornsby voluntarily waived his Miranda rights, gave the police a statement, and was provided an opportunity to review the statement before he signed it. 3 RR 113.

Detective Robertson also testified at the motion to suppress hearing. 3 RR 120. He confirmed that he was present when Hornsby gave his statement. 3 RR 121. He also said that Hornsby did not appear intoxicated or under the influence of narcotics. 3 RR 121. Detective Robertson did not smell alcohol on his breath, nor did Hornsby appear to have a mental disability. 3 RR 122-123.

The Court found that pursuant to Article 38.22 Section 2(a) of the Texas Code of Criminal Procedure, Hornsby was properly admonished of his Miranda warnings and had knowingly and voluntarily waived them. 3 RR 135. Hornsby's statement was admitted as Exhibit 23 and was published before the jury during Detective Harrison' s testimony. 3 RR 174.

In the statement Hornsby said that he was at Melissa's house on the afternoon of July 12, 2001 when Teri Hardy arrived. 3 RR 174. They were taking xanax and smoking marijuana and Melissa and Teri were drinking vodka. Id. A friend of Melissa's named Kevin arrived after dark. Id. Hornsby stated that he and Teri began to argue and he called her a bitch. Id. She got mad and grabbed a knife and came at him with it, striking him on his left forearm. Id. Hornsby then hit her on the head with a drinking glass. 3 RR 175. He broke the glass over her head, hitting her above her right eye area of her head. Id. He also punched her in the nose with his fist. Id. She had a puffy eye and nose and was bleeding. Id. She wanted to go to the hospital for some pills, but as they were driving to the hospital, she changed her mind. Id.

They drove back to Melissa's house and were there about an hour when he and Teri got into it again. 3 RR 176. Teri began striking him with her fist. Id. He struck her to the side of her head with a glass mug, hitting her three or four more times with it. Id. He said he was not trying to hurt her very badly, but was just trying to get her off of him. Id. She was laying against the wall, still alive and bleeding. Id. Melissa then cut the electrical cord of an alarm clock, turned Teri over face down, put the cord around Teri's neck and strangled her with it. 3 RR 177. Hornsby pushed Melissa off of Teri and told her to stop. Id. When he checked Teri's pulse, he did not find one. Id.

Hornsby then said in his statement that the three of them put Teri's body in the trunk of Hornsby's car. 3 RR 178-179. He and Kevin dumped it in a canal in an area that was sparsely populated. 3 RR 178-179, 29. When they returned to the apartment, Melissa had wiped up the blood and they put the evidence–the bloody clothes, bedding, and alarm clock in a cardboard box and drove to Louisiana where they put it in a dumpster behind a store. 3 RR 180-81. They bought Budweiser at the store then drove home and slept for the next couple of days until detectives knocked on the door. 3 RR 181.

On July 17, the day Hornsby gave his statement to police, police officers searched Melissa's apartment. 3 RR 55. Officer Queen was the crime scene investigation officer who took photographs of the crime scene. 3 RR 52. He identified state's exhibits 11, 11-A, 11-B, 12 through 21 as photographs he took of the crime scene. 3 RR 55. These exhibits were admitted into evidence without objection. 3 RR 55-56. When asked about the red substance that could be seen on these exhibits on the mattress, the box spring, the floor, the walls, and near the nightstand, Officer Queen answered that it was an unknown substance which they believed to be blood at the time. 3 RR 55-61. Officer Queen said he also found a mug in the kitchen, which was admitted into evidence as state's exhibit 64. 3 RR 58.

As the case was moving toward trial, Detective Harrison received a letter from Edward Holland, an inmate with burglary charges pending against him at the Jefferson County Jail. 3 RR 144, 149. In the letter, Holland stated he had information about Hornsby's motive. 3 RR 144, 149. The state called Edward

Holland to testify against Hornsby. 3 RR 138. Holland testified that Hornsby told him and another inmate, Anthony Benjamin that he had murdered Teri Hardy for his "home boy" David Yeager in retaliation for Teri testifying against Yeager in Yeager's murder trial. 3 RR 141-142. According to Holland, Hornsby said he had knocked out Teri's tooth and was going to mail it to Yeager on a necklace. 3 RR 143. Hornsby said, "what kind of bitch don't talk now," to which Holland replied, "a dead one." Id. Holland stated that the reason he came forward was because he believed in the law, and she was 16 years old, and Hornsby acted like he just didn't care. 3 RR 144.

Holland's fellow inmate Anthony Benjamin told the jury the same story–that Hornsby said he killed the girl for his home boy Yeager and had knocked out her tooth so he could send it to Yeager. 3 RR 152-154. He said the authorities contacted him because Holland told them he had overheard the conversation. 3 RR 162. Both offenders testified that they were not promised leniency or made any deals in exchange for their testimony. 3 RR 138, 149, 152, 157.

Dr. Tommy J. Brown, the forensic pathologist for Jefferson County and Southeast Texas area performed an autopsy on Teri Hardy. 3 RR 77. He testified that the body was severely decomposed because it had been in the water, but an external examination revealed that Teri Hardy had sustained at least five blows to the back of her head. 3 RR 80. She had also been hit on the forehead and the right cheek area, and had a large bruise and an abrasion on her back. 3 RR 82. Dr. Brown determined that the cause of Teri Hardy's death was blunt force injury to the head with skull fractures along with brain injury, which was consistent with Teri Hardy having been hit with a mug. 3 RR 88, 89-90. He termed the manner of death a homicide. 3 RR 88. He also noted that she had a fractured upper incisor tooth and said that he did not know if the tooth had ever been recovered. 3 RR 81. Dr. Brown said there was no evidence that she had been strangled. 3 RR 97. He was certain the cause of death was a blow to the head. 3 RR 98.

Response at 5-9.

Standard of Review

Title 28 U.S.C. § 2254(a) allows a district court to "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Section 2254 generally prohibits a petitioner from relitigating issues that were adjudicated on the merits in State court proceedings, with two exceptions. *See* 28 U.S.C. § 2254(d). The first exception allows a petitioner to raise issues previously litigated in the State court in federal habeas proceedings if the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The second exception permits relitigation if the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Federal habeas relief from a state court's determination is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Federal habeas courts are not an alternative forum for trying facts and issues which were insufficiently developed in state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). Further, following the Supreme Court's decision in *Cullen v. Pinholster*, federal habeas review under 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A determination of a factual issue made by a state court shall be presumed to be correct upon federal habeas review of the same claim. The petitioner shall have the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A decision is contrary to clearly established federal law if the state reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). An application of clearly established federal

law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.*

This court must accept as correct any factual determinations made by the state courts unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *See Young v. Dretke,* 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell,* 274 F.3d 941, 948 n. 11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact."). Deference to the factual findings of a state court is not dependent upon the quality of the state court's evidentiary hearing. *See Valdez,* 274 F.3d at 951 (holding that a full and fair hearing is not a precondition according to § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review).

Analysis

I. Unconstitutional Interrogation

In his first ground for review, petitioner claims he was convicted by use of an involuntary statement procured through an unconstitutional custodial interrogation. Petitioner claims he was the victim of assault two days prior to the interrogation and was Vicodin was prescribed for pain. Petitioner contends at trial his sister incorrectly named referred to Vicodin as Valium. However, he asserts she did testify that petitioner was under the influence at the time he was arrested.

The Fifth Amendment "protects a defendant from self-incrimination and prohibits the prosecution from using statements stemming from custodial interrogation ... unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A defendant may waive his *Miranda* rights when

the waiver is made "voluntarily, knowingly and intelligently." *Id.* When a defendant appears to be under the influence of an intoxicant, the "mere fact that a defendant had taken drugs prior to giving a statement does not render it inadmissible." *United States v. Taylor*, 508 F.2d 761, 763 (5th Cir. 1975). "The evidence must show the defendant was so affected as to make his statement, after appropriate warnings, unreliable or involuntary." *Id.* This determination relies on the particular facts presented in each case. *See id.*

This matter was examined extensively by the state courts. Each time, the state courts found petitioner's constitutional rights had not been violated with respect to his statements. The state habeas court found that petitioner failed to meet his burden of proof for collateral relief. The court stated: "No less than three (3) fact findings have deemed his statement to be made voluntarily, knowingly, intelligently, and acquired by law enforcement in a statutorily and procedurally proper manner." SCHR-04 at 10.

A review of the record shows the detective stated petitioner did not appear to be intoxicated, or not to understand what was going on during the interrogation. Further, the detective specifically asked petitioner if he was under the influence of any drugs or alcohol. The undersigned agrees that, based on this record, petitioner has failed to satisfy his burden of rebutting the state court finding.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's ground for relief should be denied.

II. Due Process

Next, petitioner raises several grounds contending he was denied due process. In ground four, petitioner claims he was denied due process as a result of the trial court's denial of his motion for continuance. In ground ten, petitioner claims he was denied due process due to the trial court's failure to comply with state criminal procedure. In ground twelve, petitioner claims he was denied due process when the clerk of court interfered with counsel's preparation of witnesses for the live hearing. Additionally, in ground fourteen, petitioner claims he was denied due process when the trial court denied his motion for new trial based on the clerk's alleged interference with counsel's preparation of witnesses.

"Due process does not afford relief where the challenged evidence was not the principal focus at trial and the errors were not so pronounced and persistent that it permeates the entire atmosphere of the trial." *Gonzales v. Thaler*, 643 F.3d 425, 430 (5th Cir. 2011). To warrant relief on a claim of trial court error, the error must do more than merely affect the verdict; the error must render the trial as a whole fundamentally unfair. *See Bailey v. Procunier,* 744 F.2d 1166, 1168 (5th Cir. 1984). In order to determine whether an error by the trial court rendered the trial fundamentally unfair, it must be determined if there is a reasonable probability that the verdict would have been different had the trial been conducted properly. *See Rogers v. Lynaugh,* 848 F.2d 606, 609 (5th Cir. 1988). The Supreme Court has held that a federal harmless error standard applies on federal habeas review of state court convictions. *Brecht v. Abrahamson,* 507 U.S. 619, 637-38, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993). The applicable test is whether the error had "substantial and injurious effect" or influence in determining the jury's verdict. *Id.* at 637. A petitioner is not entitled to habeas relief based on trial error unless he can establish that it resulted in actual prejudice. *Id.* Habeas petitioners may not prevail in federal habeas actions simply by showing a violation of

state law but must show that the trial was fundamentally unfair, thus denying them due process by prejudicing the outcome of the trial. *See Lavernia v. Lynaugh,* 845 F.2d 493, 496 (5th Cir. 1987).

The state court denied each of petitioner's grounds for relief. While counsel sought a continuance he testified at the state habeas hearing that he did not believe his performance was affected by the denial of his motion for continuance. The court found petitioner failed to prove the underlying claim for requesting the continuance has merit. Additionally, the state court found petitioner's claim regarding the trial court's failure to comply with state criminal procedure fails to state a constitutional violation. And, in the alternative, the court found the claim without merit.

Further, the state court found petitioner's claim that he was denied due process when the clerk of court interfered with counsel's preparation of witnesses for the live hearing and denied his motion for new trial. The court found petitioner had failed to satisfy the standard under which he could have received a new trial.

Petitioner has failed to show how any of the grounds harmed his defense or made his trial fundamentally unfair. Given the circumstances of this case, petitioner has failed to show the alleged errors so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Gonzales*, 643 F.3d at 429. Accordingly, petitioner's grounds are without merit.

Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

III. Prosecutorial Misconduct

Petitioner has raised multiple grounds of prosecutorial misconduct. In ground eight, petitioner claims he was denied due process as a result of prosecutorial misconduct during closing argument. Petitioner claims the prosecutor committed misconduct when he intentionally, repeatedly, and falsely asserted to the jury that the state's exhibits depict the victim's blood in petitioner's home. In ground fifteen, petitioner claims he was denied due process when the prosecutors coached the testimony of witnesses Edward Charles Holland and Anthony Benjamin. In ground sixteen, petitioner claims he was convicted by the use of perjured testimony. In ground seventeen, petitioner claims the state used the testimony of Anthony Benjamin to improperly bolster the testimony of Edward Holland. Finally, in ground eighteen, petitioner claims he was denied due process due to prosecutorial misconduct when the prosecutor repeatedly referred to perjured testimony during closing argument.

A claim of prosecutorial misconduct, when alleged in habeas corpus proceedings, is reviewed to determine whether it "so infected the [trial] with unfairness as to make the resulting [conviction] a denial of due process." *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000) (quoting *Ables v. Scott*, 73 F.3d 591, 592 n. 2 (5th Cir. 1996)). "Due process does not afford relief where the challenged evidence was not the principal focus at trial and the errors were not so pronounced and persistent that it permeates the entire atmosphere of the trial." *Gonzales v. Thaler*, 643 F.3d 425, 430 (5th Cir. 2011). "Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Due process is only violated when the alleged conduct deprived the petitioner of his right to a fair trial. A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly

conducted. *See Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992). Only in the most egregious situations will a prosecutor's improper conduct violate constitutional rights. *Ortega v. McCotter*, 808 F.2d 406, 410-11 (5th Cir. 1987).

It has long been established that a prosecutor's knowing use of false testimony violates due process, *Giglio v. United States*, 405 U.S. 150, 154 (1972), and that a prosecutor has a duty to correct false or misleading testimony when it comes to his attention. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). It is petitioner's burden, however, to prove that the testimony was false or misleading, that the prosecution knew it, and that the testimony was material. *See Giglio*, 405 U.S. 153-54; *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990).

"[A] prosecutor may not personally vouch for the credibility of a government witness, as doing so may imply that the prosecutor has additional personal knowledge about the witness and facts that confirm such witness' testimony, or may add credence to such witness' testimony." *United States v. Washington*, 44 F. 3d 1271, 1278 (5th Cir. 1995). A prosecutor may do so in rebuttal, however, when the defense is questioning the credibility of the government witness. *Id.* In such situations, a prosecutor "may even present what amounts to bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon [the prosecutor] or his witnesses." *Id.* (quoting *United States v. Thomas*, 12 F.3d 1350, 1367 (5th Cir. 1994).

Under Texas law, proper closing arguments may discuss the following: (1) summary of the evidence; (2) reasonable deductions from the evidence; (3) response to opposing counsel's argument; and (4) pleas for law enforcement. *See Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000). If the prosecution's argument is a reasonable deduction from, or a summation of, the evidence, it is permissible jury argument. *Denison v. State*, 651 S.W.2d 754, 761 (Tex. Crim. App.

1973). Further, failing to object to the opposing counsel's jury argument in order to not risk antagonizing the jury by objecting is a matter of trial strategy. *See Wiley v. Puckett*, 969, F.2d 86, 102 (5th Cir. 1992).

The state court thoroughly examined petitioner's claims and found he failed to establish the state knowingly used perjured testimony. The court found petitioner's statements regarding Holland to contain contradictions and differing representations of each other, and found the prosecutor's affidavit credible. Additionally, the state habeas court found petitioner's allegation that Benjamin's testimony was used to bolster Holland's testimony was without merit.

Petitioner fails to establish that the subject testimony was actually false, that the prosecutor was aware of the alleged falsity, and that the testimony was material. Further, petitioner has failed to show the prosecutor's questioning amounted to coaching. Petitioner has failed to show that the prosecutor's statements were actually misstatements of the law rather than reasonable deductions from, or summation of, the evidence. Thus, the statements did not amount to a violation of petitioner's due process rights. Petitioner's conclusory allegations of perjured testimony are insufficient to raise a constitutional issue or preclude the granting of summary judgment. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983); *Schlang v. Heard*, 691 F.2d 796, 798 (5th Cir. 1982).

The Texas Court of Criminal Appeals rejected petitioner's claims on habeas review, denying relief. Petitioner has failed to satisfy his burden of proof regarding his claims and has failed to demonstrate he is entitled to relief with respect to the habeas court's determination. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

IV. Ineffective Assistance of Counsel

Petitioner has also raised a number of ineffective assistance of counsel claims. In his second ground, petitioner claims he was denied the effective assistance of counsel due to counsel's failure to investigate in preparation for the motion to suppress hearing. In his third ground, petitioner claims he was denied effective assistance of counsel due to counsel's failure to call expert testimony during the motion to suppress hearing. In his fifth ground for review, petitioner claims he was denied effective assistance of counsel due to counsel's failure to prepare for trial. In his sixth ground, petitioner contends he was denied effective assistance of counsel due to counsel's failure to call expert testimony at trial and during the punishment phase. In ground seven, petitioner claims he was denied effective assistance of counsel due to counsel's failure to object to exhibits. In ground nine, petitioner claims he was denied effective assistance of counsel due to counsel's failure to object to the prosecutor's alleged misconduct during closing argument. In ground eleven, petitioner asserts he was denied effective assistance of counsel due to counsel's failure to object to the trial court's due process violations. Finally, in ground thirteen, petitioner contends he was denied effective assistance of counsel due to the clerk's interference with counsel's preparation of witnesses.

When addressing the issue of what a petitioner must prove to demonstrate an actual ineffective assistance of counsel claim, courts look to the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *See United States v. Grammas*, 376 F.3d 433, 436 (5th Cir. 2004). In order to show that counsel was ineffective a petitioner must demonstrate:

> First... that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction or death sentence resulted in a breakdown of the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687.

"To show deficient performance, 'the defendant must show that counsel's representation fell below an objective standard of reasonableness.'" *Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 688). "Counsel's performance is judged based on prevailing norms of practice, and judicial scrutiny of counsel's performance must be highly deferential to avoid 'the distorting effects of hindsight.'" *Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2015) (quoting *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009)). In order to prove the prejudice prong, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009). "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington*, 562 U.S. at 111. Because the petitioner must prove both deficient performance and prejudice, the petitioner's failure to prove either will be fatal to his claim. *See Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995).

Whether the representation was deficient is determined as measured against an objective standard of reasonableness. *See Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). "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." *United States v. Jones*, 287 F.3d 325, 331 (5th Cir. 2002) (quoting *Garland*

v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983)). "There is a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009) (quoting *Romero v. Lynaugh*, 884 F.2d 871, 876 (5th Cir. 1989)).

The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate counsel's ineffectiveness by a preponderance of the evidence. *See Martin v. Maggio,* 711 F.2d 1273, 1279 (5th Cir. 1983). A habeas petitioner must "affirmatively prove," not just allege, prejudice. *Day,* 556 F.3d at 536. If a petitioner fails to prove the prejudice part of the test, the Court need not address the question of counsel's performance. *Id.* A reviewing court "must strongly presume that trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Wilkerson v. Collins,* 950 F.2d 1054, 1065 (5th Cir. 1992). In determining the merits of an alleged Sixth Amendment violation, a Court "must be highly deferential" to counsel's conduct. *Strickland,* 466 U.S. at 687.

Strategic decisions made by counsel during the course of trial are entitled to substantial deference in the hindsight of federal habeas review. *See Strickland,* 466 U.S. at 689 (emphasizing that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight"). A federal habeas corpus court may not find ineffective assistance of counsel merely because it disagrees with counsel's chosen trial strategy. *See Crane v. Johnson,* 178 F.3d 309, 312 (5th Cir. 1999).

When a petitioner brings an ineffective assistance claim under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the relevant question is whether the state court's application of the deferential *Strickland* standard was unreasonable. *See Beatty v. Stephens*, 759 F.3d 455, 463 (5th Cir. 2014). "Both the *Strickland* standard and AEDPA standard are 'highly

deferential,' and 'when the two apply in tandem, review is doubly so.'" *Id.* (quoting *Harrington*, 562 U.S. at 105).

a. Failure to Investigate Facts and Interview Witnesses

In his second ground for review, petitioner claims he was denied the effective assistance of counsel due to counsel's failure to investigate in preparation for the motion to suppress hearing. In his third ground, petitioner claims he was denied effective assistance of counsel due to counsel's failure to call expert testimony during the motion to suppress hearing. In his fifth ground for review, petitioner claims he was denied effective assistance of counsel due to counsel's failure to prepare for trial. In his sixth ground, petitioner contends he was denied effective assistance of counsel due to counsel's failure to call expert testimony at trial and during the punishment phase.

To establish that an attorney was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial. *See United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989); *see also Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005). "Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue." *Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998). "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his *pro se* petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983).

Additionally, "complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Buckelew v. United States,* 575 F.2d 515, 521 (5th Cir. 1978). Further, the presentation of witness testimony is essentially strategy and, thus, within the

trial counsel's domain. *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985). A habeas petitioner must overcome a strong presumption that counsel's decision in not calling a particular witness was a strategic one. *See Murray v. Maggio, Jr.,* 736 F.2d 279, 282 (5th Cir. 1984). In cases where "the only evidence of a missing witness's testimony is from the defendant," claims of ineffective assistance of counsel are viewed with great caution. *See United States v. Cockrell,* 720 F.2d 1423, 1427 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251, 104 S.Ct. 3534, 82 L.Ed.2d 839 (1984). Moreover, for a petitioner to succeed on the claim, he must have shown that had counsel investigated, he would have found witnesses to support the defense, that such witnesses were available, and had counsel located and called these witnesses, they would have been willing to testify and their testimony would have been favorable to the defense. *See Alexander,* 775 F.2d at 602; *Gomez v. McKaskle,* 734 F.2d 1107,1109-10 (5th Cir. 1984). Conclusory claims are insufficient to entitle a habeas corpus petitioner to relief. *Green v. Johnson,* 160 F.3d 1029, 1045 (5th Cir. 1998); *United States v. Woods,* 870 F.2d 285, 288 n.3 (5th Cir. 1989).

While petitioner appears to be correct in his assertion that counsel confused the dates of his head injury and the date he gave his statement to police, petitioner still has not satisfied the *Strickland* standard. Petitioner has failed to demonstrate he was taking Vicodin or how much medication he was taking at the time of his statement to police. Nor has petitioner established that his head injury affected the voluntariness of his statement. Further, as set forth above, petitioner has failed to demonstrate the denial of his constitutional rights regarding the statement. Thus, petitioner has failed to establish that the state court determination that counsel's assistance was not ineffective was objectively unreasonable.

Additionally, petitioner has failed to satisfy his burden regarding counsel's failure to call expert witness. Petitioner has failed to offer an affidavit from an expert witness stating he was under

he influence of Vicodin and that he had a head injury or how either of these factors would have affect his decisions during his custodial interrogation. Further, as set forth above, petitioner has failed to demonstrate the denial of his constitutional rights regarding this issue. Thus, petitioner has failed to establish that the state court determination that counsel's assistance was constitutional was objectively unreasonable.

Further, as set forth above, petitioner has failed to show that the trial court's denial of his motion for continuance harmed his defense or rendered his trial fundamentally unfair. Thus, he has failed to show an underlying constitutional violation. Moreover, petitioner has failed to show how the denial of his motion for continuance rendered trial counsel unprepared for trial. Therefore, petitioner has failed to establish that the state court determination that counsel's assistance was not ineffective was objectively unreasonable.

Here, petitioner has failed to satisfy his burden of proof in rebutting the presumption of correctness afforded the state court's explicit and implicit findings. Petitioner attempts to relitigate his arguments presented to the state court without rebutting the findings with clear and convincing evidence. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

b. Failure to Object

Next, petitioner asserts several grounds of ineffective assistance of counsel based on counsel's failure to object. In ground seven, petitioner claims he was denied effective assistance of counsel due to counsel's failure to object to exhibits. In ground nine, petitioner claims he was

denied effective assistance of counsel due to counsel's failure to object to the prosecutor's alleged misconduct during closing argument. In ground eleven, petitioner asserts he was denied effective assistance of counsel due to counsel's failure to object to the trial court's due process violations.

As set forth above, petitioner has failed to show an underlying constitutional violations related to his claims for which counsel's performance could have been deficient in failing to object. Further, petitioner has failed to show any prejudice related to his claims. In the state proceedings, counsel explained that the decision to not object to one of the exhibits was a strategic decision in an effort to not destroy his credibility with the jury. Further, the photographs of the crime scene were admitted before the prosecution insinuated the red substance in the pictures was blood. Thus, at that point in the proceedings it would have been futile to object to the admission of the photos.

Additionally, as set forth above, petitioner has failed to show a constitutional violation regarding his claims concerning closing arguments and trial court error. Accordingly, counsel's objection on these issues also would have been futile.

It is clear in the Fifth Circuit that "counsel is not required to make futile motions or objections." *See Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012); *Murray v. Maggio*, 736 F.2d 279, 283 (5th Cir. 1984). "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). Counsel was not deficient in his performance for failing to raise petitioner's meritless claims. Further, in light of the strong evidence against him, petitioner has failed to show any related prejudice. Accordingly, petitioner's claim is without merit and should be denied.

The Texas Court of Criminal Appeals rejected petitioner's claims on habeas review, denying relief. Petitioner has failed to satisfy his burden of proof regarding his claims and has failed to demonstrate he is entitled to relief with respect to the habeas court's determination that trial

counsel's performance was constitutional. Petitioner has failed to show counsel's performance was either deficient or prejudicial. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

c. Interference from Clerk

Finally, in ground thirteen, petitioner contends he was denied effective assistance of counsel due to the clerk's interference with counsel's preparation of witnesses. However, petitioner has failed to establish a causal link between the clerk's alleged phone call and counsel's performance or lack of witnesses.

The Texas Court of Criminal Appeals rejected petitioner's claim on habeas review, denying relief. Petitioner has failed to satisfy his burden of proof regarding his claim and has failed to demonstrate he is entitled to relief with respect to the habeas court's determination that trial counsel's performance was constitutional. Petitioner has failed to show counsel's performance was either deficient or prejudicial. Petitioner has failed to show either that the state court adjudication was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's grounds for relief should be denied.

V. Insufficiency of the Evidence

In his only remaining ground for review, ground nineteen, petitioner asserts the evidence was legally insufficient to support his conviction.

The respondent contends this ground is procedurally barred. In the alternative, the respondent asserts the claim is without merit.

Petitioner did not raise this claim in his petition for discretionary review. Petitioner first raised his challenge to the sufficiency of the evidence in his state habeas proceeding, but this claim is not cognizable in an Article 11.07 habeas corpus proceeding. *See Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994).

If a petitioner has failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, the claims are procedurally defaulted for purposes of federal habeas review, irrespective of whether the last state court to which the petitioner actually presented his claims rested its decision upon an independent and adequate state ground. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991). On habeas corpus review, a federal court may not consider a state inmate's claim if the state court based its rejection of that claim on an independent and adequate procedural state ground. *See Martin v. Maxey*, 98 F.3d 844, 847 (5th Cir. 1996). The procedural bar will not be considered adequate unless it is applied regularly or strictly to the great majority of similar claims. *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), cert denied, 116 S.Ct. 557, 133 L.Ed.2d 458 (1995).

A habeas petitioner can overcome a procedural default by showing cause and actual prejudice or a miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Here, however, petitioner has failed to demonstrate either cause,

prejudice or a miscarriage of justice. Accordingly, petitioner is not entitled to federal habeas corpus relief on this ground for review as it is procedurally barred.

Assuming, *arguendo*, the claim is not procedurally barred, the claim is without merit. Federal habeas review of an insufficiency of the evidence claim is extremely limited. On habeas review, a federal court cannot disturb a conviction rendered in a state criminal proceeding unless no rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Gibson v. Collins,* 947 F.2d 780, 781 (5th Cir. 1991). During the review, the evidence must be viewed in the light most favorable to the verdict. *Jackson,* 443 U.S. at 319; *Gibson,* 947 F.2d at 781.

The Texas Court of Criminal Appeals previously recognized claims of factual sufficiency of the evidence. *See Clewis v. State*, 922 S.W.2d 126, 129-30 (Tex.Crim.App. 1996). However, in a case decided on October 6, 2010, the Texas Court of Criminal Appeals determined there is no meaningful distinction between the previous factual-sufficiency standard and the legal-sufficiency standard under *Jackson*; thus, the *Jackson* standard is the only standard courts should apply to criminal convictions. *Brooks v. State,* 323 S.W.3d 893 (Tex.Crim.App. 2010). Even when factual sufficiency review was a cognizable claim in Texas courts, it did not implicate federal constitutional concerns and was not a basis for federal habeas relief. *See Woods v. Cockrell*, 307 F.3d 353, 358 (5th Cir. 2002). Further, to the extent petitioner's challenges the legal sufficiency of the evidence, petitioner's claim lacks merit because the evidence, as set forth above, is sufficient to satisfy the *Jackson* standard. Accordingly, petitioner's claim regarding the factual sufficiency of the evidence is not cognizable on federal habeas review.

Petitioner has failed to satisfy his burden of proof regarding the state court findings. For the reasons set forth above, petitioner has failed to show either that the state court adjudication was

contrary to; or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that the state court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, petitioner's ground for relief should be denied.

Recommendation

Petitioner's petition for writ of habeas corpus should be denied and dismissed.

Objections

Within fourteen days after being served with a copy of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this the 7th day of March, 2018.

KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE

Appendix Document P

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-60,537-04

EX PARTE JAMES WILLIAM HORNSBY, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 84675 IN THE CRIMINAL DISTRICT COURT
FROM JEFFERSON COUNTY

Per curiam.

ORDER

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of murder and sentenced to fifty years' imprisonment. The Ninth Court of Appeals affirmed his conviction. *Hornsby v. State*, No. 09-06-00273-CR (Tex. App.–Beaumont Jan. 16, 2008, pet. ref'd).

On September 8, 2010, we remanded this application and directed the trial court to make findings of fact and conclusions of law as to whether trial counsel rendered ineffective assistance and whether Edward Holland and Anthony Benjamin committed perjury at Applicant's trial. On remand, after holding a live evidentiary hearing, the trial court made findings of fact and conclusions of law

Appendix E

and recommended that we deny relief. We agree with the trial court's recommendation but decline to adopt those findings that rely on counsel's October 25, 2010 affidavit. In this affidavit, counsel responded in almost every instance that Applicant's claims are procedurally barred under Article 11.07, § 4 of the Code of Criminal Procedure. Counsel also responded that Applicant should have raised his ineffective assistance of counsel claims on direct appeal. Applicant's claims are not procedurally barred under § 4, and we have held that in the majority of cases the record on direct appeal is not adequate to resolve an ineffective assistance of counsel claim. *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999) ("In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel"). Relief is denied.

Filed: March 9, 2011

Do not publish

CAUSE NO. : 84675-C

EX PARTE	§	**IN THE CRIMINAL DISTRICT**
JAMES WILLIAM HORNSBY	§	**COURT OF**
APPLICANT	§	**JEFFERSON COUNTY, TEXAS**

TRIAL COURT'S SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 8, 2010, the Texas Court of Criminal Appeals issued an Order directing this court to issue supplemental findings of fact and conclusions of law regarding the following: (1) whether Applicant's trial counsel's performance was deficient and, if so, whether counsel's deficient performance prejudiced Applicant; (2) whether two State's witnesses at Applicant's trial (Holland and Benjamin) committed perjury and, if so, whether Applicant has shown by a preponderance of the evidence that such error contributed to Applicant's conviction or punishment; and (3) any other findings and conclusions that trial court deems relevant relating to the disposition of this habeas corpus application.

On December 3, 2010, this trial court conducted a hearing on these matters with Applicant present along with his appointed attorney and the State's attorney. The evidence and arguments submitted at this hearing, along with previous pleadings and documents filed in this case's records including the numerous written communications of Applicant, are all considered by the trial court in these findings and conclusions. Also, this judge has reviewed the trial transcripts in this case along with the records in Applicant's previous direct appeal and Writ Applications in this matter.

The current matters are based upon an Application for Writ of Habeas Corpus filed by Applicant on February 9, 2010. The Application alleges 32 grounds for relief.

Appendix F

This court has grouped these grounds for relief into XV parts herein, consisting of similarly-related issues as presented in this Application. Grounds 1 through 15 of the Application allege Applicant's trial counsel provided ineffective legal assistance. Those are dealt with in parts I through VI herein. At the December 3, 2010 hearing, Applicant acknowledged those constituted the sum total of his ineffective assistance of counsel claims.

Generally, the burden of proof for Article 11.07, Tx.C.C.P. claims, such as in this case, is on the Applicant. An applicant must plead and prove facts which entitle him to relief and he must prove his claim(s) by a preponderance of the evidence. *Ex parte Rains, 555 S.W.2d 478 (Tex.Crim.App.1976).* Applicant must show or allege detailed facts which rise to and compel each legal conclusion entitling relief. *Ex parte Hogan, 556 S.W.2d 352 (Tex.Crim.App.1977).*

Texas courts have confined the scope of post-conviction writs of habeas corpus to jurisdictional or fundamental defects, and constitutional claims. Statutory violations and other non-constitutional doctrines are not recognized. *Ex parte Graves, 70 S.W.3d 103 (Tex.Crim.App.2002).*

I.

Grounds for Relief 1-5, 7 and 14

Applicant contends in Grounds 1-5, 7 and 14, that his trial counsel failed to effectively and properly represent him regarding his confession or written statement which was admitted in his trial, addressing evidence and arguments of the State, as well as failing to effectively seek a trial continuance.

Applicant's trial counsel, Mike Laird, has provided affidavits in these matters as follows (1) in Cause No. 84675-A, dated February 27, 2006, and filed on February 27, 2006; (2) in this case by affidavit signed and filed October 25, 2010; and (3) in this case by supplemental affidavit signed and filed December 15, 2010. Mr. Laird has provided abundant information in the affidavits describing his actions in this regard which refute Applicant's claim of ineffective legal counsel and describe rational and vigorous legal representation.

Additionally, Applicant alleged in his earlier writ application (84675-A) that his trial counsel (Mr. Laird) provided him ineffective assistance of counsel. The actual trial judge in this case (Hon. Charles Carver) entered Findings of Fact and Conclusions of Law dated April 25, 2006, and filed April 26, 2006, denying Applicant's claim. Applicant admitted at the December 3, 2010 hearing that the allegations in Grounds 1-15 if his current writ application were implicitly dealt with in earlier proceedings in this matter.

To obtain habeas corpus relief for ineffective assistance of counsel under *Strickland v. Washington, 466 U.S. 668 (1984)*, an applicant must show that his counsel's performance was deficient and that there is a reasonable probability, that is one sufficient to undermine confidence in the result, that the outcome would have been different but for his counsel's deficient performance. *Ex parte Scott, 190 S.W.3d 672 (Tex.Crim.App.2006)*. Whether Applicant has received effective assistance is to be judged by the totality of the representation rather than isolated acts or omissions of trial counsel. *Ex parte Raborn, 658 S.W.2d 602 (Tex.Crim.App.1983)*.

Here, Applicant has failed to meet his burden under law proving his trial counsel was ineffective. If Applicant's trial counsel was deemed deficient, such did not prejudice the outcome of Applicant's case.

II.

Ground for Relief 6

Applicant contends in this ground that his trial counsel was ineffective by failing to call expert testimony during his trial relating to his alleged manic depressive bipolar disorder.

Applicant's trial counsel has responded to this allegation in his October 25, 2010, affidavit filed in this case. Trial counsel, Mr. Laird, noted in his affidavit that this matter was previously asserted in Applicant's motion for new trial filed November 21, 2001, and which was denied by trial the Hon. Charles Carver.

Additionally, Mr. Laird's December 15, 2010 supplemental affidavit fully explains that trial counsel has never been provided with medical evidence supporting Applicant's bipolar claim.

Here, Applicant has failed to meet his burden under law showing his trial counsel was ineffective. If Applicant's trial consel was deemed deficient, such did not prejudice the outcome of Applicant's case.

III.

Grounds for Relief 8, 9, 10 and 11

In Grounds 8, 9, 10 and 11, Applicant contends his trial counsel was ineffective for failing to object to the admission of certain State's exhibits and to certain statements made by the prosecutor in his closing statement.

These grounds for relief have been responded to by Applicant's trial counsel in his October 25, 2010 affidavit. Additionally, trial counsel, Mr. Laird, goes further to explain in his December 15, 2010 supplemental affidavit his reasons for not objecting to the exhibits and prosecutor argument. His explanation is rational and a product of sound trial strategy.

Applicant has failed to meet his burden under law showing his trial counsel was ineffective. If Applicant's trial counsel was deemed deficient, such did not prejudice the outcome of Applicant's case.

IV.

Grounds for Relief 12 and 30

Grounds 12 and 30 allege error during the receiving of the jury verdict. Applicant alleges in Ground 12 that his trial counsel was ineffective for not objecting and failing to poll the jury. When the verdict was about to be announced in open court, the trial court recognized a discrepancy in the verdict and directed the jury to continue deliberating to correct their verdict. Ground 30 alleges trial court error in directing the jury to continue deliberations to resolve a conflict in its verdict. Trial counsel, Mr. Laird, addressed that allegation in his October 25, 2010 affidavit reasonably explaining why he did not object to these particular proceedings.

The allegations of trial court error was dealt with on direct appeal. In its appellate opinion filed January 16, 2008, the Ninth District Court of Appeals ruled that the trial judge's actions in this matter conformed to Articles 37.04 and 37.05 of the Texas Code of Criminal Procedure concerning accepting criminal jury verdicts and polling juries. *See Hornsby v. State, No. 09-06-273-CR, 2007 WL 4723242 (Tex. App. - - Beaumont Jan. 16,*

2008, pet. ref'd). Further, the appellate court noted that the trial court in this case followed the procedure the Texas Court of Criminal Appeals approved in *Reese v. State, 773 S.W.2d 314 (Tex.Crim.App.1989). See Hornsby v. State, No. 09-06-273-CR, 2007 WL 4723242, at *4.*

An Article 11.07 writ of habeas corpus should not be used as a substitute for a direct appeal. *Ex parte Clore, 690 S.W.2d 899 (Tex.Crim.App.1985).* Also, violations of a facially valid mandatory statute are not cognizable in an Article 11.07 writ where no constitutional violations occurred. *Ex parte Graves, 70 S.W.3d 103, 109 (Tex.Crim.App.2002).* These issues are not proper relief for an Article 11.07 writ.

Applicant has failed to meet his burden showing his trial counsel was ineffective. If Applicant's trial counsel was deemed deficient, such did not prejudice the outcome of Applicant's case.

Further, Ground 30 complaining of simple trial error is not a proper one for relief under Article 11.07.

V.

Ground for Relief 13

Applicant alleges in Ground 13 that he received ineffective assistance of counsel due to his trial counsel's failure to produce mitigating evidence in response to the State's evidence regarding exhibits allegedly depicting blood. This particular ground for relief is interwoven with his Grounds for Relief 9 and 11 herein, which have been reviewed by this trial court.

Applicant's trial counsel, Mr. Laird, answered this issue in his December 15, 2010 supplemental affidavit in which he articulated reasonable trial strategy in minimizing the evidence's impact against Applicant.

Additionally, this particular ground for relief is interwoven with his Grounds for Relief 9 and 11 herein, which have been reviewed by this trial court.

Applicant has failed to meet his burden under law showing his legal counsel was ineffective. If Applicant's trial counsel was deemed deficient, such did not prejudice the outcome of Applicant's case.

VI.

Grounds for Relief 14 and 15

In Grounds 14 and 15 of his writ application, Applicant contends his trial counsel was "constructively ineffective" at his trial and his motion for new trial hearing.

This trial court finds that Grounds 14 and 15 are linked to his Grounds for Relief 1-13 herein and have been sufficiently dealt with herein.

Applicant has failed to allege and prove detailed facts to support his claims. Additionally, Applicant has failed to meet his burden under law showing his legal counsel was ineffective. If Applicant's trial counsel was deemed deficient, such did not prejudice the outcome of Applicant's case.

VII.

Grounds for Relief 16, 17 and 18

In Grounds 16, 17 and 18, Applicant complains of various aspects of the police procuring his written statement that was introduced at trial which he claims was a product of an unconstitutional interrogation.

This issue was fully addressed at Applicant's trial during a motion to suppress hearing outside the jury's presence. *R.R. 3, p.107, line 20-p.134, line 24.* The trial judge found the statement to be lawfully admissible and made findings on the record to support his ruling. *R.R.3, p.134, line 25-p.134, line 9.*

Additionally, this issue was dealt with at the December 3, 2010 hearing before this trial judge. At that hearing, the State called Rodney Harrison to testify. He was one of the police officers who took Applicant's statement. Mr. Harrison reiterated the procedure used in acquiring Applicant's written statement. *Writ Hearing R.R. p. 58, line 5-p. 62, line 25.* He also refuted Applicant's allegations that procedures were inappropriately used in taking the statement. Of interest to note is that at Applicant's trial, Applicant testified during the punishment phase and agreed that his testimony relating to Applicant striking the victim and dumping her body coincided with the information from Applicant's written statement as testified by Detective Harrison. *R. R. 3, p. 67, lines 3-12.* In fact, Applicant testified at his trial that he was truthful in his written statement to the police. *R. R. 3, p. 67, lines 11-12.*

Also, the trial judge at Applicant's trial reviewed Applicant's earlier Writ Application No. 84675-A, which alleged his statement was coerced. That trial court found that Applicant's statement was lawfully acquired as expressed in the Findings of Fact and Conclusions of Law filed April 26, 2006.

This trial court finds that Applicant's statement was voluntary, knowingly, and intelligently made by Applicant and was constitutionally and statutorily acquired in a proper manner.

Applicant has failed to meet his burden of proof under law to support his claim for collateral relief. No less than three (3) fact findings have deemed his statement to be made voluntarily, knowingly, intelligently, and acquired by law enforcement in a statutorily and procedurally proper manner.

Further, Applicant could and should have raised these claims on direct appeal. *Ex parte Banks, 769 S.W.2d 539 (Tex.Crim.App.1989).*

VIII.

Ground for Relief 19

In Ground 19, Applicant alleges police officer Harrison committed perjury in relation to his trial testimony regarding whether he remembered Applicant was suffering injuries that may have affected the taking of Applicant's statement.

This is related to Applicant's Grounds for Relief 15-18 already reviewed herein, and was dealt with at the December 13, 2010 hearing with the testimony of Detective Harrison. Harrison reiterated his previous trial testimony that he did not recall Applicant suffering an injury at the time of the taking of Applicant's statement. *(See Writ Hearing R.R. Pgs. 43-51).*

Applicant has failed to meet his legal burden of proof to support this claim for collateral relief.

Further, Applicant could and should have raised this claim on direct appeal.

IX.

Grounds for Relief 20, 24 and 28

In Grounds 20, 24 and 28, Applicant alleges the trial testimony of State's witnesses Holland and Benjamin were a known product of perjured, bolstered and coached statements which were orchestrated by police officers.

This matter was brought up at Applicant's previous Writ Application No. 84675-A and the actual trial court judge in this case denied Applicant's allegations that perjured testimony was used by the State.

This particular matter was also brought up and dealt with by Mr. Harrison's testimony at the December 3, 2010 writ hearing before this trial court at which Mr. Harrison denied knowing anything about Holland's and Benjamin's testimony except that it conformed to what they had told him during pretrial interviews.

Applicant has provided in Appendix Documents I and J to his writ application two statement purporting to be made by Edward Holland who testified at Applicant's trial on October 22, 2001. Appendix Document I is dated March 20, 2002, and Appendix Document J is dated August 22, 2009. These two statements claim Holland falsely testified at Applicant's trial.

The statements contain contradictions and differing representations with each other. For example, the way Holland claims detectives approached him concerning this case differs between his statements. What Holland claims he was offered by the State for his cooperation also differs between the two statements. Additionally, in his earlier dated statement, Holland claims that before he testified he spoke to prosecutor Chip Radford concerning his testimony, however, in his later dated statement he claims that prosecutor

Martina Longoria also discussed his testimony with him prior to him testifying. Further, Holland's later dated statement provides that he gave authorities information about inmate Benjamin. However, his earlier dated statement fails to mention anything about Benjamin as a potential witness.

Both Holland and Benjamin testified at Applicant's trial. Holland testified that while in jail with Applicant, Applicant stated to Holland that Applicant killed the victim for a friend, David Yeager. *R. R. 3, p. 141, lines 5-16.* Holland also testified that Applicant admitted to knocking out the victim's tooth and throwing the victim into the water. *R. R. 3, p. 142, line 6-p. 143, line 14.*

Holland's recent statements submitted with Applicant's writ are refuted by Detective Harrison and prosecutors Radford and Longoria. *See Writ Hearing R.R., pp. 45-51; Affidavits of Radford and Longoria.*

Of interesting note is that Holland's statement of March 20, 2002, states that police detectives Harrison and Robertson approached him to help them in October, 2001. However, State's Exhibit B (Attachment B to Writ Hearing Transcript), admitted into evidence at the December 3, 2010 Writ Hearing, is Holland's letter to Detective Harrison dated September 28, 2001, which Harrison received from Holland setting forth the substance of the information Holland later testified to at Applicant's trial. Based upon the receipt of this letter, Harrison met with Holland who provided an affidavit to Detective Harrison confirming the information he had provided in his September 28, 2001 letter. *See State's Exhibit C (Attachment C to Writ Hearing).* This happened prior to Holland testifying at Applicant's trial. It is clear that Holland, not the police,

instigated the communication between the parties that he had information concerning Applicant's culpability.

Edward Holland was brought by Court Order for testimony at the December 3, 2010 Writ Hearing. He refused to answer questions based upon his attorney's advice. *Writ Hearing R.R., pp. 33-39.*

This judge finds that Holland's statements in Applicant's Appendix Documents I and J are incredible and unbelievable. They contradict his trial testimony as well as his earlier letter and sworn statement to Detective Harrison. Nothing supports Holland's incredible claim that State officials influenced his testimony. Also, Detective Harrison and the two prosecutors have provided sworn statements refuting Holland's more recent statements claiming he falsely testified.

As to Anthony Benjamin, the only supporting data Applicant provides for his contention that Benjamin perjured himself at Applicant's trial is from Holland's two recent statements which this fact finder has determined are not credible, and a statement from Adrian Guidry which is attached to Applicant's Writ as Document L. Regarding Benjamin, Guidry's statement claims no more than "...Edward Holland and Anthony Benjamin did come together in Jefferson County Jail (M-Dorm) and made false testimony at James W. Hornsby's trial." No other details concerning Benjamin's "false testimony" are included. Such does not rise to compel this court to require Benjamin's presence for additional information in this regard.

Applicant has failed to show, or even allege, detailed facts which entitle him to relief as to his claims that Benjamin as well as Holland provided perjured testimony or were influenced to testify falsely by any representative of the State.

X.

Ground for Relief 21

In Ground 21, Applicant claims he was denied due process relating to the trial court denying his motion for continuance at trial.

This particular allegation was brought up at Applicant's earlier Writ Application No. 84675-A. The trial court denied Applicant's similar claim in that prior proceeding.

This allegation of error was also dealt with in Applicant's Motion for New Trial which was denied by the trial judge.

Applicant has failed to meet his lawful burden to support this claim of error.

XI.

Grounds for Relief 22 and 23

In Grounds 22 and 23, Applicant collectively alleges that the trial court violated Applicant's due process rights in the manner it handled his motion for new trial.

This particular collective matter was previously dealt with at Applicant's earlier Writ Application in 84675-A. Applicant's actual trial court judge considered Applicant's allegations and denied them in this Order. This Court finds no reason to dispute the actual trial judge's decision.

Applicant has failed to meet his burden of proof to show a jurisdictional or fundamental right, or constitutional right was violated.

XII.

Grounds for Relief 25, 26 and 27

In Grounds 25, 26 and 27, Applicant alleges he was denied due process when the prosecutor made closing argument when referring to items of admitted evidence Applicant contends were inadmissible and/or misrepresented in argument.

Generally, prosecutors have wide latitude in closing arguments and will commit error when it is shown to violate due process by "infecting the trial with unfairness." *Darden v. Wainwright, 477 U.S. 168,181 (1986).* Commenting on the factual evidence is appropriate during closing argument. *U.S. v. Canales, 744 F.2d 413 (5th Cir. 1984)*; *Guidry v. State, 9 S.W. 3d 133, 154 (Tex. Crim. App. 1999).*

Also, during the reading of the jury instructions at Applicant's trial, the trial judge instructed the jury "(Q)uestions and comments of the attorneys do not constitute testimony and must not be considered as evidence." Further, the trial court instructed the jury that "(T)he arguments are not evidence and you should give the arguments only the consideration you feel they deserve during your evaluation of the evidence" There is nothing in the record to suggest the jury did not follow these instructions.

Upon review of the record in this case, this court finds no due process violations because of improper final arguments alleged to have been made by prosecutors.

XIII.

Ground for Relief 29

Applicant alleges in Ground 29 that he was prejudiced by the admission at trial of a photograph of the decedent.

This matter has been already ruled upon on Applicant's direct appeal when the Court of Appeals deemed that the photograph's admission at trial was not unfairly prejudicial. Also, Applicant conceded during the December 3, 2010 hearing that this particular issue has been resolved on direct appeal.

Habeas relief is not available to one who has already litigated his claim on direct appeal. *Ex parte Brown, 205 S.W.3d 538 (Tex.Crim.App.2006).*

XIV.

Ground for Relief 31

Applicant's Ground for Relief 31 alleges that "reversible error" occurred as a result of the prosecutor at Applicant's trial asking a question of Detective Harrison relating to hearsay statements of two other witnesses.

The pertanent portion of this testimony is as follows:

"Q. The statements given to you by Mr. Coffey and Ms. Frasier, do they lead you in any different direction?

"A. No, sir.

"MR. LAIRD: Your Honor, I'm going to object to testimony based upon hearsay. They have not been tendered into evidence. We have not had a hearing on their admissibility.

"THE COURT: Sustained.

"MR. LAIRD: I would have ask the jury to disregard the question asked by the prosecutor placing that in their minds.

"THE COURT: The jury is so instructed.

"MR. LAIRD: And I move for a mistrial.

"THE COURT: That's denied." *R.R.v.3, p. 197, line 15-p. 198, line 3.*

In this case, Applicant's trial counsel objected to the hearsay testimony. The objection was sustained. Defense counsel then requested the trial judge instruct the jury to disregard the hearsay testimony. The judge so instructed. Defense counsel went further to request a mistrial. That was denied.

Here, defense counsel properly negated the hearsay matter by objection and with the court's instruction to the jury to disregard the testimony. No error occurred. If any error occurred, it was corrected and such would have been harmless trial error. *Arizona v. Fulminante, 499 U.S. 279, 309 (1991); Ex parte Fierro, 934 S.W.2d 370, 372-73 (Tex.Crim.App.1996).*

XV.

Ground for Relief 32

Applicant's final Ground for Relief 32 alleges his conviction was based upon legally and factually insufficient evidence. Applicant argues that the only evidence offered by the State to prove the elements of intentionally or knowingly was the alleged testimony of Holland and Benjamin which Applicant alleges was influenced by agents of the State. Therefore, Applicant contends there is no evidence in the record to support culpable mental state elements in the indictment.

Although Applicant claims the trial record contains *no* evidence to sustain his guilt, he fails to distinguish between a trial in which *no* evidence of guilt is introduced, and a trial record which contains *legally insufficient* evidence to sustain guilt. *See Ex Parte Perales, 215 S.W. 3d 418, 419-20 (Tex. Crim. App. 2007).* While a ground for relief may be sustained if the trial record contains absolutely no evidence - - either direct

or circumstantial - - of a defendant's guilt, a trial record which evidences "legally sufficient" evidence, namely, at least some evidence which, when considered in the light most favorable to the verdict of "guilty" any rational jury could find each essential element of the offense proven beyond a reasonable doubt, may not be used to support a "no evidence" habeas ground for relief. *See Pereles, 215 S. W. 3d at 419- 20.* As reviewed by this Court, Applicant's trial record does contain both direct and circumstantial evidence from which a rational jury could conclude Applicant's striking the victim in the head with a thick and heavy glass beer mug was an act committed intentionally or knowingly by Applicant in order to cause the death of the victim.

This Court has ruled herein that Applicant has not presented sufficient proof to show that Holland and/or Benjamin falsely testified at Applicant's trial. Even without the inclusion of Holland and Benjamin's testimony, there is sufficient evidence in the record for a reasonable jury to convict Applicant on all the elements of the indictment, including the culpable mental states of intentionally or knowingly.

During the trial, Applicant's sworn statement to police was admitted into evidence during the testimony of Detective Harrison. *R.R. 3, P. 167, line 20-p.182, line 8.* Applicant admitted on the night of the victim's death that he was taking Xanax, smoking marijuana, and drinking beer. *R.R. 3, p. 174, lines 12-14.* Applicant admitted to arguing with the victim and hitting her above her right eye by breaking a drinking glass against her head. *R.R. 3, p. 175, lines 4-6.* Afterward, Applicant and others drove the victim around awhile and returned to the house where Applicant had initially struck the victim. *R.R. 3, p. 175, lines 10-24.*

Applicant admitted that later the same evening he argued violently again with the victim. *R.R. 3, p. 175, line 24-p. 176, line 3.* Applicant struck the victim on her head several times with a thick and heavy glass mug. *R. R.3, p. 176, lines 8-16.* Applicant states the victim fell onto the floor and she was bleeding a lot. *R. R.3, p. 176, line 17-p. 177, line 8.* Applicant and others then took the victim to a waterway and dumped her body. *R.R.3, p. 178, line 1- p. 180, line 13.* Applicant and others drove into Louisiana and disposed of items of evidence. *R.R. 3, p. 180, line 14-p. 181, line 3.* Applicant and others then purchased a case of beer and drank the beer on their way back to Texas. *R.R. 3, p. 181, lines 3-12.* Applicant then went to a friend's house and slept for a couple of days until awakened by detectives. *R. R.3, p. 181, lines 11-19.*

Dr. Tommy Brown testified at Applicant's trial. He is a licensed forensic pathologist for Jefferson County. *R. R.3, p. 78, line 2-10.* He performed the autopsy on the victim in this case. *R.R. 3, p. 79, lines 15-21.* Dr. Brown testified he observed external injuries to the victim including the appearance of a number of blows to the side of her head as well as an injury to her forehead. *R. R.3, p. 80, line 18-p. 81, line 4.* These occurred while the victim was alive. *R.R. 3, p. 81, lines 4-7.* Additionally, Dr. Brown noticed the victim suffered a broken tooth. *R.R. 3, p. 81, lines 17-13.*

Dr. Brown testified that the cause of the victim's death was blunt force injury to her head with skull fractures by manner of homicide. *R.R. 3, p. 88, lines 1-7.* Dr. Brown added that the cause of the victim's death would be consistent with her being hit on her head with a mug. *R.R. 3, p. 89, lines 15-19.*

Thus, Dr. Brown's testimony concerning the cause of death corroborates Applicant's sworn statement to police officers in which he admitted to striking the victim

numerous times in the head on two separate occasions with two separate glasses or mugs. This was corroborated by Applicant's testimony during the punishment phase of the trial.

The record contains ample evidence to support Applicant's conviction, even when the testimony of Holland and Benjamin are excluded from review.

Therefore, this Application for Writ of Habeas Corpus should, in all things, be denied.

Dated this 4th day of January, 2011.

Judge, Criminal District Court
Jefferson County, Texas

FILED
at 10:21 o'clock A M
JAN -4 2011
LOLITA RAMOS
CLERK, DISTRICT COURT OF JEFFERSON CO., TEXAS
BY _____ DEPUTY

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