No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES VICTOR THOMPSON,
Petitioner,

-v-

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix

Jonathan Landers
917 Franklin; Suite 300
Houston, TX 77002
Jlanders.law@gmail.com
Member, Supreme Court Bar
(713) 685-5000 (work)
(713) 513-5505 (fax)
Counsel of Record

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 1440
Houston, TX 77002
seth@kretzerfirm.com
Member, Supreme Court Bar
(713) 775-3050 (work)
(713) 929-2019 (fax)

COURT-APPOINTED ATTORNEYS FOR PETITIONER THOMPSON

APPENDIX TABLE OF CONTENTS

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29 Petitioner Thompson, through counsel, certifies that all parties required to be served have been served with the Petition for Writ of Certiorari. The document has been delivered to opposing counsel of record at ari.cuenin@oag.texas.gov. In addition, a copy was mailed to opposing counsel at:

Mr. Ari Cuenin
P.O. Box 12548, Capitol Station
Austin, Texas 78711

/s/ Jonathan Landers
Jonathan Landers
917 Franklin, Suite 300
Houston Texas 77002
(713) 685-5000
Jlanders.law@gmail.com
Member of Supreme Court Bar

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70008

United States Court of Appeals
Fifth Circuit
FILED
October 29, 2019
Lyle W. Cayce
Clerk

CHARLES VICTOR THOMPSON,

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 Southern District of Texas

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In 1999, Charles Victor Thompson was convicted of murdering Glenda Dennise Hayslip and Darren Cain and sentenced to death.[1] On direct review, the Texas Court of Criminal Appeals affirmed Thompson's conviction but ordered a retrial on punishment.[2] At the retrial, the State called Robin Rhodes, who testified that while the two men were detained together in the Harris

[1] *Thompson v. State*, 93 S.W.3d 16, 18–20 (Tex. Crim. App. 2001).

[2] *Id.* at 29. The court found that the State had violated Thompson's Sixth Amendment right to counsel by sending an undercover investigator, who later testified at the punishment phase of the trial, to meet with Thompson in jail and obtain information about Thompson's plot to have a witness murdered. The solicitation plot discussed in this opinion was a separate, subsequent effort involving a different intended hitman.

County Jail, Thompson had solicited him to murder a "hit list" of potential State witnesses.[3] Rhodes also testified that no one from the State had directed him to obtain information from Thompson; he simply saw an opportunity and seized it.[4]

On cross-examination, Rhodes explained that he had a longstanding working relationship with the State and had previously received large sums of money for his cooperation in other cases,[5] including up to $30,000 for his testimony in a prior capital murder trial.[6] In fact, Rhodes described himself as being a "full time informant" for the State at the time of his encounter with Thompson[7] and stated that he informed on "pretty much whatever situation [he] stumbled into." The jury also learned that Rhodes had testified in a 1999 drug case against his fiancée.[8] As part of his testimony in that case, Rhodes told the jury that he had worked for Harris County law enforcement "as a confidential informant in over 50 cases, more than 80 percent of which resulted in convictions; [and] that he had twice testified for the State, including once in a capital murder prosecution."[9]

The trial court denied Thompson's motion to strike Rhodes's testimony, and Thompson was again sentenced to death.[10] After his direct appeal and three state habeas petitions proved unsuccessful, Thompson sought federal habeas relief in 2014. Also in 2014, Thompson's counsel received the following items in response to a Public Information Act (PIA) request for information related to Robin Rhodes:

[3] *Thompson v. Stephens*, 2014 WL 2765666, at *1 (S.D. Tex. June 18, 2014).
[4] *Thompson v. Davis*, 916 F.3d 444, 456 (5th Cir. 2019).
[5] *Id.*
[6] *See Benavides v. State*, 992 S.W.2d 511 (Tex. App. 1999).
[7] *Thompson*, 916 F.3d at 456.
[8] *Stephens v. State*, 59 S.W.3d 377, 381 (Tex. App. 2001).
[9] *Id.*
[10] *Thompson v. State*, No. AP-73,431, 2007 WL 3208755, at *1 (Tex. Crim. App. Oct. 31, 2007).

1. A 1993 informant contract executed by Rhodes (under the pseudonym Robert Lee), his police handler Floyd Winkler, and Assistant District Attorney Joan Huffman. The contract, which began in August 1993 and was valid for three months, provided that the prosecutor would drop Rhodes's pending theft charge if Rhodes could provide information leading to drug arrests and seizures.
2. A 1997 *pro se* sentence-reduction motion in which Rhodes, then serving a two-year state prison term, stated that he "ha[d] cooperated in extensive narcotics investigations approximately (20) twenty [to] twenty-five (25) in number," which had led to numerous arrests and convictions. Rhodes also stated that he had been cooperating "with the Harris County Organized Crime Task Force since 1993."
3. A memorandum dated August 25, 1998 in which the DA's investigator Mike Kelly reported Rhodes's statement that he had spoken with Thompson about the solicitation plot and obtained Thompson's "hit list" on August 21.
4. A handwritten note from the prosecutor's file that appears to list Rhodes's contact information and a quote (presumably from Thompson, though unattributed) describing a woman who he "thought [was the] only witness" as a "bitch" who "had it coming." The second-to-last line of the note says: "contacted Floyd, get in hand." Presumably, "Floyd" is Rhodes's police handler, Officer Floyd Winkler. Thompson contends that this line demonstrates that Winkler "instructed Rhodes to get proof of Thompson's solicitation request."
5. Another handwritten note from the prosecutor's file outlining Thompson's interactions with Rhodes. In the left-hand margin near the top of the page is a partial date—"/13/98"—with the month missing. Thompson claims that the missing month was August, and that the note

therefore proves Rhodes was talking to authorities about the case before he ever interacted with Thompson.

6. A transcript of Rhodes's testimony in the *Stephens* case. In addition to the testimony described above, the transcript shows that Rhodes claimed that "approximately 80 percent of the cases that [he] participated in . . . resulted in arrest and conviction."

The district court denied Thompson relief on all fourteen of his claims and denied his motion for a hearing. This Court granted Thompson a certificate of appealability on his claim that the State violated his "rights to due process and counsel when it introduced the testimony of fellow inmate Robin Rhodes during the retrial on punishment."[11] Citing *Massiah v. United States*,[12] Thompson argues that Rhodes was acting on behalf of the State during their jailhouse conversations, and thus his testimony violated Thompson's Sixth Amendment right to counsel. Although the *Massiah* claim is procedurally defaulted, Thompson argues he can overcome the procedural bar by showing that the prosecution violated its *Brady*[13] obligations by concealing facts that, if known, would have led to the exclusion of Rhodes's testimony on *Massiah* grounds. And without Rhodes's testimony, Thompson claims, the jury likely would not have resentenced him to death.

Assuming only for the sake of argument that Thompson could prove the first two elements of a *Brady* violation—favorability and suppression[14]—he cannot show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[15] That is, Thompson cannot show that the PIA-request evidence would have led to the

[11] *Thompson*, 916 F.3d at 455.
[12] 377 U.S. 201 (1964).
[13] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[14] *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).
[15] *United States v. Bagley*, 473 U.S. 667, 675 (1985); *see Banks v. Dretke*, 540 U.S. 668, 691 (2004).

exclusion of Rhodes's testimony on *Massiah* grounds, much less to a more favorable sentence. To establish a *Massiah* violation, a defendant must show: "(1) a Sixth Amendment right to counsel had attached; (2) an individual seeking the information was a government agent acting without the defendant's counsel being present; and (3) that the agent deliberately elicited incriminating statements from the defendant."[16]

It may be debatable whether Thompson's right to counsel had attached when he spoke to Rhodes, but it is plain that Rhodes was not acting as a government agent. To prove an agency relationship between the government and a jailhouse informant, a defendant must show that "the informant: (1) was promised, reasonably led to believe [that he would receive], or actually received a benefit in exchange for soliciting information from the defendant; *and* (2) acted pursuant to instructions from the State, or otherwise submitted to the State's control."[17] Thompson has not met his burden as to either element. To the contrary, the evidence supports the State's contention that "although Rhodes saw an opportunity to help himself if Thompson discussed the solicitation plot, he did not elicit information from Thompson at the behest of the State." After all, an informant cannot be an agent of the State without the State's knowledge or consent,[18] and there is no credible evidence that Rhodes had any contact with the State regarding Thompson until *after* he had discussed the solicitation plot with Thompson and obtained his hit list.

Of the six PIA items identified by Thompson, the sentence-reduction motion, Mike Kelly memorandum, and *Stephens* transcript are all cumulative of testimony presented to the jury at the retrial—namely, that Rhodes, a

[16] *United States v. Bates*, 850 F.3d 807, 810 (5th Cir. 2017) (citing *Henderson v. Quarterman*, 460 F.3d 654, 664 (5th Cir. 2006)).

[17] *Id.* (emphasis added) (quoting *Creel v. Johnson*, 162 F.3d 385, 393 (5th Cir. 1998)).

[18] *See Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994) ("As in the formation of any contract, the consent of both parties is necessary to establish an agency relationship.").

longtime, full-time informant who frequently testified in exchange for money, spoke with Thompson and obtained his hit list on August 21, 1998.[19] It is well established that "when the undisclosed evidence is merely cumulative of other evidence in the record, no *Brady* violation occurs."[20]

As for the rest of the evidence, the two handwritten notes from the prosecution's files do not support the inferences Thompson would have us draw from them. Thompson argues that the "get in hand" notation in the first note and the missing month in the second (which he asserts, without evidence, must be August) prove that Rhodes approached Thompson in jail at the request of Officer Winkler. These claims are speculative, and this Court has long recognized that it is "unwise to infer the existence of *Brady* material based upon speculation alone."[21] Likewise, although the informant contract does show that Rhodes worked with Officer Winkler as far back as 1993, the contract only lasted three months and its target was drug dealing, not the murder-solicitation plot Rhodes uncovered in this case. We cannot conclude that this contract indicates Rhodes was acting under Winkler's instructions when he spoke with Thompson in jail nearly five years after the contract's 90-day term had expired.

Finally, Rhodes's previous, short-term agency relationship with the DA, evidenced by the 1993 informant contract, does not turn him into a perpetual agent. As we stated in *United States v. Fields*, a jailhouse informant is not a government agent simply because he has "previously cooperated with the government" and decides to capitalize on "an opportunity to do so again" by eliciting incriminating information from a cellmate.[22] Moreover, the fact that

[19] *See Thompson*, 93 S.W.3d at 18; *Thompson*, 2014 WL 2765666, at *1.

[20] *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004) (internal alterations omitted) (quoting *Spence v. Johnson*, 80 F.3d 989, 995 (5th Cir. 1996)).

[21] *United States v. Stanford*, 823 F.3d 814, 841 (5th Cir. 2016) (quoting *United States v. Williams-Davis*, 90 F.3d 490, 514 (D.C. Cir. 1996)).

[22] 761 F.3d 443, 478 (5th Cir. 2014).

Rhodes correctly expected, based on his past interactions with the State, "that he would receive a benefit for his testimony" does not make him a State agent. It is not enough for an informant to believe he will receive a benefit in exchange for his testimony; to be a government agent, he must be "*led* to believe" he will receive that benefit.[23]

In short, because Thompson has shown no evidence that the State controlled—or even consented to—Rhodes's informant activity, there is no valid *Massiah* claim that could have affected the outcome of the punishment retrial. Accordingly, we affirm the district court's denial of habeas relief.

[23] *Bates*, 850 F.3d at 810 (emphasis added) (quoting *Creel*, 162 F.3d at 393).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 29, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 17-70008 Charles Thompson v. Lorie Davis, Director
USDC No. 4:13-CV-1900

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

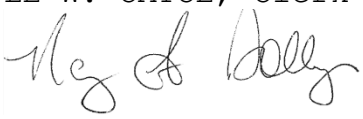
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Ari Cuenin
Mr. Stephen M. Hoffman
Mr. Seth Kretzer
Mr. Jonathan David Landers

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 18, 2019
Lyle W. Cayce
Clerk

No. 17-70008

CHARLES VICTOR THOMPSON,

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 Southern District of Texas

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Charles Victor Thompson was convicted by a Texas jury of capital murder and sentenced to death. After direct appeal and collateral review in state court, he petitioned the federal district court for a writ of habeas corpus, challenging the constitutionality of his conviction and sentence. The district court denied relief. Thompson now seeks a certificate of appealability (COA). We grant a COA on Thompson's second claim concerning the testimony of a state witness during his retrial on punishment. We otherwise deny his application for COAs on all other claims and affirm the district court's denial of an evidentiary hearing.

I.

In the early hours of April 30, 1998, responding to a call, police arrived at the apartment of Glenda Dennise Hayslip to find Hayslip's boyfriend, Darren Cain, arguing with Thompson, Hayslip's ex-boyfriend.[1] After calming the situation, the police let Thompson leave the scene.[2] Three hours later, however, Thompson returned with a gun. After kicking down the door to the apartment, Thompson confronted Cain and shot him four times in the neck and chest, killing him. Thompson then turned to Hayslip. After reloading the gun, he told Hayslip "I can shoot you too, bitch," and fired into her cheek.[3] The bullet passed through Hayslip's face, blowing the dentures out of her mouth and nearly severing her tongue.[4] Thompson left the apartment, threw the gun into a creek, and went to the house of a friend, Diane Zernia, where he fell asleep.[5]

Hayslip was alive, but bleeding profusely, and sought help from neighbors.[6] Emergency responders arrived at the apartment and airlifted Hayslip to a hospital. During surgery, doctors were unable to secure an airway for Hayslip's breathing, and, while they were preparing for emergency surgery, she fell into a coma.[7] A few days later, Hayslip's family took her off of life

[1] *Thompson v. State*, No. AP-73,431, 2007 WL 3208755, at *1 (Tex. Crim. App. Oct. 31, 2007).

[2] *Id.*

[3] *Thompson v. State*, 93 S.W.3d 16, 19–20 (Tex. Crim. App. 2001).

[4] *Id.* at 20.

[5] *Id.* at 19.

[6] *Id.*

[7] *Id.* at 20.

support, and she died.[8] Hayslip's autopsy report describes her cause of death as a gunshot wound to the face.

Awaking later in the morning, Thompson described the shootings to Zernia, including how he had disposed of the murder weapon.[9] He then called his father, who brought him to the police station where he turned himself in.[10] The State indicted Thompson for capital murder for intentionally or knowingly causing Cain and Hayslip's deaths. The state court appointed counsel on May 19, 1998.

Thompson was active during his pretrial detention at the Harris County Jail. A few days after the shooting, he called Zernia asking what she had told the police. Thompson called again a few weeks later, again seeking details on what Zernia had told investigators, and clarifying that she was the only witness who could link him to Cain and Hayslip's murders. During this second call, Thompson asked Zernia for her home address, purportedly so that his attorney "could send her some documents and talk with her." Weeks later, Zernia told investigators that she "ha[d] not heard from his attorney as of yet."

During the same period, Thompson also discussed his case with fellow inmates Jack Reid and Max Humphrey, contemplating Zernia's status as a potential state witness and looking to arrange for her death.[11] According to Reid, Thompson engaged Humphrey, an Aryan Brotherhood gang member, to murder Zernia after his release on June 30th. Thompson also arranged retrieval of the murder weapon for delivery to Humphrey, to be used to

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 22.

dispatch Zernia.[12] Thompson drew a map of the weapon's location, and asked Reid to pass the information to a contact outside the Jail for retrieval of the weapon.

Reid instead relayed the information to the police,[13] who attempted to recover the weapon. But their divers were unable to locate it. Although Thompson's right to counsel had attached, officers instructed the informant Reid to tell Thompson his contact had been unable to find the weapon, and would visit for better directions.[14] Posing as Reid's outside contact, Investigator Gary Johnson visited Thompson at the Jail, wearing a wire to record their conversation.[15] Thompson told Johnson he believed Humphrey had betrayed him, and offered Johnson $1,500 to retrieve the weapon and murder Zernia.[16] During the meeting, Thompson pressed a hand-drawn map against the glass of the visitor's booth, one similar to the map the police already held, depicting the weapon's location, as well as Zernia's address. Thompson then described Zernia's husband, daughter, her home and vehicles, and discussed the best times to carry out the murder.[17]

Relying on the recording of Johnson's meeting, the district attorney charged Thompson with solicitation of capital murder. Police visited Thompson in his cell and notified him of the charge; they searched his cell but were unable to recover the map displayed to Johnson. Police also apprehended Humphrey, who corroborated Reid's account of the murder arrangement, but denied that

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 22–23.

[16] *Id.* at 23.

[17] *Id.*

he agreed to carry out the hit on Zernia. The police recovered the murder weapon on July 18, 1998 in Cypress Creek.

Undeterred by the solicitation charge, on August 21, 1998, Thompson spoke with another inmate, Robin Rhodes, again seeking help in persuading "some people not to [come] or be able not to come" to testify at his trial.[18] Thompson provided a list of names including Zernia's,[19] advising that Rhodes "either kill them or persuade them not to be there." Rhodes, it turned out, was a long time police informant. He gave the list to the police and expressed his willingness to testify against Thompson.[20]

Thompson was tried for capital murder in 1999. The guilt stage of the trial centered on Hayslip's injuries, and whether Thompson's shooting—as opposed to medical malpractice—caused her death. Thompson called an expert witness, Dr. Pat Radalat, who initially testified Hayslip would have survived the gunshot had she received proper medical care. Radalat opined that Hayslip's medical team failed to correctly place a nasotracheal tube, and then failed to monitor Hayslip's breathing while preparing for surgery, allowing her to experience bradycardia, a condition in which the heart slows due to low oxygen. On cross examination, however, Radalat backtracked, conceding Hayslip would have died in the absence of medical intervention. The State introduced the murder weapon and called a firearms expert to explain that, given the weapon's capacity and the number of shots fired, Thompson must have reloaded during the shooting.[21] The State also introduced the autopsy

[18] *Thompson v. Stephens*, 2014 WL 2765666, at *1 (S.D. Tex. June 18, 2014).

[19] *Id.*

[20] *Id.*

[21] *Thompson*, 93 S.W.3d at 20.

report certified by Dr. Paul Shrode, describing Hayslip's cause of death as a gunshot wound to the face. The jury found Thompson guilty of capital murder.[22]

During the punishment phase of the trial, the State introduced Johnson's recording of his jailhouse meeting with Thompson, and Johnson himself took the stand.[23] Based on the jury's answers to the questions regarding punishment—whether Thompson would be a future danger to society and whether there were sufficient circumstances mitigating against a death sentence—the court imposed the death penalty.[24]

In 2001, on direct appeal, the Texas Court of Criminal Appeals affirmed Thompson's conviction,[25] but found the punishment phase of the trial tainted by the admission of Johnson's testimony, solicited after Thompson's right to counsel had attached, in violation of the Sixth Amendment.[26] It vacated and remanded for a retrial on punishment.[27] The court also denied Thompson's pro se motion for rehearing, which argued the entirety of his trial was tainted by the Sixth Amendment violation and that his conviction should be vacated and remanded for retrial.[28]

In 2005, Thompson's case returned to the trial court for a retrial on punishment before a new jury.[29] During a pre-trial hearing, the State disclosed

[22] *Id.* at 18.

[23] *Id.* at 23.

[24] *Thompson*, 2007 WL 3208755, at *1.

[25] *Thompson*, 93 S.W.3d at 29.

[26] *Id.*

[27] *Id.*

[28] *Thompson v. State*, 108 S.W.3d 269, 270 (Tex. Crim. App. 2003).

[29] Thompson's application makes no claim of error that the retrial on punishment was impermissibly presented to a new jury different than that which decided guilt. *See Powell v.*

that it would call Robin Rhodes to testify, and that the prosecution had reached an agreement with Rhodes involving dismissal of outstanding "hot check cases" and a misdemeanor in exchange for his testimony. Four days before the start of testimony, however, Thompson's counsel overheard a conversation disclosing Rhodes's extensive history as an informant for the State. The trial court ordered the prosecution to turn over all information required under *Brady v. Maryland* by 5 p.m. the day before testimony was to begin, and denied Thompson's request for a continuance. The State committed on the record to "mak[ing] sure [Thompson's] counsel has everything."

On retrial, the State presented evidence of Thompson's past criminality, beginning in his childhood.[30] The State called Rhodes, who recounted his jailhouse discussions with Thompson. On cross examination, Rhodes explained that he had a longstanding working relationship with the State and had previously served as a paid informant. The trial court denied Thompson's motion to strike Rhodes's testimony. The jury answered the two-part inquiry on punishment as before, and the court again imposed the death penalty.[31] In 2007, on direct appeal of the retrial, the Texas Court of Criminal Appeals affirmed.[32]

Thompson had originally filed a state habeas petition in 2000 following his first trial presenting seventeen grounds for relief, and amended this application in 2007 following the retrial on punishment to raise fourteen

Quarterman, 536 F.3d 325, 334 (5th Cir. 2008) (holding that "no clearly established law decided by the Supreme Court" requires "the same jury to determine guilt and punishment").

[30] *Thompson*, 2007 WL 3208755, at *2.

[31] *Id.* at *1.

[32] *Id.* at *6.

grounds.[33] In 2013, the state trial court entered findings of fact and conclusions of law recommending denial of all relief.[34] In April 2013, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions, denying relief.[35]

Thompson first filed a habeas petition with the federal district court in 2014, fifteen years after his conviction. During this same period, Rhodes's counsel submitted a Public Information Act request to the Harris County District Attorney's office for information related to Robin Rhodes. The State's responsive disclosures indicated that Rhodes went by several pseudonyms in his transactions with the State, and that there was a signed contract from 1993 between Rhodes and Assistant District Attorney Joan Huffman. Citing these new sources—undisclosed in the state trial court—Thompson moved unopposed in federal court for limited discovery from Harris County, the Houston Police Department and the City of Baytown regarding Rhodes's status as an informant. The district court granted the motion, and also ordered the District Attorney's office to produce its files relating to Rhodes for *in camera* review. Thompson moved to stay and abet proceedings while the state habeas court resolved a third application for post-conviction relief, and the district court granted the stay. After the Texas Court of Criminal Appeals dismissed Thompson's third application as an abuse of the writ in March 2016, Thompson filed an amended petition with the federal district court raising fourteen grounds for relief, and requested an evidentiary hearing. On March 23, 2017,

[33] *Ex Parte Thompson*, No. WR-78,135-01, 2013 WL 1655676 (Tex. Crim. App. Apr. 17, 2013).

[34] *Id*.

[35] *Id*.

the district court denied Thompson relief on all claims and denied the motion for a hearing. This application followed.

II.

We have jurisdiction over the district court's final decision denying post-conviction relief and a hearing under 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a).

A state prisoner does not have "an absolute right to appeal" from a federal district court decision denying a petition for a writ of habeas corpus.[36] Instead, the prisoner must obtain a COA.[37] We issue a COA upon a "substantial showing of the denial of a constitutional right"[38]—that "jurists of reason could disagree with the district court's resolution of [the applicant's] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."[39] This determination is a threshold inquiry, not a full-fledged merits analysis.[40] Any doubts as to whether a COA should issue must be resolved in the applicant's favor.[41]

Thompson's petition is "also subject to the deferential standards of AEDPA."[42] Where Thompson seeks a COA on claims denied on the merits by the state habeas court, he must show that the state court's decision was "contrary to" or "involved an unreasonable application of" clearly established federal law, or that it "was based on an unreasonable determination of the

[36] *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

[37] 28 U.S.C. § 2253(c); *Miller–El v. Cockrell*, 537 U.S. 322, 335 (2003).

[38] 28 U.S.C. § 2253(c)(2).

[39] *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 327).

[40] *See id.* at 773–74.

[41] *Young v. Davis*, 835 F.3d 520, 523–24 (5th Cir. 2016).

[42] *Charles v. Stephens*, 736 F.3d 380, 387 (5th Cir. 2013) (per curiam).

facts" given the record before the state court.[43] Where Thompson seeks a COA on claims that the state court deemed procedurally defaulted, he must show cause to excuse his failure to comply with the state procedural rule, as well as actual prejudice resulting from the alleged constitutional violation.[44]

A.

Thompson first seeks a COA arguing that the guilt phase of his trial was tainted by the State's introduction of the murder weapon in violation of right to counsel. *Massiah v. United States* held that the Government violated a criminal defendant's Sixth Amendment right to counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[45] The rule from *Massiah* applies not only to interrogation by identified officials, but also to "indirect and surreptitious" meetings during which the indicted individual may not "even know that he was under interrogation by a government agent."[46] Where state actors have obtained incriminating statements in violation of individual's right to counsel, "the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."[47] To bring a *Massiah* claim, the claimant must establish that his Sixth Amendment right to counsel

[43] *Harrington v. Richter*, 562 U.S. 86, 100 (2011) (quoting 28 U.S.C. § 2254(d)(1)–(2)).

[44] *Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017) ("A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show cause to excuse his failure to comply with the state procedural rule and actual prejudice resulting from the alleged constitutional violation." (internal quotation marks omitted)).

[45] 377 U.S. 201, 206 (1964).

[46] *Id.*

[47] *Id.* at 207.

had attached when a government agent sought information from the defendant without his counsel's presence, and deliberately elicited incriminating statements from the defendant.[48] *Massiah* claims are subject to harmless error analysis.[49]

At the outset, Thompson argues the district court erred in treating the issue as resolved by the Texas Court of Criminal Appeals and thus entitled to AEDPA deference. Jurists of reason would not debate the district court's granting of deference to the Court of Criminal Appeals' opinion on this issue. When Thompson raised the issue on direct appeal, the Court of Criminal Appeals granted a retrial on punishment, but, without stating its reasons, denied retrial on guilt. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[50] We presume that the state court adjudicated the claim on the merits, and Thompson has presented no indication or state-law procedural principles to overcome that presumption. Jurists of reasons would not debate the district court's application of AEDPA deference to this claim.

Thompson's argument hinges on the assertion that "the police only recovered the gun based on statements illegally obtained." Given the deferential AEDPA review standards, jurists of reason would not debate the state court's denial of relief in light of the lack of factual support for this

[48] *United States v. Bates*, 850 F.3d 807, 810 (5th Cir. 2017).

[49] *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991); *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) ("We have permitted harmless error analysis in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial.").

[50] *Richter*, 562 U.S. at 99.

contention. There is only a tenuous inference drawn from the timing of the meeting and discovery of the weapon: that police recovered the weapon two weeks after the meeting with Johnson does not attribute the gun's discovery to the meeting. According to the State, information regarding the gun conveyed during Johnson's jailhouse meeting was duplicative of the police's existing knowledge, namely the hand-drawn map provided to Reid and Zernia's account of Thompson's confession. Thompson does not dispute these contentions.

Moreover, even if the murder weapon was recovered based on Johnson's meeting, jurists of reason would not debate the harmlessness of its introduction during the guilt phase of Thompson's trial.[51] The murder weapon was introduced during testimony of a firearms expert, who explained that Thompson had reloaded during the shooting.[52] Thompson argues that but for the *Massiah* violation, the State would have introduced no evidence of reloading, vitiating its showing that Thompson intentionally killed Hayslip. This is farfetched. Taken together with the evidence properly before the jury—not least facts showing Thompson shot Zernia in the face and left her drowning in her own blood and suffocating on the swollen remnants of her severed tongue—the introduction of the murder weapon was not crucially important, let alone dispositive. The district court thus found that the state habeas court was not unreasonable to reject this claim. We agree that jurists of reason could not debate this conclusion, and that the claim does not deserve encouragement to proceed further. We deny a COA on this claim.

\

[51] *Milton v. Wainwright*, 407 U.S. 371, 377–78 (1972) ("[W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.").

[52] *Thompson*, 93 S.W.3d at 20.

B.

Second, Thompson seeks a COA arguing the State violated his rights to due process and counsel when it introduced the testimony of fellow inmate Robin Rhodes during the retrial on punishment. Though these claims were procedurally defaulted, Thompson argues he overcomes the procedural bar. Thompson also appeals the district court's denial of an evidentiary hearing on the Rhodes-related claims, which we review for an abuse of discretion.[53]

A *Brady* violation can provide cause and prejudice to overcome a procedural bar on a habeas claim.[54] Under *Brady*, a defendant is denied due process where the State fails to disclose evidence favorable to the accused and that evidence is material, meaning there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would be different.[55] To determine whether an informant was a government agent for purposes of a *Massiah* claim, the court asks whether the informant was promised, reasonably led to believe, or actually received a benefit in exchange for soliciting information from the defendant; and whether he acted pursuant to instructions from the State, or otherwise submitted to the State's control.[56]

1.

Thompson raised this claim in his third state habeas petition, which the Court of Criminal Appeals dismissed as an abuse of the writ.[57] The district court found the claim procedurally defaulted. Thompson argues, however, that the State's *Brady* violation in failing to disclose the full nature of Rhodes's

[53] *Hall v. Quarterman*, 534 F.3d 365, 367 (5th Cir. 2008).

[54] *Banks v. Dretke,* 540 U.S. 668, 691 (2004).

[55] *Id.*

[56] *Creel v. Johnson*, 162 F.3d 385, 393 (5th Cir. 1998).

[57] *Ex Parte Thompson*, No. WR-78,135-03, 2016 WL 922131, at *1 (Tex. Crim. App. Mar. 9, 2016).

relationship with the State until 2014 provides cause and prejudice, allowing him to overcome the procedural bar.

Days before his 2005 retrial on punishment, Thompson's trial counsel overheard a conversation suggesting Rhodes had previously worked as an informant. Thompson then probed Rhodes's relationship with the State during the retrial: specifically, during his cross examination, Rhodes self-described as a "full time informant" for the State at the time of his encounter with Thompson. The meaning of this description is not self-evident. While during the same testimony Rhodes explained that he had not solicited Thompson on the instructions of any state official, this does not preclude the possibility of more general open-ended instruction or guidance from his government "handler," nor even the possibility that Rhodes was performing general information-gathering duties. Thompson learned further that Rhodes not only served repeatedly as an informant for the State—in some cases paid tens of thousands of dollars for his services—but was even at some point an employee of the Harris County Organized Crime Task Force.[58] Aspects of Rhodes's history with the State were discoverable in public records, specifically the Texas Court of Appeals' published decision in *Stephens v. State*. That opinion describes Rhodes as an employee of the Organized Crime Task Force and "confidential informant in over 50 cases."[59] But that opinion does not necessarily describe the State's relationship with Rhodes exhaustively, particularly with respect to his status at the time he engaged Thompson in the Harris County Jail.

[58] *Thompson*, 2014 WL 2765666, at *2.

[59] 59 S.W.3d 377, 381–82 (Tex. App. 2001).

Thompson learned more of Rhodes's history with the State in mid-2014, after the Court of Criminal Appeals had denied post-conviction relief,[60] and he was before the district court. Pursuant to the district court's discovery order, the State produced a 1993 contract executed by Rhodes (under his pseudonym "Robert Lee"), his handler Floyd Winkler, and Harris County Assistant District Attorney Joan Huffman. Under the agreement, in exchange for dismissal of one theft charge and probation on another, Rhodes agreed to "cooperate with Officer Winkler . . . in the investigation of narcotics trafficking in the Harris County area of which he has knowledge," and to "follow the directions and instructions of Winkler or his fellow law enforcement officers." Thompson learned during retrial that Rhodes previously served as an informant. But the 1993 contract at least arguably clarifies the nature of his past work: Rhodes's duties to the State at times involved an open-ended information-gathering enterprise, in which the State would compensate Rhodes with without ex ante knowledge of the specific targets or subjects of his gathering. The agreement terminated in November 1993, and therefore does not cover the period during which Rhodes encountered Thompson in the Harris County Jail. But it does raise the possibility that, even if Rhodes had no specific instruction to solicit information from Thompson, he might have acted pursuant to a reasonable understanding that when he relayed the murder solicitation information to Winkler he would receive a benefit, such as payment or leniency on pending charges. Although the question is close,[61] jurists of reason could debate whether the State's delay in disclosing the 1993 contract suppressed material information regarding its history with Rhodes and caused Thompson's

[60] *Ex Parte Thompson*, 2013 WL 1655676, at *1.

[61] *Young*, 835 F.3d at 523–24 (5th Cir. 2016) (any doubts as to whether a COA should issue must be resolved in the applicant's favor).

procedural default. Jurists of reason could also debate whether the introduction of Rhodes's testimony was a *Massiah* violation that prejudiced the retrial. Here, jurists of reason might debate whether on the basis of repeated transactions and the 1993 contract the State "reasonably led" Rhodes to believe that "benefits would follow" from a successful solicitation of useful information from Thompson.[62]

We therefore grant COAs on two questions arising from this claim: first, whether Thompson has established a *Brady* violation in the State's non-disclosure of its past relationship with Rhodes that would allow Thompson to overcome the procedural bar and entitle him to habeas relief; second, if the procedural bar is overcome, whether the introduction of Rhodes's testimony at the retrial on punishment constituted a *Massiah* violation under which Thompson is entitled to habeas relief.

2.

Thompson was unable to develop the facts underlying the Rhodes-related *Brady* and *Massiah* claims in state habeas court. When he got to federal district court, Thompson moved for limited discovery—which was granted—and then for an evidentiary hearing—which was not. Considering documents turned over by the State pursuant to its discovery order, including privileged documents reviewed *in camera*, the district court found an evidentiary hearing not "necessary to a full and fair adjudication of [Thompson's] claims." In so deciding, the district court downplayed the toll of time. By 2014, the Harris County Organized Crime Task Force, the government entity with which Rhodes had interacted, had dissolved, and Rhodes's handler Floyd Winkler no longer worked with the State. In response to the subpoena for Rhodes-related documents, the City of Baytown, which had taken possession of the Task

[62] *Creel*, 162 F.3d at 393.

Force's files, disclosed that relevant retention periods had expired, and it had destroyed relevant documents from that time. As a result, no records exist from the time to document the nature of Rhodes's relationship to the State in July and August 1998. For this reason, Thompson sought to question witnesses, specifically, Gary E. Patterson, Rhodes's attorney and intermediary with the Task Force; former Assistant District Attorney Joan Huffman, with whom Rhodes had executed the 1993 agreement; Rhodes's handler, Officer Floyd Winkler; Vic Wisner and Kelley Sigler, the prosecutors at Thompson's retrial; and Investigator Mike Kelley, who investigated Thompson's solicitation of murder in 1998. Thompson's factual development of these claims has been potentially hampered by the State's nine-year delay in disclosing key aspects of its history with Rhodes. As a result, the district court may not have been provided sufficient facts to make an informed decision as to the merits of the Rhodes-related claims.[63]

Even so, the district court did not err in denying Thompson an evidentiary hearing. Under 28 U.S.C. § 2254(e)(2), an applicant who has failed to develop the factual basis of a claim in the state habeas court may not obtain an evidentiary hearing in federal habeas proceedings unless two conditions are met. First, the petitioner's claim must rely on a new rule of constitutional law, or on a factual predicate that could not have been previously discovered through the exercise of due diligence.[64] Second, the facts underlying the claim must be "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant

[63] *See McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998).

[64] 28 U.S.C. § 2254(e)(2)(A)(ii).

guilty of the underlying offense."[65] Here, the disputed factual predicate concerns potential error during Thompson's punishment retrial. Even if Thompson were to prevail on the claim, his guilty verdict would remain untouched. Under the statute, the district court did not have discretion to grant him a hearing. We affirm the district court's denial of the motion for an evidentiary hearing.

C.

Third, Thompson seeks a COA arguing that the guilt phase of his trial was tainted by the State's failure to disclose that the Hayslip autopsy report was false and improperly certified by an incompetent, unqualified medical examiner. This claim was only raised in Thompson's third state habeas application, which the state habeas court deemed an abuse of the writ.[66] To overcome the procedural default, Thompson must establish cause and prejudice.[67]

Thompson argues that the State committed a *Brady* violation that allows him to overcome the procedural default. We need not proceed past the first *Brady* element. Thompson begins from the premise that the autopsy report mischaracterized Hayslip's cause of death, and that the medical examiner, Dr. Paul Shrode, and by imputation the State, knew this was so. In support, Thompson relies on the opinion of another expert, pathologist Dr. Lloyd White,

[65] *Id.* § 2254(e)(2)(B); *Oliver v. Quarterman*, 254 F. App'x 381, 390 n.6 (5th Cir. 2007) (unpublished) (noting in dicta "subsection (B) requires the habeas applicant to show that 'no reasonable factfinder would have found the applicant *guilty of the underlying offense*,' not that no reasonable factfinder would have imposed the same sentence." (emphasis in the original)); *see also In re Webster*, 605 F.3d 256, 258 (5th Cir. 2010) (holding that the plain meaning of similar language governing successive motions in 28 U.S.C. § 2255(h)(1) is limited to determinations of guilt, and not the petitioner's eligibility for a death sentence); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) (same).

[66] *Ex Parte Thompson*, 2016 WL 922131, at *1.

[67] *Davila*, 137 S. Ct. at 2064–65.

attributing Hayslip's death to "therapeutic misadventure" rather than to the shot she sustained. Assuming arguendo White is correct, an inaccurate report is not enough to sustain Thompson's claim. Rather Thompson must show that the State suppressed the inaccuracy. Here, Thompson resorts to speculation. He invokes instances in which the State medical examiner, Dr. Shrode lied. With this past, he insists Shrode "had to know" he was unqualified to certify the autopsy report. By imputation, the State "must have known" about Shrode's shortcomings as a medical examiner and inferred that the report was unreliable. These inferences are unsubstantiated. Perhaps medical professionals could debate which of the two opinions—White's or Shrode's—is more accurate. But Thompson has not established that jurists of reason could debate whether there was evidence of the State's suppression of exculpatory or impeaching facts. Additionally, Thompson assumes rather than establishing that the nondisclosure was material. He mentions that the jury specifically requested the autopsy report during its deliberations, and infers the report was dispositive in the verdict. Given the plethora of other evidence probative of Thompson's role in Hayslip's death—not least testimony from Dr. Radalat that the gunshot wound would have been fatal—he has not shown a basis for jurists of reason to debate whether he established a reasonable probability that more information on Shrode would have turned the verdict. We agree that jurists of reason could not debate the district court's conclusion that Thompson fails to establish cause and prejudice and does not overcome the procedural default. We deny a COA on this claim.

D.

Fourth, Thompson seeks a COA arguing he received ineffective assistance of counsel during the guilt stage of his trial, describing five separate deficiencies. To prevail on such a claim, Thompson must establish that "counsel's representation fell below an objective standard of reasonableness"

and that the deficient representation caused prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[68] Our scrutiny of counsel's performance is "highly deferential"[69]—"doubly" so when the ineffective-assistance claim is raised on federal review of a state-court decision rejecting the claim on the merits.[70] With these standards in mind, we must assess whether Thompson has established that jurists of reason would debate his ineffective assistance of counsel claims.

1.

Thompson argues his trial counsel provided ineffective assistance by failing thoroughly to question potential jurors about their reactions to his potential parole eligibility if sentenced to life imprisonment and about their likely reactions to victim-impact evidence. He also faulted trial counsel for failing to exercise preemptory strikes of jurors Harrell Rogers and Maria Blassingame. The state habeas court found that trial counsel acted "to select jurors that would give the defense the best possible chance at trial," and that "counsel strategically conducted voir dire, including the use of peremptory strikes, to achieve that goal." With some potential jurors, counsel did not ask about parole eligibility because the State had already touched on the subject. With respect to victim-impact evidence, no such evidence was presented during the guilt phase of the trial (the only phase subject to this claim) and so Thompson could show no prejudice. The decisions not to strike Rogers and Blassingame were "reasonable strategic decision[s]," taken considering their circumstances and attitudes relative to other potential jurors'.

[68] *Richter*, 562 U.S. at 104.

[69] *Id.*

[70] *See id.* at 105.

The district court did not find these conclusions unreasonable. With respect to the parole and victim-impact evidence questioning, the district court pointed out that these questions pertained to jurors' attitudes towards punishment—but the punishment phase of the first trial was overturned. Thompson cannot establish prejudice from the lack of such questions with respect to the guilt phase of his trial. Moreover, Thompson's reliance on trial counsel's statements that the ability to ask such questions was "necessary" for intelligent evaluation of potential jurors concerns trial counsel's thoughts on the *option* of pursuing such questioning, not his detailed views on questioning as applied to any particular potential juror. Viewing trial counsel's choices with the benefit of hindsight, the district court noted that Thompson might have provided reasons why another attorney might have questioned and exercised preemptory strikes. But the district court found it not unreasonable for the state habeas court to conclude that trial counsel's performance did not fall below the objective standard of reasonableness. We agree that jurists of reason could not debate this conclusion, and that this claim does not deserve encouragement to proceed further. We deny a COA on this claim.

2.

Thompson argues his trial counsel failed to object to a state witness's references to his prior bad acts—namely instances in which Thompson lost his temper and destroyed property at Hayslip's house. Under Texas law, evidence of these bad acts was admissible as probative of the previous relationship between the accused and the deceased. Thompson argues that because the State had not provided notice of these prior bad acts, they were clearly inadmissible under state law. This argument does not appear to have been

raised in the district court, and is waived.[71] Moreover, while we have suggested that a failure to object to prejudicial and clearly inadmissible evidence cannot be attributed to a strategic decision,[72] we are offered no plausible argument that the evidence of these violent outbursts was prejudicial to Thompson.[73] There was no shortage of other evidence indicating Thompson's violent relationship with Hayslip, not least evidence showing that Thompson shot Hayslip in the face and left her bleeding profusely. The state habeas court concluded that trial counsel's choice was sound because Thompson's hypothetical objection would have been meritless. The district court did not find this conclusion unreasonable. We agree that jurists of reason could not debate the district court's conclusion, and that the claim does not deserve encouragement to proceed further. We deny a COA on this claim.

3.

Thompson argues that his trial counsel failed to object to the prosecution's mischaracterization of Dr. Radalat's testimony. The parties agree on the substance of Radalat's testimony: he initially described Hayslip's wound as survivable, attributing her death to inadequate medical intervention, but later conceded on cross examination that Hayslip would have died in the absence of intervention. In its argument, the prosecution told the jury that Radalat "finally admitted to you that [Hayslip's] wounds would be fatal if left untreated." Thompson argues this statement mischaracterized Radalat's testimony, such that trial counsel's failure to object falls below the

[71] *Johnson v. Puckett*, 176 F.3d 809, 814 (5th Cir. 1999) ("[A] contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court's denial of habeas relief.").

[72] *Lyons v. McCotter*, 770 F. 2d 529, 534 (5th Cir. 1985).

[73] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

objective standard of reasonableness. Thompson's trial counsel had broad discretion in choosing whether to object during closing arguments,[74] and decided not to object here—rightly so, because the objection would have had no merit. The prosecution's characterization was not inaccurate considering the totality of Radalat's testimony. The state habeas court concluded that trial counsel was not deficient in choosing not to object, because the prosecution had properly summarized Radalat's testimony and did not prejudice Thompson. The district court did not find this conclusion unreasonable. We agree jurists of reason could not debate the district court's conclusion, and that this claim does not deserve encouragement to proceed further. We deny a COA on this claim.

4.

Thompson argues that his trial counsel failed to request the inclusion of lesser included offenses with respect to Hayslip in the jury charge, even though Thompson had presented evidence suggesting he had not intended to shoot Hayslip. According to Thompson, the limited set of lesser included offenses narrowed the jury's options in the event jurors were determined to convict Thompson in some way for Hayslip's death, leaving a capital murder conviction as their only option. His argument is premised on possibility that jurors would have found that Hayslip's shooting was an accident—but the state court found that there was no evidence that could have supported such a conclusion. Trial counsel's decision as to which lesser included offenses to include in instructions is tactical, and the choice reached here was within the bounds of counsel's discretion. Once again, Thompson offers ex post evaluation of how these strategic decisions could have been better, but this cannot carry his claim. The state habeas court concluded that trial counsel was not deficient in not

[74] *Charles v. Thaler*, 629 F.3d 494, 502 (5th Cir. 2011).

requesting additional instructions, because the evidence did not support the submission of lesser-included offense instructions. The district court did not find this conclusion unreasonable. We agree jurists of reason could not debate this conclusion, and that this claim does not deserve encouragement to proceed further. We deny a COA on this claim.

5.

Thompson argues that his trial counsel failed to object to the admission of the murder weapon even though it was discovered as a result of Investigator Johnson's unlawful jailhouse interrogation. This claim does not appear to have been raised before the state habeas court, and therefore is procedurally defaulted. But even had it not faced the procedural bar, it would fail. We have already rejected Thompson's arguments attributing the recovery of the weapon to the Johnson meeting. Since that attribution is without merit, as the district court held, counsel's decision not to object on that basis was sound. We agree jurists of reason could not debate this conclusion, and that this claim does not deserve encouragement to proceed further. We deny a COA on this claim.

E.

Fifth, Thompson seeks a COA arguing the Texas capital murder scheme under which he was sentenced violates his rights under the Fifth, Sixth, and Fourteenth Amendments. In the punishment phase, the State has the burden to prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[75] If the jury finds future dangerousness, the jury must then consider whether there are sufficient mitigating circumstances to

[75] TEX. CRIM. P. CODE §§ 37.071(2)(b)(1), 37.071(2)(c).

warrant a sentence of life imprisonment rather than a death sentence.[76] Unless the jury returns an affirmative answer to question one and a negative answer to question two, the court must sentence the defendant to life imprisonment.[77]

Thompson's challenge addresses the second question. He argues that the trial court's death sentence is impermissible where the jury does not find the absence of sufficient mitigating circumstances beyond a reasonable doubt. The state habeas court denied relief, finding that the Court of Criminal Appeals had already rejected the same argument. The district court did not find this conclusion unreasonable, agreeing that settled precedent foreclosed relief on the claim.

We agree jurists of reason could not debate the district court's conclusion, and that this claim does not deserve encouragement to proceed further. We have addressed similar constitutional challenges, concluding that they "ignore[] the distinction . . . between facts in aggravation of punishment and facts in mitigation."[78] As we have stated, "not asking the jury to find an absence of mitigating circumstances beyond a reasonable doubt is perfectly consistent with *Ring* and *Apprendi* because a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death."[79] Thompson concedes that this court has already answered the question, but argues that the situation has changed in light of the Supreme Court's 2016 decision in

[76] *Id*. § 37.071(2)(e)(1).

[77] *Id*. § 37.0712(g).

[78] *Blue v. Thaler*, 665 F.3d 647, 668 (5th Cir. 2011) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 n. 16 (2000)); *see also, Druery v. Thaler*, 647 F.3d 535, 546 (5th Cir. 2011) ("This court has held that '[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof.'" (quoting *Rowell v. Dretke,* 398 F.3d 370, 378 (5th Cir. 2005)).

[79] *Blue*, 665 F.3d at 669 (internal quotation marks omitted).

Hurst v. Florida.[80] *Hurst* addressed the constitutionality of Florida's capital punishment scheme in which the jury rendered an advisory verdict on sentencing, and then, considering this advice, a judge made the critical factual findings necessary to impose the death penalty.[81] The Court held that this procedure violated the Sixth Amendment, which requires that a jury—not a judge—make all findings that increase a defendant's punishment.[82] As the district court noted, the *Hurst* Court's holding does not bear on the Texas procedure, in which a jury reaches findings regarding whether to reduce a sentence from death.[83] We deny a COA on this claim.

F.

Sixth, Thompson seeks a COA arguing the trial court's denial of his motion for a continuance before the start of the retrial on punishment violated his right to due process. The state habeas court found no error in the denials of Thompson's motions for continuance in connection with his retrial on punishment. It also rejected Thompson's premise that he was prejudiced by the lack of preparation time, and that his trial counsel failed to develop an adequate mitigation case as a result. The district court observed that "trial judges enjoy 'a great deal of latitude in scheduling trials[']and 'only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay' poses constitutional concern." Additionally, it agreed that Thompson had not shown that the denials of continuance resulted

[80] 136 S. Ct. 616 (2016).

[81] *Id*. at 620.

[82] *Id*. at 621–22.

[83] *See also Davila v. Davis*, 650 F. App'x 860, 873 (5th Cir. 2016) (unpublished), *aff'd*, 137 S. Ct. 2058 (2017) (addressing the same argument and concluding "[o]ur precedent precludes this claim. Reasonable jurists would not debate the district court's resolution, even after *Hurst*." (internal citation omitted)).

in prejudice: he could not cite specific evidence that "remained unpresented," nor demonstrate that trial counsel was in fact unprepared. The district court held it was not unreasonable for the state habeas court to conclude that there was no constitutional violation in the denials of continuance.

On remand for a retrial on punishment, the state trial court appointed Thompson's previous trial counsel, Ellis McCullough, as first chair, and in January 2005 appointed Terrence Gaiser second chair. In June, Thompson moved pro se to remove McCullough as appointed counsel; the trial court granted this motion on September 15, 2005. In that interval, Gaiser was active in Thompson's representation, including development of a mitigation case for the upcoming retrial on punishment. That retrial commenced on October 24, 2005. Thompson argues that Gaiser required more time to prepare because of the transition; he argues Gaiser discovered new information—new evidence pertaining to Thompson's treatments, closed head injuries, and documentation of substance abuse. Also, Gaiser had newly discovered a potential *Brady* violation in the State's plans to call Rhodes to testify. Without a continuance, he argues, Gaiser was unable adequately to prepare for the retrial in light of time lost after Hurricane Katrina.

Gaiser represented Thompson for almost ten months before the retrial, during which time he investigated and developed a mitigation case for his client. Thompson provides only conclusory assertions—no specific examples—in response to the state habeas court's question regarding specific evidence that went unpresented or specific instances in which Gaiser was in fact unprepared during the retrial. While Thompson is correct that denial of a continuance can violate a defendant's constitutional rights, the district court found the state habeas court was not unreasonable to conclude there was no violation in Thompson's case. We agree jurists of reason could not debate the

district court's determination, and that this claim does not deserve encouragement to proceed further. We deny a COA on this claim.

III.

We GRANT a COA as to whether Thompson has established a *Brady* violation in the State's non-disclosure of a past relationship with Rhodes, sufficient to overcome the procedural default of Thompson's second claim; and, if so, whether Thompson is entitled to habeas relief on the grounds of the *Brady* violation or a *Massiah* violation in the introduction of Rhodes's testimony during the retrial on punishment. We otherwise DENY Thompson's application for COAs on all other claims and AFFIRM the district court's denial of an evidentiary hearing.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 18, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 17-70008 Charles Thompson v. Lorie Davis, Director
USDC No. 4:13-CV-1900

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Enclosure(s)

Mr. Seth Kretzer
Mr. Jonathan David Landers
Mr. George A. d'Hemecourt

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES VICTOR THOMPSON,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-13-1900
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

The Court **DISMISSES** Charles Victor Thompson's challenge to Texas's lethal-injection protocol **WITHOUT PREJUDICE**. The Court otherwise **DENIES** Thompson's petition and **DISMISSES** the remainder of Thompson's claims **WITH PREJUDICE**. No certificate of appealability will issue.

The Clerk will provide copies of this Order to the parties.

Signed at Houston, Texas on March 23, 2017.

Gray H. Miller
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES VICTOR THOMPSON,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. H-13-1900
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Charles Victor Thompson ("Thompson"), an inmate on Texas's death row, has filed a federal petition for a writ of habeas corpus. Respondent Lorie Davis ("Respondent") has answered. After considering the record, the pleadings, and the applicable law, the Court finds that Thompson has not shown an entitlement to habeas relief.

I. BACKGROUND

Thompson started dating Dennise Hayslip, who was twelve years his senior, around June of 1997. Thompson soon moved in with her. Thompson rarely worked, but relied on Hayslip and another roommate for support. Thompson became increasingly jealous, possessive, angry, and abusive. Thompson eventually moved out.

Hayslip began dating Darren Cain, but still occasionally saw Thompson. On April 30, 1998, Thompson was at Hayslip's apartment when Cain called at around 2:30 a.m. Thompson told Cain "to come over there and he would beat his ass." RR1 Vol. 11 at 76.[1] When Cain arrived, Thompson

[1] The state court records consist of the Clerk's Record from the initial trial that contains pretrial motions, trial court orders, jury instructions, and other pleadings, cited as "CR at __"; a Reporter's Record, including hearings on pretrial motions, jury voir dire, the guilt/innocence phase, and the penalty phase, cited as "RR1 Vol. __ at __"; and a transcript of the state habeas proceedings, cited as "State Habeas Record at __." On direct appeal, the Texas Court of Criminal Appeals reversed Thompson's sentence. The Court will cite the Clerk's Record from the second punishment proceedings as CR2 at _____, and the Reporter's Record as RR2 Vol. __ at __.

answered the door with a stick. A fight ensued. Thompson lost the fight.

Cain and Hayslip exited the apartment. Thompson walked out also, yelling, cussing, and calling Hayslip a "whore." RR1 Vol. 11 at 53. As Cain told Thomson to "chill," Thompson responded: "do you want to die, mother fucker?" RR1 Vol. 11 at 54.

By that time, the police had been called. The responding officer encountered Thompson, Hayslip, and Cain standing outside. Thompson's eye was blackened from the fight he had started. Because no one wanted to press criminal charges, a police officer allowed Thompson to leave after threatening him with criminal trespass should he return. After the responding officer escorted him from the premises, Thompson went to get a gun.

Thompson later described to a friend, Diane Zernia, how he returned to Hayslip's apartment and shot both Hayslip and Cain. Thompson kicked down the door to Hayslip's apartment and encountered Cain inside. As Cain grabbed the end of the gun, Thompson began firing. Thompson shot Cain four times, and two bullets missed. After Cain fell to the ground, Thompson reloaded the gun, put it up to Hayslip's cheek, and said, "I can shoot you too, bitch." RR1 Vol. 11 at 132. The gun fired. The bullet traveled through Hayslip's cheek, into her tongue, and out the other side. Thompson later claimed that he also tried to shoot himself, causing a wound on his arm.

Neighbors heard the gunshots. Shortly thereafter, Hayslip began knocking on neighbors' doors. A neighbor found her sitting on the ground, gasping for breath as she leaned forward to prevent drowning in her own blood. When emergency responders arrived, they found Cain dead. Hayslip was bleeding profusely. Responders took her by life flight to a hospital where she later died.

Leaving the apartment, Thompson threw his gun in a nearby creek. Thompson then went to Zernia's house and fell asleep on a couch. When he woke up, he described the murders to Zernia.

Thompson then called his father, who picked him up and took him to the police station.

The State of Texas charged Thompson with capital murder for intentionally or knowingly causing the death of more than one person in the same criminal transaction. *See* TEX. PENAL CODE ANN. § 19.03(a)(7). Specifically, the indictment required the prosecution to prove that Thompson "unlawfully, during the same criminal transaction, intentionally and knowingly caused the death of" Cain by "shooting [him] with a deadly weapon" and also "intentionally and knowingly caused the death" of Hayslip by "shooting [her] with a deadly weapon . . . ." CR at 51; RR1 Vol. 11 at 4-5. Thompson stood trial in 1999.[2] The prosecution presented testimony and evidence showing that Thompson shot both Cain and Hayslip. The prosecution particularly emphasized Thompson's confession to Zernia that he shot both victims. The main defensive argument at the guilt/innocence phase was that medical malpractice, not the gunshot through Hayslip's mouth, was the primary cause of her death. The jury convicted Thompson of capital murder. He was sentenced to death.

On direct appeal, Thompson raised issues relating to both the guilt/innocence and punishment phases of trial. In 2001, the Court of Criminal Appeals found that the State violated Thompson's rights by relying in the punishment phase on the tape recording of an undercover police officer's jailhouse conversation with him. The Court of Criminal Appeals remanded for a new sentencing hearing. *Thompson v. State*, 93 S.W.3d 16 (Tex. Crim. App. 2001).

The trial court held a new sentencing hearing in 2005.[3] A Texas jury decides a capital

---

[2] Ellis McCullough and Bettina J. Richardson represented Thompson in his original trial proceedings. The Court will refer to Thompson's trial attorneys collectively as "trial counsel."

[3] The trial court appointed Thompson's original trial attorney, Ellis McCullough, to represent him as first chair at retrial. Terrence Gaiser was originally appointed second-chair counsel. On Thompson's *pro se* motion, the trial court later removed McCullough and elevated Gaiser to first chair. Kyle Johnson served as second-chair counsel at retrial. Unless necessary to identify one attorney, or to distinguish the attorneys who served at the second punishment phase from those in his original trial, the Court will generally refer to all trial attorneys as "trial counsel."

defendant's sentence by answering two special-issue questions: (1) will the defendant be a future danger to society and (2) do sufficient circumstances mitigate against a death sentence? *See* TEX. PENAL CODE art. 37.071 § 2(b). In addition to the evidence underlying Thompson's conviction, the Court of Criminal Appeals summarized the State's evidence for a death sentence as follows:

> A few hours after committing the murders, [Thompson] went to the home of Diane Zernia and confessed to her. After calling his father, [Thompson] surrendered to authorities. [Thompson] later phoned Zernia from jail and tried to persuade her to lie about what he had told her, but she refused. [Thompson] also attempted, from prison, to solicit someone to kill Zernia and was later indicted for solicitation to commit capital murder. The State also presented evidence that [Thompson] was associated with the Aryan Brotherhood gang in prison. A fellow jail inmate testified that [Thompson] gave him a list of people who [Thompson] believed were potential witnesses and told the inmate that he would pay him to "eliminate" the witnesses or otherwise make sure that they would not appear in court. The inmate turned the list over to the police.
>
> The State also presented evidence that [Thompson] began committing crimes as a juvenile. In 1984, while living with his parents in an upper-middle-class neighborhood in Colorado, [Thompson] committed a string of crimes that resulted in over $60,000 of damage to homes and property. While on probation from the youth center, [Thompson] stole his father's motorcycle, ran away, and committed a variety of crimes. He was arrested again in 1987 and sentenced to a juvenile facility. [Thompson] had problems with drugs and alcohol from an early age. He married, but later abandoned his wife and two children. In 1996, [Thompson] was arrested for transporting illegal immigrants from Mexico.

Thompson v. State, No. AP-73,431, 2007 WL 3208755, at *1-2 (Tex. Crim. App. Oct. 31, 2007). The jury again answered Texas's special-issue questions in a manner requiring imposition of a death sentence. The Court of Criminal Appeals affirmed Thompson's sentence in a second direct appeal in 2007. *Thompson v. State*, No. AP-73,431, 2007 WL 3208755 (Tex. Crim. App. Oct. 31, 2007).

Thompson filed two state applications for a writ of habeas corpus. Thompson filed a state habeas application during the pendency of his first direct appeal. Thompson filed a second state habeas application after receiving his second death sentence. In 2013, the trial-level state habeas

court entered findings of fact and conclusions of law recommending that the Court of Criminal Appeals deny both habeas applications. On April 17, 2013, the Court of Criminal Appeals adopted the lower court's recommendation and also provided additional reasons for denying Thompson's habeas applications. *Ex Parte Thompson*, No. WR-78,135-01, 2013 WL 1655676 (Tex. Crim. App. Apr. 17, 2013).

Federal review followed. Thompson filed an initial federal petition raising unexhausted issues. Dkt. 21. On Thompson's motion, the Court stayed the instant proceedings to allow state court review of Thompson's unexhausted claims. Texas only allows successive state habeas proceedings in narrowly defined circumstances. *See* TEX. CODE CRIM. PRO. art. 11.071 § 5. On March 9, 2016, the Court of Criminal Appeals found that Thompson's successive habeas application did not meet the statutory criteria and dismissed that action as an abuse of the writ. *Ex parte Thompson*, No. WR-78,135-03, 2016 WL 922131, at *1 (Tex. Crim. App. Mar. 9, 2016).

Thompson filed an amended federal habeas petition raising the following grounds for relief:

1. Insufficient evidence supports Thompson's capital-murder conviction because intervening medical care was the direct cause of Dennise Hayslip's death.

2. The prosecution violated Thompson's right to counsel by using a state agent to secure incriminating statements from Thompson while he was incarcerated before trial.

3. The State's punishment-phase case relied on incriminating statements secured by a career informant.

4. The indictment unconstitutionally omitted any facts pertaining to the Texas's special-issue questions.

5. The State adduced impermissible victim-impact evidence in violation of Thompson's constitutional right to be free from cruel and unusual punishment.

6. Texas's use of lethal injection to effectuate a death sentence does not comply with Eighth Amendment standards.

7. Texas's post-conviction procedure does not afford due process.

8. Texas's statute defining concurrent causation is unconstitutional.

9. Thompson's attorneys provided ineffective assistance in both phases of trial.

10. The trial court violated Thompson's rights by denying the request for a continuance before the second punishment phase.

11. The State violated the Eighth Amendment by presenting evidence at the second penalty phase of Thompson's youthful misconduct.

12. The Constitution requires that jurors consider the mitigation special issue under a beyond-a-reasonable-doubt standard.

13. The mitigation special issue unconstitutionally sends mixed signals to jurors.

14. The State's testimony and evidence relating to the autopsies of the victims violated Thompson's due process rights, his right to confront the witnesses against him, and right to counsel.

Dkt. 57.[4] Thompson has also filed a motion for an evidentiary hearing. Dkt. 56. Respondent has filed an answer arguing that substantive and procedural law limits federal review and forecloses habeas relief. Dkt. 66. Thompson has filed a reply. Dkt. 69. This Court has reviewed Thompson's grounds for relief and has determined that an evidentiary hearing is not necessary to a full and fair review of his claims. This matter is ripe for adjudication.

II. STANDARD OF REVIEW

Federal habeas review is secondary to the state court process and is limited in scope. The States "possess primary authority for defining and enforcing criminal law. In criminal trials they also

[4] Thompson's original federal petition contained claims that he waived in his amended habeas petition. Dkt. 57 at 109-110, 244-45. The Court has renumbered his claims as necessary.

hold the initial responsibility for vindicating constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). How an inmate has litigated his claims in state court determines the course of federal habeas adjudication. Under 28 U.S.C. § 2254(b)(1), "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State[.]" Exhaustion "reflects a policy of federal-state comity designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (internal citations and quotations omitted).

As a corollary to exhaustion, the procedural-bar doctrine requires inmates to litigate their claims in compliance with state procedural law. *See Dretke v. Haley*, 541 U.S. 386, 392 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). When an inmate fails to follow well-established state procedural requirements for attacking his conviction or sentence, and the state court finds that he has procedurally defaulted his claims, federal habeas adjudication is barred. *See Lambrix*, 520 U.S. at 523; *Coleman*, 501 U.S. at 732. A federal court may review an inmate's unexhausted or procedurally barred claims only if he shows: (1) cause and actual prejudice or (2) that "a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent[.]'" *Haley*, 541 U.S. at 393 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

If the inmate has presented his federal constitutional claims to the state courts in a procedurally proper manner, and the state courts have adjudicated the merits, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") allows federal review but limits its depth. "[A] habeas petitioner has the burden under AEDPA to prove that he is entitled to relief." *Montoya v. Johnson*,

226 F.3d 399, 404 (5th Cir. 2000); *see also DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002). A petitioner cannot meet this burden by merely alleging constitutional error. Instead, "focus[ing] on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), an inmate must show that the state court's adjudication of the alleged constitutional error "was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (quoting 28 U.S.C. § 2254(d)(1)); *see also Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Bell v. Cone*, 535 U.S. 685, 698 (2002); *Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the inmate "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003); *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) ("As a federal habeas court, we are bound by the state habeas court's factual findings, both implicit and explicit.").

A petitioner's compliance with 28 U.S.C. § 2254 does not alone create an entitlement to habeas relief. No Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]" *Horn v. Banks*, 536 U.S. 266, 272 (2002); *see also Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). Other judicial doctrines, such as the harmless-error doctrine and the non-retroactivity principle, bridle federal habeas relief. *See Thacker v. Dretke*, 396 F.3d 607, 612 n.2 (5th Cir. 2005). Any trial error cannot require habeas relief unless it "ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629

(1993)); *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome."). Also, under the jurisprudence flowing from *Teague v. Lane*, 489 U.S. 288 (1989), a habeas court cannot grant relief if it would require the creation and retroactive application of new constitutional law. *See Horn*, 536 U.S. at 272.

III. ANALYSIS

A. Sufficiency of the Evidence

The State of Texas indicted Thompson for causing the death of both Cain and Hayslip. CR at 51; RR1 Vol. 11 at 4-5. Thompson complains that insufficient evidence supports his capital-murder conviction because intervening medical care was the direct cause of Hayslip's death. As previously discussed, when Thompson shot Hayslip in the cheek, the bullet traveled through her mouth and nearly severed her tongue. The wound left Hayslip bleeding profusely. Her tongue swelled up and threatened to close off her throat. Responders tried to keep her airway free. Life Flight transported Hayslip to a major trauma center. At one point in surgery Hayslip became unable to breathe, resulting in brain death. She died sometime later in the hospital.

Thompson argues that incompetent medical care intervened in the chain of causation and resulted in her death. Thompson argues: "The death of Ms. Hayslip was the sole result of her loss of oxygen to the brain, which in turn caused her family to terminate her life one week after she was shot. This event was produced by the physicians' respective inability to properly provide competent medical assistance by way of a commonly performed hospital procedure." Dkt. 57 at 52. Because the indictment required the State to prove that he was the agent of both victims' death, Thompson

contends that medical malpractice rendered his own actions insufficient to support a capital conviction.

Insufficiency-of-the-evidence claims come before a federal habeas court under a standard of review that gives heavy deference to state-court adjudications. Under *Jackson v. Virginia*, 443 U.S. 307 (1979), a reviewing court affirms a jury's conviction if, considering all of the evidence in a light most favorable to the prosecution, a rational trier of fact could have returned a verdict unfavorable to the defendant. This demanding inquiry is highly deferential to, and resolves any conflicting evidence in favor of, the jury's verdict. *See United States v. Harris*, 293 F.3d 863, 869 (5th Cir. 2002); *United States v. Duncan*, 919 F.2d 981, 990 (5th Cir. 1990). AEDPA augments the deferential *Jackson* analysis, creating an enhanced barrier to federal habeas relief. *See Coleman v. Jackson*, 132 S. Ct. 2060, 2062 (2012); *Perez v. Cain*, 529 F.3d 588, 599 (5th Cir. 2008). Together, *Jackson* and the AEDPA create a "double dose of deference that can rarely be surmounted." *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011). A federal habeas court focuses only on whether the state court reasonably applied the *Jackson* standard.

After reviewing the trial evidence, the Court of Criminal Appeals determined that the evidence sufficiently proved that Thompson's actions caused Hayslip's death. Texas law on causation framed the Court of Criminal Appeals's review of Thompson's insufficiency-of-the-evidence claim. Texas Penal Code § 6.04(a) provides: "A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient." "An accused may be exonerated under [§6.04] only if his conduct alone was clearly insufficient to produce the result and the concurrent cause clearly

sufficient, operating alone, to do so." *Felder v. State*, 848 S.W.2d 85, 90 (Tex. Crim. App. 1992) (quotation omitted). The Court of Criminal Appeals found:

> The shot to Hayslip's face went through her cheek and nearly severed her tongue. According to the State's medical evidence, because the tongue is especially "well vascularized" (contains more blood per gram of tissue than other parts of the body), Hayslip was at risk of bleeding to death or of bleeding down into her lungs which also could have resulted in death similar to drowning. The doctor in charge of Hayslip's care further testified that, without any medical attention, the swelling of Hayslip's tongue could have eventually obstructed her airway entirely, resulting in suffocation. He stated that without medical intervention, Hayslip would not have survived her injuries. [Thompson's] medical expert agreed that the injury to Hayslip's tongue was life threatening and also agreed that Hayslip "probably" would have died without medical intervention.

Thompson, 93 S.W.3d at 20-21. Thompson raises two primary criticisms of the Court of Criminal Appeals's ruling. Dkt. 57 at 44. First, Thompson faults the state court for relying on a false premise by looking at whether the victim "would not have survived her injuries" if she went "without medical attention." Dkt. 57 at 44.

Thompson contends that "there was no chance that Hayslip would go without medical attention." Dkt. 57 at 44. Testimony from medical experts laid out the risks caused by Hayslip's bleeding and diminished breathing ability.[5] The Court of Criminal Appeals has interpreted Texas law to include asking whether the initial injury would have been fatal without medical attention. Thompson has not pointed to any law definitely disallowing the state court to factor into its causation review the question of what would have happened to the victim without medical care. *See Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) (rejecting the argument that a defendant lacked a specific intent to kill because the victim did not seek medical attention). This Court must

[5] Thompson relies on evidence developed after trial to support his argument that Hayslip would have survived her wounds had she been administered adequate medical care. This Court's analysis under *Jackson*, however, focuses on "the record evidence adduced at the trial," not that developed afterward. *Jackson*, 443 U.S. at 324.

defer to a state court's interpretation of its own law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). Trial testimony sufficiently established that Thompson inflicted a life-threatening injury, one which required urgent medical attention in order to preserve Hayslip's life. "Thus, viewing the evidence in the light most favorable to the verdict, even assuming, *arguendo*, that the conduct of the doctors was 'clearly sufficient' to cause Hayslip's death, the conduct of [Thompson] was not 'clearly insufficient' so as to absolve him of criminal responsibility under § 6.04." *Thompson,* 93 S.W.3d at 20-21.

Thompson's second criticism is that the state court incorrectly characterized his expert's trial testimony. The Court of Criminal Appeals described defense witness Dr. Pat Radalat's testimony as "agree[ing] that the injury to Hayslip's tongue was life threatening and also agree[ing] that Hayslip 'probably' would have died without medical intervention." *Thompson*, 93 S.W.3d at 21. Even though Thompson disputes the Court of Criminal Appeals's interpretation of the defensive testimony, Dr. Radalat testified that, without medical intervention, the wound "would probably be fatal." RR1 Vol. 12 at 232. Thompson's own expert would not testify that the medical efforts to save Hayslip's life caused her death. RR1 Vol. 12 at 256.

Viewing the trial evidence and testimony in a light most favorable to the jury's verdict, the Court of Criminal Appeals could reasonably find that a rational jury could convict Thompson. Thompson shot the victim in the mouth, causing a wound that nearly severed her tongue. The wound was serious and threatened her ability to breathe. Care had to be taken so that Hayslip would not drown in her own blood. Tr. Vol. 15 at 84. Surgical efforts to save the victim failed. Whether

medical errors played some part in her death is not a question before this Court. This Court's sole inquiry is whether the state court unreasonably found that, construing the evidence in favor of the jury's verdict, sufficient evidence existed to support Thompson's conviction. The doubly deferential nature of federal review precludes habeas relief on this claim.

B. Use of Information Derived from a State Actor at the Guilt/innocence Phase

The Court of Criminal Appeals ordered a new sentencing hearing after finding that the State had unconstitutionally admitted into evidence a recording of Thompson's jailhouse conversation with undercover police officer Gary Johnson. In Thompson's first appellate proceeding, the Court of Criminal Appeals provided the following background:

> Deputy Max Cox of the Harris County Sheriff's Department testified at punishment that he was approached by an inmate, Jack Reid, who told him that [Thompson] was attempting to solicit the murder of Diane Zernia, who was slated to be a witness in his capital murder case. Reid shared a cell with [Thompson]. Reid told Cox that [Thompson] had already arranged for the murder by another inmate, Max Humphrey, who had also shared a cell with [Thompson] and had recently been discharged, but was looking for someone to retrieve a gun and give it to Humphrey in order for him to carry out the murder.[6] Cox told Reid that if he was approached by [Thompson] again, he should tell him that he knew someone who could retrieve the gun for him. Reid called Cox the next day and indicated that he had complied with Cox's instructions. Cox then arranged for Gary Johnson, an investigator with the Harris County District Attorney's Office, to meet with [Thompson] in an undercover capacity to discuss the retrieval of the weapon and record their conversation. Johnson was to assume the identity of Reid's friend, who had supposedly been contacted by Reid about retrieval of the gun. Cox further testified that he gave Johnson a map that presumably identified where the gun could be located.[7] Johnson testified that he had been contacted by Cox and had agreed to assume an undercover identity for the purpose of meeting with [Thompson] to discuss retrieving a weapon to be used in a murder that had possibly already been arranged. Johnson testified that he was wired for recording throughout their meeting.

---

[6] The gun [Thompson] wanted retrieved was later discovered to be the murder weapon used in the instant case.

[7] Cox testified that he received the map from the officer who did the initial interview (presumably of the informant). However, it is not clear where this officer obtained the map.

> He further testified that [Thompson] brought a hand-drawn map to the meeting, similar to the one Cox had given him, and held it up to the glass for him to see. At that point during Johnson's testimony, the State offered the tape into evidence.
>
> [Thompson] was given permission to question Johnson on voir dire. Johnson admitted to having been aware that [Thompson] was represented by counsel on the capital murder charge at the time of their meeting. He conceded that he had not notified counsel of their meeting, had not informed [Thompson] that he was an officer of the State, and had not given [Thompson] any warnings. *See* TEX. CODE CRIM. PROC. art. 38.22; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). [Thompson] objected and sought suppression of the tape on the ground that he had been denied counsel during the meeting with Johnson. The trial court overruled the objection and admitted the tape into evidence. The tape was played for the jury.
>
> During their tape-recorded meeting [Thompson] and Johnson briefly discussed retrieval of the gun. Then, [Thompson] told Johnson that there was a witness in his case that he wanted "taken care of." [Thompson] stated that he had already paid Humphrey to kill the witness, but Humphrey had not gone through with the job. [Thompson] gave Johnson the witness' address, and described the witness as a mother with a fourteen year old daughter and a husband. He described her car, and informed him that she was usually home in the mornings after her daughter went to school. He described her house as Victorian and her mailbox as black and white spotted, like a cow. [Thompson] promised that when he got out of jail, he would pay Johnson $1,500 for killing the witness. After the tape was played for the jury, Johnson testified further, without objection, that [Thompson] had brought the map with him to the meeting, and that it had an address written on it. Johnson stated that [Thompson] had held it up to the glass for Johnson to read.

Thompson, 93 S.W.3d 1at 22-23 (footnotes in original).

Thompson argued that the State violated his Sixth Amendment rights by using "against him at his trial evidence from his own incriminating words, which [state] agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206 (1964). A *Massiah* violation has three elements: "(1) the Sixth Amendment right to counsel has attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel's being present; and (3) that agent deliberately elicits incriminating statements from the defendant." *Henderson v. Quarterman*, 460 F.3d 654, 664 (5th

Cir. 2006) (quotation omitted). The Court of Criminal Appeals found that the punishment-phase introduction of the tape-recorded conversation between Thompson and Johnson was improper:

> The State elicited information from [Thompson] regarding the solicitation of the murder of a person who was to be a witness against [him]. The information was elicited by an agent of the State, without notifying [Thompson's] counsel, and was then used at [his] capital murder trial to help the State establish that [he] posed a continuing threat to society. The State knew the capital murder charges were pending against [Thompson] at the time, and that any evidence incriminating [him] in another offense would probably be used against him in the capital punishment phase. We hold [Thompson's] Sixth Amendment right to counsel was violated by the State's actions in soliciting the tape recorded conversation between [Thompson] and Johnson and using it against [him] in the punishment phase of his capital murder trial, the charges of which were pending at the time of the conversation. The trial court should have granted [Thompson's] motion to suppress the tape.

Thompson, 93 S.W.3d at 27 (citation omitted). On that basis, the Court of Criminal Appeals overturned Thompson's death sentence.

Thompson argues that the Court of Criminal Appeals did not ameliorate all the harm caused by the State's use of an undercover agent. Thompson's federal petition contends that, because the information Johnson obtained from him led to evidence the State presented in the guilt/innocence phase, the Court of Criminal Appeals should have overturned not just his first death sentence, but his capital conviction also. Thompson particularly objects because the discovery of the murder weapon revealed how many bullets it would hold, which in turn allowed the State to argue that Thompson reloaded the weapon during the criminal episode.

Thompson's arguments that a *Massiah* violation harmed him the guilt/innocence phase depend on his claim that "the gun was only found based on the information uncovered by Johnson." Dkt. 57 at 60. Before Johnson met with Thompson, the police obtained a map of where Thompson

had discarded the gun.[8] Johnson testified that Cox had received the map "through an informant in the Harris County Jail," presumably Reid. RR1 Vol. 14 at 156. Thompson argues that, "because authorities were not able to recover the gun based on the map alone," the police sent "Johnson in to speak with Thompson with the goal of recovering the weapon." Dkt. 57 at 55. Cox testified that he gave the map to Johnson so he "would have knowledge in talking with the defendant when the defendant was wanting him to go recover the weapon." RR1 Vol. 14 at 125.

Johnson met with Thompson on July 7, 1998. Johnson intended to talk to Thompson about "the retrieval of the gun" and "the solicitation" to kill witnesses. RR1 Vol. 14 at 171. After Johnson lied and said he had personally searched for, but could not find, the gun, Thompson showed a map that was nearly identical to the first one. RR1 Vol. 14 at 165. The police, however, apparently never took the second map from Thompson. RR1 Vol. 14 at 165-66, 175. The record does not elaborate on any information outside of the map that Thompson may have provided about the gun's location.

The police recovered the murder weapon almost two weeks later.[9] Johnson testified that he did not think that the police used the information from his conversation with Thompson to find the gun. RR1 Vol. 14 at 175. Johnson thought that the recovery of the gun "would have been from a map they had prior to" his involvement in the case. RR1 Vol. 14 at 176.

Before turning to the merits, the Court must clarify what issues were resolved by the Court of Criminal Appeals on direct appeal. Thompson contends that this Court can adjudicate the merits

---

[8] Deputy Cox did not testify about the origin of the map because trial counsel lodged a hearsay objection to Cox explaining where it came from. RR1 Vol. 14 at 124-25. Cox, however, told Johnson to represent that he had received the map from Reid. RR1 Vol. 14 at 126.

[9] One of the investigating police officers testified that he received the recovered gun from Officer Gregory Pinkins on July 23, 1998. RR1 Vol. 11 at 32-33. Officer Pinkins, who had been investigating the murders, testified that "with the help of an informant" they found the gun in a bayou. RR1 Vol. 11 at 154. Officer Pinkins did not say when the police found the weapon other than it was "[a]pproximately four or five days" before he gave it to the other officer.

of his claim *de novo* because the Court of Criminal Appeals never ruled on his argument that a *Massiah* violation tainted the guilt/innocence phase. Respondent argues that either (1) Thompson never made clear to the state courts that the Johnson conversation influenced the guilt/innocence phase, thus rendering the claim in his federal petition unexhausted or (2) the Court of Criminal Appeals adjudicated the whole of his claim on the merits, requiring the application of AEDPA deference.

1. Litigation of this Claim in State Court

Respondent primarily argues that Thompson exhausted his *Massiah* claim on direct appeal, but in the alternative asserts that Thompson did not adequately place the issue before the state courts. Thompson never asked the trial court to find that the gun was inadmissible. The Court must decide whether his arguments on appeal sufficiently put the guilt/innocence aspects of his claim before the Court of Criminal Appeals.

Under 28 U.S.C. § 2254(b)(1), a federal habeas petitioner must fully exhaust remedies available in state court before proceeding to federal court. A federal court may only adjudicate a claim when the petitioner fairly presents its substance to the state courts. *See Smith v. Dretke*, 134 F. App'x 674, 677 (5th Cir. 2005). Then, AEDPA deference applies if the state court adjudicated the merits of the inmate's claim. Before turning to the merits, the Court must ask: Did Thompson sufficiently raise his federal claim in state court for the purposes of exhaustion? If so, did the state courts rule on his claim *sub silentio* or did they ignore it? If the state courts ruled on his claim, does AEDPA govern federal review?

Thompson's appellate brief first introduced his theory that a *Massiah* violation tainted both stages of trial: "The undercover interview was intertwined with the recovery of the murder weapon

and the investigation of a solicitation of a homicide. The State of Texas did not make any attempt to delineate between the two events." Appellate Brief, at 28. But Thompson's brief still focused its discussion on the jury's punishment phase deliberations: "The record clearly demonstrates that the Defendant's statements on the tape recording and to Gary Johnson were incriminating both at guilt and punishment and significantly aided the State of Texas in securing an affirmative answer to Special Issue Number 1. It created future dangerousness evidence for the State." Appellate Brief, at 28. A supplemental brief emphasized that "[a]s a direct result of the interview the weapon was recovered by the State," but only generally argued that "the judgment of the Court should be reversed and remanded for a new trial or a new punishment hearing." Supplemental Appellate Brief, at 3.

The Court of Criminal Appeals extensively discussed the effect that the *Massiah* violation had on the punishment phase of trial without mentioning Thompson's allegations relating to the guilt/innocence phase. Thompson subsequently filed a *pro se* motion for rehearing and argued that the *Massiah* violation harmed him "throughout trial," including in the guilt/innocence phase. The Court of Criminal Appeals initially granted Thompson's motion for rehearing, but subsequently dismissed it as improvidently granted.[10]

On federal review, the question of whether Thompson fairly presented his claims to the Texas courts is separate from the question of whether the Texas courts adjudicated them. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978) ("It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim[.]"). Thompson did

[10] The Court of Criminal Appeals provided only a brief explanation of its action: "We granted [Thompson's] first ground for rehearing in which he maintained we failed to fully consider his fourth point of error on original submission. Upon further consideration, we have concluded our decision to grant rehearing was improvident and we withdraw the order granting rehearing." *Thompson v. State*, 108 S.W.3d 269 (Tex. Crim. App. 2003).

not provide the same detailed briefing regarding the *Massiah* violation as he does in federal court, but still afforded the state courts an opportunity to consider whether the Johnson conversation influenced the guilt/innocence phase. The Court finds that Thompson exhausted his *Massiah* claim.

The record, however, does not clearly indicate whether the Court of Criminal Appeals intended to adjudicate the guilt/innocence portion of the *Massiah* claim, intentionally ignored it, or neglected to rule on it. Generally, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013); *see also Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits [for purposes of § 2254(d)] in the absence of any indication or state-law procedural principles to the contrary."). The "presumption can in some limited circumstances be rebutted . . . either by the habeas petitioner (for the purpose of showing that the claim should be considered by the federal court *de novo*) or by the State (for the purpose of showing that the federal claim should be regarded as procedurally defaulted). . . . Thus, while the . . . presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable." *Williams*, 133 S. Ct. at 1096.

Thompson's *pro se* motion for rehearing argued that the Court of Criminal Appeals did not fully adjudicate his claim. The Court of Criminal Appeals ultimately denied rehearing without divulging whether it had already adjudicated the claim, considered it to be meritless, applied Texas procedural law, or found some other reason for denial. Nevertheless, neither party has rebutted the presumption that the Court of Criminal Appeals decided the issue on the merits. The Court, therefore, presumes that the Court of Criminal Appeals denied the guilt/innocence aspects of his

Massiah claim on the merits. The Court will apply AEDPA's deferential scheme to Thompson's *Massiah* claim.

2. The Merits

The Court of Criminal Appeals decided on direct appeal that the State had committed a *Massiah* violation by sending an undercover agent to speak with Thompson. Because neither party questions whether the Court of Criminal Appeals was correct in finding a constitutional violation, this Court does not revisit that decision and only considers its impact on Thompson's conviction.[11]

Johnson did not testify in the guilt/innocence phase. Instead, Thompson objects to derivative evidence and testimony relating to the murder weapon, which Thompson argues was only discovered after Johnson's conversation with him. Information about the gun came before the jury in various contexts.[12] Thompson argues that "[t]here is no question that [he] was harmed by the admission of the gun in his case, and the gun was only found based on the information uncovered by Gary Johnson in violation of Thompson's Right to Counsel." Dkt. 57 at 60.

Respondent claims that two doctrines overcome the deterrence rationale underlying a *Massiah* violation. The Supreme Court recognizes an "independent source doctrine" that allows trial courts to admit evidence when "officers independently acquired it from a separate, independent source." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); *see also Nix v. Williams*, 467 U.S. 431, 442

---

[11] Subsequent to deciding that a *Massiah* violation occurred in this case, the Court of Criminal Appeals observed that its "holding in *Thompson* may have been called into question by the later Supreme Court decision in *Kansas v. Ventris*, [556 U.S. 586 (2009)]." *Rubalcado v. State*, 424 S.W.3d 560, 572 (Tex. Crim. App. 2014). As the parties have not questioned whether a *Massiah* violation occurred, and Respondent persuasively argues that Thompson has not shown any connection between the Johnson conversation and the gun's recovery, the Court will assume that the State violated the Sixth Amendment by having Johnson speak with Thompson.

[12] Police officers described finding the weapon submerged in Cypress Creek, RR1 Vol. 11 at 32-33, 153-57, based on information from an informant, RR1 Vol. 11 at 153-54. A firearms examiner told jurors that, since the gun could only hold six bullets, the shooter would have to reload to discharge the number of fired bullets found at the crime scene. RR1 Vol. 11 at 165-174. In closing arguments, the State emphasized that reloading the weapon showed that the shootings were not an accident, but an intentional effort to kill. RR1 Vol. 13 at 55-57.

(1984). Also, Respondent argues that the inevitable-discovery doctrine, which "asks whether there is a reasonable probability that the evidence in question would have been discovered in the absence of the police misconduct," cured the *Massiah* violation. *United States v. Zavala*, 541 F.3d 562, 579 (5th Cir. 2008); *see also Nix*, 467 U.S. at 443-44 . Respondent argues that "it is clear that the gun was discovered either from a source independent of Johnson or its discovery was inevitable." Dkt. 66 at 40. Respondent's arguments under both the inevitable-discovery and the independent-source doctrine rely on the absence of a link between the Johnson conversation and the gun's recovery.

Thompson has not shown that his conversation with Johnson was the predicate for the police recovering the murder weapon. Thompson assumes that the police recovered the gun "with the help of Johnson's recording," because they found it afterward. Dkt. 57 at 58. Showing that the police found the gun after the Johnson conversation does not mean they found it *because of* the conversation. The record does not extensively discuss the discovery of the murder weapon, likely because trial counsel did not challenge its admissibility. Still, the record does not suggest that the police used information from Johnson to find the gun. Thompson has not pointed to anything in the record showing that he provided Johnson some detail not already known from the first map or his statements to Zernia.[13] A previous informant had already obtained a map showing the location of the murder weapon, which the police had before sending Johnson to speak with Thompson. RR1 Vol. 14 at 124-25. That map indicated the location of the creek in which Thompson discarded the gun. RR1 Vol. 14 at 126. The police used that map in searching for the weapon. RR1 Vol. 14 at 127. Despite having looked before the Johnson conversation, the police did not find the gun until

[13] While Johnson testified that Thompson told him which direction he threw the weapon from his car, the original map indicated where Thompson discarded the gun. *Compare* RR1 Vol. 14 at 173 *with* RR1 Vol. 16, State's Exhibit 88. When Johnson asked for more information, Thompson drew a map. RR1 Vol. 14 at 174. Thompson has not identified any meaningful difference between that map and the initial one, much less any difference that the police used to find the discarded weapon.

nearly two weeks *after* Johnson met with Thompson. Johnson testified that he thought the police used the first map to find the murder weapon. RR1 Vol. 14 at 176-77. Johnson also provided uncontradicted testimony that the police did not rely on his conversation with Thompson. Tr. Vol. 14 at 174-76.

With that record, Thompson bases his claim on speculation that he provided Johnson some previously unknown fact about the location of the discarded weapon. He also speculates that Johnson provided some otherwise-unknown information to the officers who found the gun. From the record before the Court, it appears that the discovery of the gun was "wholly independent of any constitutional violation." *Nix*, 467 U.S. at 442. Thompson, therefore, has not shown that the Court of Criminal Appeals was unreasonable in denying the guilt/innocence aspects of his *Massiah* claim.[14] The Court, therefore, will deny relief.

C. Testimony from an Informant in the Second Punishment Hearing

In his third ground for relief, Thompson claims that the State violated his constitutional rights by presenting testimony in the second punishment phase from fellow inmate Robin Rhodes. As previously discussed, undercover police officer Johnson testified in the first penalty hearing that Thompson had attempted to solicit the murder of witnesses. Johnson, however, was not the only

---

[14] The Court's analysis would be the same whether under AEDPA or *de novo* review. Even if Thompson had shown constitutional error, he must still prove that any improper influence resulting from the Johnson conversation had some impact in the guilt/innocence phase. The Supreme Court has held that a *Massiah* violation can be harmless. *See Milton v. Wainwright*, 407 U.S. 371 (1972). Under *Brecht v. Abrahamson*, a federal court may grant habeas relief based on trial error only when that error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 637 (1993) (quotation omitted). Here, testimony and evidence relating to the murder weapon had a negligible influence on the jury's decision. No question existed as to Thompson's role as the killer. The defense at trial focused on causation, not ballistics evidence. To the extent that the prosecution drew inferences from the weapon, such as that Thompson reloaded before shooting Hayslip, that information bore little relationship to his decision to pull the trigger. In fact, the most conclusive indication of his intent was his declaration "I can shoot you too, bitch" as he fired into Hayslip's face. RR1 Vol. 11 at 132. In short, Thompson has not shown that any *Massiah* violation harmed him in the guilt/innocence phase.

person who could describe Thompson's efforts to solicit murder. Prior to Thompson's original trial, the Harris County District Attorney's office gave Thompson the following notice: "In August, 1998 the defendant solicited inmate Robin Rhodes to kill numerous witnesses and obtain and destroy the murder weapon in this case." CR at 67-68. Rhodes, however, did not testify at the original trial.

Because the Court of Criminal Appeals found that Johnson's testimony should have been excluded, *Thompson*, 93 S.W.3d at 22-29, the State called other witnesses to show that Thompson tried to solicit murder, including Rhodes who had been incarcerated with Thompson in 1998. Thompson contends: "it is clear that (1) his right to counsel had attached in both the capital murder and the subsequently filed solicitation of capital murder proceedings; (2) Robin Rhodes was a government agent (full time informant for Harris County law enforcement); (3) and that Rhodes deliberately elicited evidence from Thompson." Dkt. 57 at 62. Thompson, in fact, now calls Rhodes not only an informant, but a "government employee." Dkt. 69 at 27.

Based on that premise, Thompson raises three separate constitutional arguments. First, Thompson argues that Rhodes's testimony amounted to a separate *Massiah* violation.[15] Second, Thompson asserts that the State of Texas disregarded its duty under *Brady v. Maryland*, 373 U.S. 83 (1963) to disclose information about its relationship with Rhodes.[16] Finally, Thompson maintains that his trial, appellate, and state habeas attorneys provided ineffective representation in their

---

[15] Again, "[a] *Massiah* violation has three elements: (1) the Sixth Amendment right to counsel has attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel being present; and (3) that agent 'deliberately elicit[s]' incriminating statements from the defendant." *Henderson*, 460 F.3d at 664 (alteration in original) (quoting *Massiah*, 377 U.S. at 206).

[16] "A *Brady* claim involves three elements; (1) the prosecution's suppression or withholding of evidence, (2) which evidence is favorable, and (3) material to the defense." *United States v. Stephens*, 964 F.2d 424, 435 (5th Cir. 1992). Also, "*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Reed v. Stephens*, 739 F.3d 753, 788 (5th Cir. 2014).

handling of Rhodes's testimony.[17] Respondent contends that each argument is procedurally barred and, alternatively, without merit.

1. Procedural Bar

Thompson failed to raise any arguments from claim three in his first two state habeas applications. When Thompson raised these claims in his third state habeas application, the Court of Criminal Appeals dismissed the claims under TEX. CODE CRIM. PRO. art. 11.071 §5 as an abuse of the writ without considering the merits. "A dismissal pursuant to Article 11.071 'is an independent and adequate state ground for the purpose of imposing a procedural bar' in a subsequent federal habeas proceeding." *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008)).[18]

Thompson makes two arguments to overcome the procedural bar. First, Thompson contends that the suppression of evidence, discussed in the *Brady* portion of his argument, should forgive his failure to raise the claim properly in state court. Second, Thompson argues that state habeas counsel provided ineffective representation under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), by not raising his federal claims in the initial rounds of state habeas review. Both arguments, however, cover the same ground as his substantive claims. For the same reasons that Thompson has not shown constitutional error in the State's use of Rhodes's testimony, he has not shown cause or actual prejudice to overcome the procedural bar.

---

[17] Despite some differences in application, whether an inmate complains about the representation provided by his trial, appellate, or habeas counsel he still must show deficient performance and resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

[18] Thompson argues that the Court of Criminal Appeals's dismissal amounts to a decision on the merits under *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007). *Ruiz*, however, is not applicable in this circumstance. "The Fifth Circuit has held post-*Ruiz* that § 5(a) remains an independent and adequate state ground for the purpose of imposing a procedural bar." *Stroman v. Thaler*, 405 F. App'x 933, 935 (5th Cir. 2010) (citing *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) and *Rocha v. Thaler*, 619 F.3d 387 (5th Cir. 2010)).

2. The Merits

At the core, each of Thompson's various constitutional arguments complains that the State failed to divulge important facts about its relationship with Rhodes. Thompson specifically says that Rhodes "was, by his own admission, a full time informant for Harris County when he elicited information from Thompson." Dkt. 57 at 63. Thompson wishes that the State had disclosed that Rhodes: was employed by the Harris County Organized Crime Narcotics Task Force, which included the Harris County District Attorney's Office; had been a confidential informant in numerous cases and had twice testified for the State, including once in a capital murder prosecution; had received $30,000 for his participation in another capital murder case relating to a narcotics transaction; had previously received other payments for assisting police; had helped secure numerous search warrants; and had acted at the State's direction in extracting statements from Thompson. As discussed below, whether he casts his claims in the context of *Massiah*, *Brady*, or *Strickland* claims, much of the information on which Thompson bases his claim was known to – and used by – trial counsel.

Before the retrial, the State gave notice that it intended to call Rhodes as a witness in the retrial of Thompson's punishment. CR2 at 110.[19] Shortly before retrial, defense counsel moved for a continuance to investigate Rhodes's testimony. The defense argued: "For the first time and literally by accident Counsel on overhearing a conversation learned of Rhodes's participation in a previous capital murder trial. Subsequent investigation leads Counsel to believe that Rhodes may well have been an agent of the State while he was incarcerated with this defendant, if so, his testimony is

[19] The State's notice specified: "On or about August 21, 1998 the defendant prepared a list of witnesses to fellow inmate Robin Rhodes for the purpose of Rhodes to kill or otherwise use physical means to prevent from testifying at trial." CR at 67-68.

clearly inadmissible." CR2 at 210. The defense also argued that "there may be significant impeachment evidence" relating to Rhodes that the State had not disclosed. CR2 at 210. The trial court refused to postpone the trial.

Before testimony began in the second punishment phase, the parties discussed the disclosure of any information relating to Rhodes. RR2 Vol. 16 at 8.[20] The State had already disclosed that it had entered into an agreement with Rhodes. RR2 Vol. 2 at 28-29, 47. During opening argument, the State told jurors that Thompson had developed a hit list of potential witnesses. The prosecutor told jurors that Rhodes "takes that list to the police . . . . He is expecting consideration for the evidence and has received consideration in exchange for his testimony in the case. He has eight hot check cases, Class C misdemeanors that we're going to go ahead and dismiss. He also has a pending Class B misdemeanor, false report case, that we're also going to dismiss in exchange for his testimony." RR2 Vol. 16 at 31-32.

Rhodes testified on the second day of the punishment hearing. Rhodes told jurors that he worked with the Harris County Organized Crime Task Force relating to "pretty much whatever situation he stumbled into." RR2 Vol. 17 at 136. In August 1998, Rhodes struck up a conversation with Thompson in recreation and claimed that he "could find anybody anywhere at any time." RR2 Vol. 17 at 136. Thompson responded that he "wanted some people to not appear [at his trial] or disappear." RR2 Vol. 17 at 138. Rhodes testified:

> From my understanding he had a problem with some people that he wanted to, he said, Just go away. I don't care how it happens. He – found out he had a problem with a female and another man and there was some people that could tie him to it. He figured with my expertise I could make them go away.

---

[20] The prosecutor told the trial court that Rhodes had several criminal issues pending, and that the State agreed to treat him with leniency in return for his honest testimony. RR2 Vol. 2 at 26-29, 47.

RR2 Vol. 17 at 138. "The deal was that [Rhodes] would do what [he] could do" to keep them from coming to court. RR2 Vol. 17 at 138. When Rhodes "asked for some descriptions" of the intended victims, Thompson gave him a list of names. RR2 Vol. 17 at 140-41. Rhodes then contacted an officer with the Harris County Organized Crime Unit and gave him the list. RR2 Vol. 17 at 141. The State admitted the list into evidence without any objection.

Rhodes also testified that Thompson told him about the murders. Thompson explained that "he had gone over to the apartment and he had shot the gentleman and got mad because it didn't kill him and they accidentally got into a struggle and he shot himself and then he shot the guy again." RR2 Vol. 17 at 139. Referring to Hayslip, Thompson said "the bitch wouldn't get up again." RR2 Vol. 17 at 139.

On cross-examination, Rhodes explained that he had helped the government for a long time. RR2 Vol. 17 at 149. He had assisted the Harris County District Attorney's Office as an informant and had been paid "on many occasions." RR2 Vol. 17 at 153. Rhodes described his role: "I was a full-time – basically I was a full-time informant for the Harris County Organized Crime Task Force." RR2 Vol. 17 at 153. Rhodes explained that he had testified in two other trials that he could recall. RR2 Vol. 17 at 154. In one of the trials in which he provided information about a capital murder involving a significant amount of drugs, the State paid him "somewhere in the neighborhood of between 20 and $30,000" from money the government had seized. RR2 Vol. 17 at 159. The defense unsuccessfully moved to strike Rhodes's testimony because the District Attorney's Office violated *Brady* by not divulging that he was in their employ. RR2 Vol. 17 at 163.

Trial counsel's thorough cross-examination of Rhodes demonstrated an intricate understanding of his past interaction with the State.[21] To the extent that trial counsel did not know about some facets of his role as an informant, Thompson concedes that Rhodes's history was discoverable from a published appellate opinion. In *Stephens v. State*, 59 S.W.3d 377, 381-82 (Tex. App.-Houston [1 Dist.] 2001), a Texas appellate court explained that Rhodes had:

> testified before the jury that he was currently employed by the Harris County Organized Crime Narcotics Task Force, which included the Harris County District Attorney's Office, as a confidential informant in over 50 cases, more than 80 percent of which resulted in convictions; that he had twice testified for the State, including once in a capital murder prosecution; and that the State had not doubted him.

Stephens, 59 S.W.3d at 381. Thompson has not shown how the State could have suppressed information in a published judicial decision. *See Parr v. Quarterman*, 472 F.3d 245, 254 (5th Cir. 2006) ("[T]he prosecution is not required to disclose evidence that could be discovered by exercising due diligence.").

The trial record clearly shows that Rhodes had a history of providing information to, and testimony for, the State. Even accepting Thompson's argument that "there is no doubt that [Rhodes's] aim, once in jail, was to get information and relay it to the government," Dkt. 21 at 57,

---

[21] In adjudicating a different claim, the state habeas court recognized that trial counsel effectively cross-examined Rhodes about his prior work as an informant:

> Trial counsel effectively cross-examined Rhodes, impeaching his credibility eliciting testimony regarding his work as an informant for law enforcement, and suggesting that Rhodes' testimony in the instant trial was a product of Rhodes' desire to help himself. Trial counsel elicited testimony that Rhodes had a prior conviction for aggravated robbery that he neglected to mention during his direct examination; that Rhodes had done a lot of work for law enforcement and received pay for that work; that Rhodes was not looking for a way to gain favor with law enforcement authorities when he was in jail with [Thompson] but Rhodes would not overlook it if it was dumped in his lap; that Rhodes was a full-time informant for the Harris County Organized Crime Task Force in 1998 and 1999 and testified in two trials and that Rhodes was paid for his participation in the Benavidez trial even though the record from that trial reflected that Rhodes denied receiving payment.

State Habeas Record at 250.

Thompson's briefing does not show that the State instructed Rhodes to do so. Rhodes characterized himself as a "ful-time" informant, but the record does not show that he was an agent or employee of the State with regard to securing information from Thompson. Instead, the record confirms that Rhodes often provided information to the State in return for monetary gain or leniency. But the question is "whether the challenged statements had been deliberately elicited" and "whether the government had directed or steered the informant toward the defendant." *United States v. York*, 933 F.2d 1343, 1356 (7th Cir. 1991). The core of Thompson's claims depends on showing that Rhodes "was acting *under instructions* as a paid informant for the Government[.]" *United States v. Henry*, 447 U.S. 264, 270 (1980) (emphasis added); *see also Kuhlmann v. Wilson*, 477 U.S. 436, 459 (5th Cir. 1986) ("[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation."). Rhodes explicitly testified, however, that he did not talk with Thompson pursuant to any State-directed instruction or order:

> The State: When you went back in jail did anybody from any law enforcement agency ask you to target Charles Victor Thompson and help us gather evidence against him?
>
> Rhodes: No, not at all.

RR2 Vol. 17 at 134-35. As it now stands, Thompson only speculates that Rhodes "was charged with obtaining information" from him. *Henry*, 447 U.S. at 272 n.10. Even to the extent that Thompson may not have had all possible information about Rhodes, the new information only fills in outlines known at the time of trial, yet still does not suggest that the State encouraged Rhodes to act. Simply, the record before the Court does not suggest that the State deliberately used Rhodes as an agent to

deliberately secure information from Thompson in violation of his constitutional rights.[22]

The transcript alone reveals that the defense understood at least the rudimentary facts of Rhodes's background as a government informant. While Thompson later learned additional information about Rhodes,[23] it only confirms trial testimony showing that Rhodes previously had a close relationship with law enforcement, had provided information used in criminal prosecutions, had testified for the State as an informant, and had received a benefit for his testimony. Jurors had an adequate opportunity to consider that information.[24] The record, however, does not show that the State directed Rhodes to secure information from Thompson. Whether under *Brady*, *Strickland*, or some other standard, Thompson has not shown prejudice or harm.

In conclusion, Thompson has not shown that Rhodes elicited information at the behest of state agencies or with the authority of a state actor. The record does not show that state actors

---

[22] The Court ordered the Respondent to submit prosecutorial notes and other material not previously disclosed for *in camera* review. Dkt. 32, 35. The Court has fully reviewed the whole of the submitted material and has found nothing that would support the allegations Thompson raises in his third ground for relief. With the factual record, Thompson has not shown that an evidentiary hearing or additional factual development is necessary to a full and fair adjudication of his claims.

[23] For instance, Thompson uncovered a contract between Rhodes and the district attorney's office to "cooperate with . . . law enforcement officers in the investigation of narcotics trafficking . . . ." Dkt. 57 at 75. Because this contract ended years before trial, and involved issues completely separate from those in the instant case, such evidence is of little value in deciding whether a *Massiah* violation occurred. Thompson also emphasizes an inter-office memorandum that an assistant district attorney prepared after being contacted by Rhodes in which he reports contact with "the witness in this case Robin Rhodes." Dkt. 57 at 85. Also, other memoranda suggest that the District Attorney's Office knew at the time of trial that Rhodes had previously worked as an informant. As Respondent observes, however, "the 'recently disclosed' facts merely provide more detailed specifics relating to Rhodes's informant activity that he testified about explicitly at trial" Dkt. 66 at 61. In particular, Respondent observes two problems. First, "it is unsurprising that Rhodes would be referred to as a potential witness in either Thompson's capital murder or solicitation case immediately after he disclosed information that Thompson attempted to enlist him in a plot to murder witnesses." Second, "the memo explains that [Rhodes] received information from [Thompson] on August 21, 1998, and contacted Kelly five days later, on August 26, 1998. Ultimately, instead of providing an indication that the State directed Thompson to obtain information, this evidence confirms that after Thompson made the disclosures, Rhodes contacted a 'handler' at the Harris County Organized Crime Unit and was put in touch with an investigator from the District Attorney's Office to whom he provided the list." Dkt. 66 at 63-64.

[24] To that end, Thompson has also not shown that his previous attorneys provided ineffective representation at any prior stage for not doing more to advance his federal claim.

engaged in a plot to hide Rhodes's alleged role as a state agent. Concomitantly, Thompson has not shown any new or previously undisclosed information about Rhodes' relationship with the State that would have excluded him from testifying or made any greater impact in the jury's consideration of his testimony than that known at trial. In sum, Thompson has not overcome the procedural bar of his third federal claim and, alternatively, has not provided a reasonable basis to suspect that Rhodes was a government agent or that the State did not divulge material details about his status. Thompson has not shown that claim three merits federal relief.[25]

D. Sufficiency of the Indictment

Thompson contends that the indictment against him was insufficient because it did not allege any facts relating to the special-issue questions that the jury would answer. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that "[o]ther than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[.]" *See also Ring v. Arizona*, 536 U.S. 584, 609 (2002) (extending *Apprendi* to capital cases). Thompson argues that Texas's capital punishment system violates *Apprendi* because it does not require the indictment to notify him of what evidence the State intends to introduce in seeking a death sentence.

The Court of Criminal Appeals summarily denied this claim on direct appeal by simply stating: "This Court has repeatedly rejected the argument that *Apprendi* requires the State to allege the special issues in the indictment." *Thompson*, 2007 WL 3208755, at *3. Thompson has not shown that the terse rejection of this claim was contrary to, or an unreasonable application of, federal

[25] Thompson's pending motion for an evidentiary hearing focuses on developing his claim relating to Rhodes's testimony. The Court finds that Thompson has not shown that factual development is necessary to a fair development of this claim.

law. As an initial matter, defects in a state criminal indictment are of no moment on federal habeas review. The Supreme Court has never held that the indictment provisions of the Fifth Amendment apply to the States through the Fourteenth Amendment. *See, e.g., Branzburg v. Haynes*, 408 U.S. 665, 686-88 n.25 (1972) (noting that "indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment"); *see also Apprendi*, 530 U.S. at 477 n.3 (declining to discuss the implications of that decision on the sufficiency of an indictment). The sufficiency of a state indictment is an appropriate concern on federal habeas corpus only when it can be shown that the indictment is so defective that it deprives the convicting court of jurisdiction. *Williams v. Collins*, 16 F.3d 626, 637 (5th Cir. 1994); *McKay v. Collins*, 12 F.3d 66, 68 (5th Cir. 1994).

State law dictates whether a state indictment is sufficient to confer a court with jurisdiction. In addressing a separate issue, the Court of Criminal Appeals found that Texas state law "do[es] not require the State to plead the punishment special issues in [the indictment in] a capital case." *Thompson*, 2007 WL 3208755, at *4. The Fifth Circuit has held that the district court is "required to accord due deference to the state's interpretation of its own law that a defect of substance in an indictment does not deprive a state trial court of jurisdiction." *McKay*, 12 F.3d at 69 (citations omitted). Where, as here, the state court has been presented the question of the indictment's sufficiency on appeal and ruled that the indictment was not fundamentally defective, federal habeas review is foreclosed. *See Wood v. Quarterman*, 503 F.3d 408, 412 (5th Cir. 2007).

Even if federal law placed any requirement on state criminal indictments, Thompson has not shown that *Apprendi* requires that an indictment include facts relating to the special issues. The Supreme Court has approached *Apprendi* from several different legal angles, but has never held that

the prosecution must plead punishment-phase factors in the indictment. *See Apprendi*, 530 U.S. at 477 n. 3 (refusing to address the indictment issue because the petitioner did not raise it); *Ring*, 536 U.S. at 597 n. 4 (noting that petitioner did not allege constitutional defects in the indictment); *see also United States v. Bourgeois*, 423 F.3d 501, 507 (5th Cir. 2005) (noting that the Supreme Court has yet to hold that aggravating factors must be charged in the indictment). The Fifth Circuit has summarily denied a similar claim in at least one case. *See Bigby v. Stephens*, 595 F. App'x 350, 354 (5th Cir. 2014). For this court to rule otherwise would violate the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Harris*, 81 F.3d at 541.[26]

For the reasons discussed above, the Court of Criminal Appeals's denial of Thompson's claim of error in the indictment was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

E. Victim-Impact Testimony

Thompson contends that the State adduced impermissible victim-impact evidence in violation of his constitutional right to be free from cruel and unusual punishment. "To be clear, the Eighth Amendment does not per se bar the introduction of victim impact evidence in capital cases." *Roberts v. Thaler*, 681 F.3d 597, 611 (5th Cir. 2012) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Instead, the United States Supreme Court has held that, because "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed," a State

[26] At any rate, Texas places the constitutionally required finding of an aggravating factor in the guilt/innocence phase where the jury finds a defendant guilty of a death-eligible offense. *See Jurek v. Texas*, 428 U.S. 262, 270-71 (1976) (approving Texas's use of aggravating factors in the guilt/innocence phase to narrow the class of death-eligible defendants); *Woods v. Cockrell*, 75 F.3d 1017, 1033-34 (5th Cir. 1996); *James v. Collins*, 987 F.2d 1116, 1119 (5th Cir. 1993). After a jury convicts a capital inmate, the maximum punishment available is death. The punishment phase's factual issues do not increase an inmate's authorized punishment, making *Apprendi* inapplicable. *Allen v. Stephens*, 805 F.3d 617, 628 (5th Cir. 2015).

may "choose[] to permit the admission of victim impact evidence and prosecutorial argument on that subject . . . ." *Payne*, 501 U.S. at 827. Still, "an Eighth Amendment problem may result" if "'evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair . . . .'" *Janecka v. Cockrell*, 301 F.3d 316, 328 (5th Cir. 2002) (quoting *Payne*, 501 U.S. at 825).

During the second punishment phase, Michael Gene Donaghy, Hayslip's brother, testified about her funeral. During that testimony, Thompson claims that the State "exceeded the scope of permissible victim impact [testimony] when it sought detailed testimony on the number and types of persons who appeared at the complainant Hayslip's funeral." Dkt. 57 at 12. Specifically, Thompson objects to the following interchange:

The State:	How many people showed up [at the funeral]?
Donaghy:	Hundreds. There was a lot of people.
The State:	Did you even realize she had that many friends or that many people who knew her?
Donaghy:	I knew my sister touched a lot of lives and everybody loved her and she loved everybody. I didn't know she knew that many people.
The State:	Who showed up at the funeral? Social friends? Clients? Mixture of both?
Trial Counsel:	I object to this. This goes beyond victim impact with this testimony.
Trial Court:	That's overruled.
Trial Counsel:	Gets to the area of victim character evidence and we object to it.
Trial court:	Overruled. Go ahead.

RR2 Vol. 18 at 35. At that point, the prosecutor did not pursue any more testimony about who attended Hayslip's funeral.

On direct appeal, Thompson complained that the trial court erred in allowing Donaghy to testify about both the number and the type of people who attended Hayslip's funeral. The Court of Criminal Appeals provided three justifications for denying Thompson's claim. The Court finds that each ground provides a reasonable basis to deny federal habeas relief.

First, the Court of Criminal Appeals held that Thompson failed to preserve error with regard to testimony about number of people who attended Hayslip's funeral. *See Thompson*, 2007 WL 3208755, at *6. Texas contemporaneous objection rule requires "a party to preserve an issue for appellate review" by making "a timely objection with specific grounds for the desired ruling[.]" *Livingston v. Johnson*, 107 F.3d 297, 311 (5th Cir. 1997). The Fifth Circuit "has consistently held that the Texas's contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999); *see also Cotton v. Cockrell*, 343 F.3d 746, 754 (5th Cir. 2003). The state courts's invocation of its procedural law on that portion of Thompson's claim bars federal review.

Second, the Court of Criminal Appeals found that Thompson failed to show error because Donaghy never actually testified about the type of people who attended Hayslip's funeral. The Court of Criminal Appeals observed: "Although [Thompson] argues that the trial court erred in allowing Donaghy 'to testify to the . . . types of people who attended the . . . funeral,' no testimony was actually elicited. The question was asked, and the trial court overruled [Thompson's] objection, but the prosecutor never pursued an answer." *Thompson*, 2007 WL 3208755, at *6. Even if the

prosecutor asked a question intended to elicit improper victim-impact testimony, the witnesses did not answer it.

Finally, the Court of Criminal Appeals found that "assuming that the question was improper," Thompson "was not harmed by the unanswered question. The question by itself did not assume, suggest, or interject any facts about who actually attended the service or leave the jury with a particular impression about the types of persons who attended." *Thompson*, 2007 WL 3208755, at *6. Given the nature of the evidence against Thompson, inferences the jury may have taken from the question would have had negligible, if any, impact on the jury's consideration of Thompson's sentence. Even if the prosecution erred in asking for details about the victim's funeral, Thompson has not shown any prejudice resulting therefrom.

Thompson procedurally defaulted a portion of this claim in state court. Thompson has otherwise not shown that the state court's adjudication of the merits was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

F. Lethal Injection

Thompson claims that Texas's lethal-injection procedure violates the Eighth Amendment. In 1982, the State of Texas adopted lethal injection as its sole method of execution. Texas law does not specify what substance will be used to effectuate its death sentences, but since 2012 Texas has used pentobarbital. Thompson asserts that a constitutionally unacceptable risk attends Texas's use of pentobarbital. Respondent contends that Thompson's complaints about lethal injection sound in civil rights, not habeas, law. Alternatively, Respondent argues that Thompson has not shown that the state habeas court's rejection of his arguments about lethal injection were contrary to, or an unreasonable application of, federal law.

In *Hill v. McDonough*, 547 U.S. 573 (2006), the Supreme Court confronted the question of "whether a challenge to a method of execution must be brought by means of an application for a writ of habeas corpus or a civil action under § 1983." *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015). The Supreme Court "held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015). Based on *Hill* and *Glossip*, this ground for relief should be dismissed without prejudice so that Thompson may raise it in a § 1983 action.[27]

The Court observes, however, that, even if an inmate could properly litigate a lethal-injection challenge on habeas review, Thompson has not met his AEDPA burden to show an entitlement to relief. The state habeas court found that the "Texas lethal injection procedure satisfies the prohibition against cruel and unusual punishment." State Habeas Record at 255. Federal law defers to that factual determination, absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). Texas has performed numerous executions using pentobarbital as the only agent of execution. Even while identifying hypothetical concerns about the use of pentobarbital, Thompson has not pointed to any particularized defect in its use, administration, or efficacy. *See Raby v. Livingston*, 600 F.3d 552, 560 (5th Cir. 2010) (concluding that the plaintiff "has failed to establish that the Texas lethal injection protocol creates a demonstrated risk of severe pain" in Texas's lethal injection process). Thompson provides nothing but conjecture that Texas will change the execution drug any time before his execution. "The reality is that pentobarbital, when used as the sole drug in a single-drug protocol," has not realized "a sure or very likely risk of pain." *Wood v. Collier*, 836

[27] Even in civil rights actions, however, the federal courts in this circuit have not viewed favorably attacks on pentobarbital. For instance, the Fifth Circuit recently refused to enjoin an execution based on a lethal-injection challenge and noted: "The reality is that pentobarbital, when used as the sole drug in a single-drug protocol, has realized no . . . risk" that it "is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Wood v. Collier*, 836 F.3d 534, 540 (5th Cir. 2016) (quotation omitted).

F.3d 534, 540 (5th Cir. 2016). Thompson's speculative habeas claim falls far short of proving that the state habeas court's rejection of his lethal-injection claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1). The Court would still deny habeas relief even if lethal-injection claims were cognizable on habeas review.

G. Texas Capital Habeas Procedure

Under Article 11.071 of the Texas Code of Criminal Procedure, a state habeas applicant must file his or her state habeas application (1) within 180 days of appointment of state writ counsel or (2) forty-five days after the State has filed its response on direct appeal, whichever is later. An applicant may obtain a 90-day extension of the deadline upon a showing of good cause. TEX. CODE. CRIM. PROC. ANN. art. 11.071 § 4(a),(b). Thompson "contends that [Texas's capital-habeas statute] is unconstitutional, on its face and as applied, because it distorts the historic purpose of a post-conviction application for [a] writ of habeas corpus." Dkt. 57 at 143. Thompson argues that the short time for filing a habeas writ precludes development of the record and the ripening of issues, including *Strickland* claims. With those defects, Thompson contends that Texas's habeas statute does not provide due process.

The state habeas court rejected Thompson's arguments because "[t]he imposition of a time limit for filing an initial application for writ of habeas corpus in capital cases is appropriate [and] constitutional." State Habeas Record at 220. To the extent some claims may not ripen by the time for habeas filing, Texas allows successive habeas actions to proceed "provided [the inmate] meets the statutory exceptions." State Habeas Record at 220. The state habeas court concluded that Texas habeas procedure met constitutional requirements. State Habeas Record at 220. Importantly,

Thompson failed to show that Texas's habeas procedure "prevented him from advancing meritorious habeas claims . . . ." State Habeas Record at 34.

The Supreme Court has held that state collateral proceedings are not constitutionally required. *Murray v. Giarrantano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Because the federal constitution does not require state post-conviction remedies, defects in a State's chosen habeas process do not give rise to a federal constitutional claim. *See Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999).[28] The state habeas court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

H. Constitutionality of Texas Statutory Law

As previously discussed, the defense in this case argued that medical error, not Thompson's action, was the primary cause of Hayslip's death. With the defense's argument that botched medical care caused Hayslip's death, the trial court instructed the jury as follows:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient.
>
> Therefore if you find from the evidence beyond a reasonable doubt that the death of Glenda Dennise Hayslip would not have occurred but for the defendant's conduct as charged in the indictment operating either alone or concurrently with another cause unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient you will find the defendant criminally responsible. Unless you so find beyond a reasonable doubt or if you have a reasonable doubt thereof you will find the defendant not criminally responsible and say by your verdict "Not Guilty of Capital Murder."
>
> . . .

[28] Thompson has failed to establish that the statutory time limits have prevented him from investigating any known avenues or would prevent him from asserting any potential claims that might be discovered in the future. In fact, the state habeas court found that Thompson did "not specify or complain that the dual track habeas application system forced him to neglect certain meritorious claims . . . ." State Habeas Record at 220.

> The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do, so you much [sic.] acquit the defendant.

State Habeas Record at 221. The trial court's instruction mirrored the Texas statutory language on causation found in Texas Penal Code Section 6.04.[29] Thompson argues that the Texas statute violates *Mullaney v. Wilbur*, 421 U.S. 684 (1975) by shifting the burden of proof to the defense.

Mullaney was the first case the Supreme Court decided based on *In re Winship*, 397 U.S. 358 (1970), which "made clear what has long been accepted in our criminal justice system[:] . . . in a criminal case the government must establish guilt beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 264 (1999). In *Mullaney*, the Supreme Court struck down a Maine law placing the burden of proof on a defendant when he argued that a killing was in the heat of passion or due to provocation. Cases have relied on *Mullaney* to hold "that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *Patterson v. New York*, 432 U.S. 197, 215 (1977). Thompson contends that the Texas statute, by asking whether the conduct in the concurrent cause was "clearly insufficient" to "produce the result," unconstitutionally "creates an impermissible burden of proof for defendants." Dkt. 57 at 149.

When Thompson raised this claim on state habeas review, the state habeas court found two reasons to apply a procedural bar. First, Thompson's claim ran afoul of Texas's contemporaneous-objection rule because "counsel objected to the trial court's charge on concurrent causation, but not on the basis urged in the instant habeas application." State Habeas Record at 222. Additionally,

---

[29] Under Texas Penal Code Section 6.04, "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient."

Thompson "fail[ed] to assert legal arguments or authorities to support his [state habeas] claim that TEX. PENAL CODE 6.04 is unconstitutional . . . ." State Habeas Record at 222. Both Texas's contemporaneous-objection rule and a dismissal for inadequate briefing provide a sufficient basis to bar federal review. *See Roberts v. Thaler*, 681 F.3d 597 (5th Cir. 2012); *Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998). Thompson has not shown cause or actual prejudice to overcome the procedural bar to federal review.

Alternatively, the state habeas court found that Thompson's "claims are meritless" because TEX. PENAL CODE § 6.04(a) "does not create a burden of proof for defendants." State Habeas Record at 252. The trial court's instructions properly directed the jury to consider concurrent causes as provided by the statute. Unlike the Maine law in *Mullaney*, neither the Texas statute or the jury instructions explicitly or implicitly placed a burden on the defense to prove that any concurrent cause was sufficient to product the victims' death. The instructions centered the jury's duty on the reasonable doubt standard, and focused their inquiry on whether Thompson's own actions caused the victim's death, without requiring the defense to present evidence about a separate, concurrent cause. Thompson has not pointed to any clearly established Supreme Court precedent extending *Mullaney* to the circumstances presented by a statute such as TEX. PENAL CODE § 6.04(a). Thompson, therefore, has not shown that the state court's decision was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

I. Ineffective Assistance of Trial Counsel

On state habeas review, Thompson exhausted several complaints about trial counsel's representation in the guilt/innocence phase. Thompson now argues that trial counsel performed deficiently by: (1) failing to conduct an effective voir dire; (2) failing to prevent the State from

presenting evidence of extraneous bad acts; (3) not objecting to the prosecution's characterization of one defense witness's testimony; (4) not requesting a lesser-included-offense instruction relating to Hayslip's death; and (5) not objecting to the admission of the gun.

Strickland v. Washington, 466 U.S. 668, 686 (1984), provides the general conceptual framework for judging an attorney's representation. Under *Strickland*, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. A petitioner must also show actual prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; *see also Wiggins*, 539 U.S. at 534.

"Surmounting *Strickland*'s high bar is never an easy task . . . ." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). In federal habeas proceedings, the *Strickland* inquiry merges with AEDPA's forgiving standards into a "doubly deferential" review. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see also Pinholster*, 131 S. Ct. at 1403; *Gentry*, 540 U.S. at 5-6. In practice, this standard gives wide latitude to state adjudications: "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105; *see also Premo v. Moore*, 562 U.S. 115, 123 (2011) (quoting *Richter*).

1. Voir Dire

Thompson generally criticizes his initial trial counsel's handing of jury selection, claiming that trial counsel engaged in superficial and too-brief questioning. Thompson, however, only makes two specific complaints about trial counsel's handling of voir dire. First, Thompson complains that trial counsel did not adequately question jurors about Texas parole law and victim-impact testimony. Second, Thompson claims that trial counsel should have used peremptory strikes on two prospective jurors who served at his first trial. Neither argument warrants federal habeas relief.

Thompson's challenge to trial counsel's approach to questioning jurors only complains about the voir dire before his first trial. The Court of Criminal Appeals reversed Thompson's sentence, allowing the state habeas court to conclude that "any alleged harm relating to [his initial] trial counsel's failure to voir dire on victim impact evidence is moot." State Habeas Record at 235. Thompson's complaints about trial counsel's questioning focus on punishment issues without drawing a connection to why those potential jurors would have been partial on questions of guilt. Thompson cannot show harm because the jurors affected by his initial counsel's questioning did not return the death sentence under which he is currently in custody.

The only portion of this claim presenting a judicable issue is that relating to trial counsel's failure to use peremptory strikes on two prospective jurors. The state habeas court engaged in a detailed review of trial counsel's questioning of the two challenged jurors. The state habeas court rejected this claim for three reasons. First, trial counsel used strategic professional judgment in not striking the two jurors. Second, the record suggested that the two jurors would be favorable to the defense. Finally, the questioning of the two jurors "establishes that both jurors understood various

legal burdens and distinctions, could follow the law, consider the evidence, be fair to both parties, and participate as jurors in the instant capital murder case . . . ." State Habeas Record at 239.

The state habeas court was not unreasonable in finding that trial counsel did not provide deficient representation in this regard. Trial counsel made a strategic decision to accept the final two jurors, which a reviewing court must uphold unless the decision was "so ill chosen that it permeates the entire trial with obvious unfairness." *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995). Perhaps Thompson has provided reasons for which an attorney may have used peremptory strikes to remove the two final jurors. He has not, however, shown that those jurors were biased as a matter of law or subject to strikes for cause. Thompson has not shown that the two challenged jurors were so poorly chosen that it permeated his trial with unfairness. Thompson has not shown that the state habeas court's decision on this issue was contrary to, or an unreasonable application of, federal law.

2. Evidence of Extraneous Bad Acts

Trial counsel filed a pre-trial motion in limine to preclude the prosecution from discussing "prior convictions, extraneous offenses, and bad acts." CR at 33. The trial court granted the motion. During the guilt/innocence phase, Hayslip's co-worker and roommate Lisa Gonzalez described the tumultuous relationship between Hayslip and Thompson. Gonzalez testified that when Thompson became angry he would break things, kick things, and punch holes in the wall. RR1 Vol. 11 at 190-92. Trial counsel objected to Gonzalez's testimony, and in a bench conference reminded the judge of the motion in limine, but did not seek any ruling from the trial court. Thompson faults trial counsel for not acting more zealously to exclude testimony about his anger outbursts.[30]

[30] Trial counsel explained in an affidavit that: "[t]he defense had filed a motion in limine to prevent the State from going into extraneous matters without the approval of the trial court judge, and the defense reminded the judge of our motion once the State started questioning Gonzalez about those extraneous matters." State Habeas Record at 171.

"In order to show that counsel was deficient for failing to object . . ., the objection must have merit." *Ries v. Quarterman*, 522 F.3d 517, 530 (5th Cir. 2008). "Admitting evidence of prior convictions and other bad acts is generally prohibited in the guilt-innocence phase." *Robles v. State*, 85 S.W.3d 211, 213 (Tex. Crim. App. 2002). Still, as the state habeas court observed, Texas law "allows admission of evidence that shows (1) relevant facts and circumstances surrounding the murder, (2) the previous relationship between the accused and the deceased, or (3) the condition of the mind of the accused at the time of the offense." State Habeas Record at 235; *see also* TEX. CODE CRIM. PRO. art. 38.36(a). Presumably because Gonzalez's testimony related to the "previous relationship existing between the accused and the deceased" and to "facts and circumstances going to show the condition of the mind of the accused at the time of the offense," the state habeas court concluded that "[t]rial counsel was not ineffective for failing to object and/or preserve error regarding the State's properly admitted evidence of the [Thompson's] violent acts involving complainant Hayslip at guilt-innocence." State Habeas Record at 259.

The state habeas court found that the complained-of testimony was admissible under state law. A federal habeas court does not sit in judgment of a state court's interpretation of its own law. With that state-law finding, Thompson has not shown that trial counsel failed to make a meritorious objection. The state habeas court reasonably found that counsel did not provide deficient performance with regard to the testimony about his anger outbursts.[31] Thompson has not shown that the state habeas court's decision was contrary to, or an unreasonable application of, federal law

3. Prosecutor's Closing Argument

Thompson contends that trial counsel should have objected to prosecution's closing

[31] With the weighty evidence against Thompson, any minor prejudicial effect caused by Gonzalez's testimony would not amount to a reasonable probability of a different result.

arguments summarizing Dr. Radalat's testimony as "finally admitt[ing] to you that the wounds would be fatal if left untreated." With that testimony, the prosecution said: "You got causation. The defendant is guilty." RR1 Vol. 13 at 30-31. Thompson claims that the prosecution's argument "mischaracterized" Dr. Radalat's testimony because he "did not quite go so far as to concede that the shooting did cause death." Dkt. 57 at 169-70. The state habeas court, however, found that "the State's complained of argument at guilt-innocence was proper as a summary of the evidence and/or a reasonable deduction of evidence elicited at trial." State Habeas Record at 237.[32]

Courts traditionally give defense attorneys broad discretion in choosing whether to object during closing arguments. *See, e.g., Hernandez v. Thaler*, 463 F. App'x. 349, 356 (5th Cir. 2012); *Charles v. Thaler*, 629 F.3d 494, 502 (5th Cir. 2011). Here, the prosecutor's statements were within the range of proper closing argument and a fair interpretation of the defense witness's testimony. Dr. Radalat told jurors that "[t]he intermediate long term conditions without any medical intervention . . . [o]ver the long term . . . would probably be fatal." RR1 Vol. 12 at 255-56. In addition, Dr. Radalat replied "no" when asked on cross-examination if the doctors' actions caused Hayslip's death. RR1 Vol. 12 at 256. A reasonable trial attorney could decide not to highlight the prosecution's fair interpretation of Dr. Radalat's testimony by objecting. The state habeas court was not unreasonable in finding that trial counsel did not provide deficient representation at closing argument.[33]

---

[32] Under Texas law, proper closing argument may discuss: (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).

[33] Further, the state habeas court found that Thompson "was not prejudiced by the complained-of arguments; the arguments were not extreme, manifestly improper, violative of a mandatory statute, and did not inject new facts harmful to [Thmpson] into the trial proceedings." State Habeas Record at 237. Given the additional evidence against Thompson, he has not shown any actual prejudice because trial counsel did not lodge an objection to the (continued...)

4. Lesser-Included-Offense Instructions

On trial counsel's request, RR1 Vol. 13 at 39, the trial court instructed jurors that, if they found Thompson had committed the murder of Cain, but was only guilty of some crime other than capital murder against Hayslip, they should find Thompson only guilty of the lesser-included offense of murder. Thompson argues that trial counsel should have requested two additional lesser-included-offense instructions. First, Thompson argues that the defense's theory blaming Hayslip's death on botched medical care would have allowed jurors to convict him only of aggravated assault. Second, Thompson contends that he did not intentionally shoot Hayslip, allowing for an instruction on felony murder.

Texas law entitles a defendant to a lesser-included-offense instruction when: (1) the lesser-included offense is included within the proof necessary to establish the offense charged, and (2) there is some evidence showing that if the defendant is guilty, he is guilty only of the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672-673 (Tex. Crim. App. 1993). Respondent does not dispute that aggravated assault and felony murder are lesser-included offenses of capital murder. Respondent, however, argues that the evidence did not only allow for Thompson's conviction of lesser offenses.[34]

---

[33] (...continued)
comments.

[34] To that end, the state habeas court found that Thompson's "criminal conduct towards complainant Hayslip was committed intentionally and knowingly. Evidence did not exist in the record that [Thompson's] shooting of Hayslip was an accident; that [Thompson] intended only one victim; or that [Thompson] knew with a reasonable certainty that only one person would die." State Habeas Record at 224. The state habeas court also found that "[t]he evidence presented at trial did not support the submission of the lesser-included offense instructions urged in the instant habeas application; accordingly, [Thompson] was not prejudiced by counsel's failure to request such instructions at trial." State Habeas Record at 243.

Here, trial counsel gave the jury the options to render a non-capital verdict. Trial counsel's closing argument urged jurors to find that Thompson did not intend to harm Hayslip, requiring them to return a lesser verdict of simple murder. RR1 Vol. 13 at 36. Trial counsel tried to form a defense for an acquittal based on the medical-malpractice theory, CR at 171, and asked jurors to convict Thompson only on a lesser offense based on that same theory, RR1 Vol. 13 at 48-49. Thompson may wish that trial counsel had requested additional instructions, but trial counsel explained on habeas review: "I did everything possible to rebut the State's theory of causation and persuade the jury to adopt the defense's theory of the case. Consistent with the defensive theory an instruction on concurrent causation and the lesser-included offense of murder were included in the guilt/innocence charge." State Habeas Record at 171. Thompson may wish that trial counsel had made different tactical decisions, but under *Strickland* jurisprudence decisions such as those made by counsel are "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. Thompson has also not shown that jurors would be more likely to forgo a capital conviction had the trial court given instructions different from those provided by trial counsel. Thompson may argue that counsel should have made different choices, but he has not shown that counsel should have made better ones. Trial counsel gave the jury two vehicles to return a non-capital conviction; Thompson has not shown that trial counsel provided constitutionally deficient, prejudicial representation by not doing more.

5. Admission of the Murder Weapon

Thompson makes a conclusory argument that trial counsel should have objected to the admission of the murder weapon. Thompson does not elaborate, but his argument presupposes that trial counsel should have argued that the police only found the weapon because they had violated his constitutional rights by sending Johnson to interview him. Thompson did not raise this claim on

direct appeal or in any of his state habeas applications. Because the state courts would not authorize him to file a successive application raising this argument, and he has not shown cause or prejudice to allow federal review, it is procedurally barred from federal habeas review.

Alternatively, the Court has already discussed at length the tenuous connection between the Johnson conversation and the recovery of the gun. Thompson had already provided the police a map of where he discarded the weapon. The trial testimony did not show that the Johnson conversation provided the police with previously unknown information necessary to recover the gun. Thompson has not shown that the murder weapon was inadmissible, and thus has not shown that trial counsel provided ineffective representation.

J. Denial of a Continuance

Thompson argues that the trial court violated his rights by denying his requests to postpone trial. Specifically, Thompson complains that the trial court's denial of additional time for trial preparation deprived him of due process under the Fourteenth Amendment and precluded effective legal representation under the Sixth Amendment.

The Constitution guarantees inmates "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted). Still, not every denial of a continuance violates the Constitution:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (citations omitted). "When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process." *Skillern v. Estelle*, 720 F.2d 839, 850 (5th Cir. 1983) (quotation omitted). Also, "the failure to grant a continuance [must have] harmed the defense." *Newton v. Dretke*, 371 F.3d 250, 255 (5th Cir. 2004).

Determining whether the trial court abused its discretion in refusing to continue Thompson's trial requires a detailed review of the trial court proceedings. When the Court of Criminal Appeals remanded this case for a new punishment hearing, the trial court appointed Thompson's original trial attorney, Ellis McCullough, to represent him at retrial. On January 21, 2005, the trial court appointed Terrence Gaiser as second-chair counsel. Six months later, Thompson filed a *pro se* motion to dismiss McCullough arguing that he was not qualified to represent capital defendants under Texas's Fair Defense Act. The trial court delayed ruling on the motion, but on September 15, 2005, removed McCullough from representing Thompson. The trial court elevated Gaiser to first chair and appointed Kyle Johnson as second-chair counsel.

Gaiser had not been inactive during the pendency of Thompson's substitution motion. Throughout August and September 2005, Gaiser filed motions on Thompson's behalf. Gaiser's filings included motions for the appointment of a mitigation specialist, an investigator, and various experts, including a psychologist. The trial court promptly granted the defense's motions. Gaiser secured investigative assistance.

The trial court set October 24, 2005, as the first day for trial testimony. On September 29, 2005, the day before jury selection was set to begin, Thompson's attorneys filed a motion for

continuance. Trial counsel asked for an additional ninety days because the attorneys had a limited time to prepare and to investigate mitigating theories after their appointment. In a hearing, trial counsel provided additional background on the motion for a continuance: "Gaiser stated that he was recently elevated to first chair, and Johnson was recently appointed to [Thompson's] case as second chair counsel and had a limited time to prepare for trial; Gaiser stated that he and Johnson lost time in their offices due to the threat of a hurricane . . . ." State Habeas Record at 241. The prosecution, however, provided reasons to deny a continuance: "prosecutor Vic Wisner stated that counsel Gaiser had been the de facto lead counsel on the case since his appointment, that Wisner had worked with Gaiser on discovery over the last two months, that Wisner had met with Gaiser and his expert, and, that the State's file had been available to Gaiser and his experts 'at length.'" State Habeas Record at 241. The trial court denied a continuance.

The next week the defense filed a notice listing two potential experts for defense testimony. On October 25, 2005, the defense filed a second motion for a continuance. This time, the defense specifically said it needed additional time to investigate the State's proposed witness Robin Rhodes. The trial court denied the second motion for a continuance. CR2 at 209-14.

On state habeas review, Thompson argued that the trial court's denial of a continuance violated federal and state law. Thompson argued that additional time would have allowed the defense to (1) develop mitigating themes, particularly relating to an expert's testimony about past substance abuse and possible brain damage and (2) engage in additional investigation of witness Rhodes for impeachment.[35] The state habeas court found that the trial court did not abuse its

[35] As he does on federal review, Thompson observed in state court that the development of a mitigation case requires six steps:

(continued...)

discretion in denying a continuance on those two arguments.

Thompson wanted more time to prepare his punishment phase expert neuropsychologist, Dr Daneen Milam. Dr. Milam testified that Thompson suffered from "mild and diffused" brain damage, but was able to function. Dr. Milam based her conclusion on Thompson's results from an IQ test and the Halstead-Reitan Battery. A sharp cross-examination centered on the lack of physical testing to verify Dr. Milam's conclusions. Thompson argued that additional time would have allowed trial counsel to bolster Dr. Milam's conclusions. In particular, Thompson argues that trial counsel should have sought out the psychologist who developed the Halstead-Reitan Battery to shore up Dr. Milam's interpretation of Thompson's results.

The state habeas court found that Thompson had not shown prejudice relating to Dr. Milam's testimony. The state habeas court specially found that Thompson's claim that he suffered prejudice from the denial of a continuance was "purely speculative." State Habeas Record at 242. The state habeas court observed that "trial counsel investigated the potential benefit of presenting other experts" who could provide information about Thompson's mental health. State Habeas Record at

---

[35] (...continued)

(1) Hiring a mitigation specialist to guide the research;

(2) Gathering of background information;

(3) Determination, based on that information, of what type of expert could be helpful to the defense;

(4) Expert evaluations, reported back to counsel;

(5) Attempts to negotiate a life sentence; and

(6) Strategic decisions as to what defensive theories and what witnesses to use.

Dkt. 57 at 199-200. Thompson conceded that "[s]teps one, two, and three had been undertaken by Gaiser while he was second-chair counsel," but argues that his trial attorneys did not have time to complete "work still needed to be done on steps four, five, and six . . . ." Dkt. 57 at 200.

243. The state habeas court found that Dr. Milam had provided trial counsel documentary evidence relating to her testing. Also, Dr. Milam testified "concerning the futility of obtaining a MRI or CAT scan to support her diagnosis of the [his] alleged brain damage," thus discounting the benefit of any physical confirmation of Dr. Milam's testimony. State Habeas Record at 243.

The state habeas court also found no prejudice in the lack of additional time to investigate State's witness Rhodes. The state habeas court found that Thompson "concede[d] that counsel did not do a bad job impeaching Rhodes . . . ." State Habeas Record at 244.[36] Importantly, the state habeas court observed that Thompson had "not allege[d] the specific information that could have been garnered had trial counsel obtained additional time to prepare for Rhodes cross-examination." State Habeas Record at 244. Without some indication of how the denial of additional time prejudiced the defense, Thompson's claims were "purely speculative." State Habeas Record at 244.

Under AEDPA jurisprudence, Thompson must show that the state habeas court unreasonably found that the trial court did not abuse its discretion and that he had not shown prejudice. Thompson has not shown constitutional error in the state court's decision not to provide more time before trial. The Supreme Court has noted that trial judges enjoy "a great deal of latitude in scheduling trials and "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable

---

[36] Specifically, the state habeas court found:

> Trial counsel effectively cross-examined Rhodes impeaching his credibility eliciting testimony regarding his work as an informant for law enforcement and suggesting that Rhodes testimony in the instant trial was a product of Rhodes desire to help himself. Trial counsel elicited testimony that Rhodes had a prior conviction for aggravated robbery that he neglected to mention during his direct examination that Rhodes had done a lot of work for law enforcement and received pay for that work that Rhodes was not looking for a way to gain favor with law enforcement authorities when he was in jail with the applicant but Rhodes would not overlook it if it was dumped in his lap that Rhodes was a full-time informant for the Harris County Organized Crime Task force in 1998 and 1999 and testified in two trials and that Rhodes was paid for his participation in the Benavidez trial even though the record from that trial reflected that Rhodes denied receiving payment.

State Habeas Record at 244.

request for delay" poses constitutional concern. *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (quotation omitted). Gaiser represented Thompson ten months before the punishment hearing began. Even though he initially served as second-chair counsel, Gaiser represented Thompson until eventually appointed first chair. In fact, Gaiser told the trial court that he had been "the de facto first chair" for some time. RR1 2 Vol. 2 at 7-8. Thompson's trial attorneys approached the defense of his punishment retrial with a preview of what evidence the State would present and the viability of defensive theories. Despite his arguments to the trial court about needing additional time, the record shows that investigators and experts had been assembled and were working toward a mitigation defense. Given those circumstances, the state habeas court was not unreasonable in finding that the trial court had not abused its discretion.

Additionally, Thompson has not shown that the denial prejudiced him. As in state court, Thompson does not prove that his trial attorneys were unprepared or demonstrate what evidence remained unpresented. Instead, Thompson speculates that additional witnesses or additional evidence may have influenced jurors, but provides no specificity about what trial counsel should have put forth. Without a concrete understanding of how additional time would have amplified or altered the mitigation defense, the state habeas court was reasonable in finding his allegations of prejudice to be speculative. Thompson has not shown that the state habeas court's rejection of this claim was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

K. Testimony about Youthful Misconduct

Thompson contends that the State violated his Eighth Amendment rights by presenting evidence of his youthful misconduct. As described by the Court of Criminal Appeals, the State

presented evidence during the punishment stage of trial of crimes and bad acts Thompson committed as a minor:

> . . . [Thompson] began committing crimes as a juvenile. In 1984, while living with his parents in an upper-middle-class neighborhood in Colorado, [Thompson] committed a string of crimes that resulted in over $60,000 of damage to homes and property. While on probation from the youth center, [Thompson] stole his father's motorcycle, ran away, and committed a variety of crimes. He was arrested again in 1987 and sentenced to a juvenile facility. [Thompson] had problems with drugs and alcohol from an early age.

Thompson, 2007 WL 3208755 at 3.

Thompson, however, did not object to the use of youthful-misconduct testimony at trial. The state habeas court found that the lack of a contemporaneous objection defaulted judicial consideration of the instant claim. State Habeas Record at 256. Thompson has not shown cause or prejudice to overcome the procedural bar of that claim, thus precluding federal review.

Alternatively, the state habeas court found that "the admission of punishment evidence of the [Thompson's] youthful misconduct did not violate [his] constitutional rights." State Habeas Record at 256. Thompson has not pointed to any Supreme Court case preventing the State from relying on youthful misconduct when arguing for a death sentence. Thompson instead asks for an extension of other cases in which the Supreme Court has recognized special protections for juvenile offenders. Thompson relies on the prohibition on executing juvenile offenders, *Roper v. Simmons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and the exclusion of juveniles from mandatory life sentences, *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010), to emphasize the lessened moral blameworthiness of juvenile offenders. Because "the juvenile crimes used against Thompson in his sentencing, essentially crimes of criminal mischief, show both

a lack of maturity and a strong correlation to peer pressure," Thompson contends that the Constitution should bar their use in determining his sentence. Dkt. 57 at 218.

The Supreme Court has recognized that important constitutional principles protect juvenile offenders. Here, although the State presented evidence of bad acts Thompson committed when he was under the age of eighteen, he was tried and convicted for an offense he committed as an adult. The Fifth Circuit has held that Supreme Court precedent "does not clearly establish that [a juvenile] offense may not be used to elevate murder to capital murder." *Taylor v. Thaler*, 397 F. App'x 104, 108 (5th Cir. 2010). Extending the constitutional protections in the manner proposed by Thompson would require the creation of new constitutional law in violation of *Teague*'s non-retroactivity principles. For those reasons, Thompson has not shown that he merits federal habeas relief on this claim.

L. Mitigation Special Issue

Thompson raises two claims challenging the manner in which Texas structures a jury's consideration of mitigating evidence. In his twelfth claim, Thompson argues that the Constitution requires that jurors consider the mitigation special issue under a beyond-a-reasonable-doubt standard. Thompson's thirteenth claim argues that Texas's mitigation special issue unconstitutionally sends mixed signals to jurors. Settled precedent forecloses relief on both claims.

Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), Thompson's twelfth claim argues the Texas capital sentencing scheme violates constitutional protections by not requiring the State to prove the absence of sufficient mitigating evidence beyond a reasonable doubt. The Fifth Circuit has repeatedly rejected the argument that the prosecution bears a burden to disprove the existence of mitigating factors beyond a reasonable doubt. *See Blue v.*

Thaler, 665 F.3d 647, 668 (5th Cir. 2011); *Druery v. Thaler*, 647 F.3d 535, 546-47 (5th Cir. 2011); *Adams v. Thaler*, 421 F. App'x 322, 334 (5th Cir. 2011); *Granados v. Quarterman*, 455 F.3d 529, 536-37 (5th Cir. 2006)*; Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).[37] Because "[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof," granting relief on a capital petitioner's *Apprendi* claim would require the creation of new constitutional law in violation of *Teague v. Lane*, 489 U.S. 288 (1989).

Thompson's thirteenth claim argues that the Texas death penalty scheme violates the Eighth Amendment in light of the Supreme Court's decision in *Penry v. Johnson*, 532 U.S. 782 (2001), because the mitigation special issue sends "mixed signals" to the jury. In *Penry*, the Supreme Court struck down a judicially crafted jury instruction because it was perplexing and, in effect, required the jury to answer the special issues dishonestly in order to give effect to the defendant's mitigating evidence. Thompson clams that current mitigation special issue sends mixed signals because it is unclear about the burden of proof. The state habeas court relied on Texas precedent and denied relief. State Habeas Record at 247-48.[38]

Here, the mitigation instruction that the trial court delivered did not contain the defect identified in *Penry*. In fact, the Supreme Court has described the current mitigation special issue as "[a] clearly drafted catchall instruction on mitigating evidence" whose "brevity and clarity . . . highlight[ed] the confusing nature of the supplemental instruction" they had previously condemned. *Penry*, 532 U.S. at 803. Given that endorsement, the Fifth Circuit has found no merit to similar

---

[37] Thompson argues that a recent Supreme Court case, *Hurst v. Florida*, 126 S. Ct. 616, 622 (2016), would compel a different result. The Fifth Circuit, however, has held that *Hurst* does not change its precedent. *See Davila v. Davis*, 650 F. App'x 860, 873 (5th Cir. 2016).

[38] The state habeas court also found that Thompson had defaulted federal consideration of this claim by failing to raise it on direct appeal. State Habeas Record at 257. In addition to the fact that well-settled precedent undercuts the merits of this claim, the state habeas court's procedural ruling forecloses relief.

claims raised by other inmates. *See Foster v. Thaler*, 369 F. App'x 598, 606 (5th Cir. 2010); *Manns v. Quarterman*, 236 F. App'x 908, 911-12 (5th Cir. 2007); *Oliver v. Quarterman*, 254 F. App'x 381, 385-86 (5th Cir. 2007). The Texas court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

M. The Autopsy

Thompson complains that the State violated his due process rights, his right to confront witnesses against him, and right to counsel though its use of the autopsy results in this case. At the guilt/innocence phase, the State presented evidence about Hayslip's cause of death based on an autopsy performed by Dr. Paul Shrode. Dr. Shrode reported that Hayslip's cause of death was a "gunshot wound to the face." Dr. Shrode, however, did not testify at trial. The State admitted the autopsy report into evidence during the testimony of Dr. Shrode's colleague Dr. Patricia Moore. Dr. Moore had performed the autopsy on Cain and testified about the cause of death for both victims. Dr. Moore's testimony reiterated Dr. Shrode's finding that the cause of Hayslip's death was a gunshot wound to the face.

Thompson raises three separate claims based on Dr. Shrode performing the autopsy and the related testimony. Thompson contends that: (1) the State violated *Brady* by failing to disclose that Dr. Shrode lacked adequate qualifications; (2) trial counsel should have objected to the admission of Dr. Moore's testimony about the autopsy report on Sixth Amendment Confrontation Clause grounds; and (3) the State violated the Due Process Clause by knowingly admitting a false autopsy report. Dkt. 57 at 236-43. Thompson, however, raised these arguments in his third state habeas application that the Court of Criminal Appeals found to be an abuse of the writ. This claim is procedurally barred from federal review unless Thompson can show cause and actual prejudice.

Thompson contends that the Court can reach the merits of this claim because the State suppressed evidence of Dr. Shrode's qualifications and the true cause of Hayslip's death. Also, Thompson contends that he can show ineffective representation by habeas counsel for failing to raise the issues. This Court's review of the records and the pleadings shows that Thompson cannot overcome the procedural bar.

As an initial matter, Thompson contends that "Shrode was incompetent and unqualified to perform the work he was tasked with, and for failing to disclose that his autopsy was factually incorrect and misleading." Dkt. 57 at 240. Thompson bases his arguments on disciplinary actions and allegations of falsehoods on Dr. Shrode's curriculum vitae that came to light well after the trial in this case. Thompson has not pointed to any contemporaneous evidence that any member of the prosecutorial team knew of the alleged problems with Dr. Shrode's work. Additionally, Thompson's allegations of incompetency may serve to allow the impeachment of Dr. Shrode's work, but he has not shown demonstrable errors in Hayslip's autopsy. Thompson has provided the opinion of another expert, Dr. Lloyd White, who would have reached a different conclusion about Hayslip's death. In doing so, however, Thompson only casts a defensive theory from trial in a different light. Trial counsel attempted to convince the jury that intervening medical care caused Hayslip's death. The fact that other medical professionals may disagree with Dr. Shrode's conclusions does not mean that the prosecution knowingly suppressed information about Hayslip's death.

Also, Thompson faults trial counsel for not raising a Confrontation Clause objection because Dr. Moore, rather than Dr. Shrode who performed the autopsy, testified about the cause of Hayslip's death. After Thompson's trial, the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which held that admission of testimonial statements against a criminal defendant violates

the Confrontation Clause unless the witness is unavailable and was subject to a prior cross-examination. At the time of Thompson's trial, however, Texas courts held that autopsy reports were not testimonial, and thus not subject to a Confrontation Clause challenge. Since *Crawford* courts have been split on its application to autopsy reports, and some Texas courts have held autopsy reports are testimonial, *see Martinez v. Davis*, 653 F. App'x 308, 320 n.5 (5th Cir. 2016) (reviewing relevant law), but the law at the time of trial and of Thompson's first two habeas proceedings did not support a Confrontation Clause challenge to the autopsy report.

Accordingly, Thompson has not shown cause to overcome the procedural bar of his claims under either *Brady* or *Martinez*. For those same reasons, and in consideration of the Court's review of the record and the parties' briefing, the Court would find his claims without merit if fully available for federal review. The Court denies Thompson's final ground for relief.

IV. CERTIFICATE OF APPPEALABILTIY

Under AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a Certificate of Appealability ("COA"). *See* 28 U.S.C. § 2253(c). Thompson has not yet requested that this Court grant him a COA, though this Court can consider the issue *sua sponte*. *See Alexander*, 211 F.3d at 898. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Fifth Circuit holds that the severity of an inmate's punishment, even a sentence of death, "does not, in and of itself, require the issuance of a COA." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). The Fifth Circuit, however, anticipates that a court will resolve any questions about a

COA in the death-row inmate's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. On the other hand, a district court that has denied habeas relief on procedural grounds should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

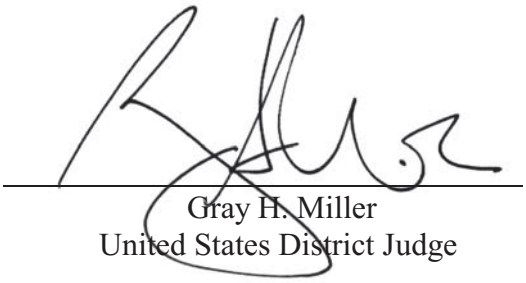
Thompson's petition raises several issues worthy of judicial review. Nevertheless, having considered the merits of Thompson's petition, and in light of AEDPA's standards and controlling precedent, this Court determines that a COA should not issue on any of Thompson's claims.

V. CONCLUSION

For the reasons described above, the Court finds that Thompson has not shown an entitlement to federal habeas relief. The Court **DISMISSES** Thompson's challenge to Texas's lethal-injection protocol **WITHOUT PREJUDICE**. The Court otherwise **DENIES** Thompson's petition and **DISMISSES** the remainder of Thompson's claims **WITH PREJUDICE**. The Court also **DENIES** Thompson's motion for an evidentiary hearing. Dkt. 56. The Court will not issue a Certificate of Appealability.

The Clerk will provide copies of this Order to the parties.

Signed at Houston, Texas, on March 23, 2017.



Gray H. Miller
United States District Judge

Appendix D

93 S.W.3d 16
Court of Criminal Appeals of Texas.

Charles Victor THOMPSON, Appellant,

v.

The STATE of Texas.

No. 73431.
|
Oct. 24, 2001.
|
Rehearing Granted in Part and Denied in Part Dec. 19, 2001.

Synopsis
Defendant was convicted, after a jury trial in 262nd District Court, Harris County, Doug Shaver, J., of capital murder, and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, Meyers, J., held that: (1) evidence was legally and factually sufficient to establish causation, even assuming that the alleged negligence of doctors who performed surgery on victim could have killed the victim; (2) admission of tape recording of defendant's jailhouse conversation with undercover police officer regarding defendant's solicitation of murder of potential witness, to show future dangerousness at punishment phase of the capital murder trial, violated defendant's right to counsel; and (3) the error in admitting the tape recording was not harmless.

Conviction affirmed; sentence vacated, and case remanded.

Keller, P.J., filed a dissenting opinion in which Keasler, Hervey, and Cochran, JJ., joined.

West Headnotes (15)

[1] Homicide Cause of death

Even assuming that the alleged negligence of doctors who performed surgery on victim was sufficient to have caused victim's death, evidence that defendant's gunshot to victim's face went through victim's cheek and nearly severed her tongue, and that victim probably would have died without medical attention, established causation, in prosecution for capital murder. V.T.C.A., Penal Code §§ 6.04(a), 19.03(a).

1 Cases that cite this headnote

[2] Criminal Law Construction of Evidence

Criminal Law Reasonable doubt

In reviewing the legal sufficiency of the evidence, the appellate court looks at all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

2 Cases that cite this headnote

[3] Criminal Law Construction in favor of government, state, or prosecution

Criminal Law Verdict unsupported by evidence or contrary to evidence

In a factual sufficiency review, the appellate court views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

[4] **Criminal Law** Sufficiency of Evidence

In conducting a factual sufficiency review, the appellate court begins with the presumption that the evidence is legally sufficient.

2 Cases that cite this headnote

[5] **Criminal Law** Weight and sufficiency

The appellate court, when conducting a factual sufficiency review, considers all of the evidence in the record, comparing the evidence which tends to prove the existence of the elemental fact in dispute to the evidence which tends to disprove it.

1 Cases that cite this headnote

[6] **Criminal Law** Weight of Evidence in General

The appellate court is authorized to disagree with the jury's determination when conducting a factual sufficiency review, even if probative evidence exists which supports the verdict, but must avoid substituting its judgment for that of the fact-finder.

3 Cases that cite this headnote

[7] **Criminal Law** Conclusiveness of Verdict

A clearly wrong and unjust verdict occurs, for purposes of factual sufficiency review, where the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias.

2 Cases that cite this headnote

[8] **Criminal Law** Critical stages

Criminal Law Adversary or judicial proceedings

The Sixth Amendment guarantees a criminal defendant the assistance of counsel at the initiation of adversary proceedings against him, and at any subsequent "critical stage" of the proceedings against him. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[9] **Criminal Law** Inquiry, interrogation, or conversation; request for attorney while in custody

While the Sixth Amendment is not violated when the government, by luck or happenstance, obtains incriminating evidence after the right to counsel has attached, it is violated by knowing exploitation of an opportunity to confront the accused without counsel. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[10] **Criminal Law** Other offenses

The Sixth Amendment does not require the assistance of counsel as to interrogations in the course of an investigation concerning then-uncharged criminal conduct, even though other charges are pending as to which the right has attached. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** Other offenses

Incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other uncharged crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[12] **Criminal Law** Reinitiating Interrogation

If the right to counsel has attached as to a charged offense, and the police interrogate the defendant in the absence of his counsel about matters that the police knew or should have known might elicit incriminating evidence pertaining to the pending charges, the Sixth Amendment right to counsel has been violated and such evidence is inadmissible at the trial of those charges. U.S.C.A. Const.Amend. 6.

6 Cases that cite this headnote

[13] **Criminal Law** Other offenses

If the right to counsel has attached as to a charged offense, and the police elicit incriminating evidence pertaining to criminal conduct that is not yet the subject of a formal charge, the Sixth Amendment right to counsel has not yet attached as to that then-uncharged offense, and therefore any such evidence is admissible against the defendant at the trial on the then-uncharged offense. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[14] **Criminal Law** Informants; inmates

Sentencing and Punishment Declarations and confessions

State's use of undercover officer, as its agent, to elicit information from defendant, while defendant was in jail pending his trial for capital murder, about defendant's solicitation for the murder of potential witness against him at his pending trial, violated defendant's right to counsel, though no charge for solicitation of murder had been pending, and thus, a tape recording of officer's conversation with defendant could not be presented to jury to show future dangerousness, at punishment phase of capital murder trial. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[15] **Sentencing and Punishment** Harmless and reversible error

Trial court's error in allowing State to use, to show future dangerousness at punishment phase of capital murder trial, tape recording of undercover officer's jailhouse conversation with defendant, conducted in violation of defendant's right to counsel, in which defendant gave officer directions for finding gun that another person, solicited by defendant, could use to murder a potential witness in the pending capital murder trial, was not harmless; tape recording

corroborated jailhouse informant's testimony that defendant had solicited the murder of the witness and demonstrated defendant's efforts to see the solicited murder was carried out. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

Attorneys and Law Firms

***18** Floyd W. Freed, III, Spring, for Appellant.

Alan Curry, Asst. DA, Houston, Matthew Paul, State's Atty., Austin, for State.

OPINION

MEYERS, J., delivered the opinion of the Court, joined by PRICE, WOMACK, JOHNSON and HOLCOMB.

Appellant was convicted of capital murder in April 1999. Tex. Penal Code Ann. § 19.03(a). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.071 §§ 2(b) and 2(e), the trial court sentenced appellant to death. Tex.Code Crim. Proc. art. 37.071 § 2(g). Direct appeal to this Court is automatic. Tex.Code Crim. Proc. art. 37.071 § 2(h). Appellant raises seven points of error, including challenges to the sufficiency of the evidence to support the jury's verdict. The sufficiency points will be addressed first followed by the remainder of the points in the order in which they are raised.

Around June of 1997, appellant began dating Dennise Hayslip and subsequently moved into the home she shared with her son, her co-worker Lisa Gonzalez, and Gonzalez' two daughters. While living there, appellant grew increasingly jealous, possessive, and angry. During fits of anger, appellant would throw things, kick the refrigerator, and punch or kick the walls, often leaving holes in them. Appellant rarely worked, relying on Hayslip and Gonzalez to pay the bills. Appellant became irate when Gonzalez asked him to contribute.

On one occasion, Gonzalez heard appellant screaming at Hayslip and calling her names and saw him shaking her. When Gonzalez tried to stop appellant from hurting Hayslip, appellant grabbed Gonzalez and threw her to the ground. Gonzalez thereafter attempted to call the police, but the telephone went dead. She later discovered that the telephone cord had been ripped out of the wall. Appellant eventually moved out and Hayslip moved into her own apartment.

On March 16, 1998, Gonzalez accompanied Hayslip and appellant to a local pub. Appellant became sullen and angry during the evening and told Hayslip he wanted ***19** her to sit with him and not dance with anyone else. When Gonzalez saw Hayslip three days later, one side of her face was bruised, her lip was split, and there were bruises on her neck.

At some point in time, Hayslip met Darren Cain at a local bar where he worked as a bartender and they became friends. On the evening of April 29, 1998, Cain called his best friend, Tony Alfano, and asked him to meet him at the bar to watch the Rockets game, but Alfano declined. At 2:30 the next morning, Cain again called Alfano and told him that appellant had threatened him over the telephone. Cain told Alfano that appellant was beating up or "messing with" Hayslip and he was going over to her apartment to help her.

Kathryn Page, one of Hayslip's neighbors, woke up around 3:00 a.m. on the morning of April 30th to the sound of her dog barking and someone screaming. She heard loud voices, including a female voice saying, "stop," and "help." Page called the police and walked outside to check Hayslip's apartment number. She saw Hayslip and Cain standing outside, but neither appeared to be hurt or wounded in any way. However, Hayslip was agitated and apologizing to Cain "for all of this." Appellant then walked

out of Hayslip's apartment yelling, cussing, and calling Hayslip a "whore." Page noticed at that time that appellant had a black eye. Cain told appellant to "chill," and appellant responded, "[D]o you want to die, mother fucker?"

Responding to the disturbance call, Deputy William Coker saw Cain, Hayslip, and appellant standing outside and all appeared to be calm. Coker saw that appellant's face was swollen from being in a fight, but learned that appellant had started the fight. Because no one wanted to file charges, Coker told appellant to leave the complex and followed him as he exited the property. Coker warned appellant that he would be committing criminal trespass if he returned.

About 6:00 a.m. that same morning, Page's son heard gunshots as he was leaving for school. Shortly thereafter, Page heard someone beating on her door. When she walked outside, Page saw Hayslip sitting on the ground bleeding from the mouth and gasping for breath. Hayslip made a sign with her hands like someone shooting a gun.

When Coker arrived back at the apartments, he found Hayslip sitting in a pool of blood with a bullet hole in her right cheek and a great amount of blood draining from her mouth. Coker asked her if appellant had shot her and she nodded. Coker found Cain's dead body in Hayslip's apartment.

Hayslip was taken by Life Flight to Hermann Hospital. While Hayslip was awaiting surgery, her brother asked her, "[D]id Chuck do this?" Hayslip nodded emphatically in response.

In the meantime, appellant went to Diane Zernia's home. Zernia was getting her daughter ready for school, so appellant waited for her in the living room; however, he soon fell asleep. After her daughter left for school, Zernia watched the news while appellant slept. As she watched, she saw a story about the shooting. When appellant woke up a couple of hours later, Zernia joked about his black eye stating, "I hope the other guy looks worse." Appellant replied, "He does. I shot him." Appellant told Zernia that he had been beaten up in a fight so he left the apartments where it happened to get a gun. Upon his return, he kicked in the apartment door and shot Cain four times. Appellant told Zernia that he shot Hayslip also. Zernia testified that appellant said he told Hayslip, "I can shoot you too, ***20** bitch," and then he put the gun to her cheek and pulled the trigger. Appellant told Zernia that he threw the gun in a creek after leaving the scene.

Appellant asked Zernia if he could call his father, and his father came and picked him up from Zernia's home. Appellant's father took appellant to the police station where he turned himself in for the shooting. Appellant later called Zernia from jail in an apparent attempt to influence her to change her testimony about why he returned to the apartments.

During surgery, doctors were unable to secure an airway and Hayslip fell into a coma. A few days later, her family was told she was brain dead and they agreed to remove life support systems. Hayslip continued to live for four more days, ultimately dying a week after she was shot. The medical examiner testified that, according to the doctor who performed Hayslip's autopsy, the cause of death was a gunshot wound to the face.

A deputy with the Harris County Sheriff's Office testified that the murder weapon was eventually recovered with the help of an informant. The firearms examiner testified that, after evaluating the weapon and the evidence found at the scene of the shooting, the weapon must have been reloaded during the incident. Appellant was charged with committing capital murder by murdering more than one person during the same criminal transaction. *See* Tex. Penal Code Ann. § 19.03(a)(7)(A).

[1] In his first point of error appellant claims the evidence is legally insufficient to support his conviction on the ground that intervening medical care was the actual cause of Hayslip's death. Appellant argues her death "was the sole result of her loss of oxygen to the brain which caused her family to terminate her life one week after she was shot" and that "[t]his event was produced by the physicians inability to properly provide competent medical assistance."

[2] In reviewing the legal sufficiency of the evidence, this Court looks at all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Texas Penal Code § 6.04(a), *Causation: Conduct and Results,* provides

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, *unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.*

(emphasis added); *see also McFarland v. State,* 928 S.W.2d 482, 516 (Tex.Crim.App.1996), *cert. denied,* 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997); *Felder v. State,* 848 S.W.2d 85, 90 n. 1 (Tex.Crim.App.1992), *cert. denied,* 510 U.S. 829, 114 S.Ct. 95, 126 L.Ed.2d 62 (1993).

The shot to Hayslip's face went through her cheek and nearly severed her tongue. According to the State's medical evidence, because the tongue is especially "well vascularized" (contains more blood per gram of tissue than other parts of the body), Hayslip was at risk of bleeding to death or of bleeding down into her lungs which also could have resulted in death similar to drowning. The doctor in charge of Hayslip's care further testified that, without any medical attention, the swelling of Hayslip's tongue could have eventually obstructed her airway entirely, resulting in suffocation. He stated that without medical intervention, Hayslip would not have survived her injuries. Appellant's medical expert agreed that the injury to Hayslip's tongue was life threatening and also ***21** agreed that Hayslip "probably" would have died without medical intervention. Thus, viewing the evidence in the light most favorable to the verdict, even assuming, *arguendo,* that the conduct of the doctors was clearly sufficient to cause Hayslip's death, the conduct of appellant was not "clearly insufficient" so as to absolve him of criminal responsibility under § 6.04. Appellant's first point of error is overruled.

In his second point of error, appellant claims the evidence is factually insufficient to support the verdict. *See Jones v. State,* 944 S.W.2d 642, 647 (Tex.Crim.App.1996), *cert. denied,* 522 U.S. 832, 118 S.Ct. 100, 139 L.Ed.2d 54 (1997). Appellant continues to argue here that Hayslip would have lived, notwithstanding the wound she received, but for the negligent medical care she received at the hospital.

[3] **[4]** **[5]** **[6]** **[7]** In a factual sufficiency review, this Court views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Johnson v. State,* 23 S.W.3d 1 (Tex.Crim.App.2000); *Clewis v. State,* 922 S.W.2d 126, 129 (Tex.Crim.App.1996). In conducting such a review, we begin with the presumption that the evidence is legally sufficient under *Jackson, supra.* Next, we consider all of the evidence in the record, comparing the evidence which tends to prove the existence of the elemental fact in dispute to the evidence which tends to disprove it. *Santellan v. State,* 939 S.W.2d 155 (Tex.Crim.App.1997); *Jones,* 944 S.W.2d at 647. We are authorized to disagree with the jury's determination even if probative evidence exists which supports the verdict, but must avoid substituting our judgment for that of the fact-finder. *Santellan,* 939 S.W.2d at 164; *Jones, supra.* A clearly wrong and unjust verdict occurs where the jury's finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Jones, supra; Santellan, supra.*

In addition to the evidence discussed in connection with point of error one above, a physician testified for appellant that Hayslip's wound was survivable, if properly treated. Appellant points out that the treating physician testified that he and the other physician who attended Hayslip were to be subject to a civil lawsuit for Hayslip's death. On the other hand, even appellant's own expert agreed that Hayslip had sustained a life-threatening injury and would have died if she had not received medical care. Furthermore, no evidence was presented that any of the actions taken in attempting to save Haylsip's life were clearly sufficient to kill her.

In light of the medical testimony presented by the State, we cannot say that the verdict was so contrary *to the overwhelming weight of the evidence* as to be clearly wrong and unjust. We hold the evidence was factually sufficient. *See Santellan, supra; Clewis,* 922 S.W.2d at 129. Point of error two is overruled.

In his third point of error, appellant claims the trial court erred in denying his requested charge "on the law of intervening medical care as a cause of death." Appellant relies solely on *Lerma v. State,* 150 Tex.Crim. 360, 200 S.W.2d 635, 637 (1947)(opinion on reh'g). In *Lerma,* we held that when proof is presented showing that a victim's death was brought about by gross neglect or improper treatment on the part of a physician, an instruction to the jury that the defendant is not guilty of homicide is required. But the instruction required in *Lerma* rested entirely on a statute no longer in existence. The statute at issue in *Lerma,* then Texas Penal Code article 1202, provided:

> ***22** The destruction of life must be complete by such act, agency, procurement or omission; but although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide.

Lerma v. State, 150 Tex.Crim. 360, 200 S.W.2d 635, 637 (1947)(provision quoted). Appellant cites no comparable provision today under which such instruction should be given.

The controlling statute today, as discussed above, is Penal Code § 6.04(a), governing concurrent causation. Appellant received an instruction essentially tracking the language of § 6.04(a)[1] and he does not otherwise complain of the instruction given. Appellant was not entitled to an instruction of the sort called for in *Lerma, supra.* Point of error three is overruled.

1 The jury instruction provided in part that:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient.
>
> Therefore if you find from the evidence beyond a reasonable doubt that the death of Glenda Dennise Hayslip would not have occurred but for the defendant's conduct, as charged in the indictment, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient, you will find the defendant criminally responsible. Unless you so find beyond a reasonable doubt or if you have a reasonable doubt thereof you will find the defendant not criminally responsible and say by your verdict "Not Guilty of Capital Murder."

In his fourth point of error, appellant claims the State conducted an interview with him while he was in custody pending charges in the instant case, by utilizing an undercover officer without notifying his counsel or warning him of his rights, and then used statements he made during that interrogation about his plans to commit another crime, against him at the punishment phase of the instant capital murder trial. Appellant says those statements were erroneously admitted in violation of his Sixth Amendment right to counsel.

The pertinent facts follow. Deputy Max Cox of the Harris County Sheriff's Department testified at punishment that he was approached by an inmate, Jack Reid, who told him that appellant was attempting to solicit the murder of Diane Zernia, who was slated to be a witness in his capital murder case. Reid shared a cell with appellant. Reid told Cox that appellant had already arranged for the murder by another inmate, Max Humphrey, who had also shared a cell with appellant and had recently been discharged, but was looking for someone to retrieve a gun and give it to Humphrey in order for him to carry out the murder.[2] Cox told Reid that if he was approached by appellant again, he should tell him that he knew someone who could retrieve the gun for him. Reid called Cox the next day and indicated that he had complied with Cox's instructions. Cox then arranged for Gary Johnson, an investigator with the Harris County District Attorney's Office, to meet with appellant in an undercover capacity to discuss the retrieval of the weapon and record their conversation. Johnson was to assume the identity of Reid's friend, who had supposedly been contacted by Reid about retrieval of the gun. Cox further testified that he ***23** gave Johnson a map that presumably identified where the gun could be located.[3] Johnson testified that he had been contacted by Cox and had agreed to assume an undercover identity for the purpose of meeting with appellant to discuss retrieving a weapon to be used in a murder that had possibly already been arranged. Johnson testified that he was wired for recording throughout their meeting. He further testified that appellant brought a hand-drawn map to the meeting, similar to the one Cox had given him, and held it up to the glass for him to see. At that point during Johnson's testimony, the State offered the tape into evidence.

2 The gun appellant wanted retrieved was later discovered to be the murder weapon used in the instant case.

3 Cox testified that he received the map from the officer who did the initial interview (presumably of the informant). However, it is not clear where this officer obtained the map.

Appellant was given permission to question Johnson on voir dire. Johnson admitted to having been aware that appellant was represented by counsel on the capital murder charge at the time of their meeting. He conceded that had not notified counsel of their meeting, had not informed appellant that he was an officer of the State, and had not given appellant any warnings. *See* Tex.Code Crim. Proc. art. 38.22; *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Appellant objected and sought suppression of the tape on the ground that he had been denied counsel during the meeting with Johnson. The trial court overruled the objection and admitted the tape into evidence. The tape was played for the jury.

During their tape-recorded meeting appellant and Johnson briefly discussed retrieval of the gun. Then, appellant told Johnson that there was a witness in his case that he wanted "taken care of." Appellant stated that he had already paid Humphrey to kill the witness, but Humphrey had not gone through with the job. Appellant gave Johnson the witness' address, and described the witness as a mother with a fourteen year old daughter and a husband. He described her car, and informed him that she was usually home in the mornings after her daughter went to school. He described her house as Victorian and her mailbox as black and white spotted, like a cow. Appellant promised that when he got out of jail, he would pay Johnson $1,500 for killing the witness. After the tape was played for the jury, Johnson testified further, without objection, that appellant had brought the map with him to the meeting, and that it had an address written on it. Johnson stated that appellant had held it up to the glass for Johnson to read.

[8] The Sixth Amendment guarantees a criminal defendant the assistance of counsel at the initiation of adversary proceedings against him, and at any subsequent "critical stage" of the proceedings against him. *Estelle v. Smith,* 451 U.S. 454, 469–70, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Thus, in *Estelle,* where the defendant had been indicted and counsel appointed at the time he was subjected to a competency examination by a court-ordered psychiatrist, his Sixth Amendment rights were violated by the introduction of the psychiatrist's diagnosis against him at the penalty stage on the issue of future dangerousness. *Id.* at 470–71, 101 S.Ct. 1866. The right to counsel had attached at the time of the interview and "the interview proved to be a 'critical stage' of the aggregate proceedings" against the defendant. *Id.* at 470, 101 S.Ct. 1866.

[9] **[10]** **[11]** But the right to counsel is "offense specific." *See Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).[4] That is, the Sixth Amendment ***24** does not require the assistance of counsel as to interrogations in the course of an investigation concerning then-uncharged criminal conduct, even though other charges are pending as to which the right has attached. However, such investigations might encroach on the defendant's rights concerning the pending charges. The Supreme Court has recognized the competing interests at stake in such situation:

4 In *Maine v. Moulton,* the defendant and a co-defendant were indicted with four counts of theft by receiving stolen vehicles and automotive parts. While out on bail, the co-defendant told police that the defendant had suggested to him that they kill a State's witness in the case. *Id.* at 162, 106 S.Ct. 477. The co-defendant ultimately agreed to wear a body wire to a meeting with the defendant where the two planned to discuss their defensive strategy in the upcoming trial. *Id.* at 165, 106 S.Ct. 477. Although the idea of eliminating witnesses was briefly mentioned at the beginning of the meeting, the defendant made many incriminating statements about his participation in the charged offenses. *Id.* at 165–66, 106 S.Ct. 477. Portions of the tape implicating the defendant in the charged offenses were admitted at trial, and the defendant was convicted. The defendant appealed on the ground that the tape's admission violated his Sixth Amendment right to counsel. The state court of appeals reversed the trial court, holding that the State could not use the recordings where the State knew or should have known that the defendant would make incriminating statements as to charges that were pending. *Id.* at 168, 106 S.Ct. 477.

The United States Supreme Court upheld the state appeals court. Discussing the scope of the Sixth Amendment right to counsel, the Court stated that the State has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.* at 171, 106 S.Ct. 477. The Court explained that while the Sixth Amendment is not violated when the government, "by luck or happenstance," obtains incriminating evidence after the right to counsel has attached, but it is violated by "knowing exploitation ... of an opportunity to confront the accused without counsel." *Id.* at 176, 106 S.Ct. 477. The Court rejected the State's argument that because there was a legitimate reason for listening to the conversation—investigating a

plot to kill a State's witness—the incriminating statements regarding the already-charged crime should therefore not be suppressed. *Id.* at 178, 106 S.Ct. 477. Because the police knew (or should have known), from previous conversations between the defendant and co-defendant, that their meeting was in part for the purpose of discussing the pending charges and their defense strategy, the defendant's Sixth Amendment rights were violated.

The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime. In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah.* On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating ***25** statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

Id. at 179–80, 106 S.Ct. 477.[5]

[5] These principles were reaffirmed in *Texas v. Cobb,* 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). On direct appeal in our own Court, we had held that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." *Cobb v. State,* 93 S.W.3d 1, 6 (Tex.Crim.App.2000). Emphasizing, as in *Moulton,* that "[t]he Sixth Amendment right [to counsel] ... is offense specific," *Cobb,* 121 S.Ct. at 1340 (quoting *McNeil v. Wisconsin,* 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)), the Supreme Court rejected the notion that there is an exception to this principle for uncharged offenses that are "factually related" to a charged offense. *Id.* at 1343. The Court further held that when the Sixth Amendment right to counsel attaches, it encompasses offenses that, even if not formally charged, are considered the same offense as the charged offense, under *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[12] **[13]** Thus, if the right to counsel has attached as to a charged offense, and the police interrogate the defendant in the absence of his counsel about matters that the police knew or should have known might elicit incriminating evidence pertaining to the pending charges, the Sixth Amendment right to counsel has been violated and such evidence is "inadmissible at the trial of those charges." But if, during that same interrogation, the police elicit incriminating evidence pertaining to criminal conduct that is not yet the subject of a formal charge, the Sixth Amendment right to counsel has not yet attached as to that offense, and therefore any such evidence is admissible against the defendant at the trial on the then-uncharged offense.

[14] At the time of the interrogation in the instant case, appellant had been charged with capital murder but had not been charged with solicitation for murder. There is no question that evidence obtained in connection with questioning appellant about the solicitation offense would be admissible at the trial *for that offense* because his Sixth Amendment right to counsel had not yet attached as to that offense. And there is no question that evidence obtained in the course of such questioning, incriminating appellant as to his guilt for the capital murder, would be inadmissible in his capital murder trial. The question here is whether evidence obtained about the solicitation offense is admissible against appellant on the question of future dangerousness at the punishment phase of his capital murder trial, as to which appellant's Sixth Amendment rights had attached.

This issue was recently addressed by this Court.[6] ***26** *Wesbrook v. State,* 29 S.W.3d 103 (Tex.Crim.App.2000)(plurality opinion), *cert. denied,* 532 U.S. 944, 121 S.Ct. 1407, 149 L.Ed.2d 349 (2001). In *Wesbrook,* the trial court overruled a motion to suppress evidence that the defendant argued had been obtained in violation of his Sixth Amendment right to counsel. The complained-of evidence allegedly established an attempt by the defendant to solicit the murder of various individuals, including witnesses at the defendant's trial. *Wesbrook,* 29 S.W.3d at 116. Facts developed at a hearing on the matter showed that an informant, a fellow inmate at the Harris County Jail, became acquainted with the defendant about three months prior to the

defendant's trial. During numerous conversations, the defendant expressed a desire to hire someone to kill two individuals (the defendant's ex-wife and her husband). The informant contacted law enforcement. In exchange for a favorable recommendation by the State during the prosecution of his own pending charges, the informant arranged a meeting between the defendant and undercover investigator Gary Johnson, who was to pose as a hit man. Johnson tape-recorded the conversation he had with the defendant concerning the murder solicitations. In the recorded conversation, the defendant expressed his desire to have murdered the two individuals he had mentioned to the informant, plus five others, four of which were to be, or already had been, witnesses in his capital murder trial. Johnson admitted at trial that he had assumed the evidence would be used against the defendant at his capital murder trial. *Id.* at 116–17.

6 At least two state courts have addressed this issue and held such evidence inadmissible at the punishment phase of the trial on in sentencing a defendant on the charges that were pending at the time of the interrogation of the uncharged offenses. *People v. Kidd,* 129 Ill.2d 432, 136 Ill.Dec. 18, 544 N.E.2d 704, 712–13 (1989)(defendant's right to counsel as to pending charges could not be circumvented even when investigating uncharged conduct if uncharged conduct was to be used against defendant at death penalty hearing in trial of charged offense); *Jackson v. State,* 643 A.2d 1360 (Del.1994)(incriminating statements obtained during investigation of uncharged conduct could be used at trial for charges arising from uncharged conduct, but could not be used against defendant at punishment phase of trial on charges that were pending at time of interrogation if "in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to counsel"). *But see United States v. Kidd,* 12 F.3d 30 (4th Cir.1993)(holding that because evidence related to new criminal activity and not pending charges, it was admissible for consideration under sentencing guidelines at sentencing hearing portion of trial on pending charges).

At the conclusion of the hearing, the trial court determined that no Sixth Amendment violation had taken place because the right to counsel had not attached to the solicitation offense. Therefore, the court concluded that the evidence was admissible and denied the defendant's motion to suppress. Seven judges on this Court disagreed, holding that a Sixth Amendment violation had occurred.[7] The three-judge lead opinion explained:

7 The lead opinion, authored by Judge Mansfield, and joined by Judges Keasler and Meyers, held there was a Sixth Amendment violation. Although Judge Meyers concurred in another point of error, he otherwise joined the lead opinion. A separate concurring opinion authored by Judge Womack, and joined by Judges Price, Holland and Johnson, agreed there was a Sixth Amendment violation, but parted ways with the lead opinion on the issue of harm arising from the violation. *Wesbrook,* 29 S.W.3d at 127–28 (Womack., J., concurring). The concurring judges found "it impossible to say beyond a reasonable doubt that the testimony [that should have been suppressed] did not influence the sentencing jury." *Id.* at 128. Presiding Judge McCormick and Judge Keller would have held there was no Sixth Amendment violation. *Id.* at 123–27 (Keller, J., concurring, joined by McCormick, P.J.).

> "By intentionally creating a situation likely to induce appellant to make incriminating statements without the assistance of counsel, the State violated appellant's Sixth Amendment right to counsel. [The informant] was not housed with appellant to act as a passive 'listening post.' He was sent in with instructions to exploit the existing relationship he had forged with appellant in order to 'deliberately elicit' incriminating information regarding the solicitation of murder. This information was then to be used at appellant's capital murder trial to help satisfy the State's burden of establishing that appellant ***27** posed a continuing threat to society. Just as a psychiatrist, acting as a state agent, cannot elicit information that would be used to help demonstrate future dangerousness without counsel being notified first, so too, a jail house informant, acting at the behest of the State, cannot elicit information to be used at any stage of trial concerning charges in which the Sixth Amendment right to counsel had already attached and counsel had not been notified."
>
> *Id.* at 118 (citations omitted).

No developments in the law since *Wesbrook* would change or affect the holding of the seven-judge majority there.[8] We turn again to the instant case. As in *Wesbrook,* the State elicited information from appellant regarding the solicitation of the murder of a person who was to be a witness against appellant. The information was elicited by an agent of the State, without notifying appellant's counsel, and was then used at appellant's capital murder trial to help the State establish that appellant posed a continuing threat to society. The State knew the capital murder charges were pending against appellant at the time, and that any evidence incriminating appellant in another offense would probably be used against him in the capital punishment phase. We hold appellant's Sixth Amendment right to counsel was violated by the State's actions in soliciting the tape recorded conversation

between appellant and Johnson and using it against appellant in the punishment phase of his capital murder trial, the charges of which were pending at the time of the conversation. *Wesbrook, supra.* The trial court should have granted appellant's motion to suppress the tape. We turn now to the question of harm. Tex.R.App. P. 44.2(a).

8 *Cobb, infra* fn.5, reaffirmed previously-stated principles that were in existence at the time of *Wesbrook.*

[15] Appellant's punishment will be reversed unless we can conclude that the erroneously admitted evidence was harmless beyond a reasonable doubt. *Wesbrook, supra.* The seven *Wesbrook* judges who held there was error, split on the question of whether the error was harmful. Three of the judges concluded the error was not harmful in light of the facts of that case and the other punishment evidence, apart from the improperly admitted solicitation evidence. The evidence in the case reflected that the defendant had killed five people in the subject capital murder, had made some previous threats of violence, and that he had tried, from prison, to solicit the murder of his ex-wife and her husband. The evidence of these solicitations were admissible because it was obtained by the informant prior to his becoming an agent of the State. *Id.* at 119–20 (Mansfield, J., joined by Meyers and Keasler, J.J.). Four other judges could not say the erroneous admission of the evidence was harmless. *Id.* at 127–28 (Womack, J., joined by Price, Holland and Johnson, J.J.). They pointed to the importance of the erroneously admitted evidence in corroborating the testimony of the cell mate who might otherwise have been disbelieved, and also to the emphasis placed on the illegally obtained evidence by the State in closing arguments at punishment. *Id.* at 128. In closing, the State repeatedly relied on the tapes and urged the jury to listen to the tapes "over and over and over." *Id.*

To support a finding of future dangerousness in the instant case, the State relied on the facts of the crime itself, the unadjudicated extraneous solicitation offense, and a number of bad acts committed ***28** by appellant.[9] Appellant presented testimony from a psychologist who admitted on cross-examination that appellant had trouble controlling himself whenever stimulated by strong feelings and there was no guarantee that these feelings would not be evoked by some event in the prison setting. Appellant's psychologist also admitted appellant was narcissistic and had a sociopathic personality, was a follower and could be easily manipulated. Appellant's psychologist testified that test results revealed that appellant had "chronic problems with obeying rules and exercising proper moral judgment."

9 These extraneous acts included an arrest as a juvenile for a burglary and destruction of property, trespass, and theft. Appellant was arrested as an adult for driving under the influence—and as a result of the arrest became belligerent and threatened the deputy. Appellant was also arrested by an agent of the United States Customs Service at a border crossing where he was driving a truck filled with seventeen undocumented illegal aliens. Finally, a deputy with the Harris County Jail who was an expert on gang-related activities in penal institutions testified that letters connected to appellant had gang-related symbols on them.

Although the tape itself was inadmissible, substantively similar testimony regarding appellant's attempts to solicit the murder of the witness was before the jury that was not objected to and/or was not inadmissible. All of Cox's testimony and most of Johnson's testimony before and after the tape, was not objected to. The information that Cox initially obtained from Reid (appellant's cell mate) before Reid became an agent for the State was admissible. Cox testified without objection that he had been approached by Reid who told him that appellant was attempting to arrange for the murder of Diane Zernia, a witness in appellant's case. Reid also told Cox that appellant wanted to hire someone to recover a weapon to be used in that subsequent murder. The map showing the location of the gun was also before the jury without objection. Johnson testified that he agreed to go undercover and meet with appellant, pretending to be a friend of Reid's who could help retrieve the weapon for appellant. Johnson also testified, without objection, that appellant had brought a hand-drawn map to the meeting, supposedly showing the location of the weapon. After the tape was played, Johnson testified further, without objection, that the map appellant had brought to the meeting also had an address written on it, and that appellant had held the map up to the glass for him to see.

Without the tape, the jury would not have known that appellant made plans with Johnson for Johnson to kill the witness, in addition to retrieving the gun. It would have heard only that Reid had reported to authorities that appellant was attempting to hire Humphrey to kill the witness.

The State emphasized appellant's taped conversation with Detective Johnson in closing arguments:

> Think about this. This shows what that defendant is like. He identifies [Diane Zerbia] for his want to be killer by describing the 14 year old soon to be motherless daughter she has. If you hadn't heard it yourself from his own mouth, you wouldn't even believe somebody would be that evil. Just mind boggling ...

* * * * * *

> ... Every time [appellant] threatened he has followed through on it. What did he tell Gary Johnson? I'm a man of my word. When I get out you got a free one coming.... He also tried to frame an innocent man. He tried to have Gary Johnson go get the gun, give it to somebody ***29** else so that person could be the one caught with the weapon and framed for the murder of the people he killed.... When he wanted to have Diane Zernia killed did it ever bother him? Did he ever flinch? Did he ever hesitate about the fact that she had a 14 year old daughter or a husband? All he was concerned with was getting the details right. That it was a cow mailbox.... Remember this. He came to that cell to meet Gary Johnson that day with that address already written down. He didn't think it up on the spur of the moment as he was talking to Gary Johnson that day. He came down there meaning to have her killed.

The evidence of appellant's future dangerousness, apart from the tape, is considerably less than the evidence of the defendant's future dangerousness in *Wesbrook.* In *Wesbrook,* the defendant had killed five people in the course of committing the subject capital murder. There was admissible evidence that the defendant attempted to solicit from prison the murders of two others (his ex-wife and her husband). These were the critical facts that led three judges to conclude the error was harmless: "because the jury possessed details of both the crime itself and the solicitation to murder, there is no reasonable likelihood that the inadmissible portion of Jones' testimony, considered either alone or in context, moved the jury from a state of nonpersuasion to persuasion regarding the issue of future dangerousness." *Id.* By contrast, the facts of the capital murder in the instant case involved two victims, rather than five. The admissible solicitation evidence pertained to the planned murder of one person, rather than two. Further, as emphasized by the four *Wesbrook* judges who could not conclude the error was harmless, the prosecutor in the instant case emphasized the inadmissible evidence in closing. He referred the jury to statements made by appellant to Johnson on the tape. Further, as pointed out by the four Wesbrook judges who found the error harmful in that case, without the tape to corroborate him, Reid's testimony might not have borne much credibility. Although Cox had testified that Reid had reported appellant's efforts to solicit the murder of Zernia by a former cell mate, the tape corroborates Reid's report and further demonstrates appellant's additional efforts to see that the murder was carried out by attempting to enlist yet another hitman. We are unable to say beyond a reasonable doubt that the tape did not influence the sentencing jury. Point of error four is sustained.[10]

10 Appellant's points of error five, six and seven, all alleging error at the punishment phase, are dismissed, due to our disposition of point of error four.

Appellant's conviction is affirmed. Appellant's sentence is vacated, and this case is remanded to the trial court for a new punishment hearing.

KELLER, P.J., filed a dissenting opinion, joined by KEASLER, HERVEY and COCHRAN.

KELLER, P.J., filed a dissenting opinion in which KEASLER, HERVEY, and COCHRAN, J.J., joined.

Today, the Court bars the admission of evidence even though: (1) the police did nothing wrong in obtaining the evidence, and (2) the evidence involves a defendant's attempt to subvert his trial by having one of the State's witnesses killed. This odd result is not dictated by Supreme Court precedent or by the purposes underlying the Sixth Amendment. Although this Court's opinion is consistent with its recent ***30** opinion in *Wesbrook v. State,*[1] we should take this opportunity to reexamine and disavow *Wesbrook's* conclusions about the admissibility of this type of evidence.[2]

1 29 S.W.3d 103 (Tex.Crim.App.2000).

2 Some of the arguments in this opinion are discussed in greater detail in my concurring opinion in *Wesbrook. Id.* at 123–127 (Keller, J. concurring).

1. The Supreme Court has not ruled on this issue.

The Sixth Amendment right to counsel is violated when an undercover government agent deliberately elicits from a defendant incriminating evidence of an offense for which the defendant has already been charged.[3] "The Sixth Amendment right, however, is offense specific" and does not apply to crimes for which adversary criminal proceedings have not been initiated.[4] The Supreme Court's decision in *Maine v. Moulton* addressed the application of the Sixth Amendment to undercover investigations relating to multiple crimes, some of which had been charged and some of which had not. The Supreme Court held that, even though a defendant is charged with a crime, the government may legitimately conduct undercover investigations of extraneous, uncharged crimes and use the evidence recovered in prosecutions for the extraneous crimes.[5] However, the government may not use evidence pertaining to the charged offense at the trial of the charged offense even though the evidence may have been obtained incidentally during the government's investigation of uncharged, extraneous crimes.[6] What *Moulton* did not decide is whether (or to what extent) the government may use evidence pertaining to an uncharged, extraneous offense at the trial of the charged offense.[7] That issue was presented in *Wesbrook* and is presented now in this case.

3 *Maine v. Moulton,* 474 U.S. 159, 171–174, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985); *see also Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

4 *McNeil v. Wisconsin,* 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).

5 *Moulton, supra; see also McNeil,* 501 U.S. at 176.

6 *Moulton, supra; see also United States v. Terzado Madruga,* 897 F.2d 1099, 1110 (11th Cir.1990).

7 *See Moulton, supra; Wesbrook,* 29 S.W.3d at 123–127 (Keller, J. concurring).

2. *Cobb* should motivate us to rethink our holding in *Wesbrook.*

In *Texas v. Cobb,* the United States Supreme Court disavowed the doctrine, expounded by several lower courts including this Court, of extending the Sixth Amendment right to counsel to uncharged offenses that are closely related factually to the charged offense.[8] The Supreme Court pointed out the error of expanding the scope of the Sixth Amendment right to counsel beyond the Supreme Court's earlier pronouncements: "We hold that our decision in *McNeil v. Wisconsin* ... meant what it said, and that the Sixth Amendment right is 'offense specific.' "[9] As the lead opinion observes, *Cobb* does not speak directly to the issue at hand. Nevertheless, the Supreme Court's restrictive construction of the Sixth Amendment right to counsel is at odds with our expansive interpretation of the right in *Wesbrook. Cobb* illustrates that this Court should not too hastily extend the Sixth Amendment right ***31** to counsel to situations not directly addressed by the Supreme Court.[10]

8 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001).

9 *Id.* at 1339 (citation omitted).

10 In any event, we should not consider ourselves wedded to our prior decision in *Wesbrook.* Although seven judges agreed that the defendant's statements were erroneously admitted, *Wesbrook* was a fractured decision. The lead opinion (plurality) found error but held it to be harmless, the dissent found reversible error, and this writer authored a concurring opinion finding that no error occurred. Although the concurring opinion offered three reasons for finding that there was no constitutional violation, neither the lead opinion

nor the dissent chose to respond to those arguments. And because the lead opinion found the error to be harmless, its pronouncement that there was error was not necessary to the resolution of the case. Given these circumstances, we should not feel constrained by the force of precedent to follow *Wesbrook.*

3. The Sixth Amendment right to counsel should not apply here.

The lead opinion in *Wesbrook* relied upon the Supreme Court's opinion in *Moulton* to support its conclusion that a constitutional violation occurred. But four factors distinguish this case from *Moulton* and support finding that there was no Sixth Amendment violation.

a. The evidence consisted of proof of an extraneous, uncharged offense.

In *Moulton,* the Supreme Court was concerned that law enforcement officials might fabricate the existence of an extraneous offense to use as a pretext to elicit evidence of the charged offense.[11] But the present case is not one in which authorities investigated an extraneous offense and incidentally found proof of the charged offense. Here, the police investigated an extraneous offense, and evidence of that offense is exactly what they discovered. That the extraneous offense may have probative value in a prosecution for the charged offense is immaterial because it is still an extraneous offense. As the Sixth Amendment right to counsel had not attached to the uncharged extraneous offense, the police were entitled to investigate that offense, and the State should be allowed to use that evidence in any proceeding brought against the defendant.

11 *Moulton,* 474 U.S. at 180, 106 S.Ct. 477.

b. Statements that constitute a crime or show an intent to commit future criminal activity do not deserve Sixth Amendment protection.

The statements made by Moulton related the details of a past crime.[12] The statements made by appellant, however, constituted a present crime (solicitation of murder) or a proposed future crime (murder, to be carried out in the future). This works strongly against finding a Sixth Amendment violation. Federal cases in the Seventh and Eleventh Circuits have held that the Sixth Amendment does not bar admission, at the trial for the charged offense, of statements that constitute a present crime or address a crime to be committed in the future.[13] Statements ***32** that constitute a present crime or propose a future crime are uniquely outside the attorney-client relationship because there is no right to the assistance of counsel in committing a new crime.[14] These types of statements are not covered by the attorney-client privilege, and the ethical rules do not require attorneys to keep such information confidential.[15] If a defendant made such statements in counsel's presence, counsel might be obligated to reveal those statements.[16] If counsel had been present during the exchange between appellant and the undercover informant, any advice to the defendant to refrain from making the statements would be "not because the statements would have shown a consciousness of guilt of complicity in ... murder, but because his statements, themselves, were the operative acts of a separate criminal offense."[17] As the Eleventh Circuit has noted, "*Massiah* is not a magic cloak with respect to future conduct."[18]

12 When Moulton raised the possibility of killing a government witness, he may well have been proposing a future crime, but that evidence was obtained before the informant became a government agent and was not the focus of the opinion in *Moulton.*

13 *United States v. Moschiano,* 695 F.2d 236, 240–243 (7th Cir.1982), *cert. denied,* 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 111 (1983); *United States v. Darwin,* 757 F.2d 1193 (11th Cir.1985), *cert. denied,* 474 U.S. 1110, 106 S.Ct. 896, 88 L.Ed.2d 930 (1986). A similar holding occurred in *Grieco v. Meachum,* 533 F.2d 713, 717–718 (1st Cir.), *cert. denied,* 429 U.S. 858, 97 S.Ct. 158, 50 L.Ed.2d 135 (1976), but the First Circuit subsequently held that *Grieco* had been overruled by *Moulton. Bender,* 221 F.3d 265, 269 n. 4 (1st.Cir.2000).

14 *Moschiano,* 695 F.2d at 241; *Darwin,* 757 F.2d at 1200.

15 *Grieco,* 533 F.2d at 718 n. 4 ("The privilege generally does not extend to confidences concerning present and future criminal activity"); *see also* Tex.R. Evid. 503(d)(1); Tex. Disc. R. Prof. Conduct 1.05(c)(7) & (8).

16 *Darwin,* 757 F.2d at 1200; *see also* Tex. Disc. R. Prof. Conduct 1.05(e); *Henderson v. State,* 962 S.W.2d 544, 554–556 (Tex.Crim.App.1997).

17 *Grieco,* 533 F.2d at 718 (ellipsis inserted).

18 *Darwin,* 757 F.2d at 1199 (quoting *United States v. DeWolf,* 696 F.2d 1, 3 (1st Cir.1982)).

c. Criminal attempts to subvert a trial do not deserve Sixth Amendment protection.

What appellant attempted to do here was to subvert his criminal trial by killing one of the prosecution's witnesses. When the new criminal activity involves an attempt to subvert a defendant's upcoming trial, a form of estoppel should arise with regard to any Sixth Amendment claim the defendant might otherwise have: the defendant should not be permitted to claim that he was wronged by the admission of such evidence at the very proceeding the defendant has tried to improperly influence:[19]

19 *Id.* (noting the irony that attempts by a defendant to improperly influence a proceeding may then become admissible in that proceeding; if so, "that is the defendant's lookout"); *United States v. Pineda,* 692 F.2d 284, 288 (2nd Cir.1982).

> [W]e perceive no reason why this sort of evidence concerning post-indictment obstruction of justice should not be admissible at a hearing on sentence. The sentencing judge is entitled to know that the defendant has attempted to distort the very proceeding at which the sentence is determined. Yet since obstruction of justice occurred after the guilty plea, the government necessarily conducted its investigation into this activity after the indictment had been filed. In these circumstances, if we adopted defendant's understanding of *Massiah* and required the government to contact defendant's counsel before using an informer, the government would be effectively prevented from fully investigating such conduct and from obtaining such compelling evidence for the sentencing judge. We refuse to read *Massiah* as providing a shield for defendant's attempts to interfere with the sentencing process.[20]

20 *Pineda,* 692 F.2d at 288.

Appellant's argument is akin to that of a defendant who has murdered his parents asking the court to take pity on him because he is an orphan.

33 *d. The evidence should at least be admissible at punishment.

The disputed evidence in *Moulton* was presented during the guilt phase of trial, while the evidence here was presented during the punishment phase. Recently the First Circuit, while holding such evidence to be inadmissible at the guilt stage of trial, indicated that it would be admissible at sentencing.[21] And in *United States v. Kidd,* the Fourth Circuit held that the Sixth Amendment was not violated by the introduction of an extraneous offense (elicited by an undercover agent after indictment in the primary case) at the sentencing phase of trial for the charged offense.[22] In *Kidd,* the defendant was charged with several offenses regarding the possession and distribution of cocaine.[23] Later, an undercover informant made a tape-recorded purchase of cocaine from the defendant.[24] The defendant pled guilty to one of the earlier distribution offenses, and at sentencing, the post-indictment sale was introduced as relevant conduct to enhance the defendant's punishment under the Federal Sentencing Guidelines.[25] Although the court expressed doubt about the propriety of introducing this evidence at the guilt stage of trial,[26] it held that the Sixth Amendment did not prohibit the introduction of the evidence at sentencing.[27] In arriving at this holding, the Fourth Circuit

remarked, "The Sixth Amendment does not create a sanctuary for the commission of additional crimes during the pendency of an indictment."[28]

21 *Bender,* 221 F.3d at 271.

22 *United States v. Kidd,* 12 F.3d 30, 32–34 (4th Cir.1993), *cert. denied,* 511 U.S. 1059, 114 S.Ct. 1629, 128 L.Ed.2d 352 (1994).

23 *Id.* at 31.

24 *Id.* at 32.

25 *Id.*

26 *Id.* at 33 n. 2.

27 *Id.* at 33. *But see Jackson v. State,* 643 A.2d 1360, 1374 (Del.1994), *cert. denied,* 513 U.S. 1136, 115 S.Ct. 956, 130 L.Ed.2d 898 (1995)(disagreeing with *Kidd's* holding that extraneous offenses, so obtained, are admissible at sentencing).

28 *Id.*

For these reasons, I would hold that the trial court did not err in admitting appellant's statements.

All Citations

93 S.W.3d 16

End of Document

Appendix E

108 S.W.3d 269 (Mem)
Court of Criminal Appeals of Texas.

Charles Victor THOMPSON, Appellant,

v.

The STATE of Texas.

No. 73431.
|
Jan. 29, 2003.
|
Rehearing Denied April 9, 2003.

Attorneys and Law Firms

Floyd W.Freed, III, Spring, for Appellant.

Alan Curry, Asst. DA, Houston, Matthew Paul, State's Atty., Austin, for State.

OPINION

The opinion is delivered PER CURIAM.

Appellant was convicted of capital murder in April 1999. Tex. Penal Code Ann. § 19.03(a). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.071 §§ 2(b) and 2(e), the trial court sentenced appellant to death. Tex.Code Crim. Proc. art. 37.071 § 2(g). On original submission, the cause was remanded for a new punishment hearing due to error occurring during the punishment phase of the trial. *Thompson v. State,* 93 S.W.3d 16 (Tex.Crim.App. 2001).

We granted appellant's first ground for rehearing in which he maintained we failed to fully consider his fourth point of error on original submission. Upon further consideration, we have concluded our decision to grant rehearing was improvident and we withdraw the order granting rehearing. The cause is remanded to the trial court for a new punishment hearing. TEX. CODE CRIM. PROC. art. 44.29(c).

KEASLER and HERVEY, J.J. concurring and dissenting.

KEASLER, J., delivered this opinion concurring to the denial of Appellant's motion for rehearing and dissenting to the Court's failure to grant rehearing on its own motion. HERVEY, J., joined.
The Court denied Thompson's motion for rehearing. I concur with that decision. But we should grant rehearing on our own motion, overrule *Wesbrook v. State,*[1] and correct the flaws of our previous opinion in this case. I dissent to the Court's failure to do so.

1 29 S.W.3d 103 (Tex.Crim.App.2000), *cert. denied,* 532 U.S. 944, 121 S.Ct. 1407, 149 L.Ed.2d 349 (2001).

I.

In Thompson's fourth point of error, he argues that the State's use of undercover officer Gary Johnson to obtain incriminating statements from him violated the Sixth Amendment. On original submission, we agreed. We relied on our own opinion in *Wesbrook,* which involved almost identical facts, and we reasoned that "no developments in the law since *Wesbrook* would change or affect" that holding.[2] We also relied on the leading Supreme Court authority, *Maine v. Moulton,*[3] which had formed the basis of our holding in *Wesbrook* as well. In both opinions we quoted *Moulton* 's now familiar language:

2 *Thompson v. State,* 93 S.W.3d 16, 27 (Tex.Crim.App.2001) (op. on orig. subm.).

3 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).

> To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in ***270** the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah.* On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[4]

4 *Wesbrook,* 29 S.W.3d at 118–19 (internal footnote omitted); *Thompson,* 93 S.W.3d 16, 24.

But our opinion in *Wesbrook* misinterpreted *Moulton,* and we should therefore reevaluate our decision in this case.

Initially, it is worth noting that when statements are obtained from a suspect in violation of his right to counsel, the Sixth Amendment violation occurs at the moment that the statements are obtained. If such a violation occurs, the statements are inadmissible at trial—at any trial—of the accused for any offense. Conversely, if the statements are legally obtained, they are admissible, if relevant, at any trial of the accused for any offense.

Of course, if a statement incriminates a defendant with regard to two separate offenses simultaneously, one a charged offense and one an uncharged offense, then that particular statement could be inadmissible at one trial and admissible at the other. But that is not the case here. In this case we are concerned solely with statements about one particular offense—an uncharged offense. In that sense, the analysis of whether the Sixth Amendment was violated in obtaining the statement should govern that statement's admissibility at both the trial of that uncharged offense and the trial of the pending charge.

II.

I will next consider the leading Supreme Court authority on the issue of statements obtained from defendants before their trial and in the absence of their lawyers. I will also attempt to demystify the critical language in *Maine v. Moulton.*

A. The Cases

I begin with *Massiah v. United States.*[5] There, the defendant and a co-defendant were charged with possessing narcotics. They each retained a lawyer, pleaded not guilty, and were released on bail pending trial. The co-defendant soon decided to cooperate

with authorities in their continuing investigation of the drug transaction. The police hoped to locate the source of the drugs as well as the intended buyer. To assist them, the co-defendant met with the defendant in the co-defendant's car, which had been equipped with a receiving device so that a police officer could overhear the conversation. The defendant made incriminating statements regarding the drug operation during the conversation and those statements were admitted at his trial.

5 377 U.S. 201, 84 S.Ct. 1199.

The Supreme Court began by referring to the concurring opinions in *Spano v. New York.*[6] That case had involved the admission into evidence of the defendant's confession, ***271** which had been obtained after he had been indicted but without the aid of his lawyer. The *Massiah* Court looked to the concurring opinions in *Spano,* stating that they "pointed out that under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law."[7] In addition, the *Massiah* Court said, the *Spano* concurrences emphasized that "a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less ... might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."[8]

6 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).

7 *Massiah,* 377 U.S. at 204, 84 S.Ct. 1199 *quoting Spano,* 360 U.S. at 327, 79 S.Ct. 1202 (Stewart, J., concurring).

8 *Id., quoting Spano,* 360 U.S. at 326, 79 S.Ct. 1202 (Douglas, J., concurring).

The *Massiah* Court also referred to *Powell v. Alabama,*[9] which had recognized that defendants "are as much entitled" to the aid of counsel during the time from their arraignment to the beginning of trial "as at the trial itself," because this pretrial period is "perhaps the most critical period of the proceedings ... when consultation, thorough-going investigation and preparation are vitally important."[10]

9 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

10 *Massiah,* 377 U.S. at 205, 84 S.Ct. 1199 (internal brackets omitted), *quoting Powell,* 287 U.S. at 57, 53 S.Ct. 55.

The Court then applied this law to the facts before it, even though Massiah had been interrogated not by a police officer but by a government informant. The Court explained that the rule would have to extend to facts such as these because "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon because he did not even know that he was under interrogation by a government agent."[11]

11 *Id.* at 206, 84 S.Ct. 1199 *quoting United States v. Massiah,* 307 F.2d 62, 72–73 (Hays, J., dissenting).

The Court concluded by recognizing that while the police may naturally continue their investigative efforts into a crime after the defendant has been arrested, "the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."[12]

12 *Id.* at 207, 84 S.Ct. 1199.

The next significant case after *Massiah* was *United States v. Henry.*[13] In *Henry,* the defendant was indicted for robbery, had counsel appointed, and was in jail awaiting trial. Coincidentally, housed with him in the jail was a paid government informant incarcerated on forgery charges. Authorities spoke with the informant and asked him to "be alert" to any statements made by the other prisoners, but not to initiate a conversation with Henry or to ask him any questions. Later, the informant told authorities

that Henry had told him about the robbery, and the informant was paid for his information. The informant then testified at Henry's trial regarding ***272** the statements Henry had made to him about the robbery.

13 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

The Court began with the language in *Massiah* holding that the defendant's right to counsel had been violated when "federal agents had deliberately elicited" from him incriminating statements.[14] The questions in *Henry* were whether the jailhouse informant was a "government agent" and whether he had "deliberately elicited" statements from the defendant. The Court answered both questions affirmatively.[15] The Court acknowledged the government's argument that the informant had been instructed not to question Henry. But the Court concluded that, despite this instruction, the government agent "must have known" that Henry would likely incriminate himself to the informant.[16] Additionally, the Court noted that the informant had been more than just a passive listener—he had actually engaged in conversation with Henry.[17]

14 *Id.* at 270, 100 S.Ct. 2183.

15 *Id.* at 270–71, 100 S.Ct. 2183.

16 *Id.* at 271, 100 S.Ct. 2183.

17 *Id.*

The *Henry* Court emphasized that the defendant had not known that he was speaking to someone who would convey his words to the prosecution. It recognized that "[a]n accused speaking to a known Government agent is typically aware that his statements may be used against him," whereas "the same cannot be said" with regard to an accused who is "in the company of a fellow inmate who is acting by prearrangement as a Government agent."[18] It stated that "[c]onversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents."[19] The Court concluded by holding that the government "intentionally creat[ed] a situation likely to induce Henry to make incriminating statements without the assistance of counsel," thereby violating Henry's right to counsel.[20]

18 *Id.* at 273, 100 S.Ct. 2183.

19 *Id.*

20 *Id.* at 274, 100 S.Ct. 2183.

A few years later came *Moulton.* In that case, the defendant was out on bail awaiting trial when he met with his co-defendant and suggested murdering one of the State's witnesses. The co-defendant decided to cooperate with the police. He recorded a conversation that he had with the defendant in which he indirectly elicited a number of incriminating statements from the defendant. The bulk of the comments involved the offense for which trial was pending; the defendant dropped the witness-murder idea as not being feasible. At the defendant's trial, the incriminating statements related to the offense were admitted, but not any of the statements related to the murder plot.

The Supreme Court began with the acknowledgment that the right to counsel does not exist solely at trial—it applies before trial as well, when the adversary criminal proceedings have begun.[21] The Court then noted that once the right to counsel has attached and been asserted, the State must honor it, meaning, "at the very least," that "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[22] The Court then reviewed *Spano*, *Massiah*, and *Henry*, emphasizing ***273** that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."[23]

21 *Moulton,* 474 U.S. at 170, 106 S.Ct. 477.

22 *Id.* at 170–71, 106 S.Ct. 477.

23 *Id.* at 171–76, 106 S.Ct. 477.

In attempting to distinguish the previous cases, the government argued that the State was validly investigating a potential murder in *Moulton.*[24] Since that investigation was legitimate, the government contended, the statements Moulton made during that investigation which concerned the charged offense should have been admissible at the trial of that offense.[25] But the Court disagreed. It recognized that the police have "an interest in investigating new or additional crimes."[26] But it concluded that, "[i]n seeking evidence pertaining to pending charges, ... the Government's investigative powers are limited by the Sixth Amendment rights of the accused."[27] The Court then set forth the critical language which formed the basis of its holding:

24 *Id.* at 178, 106 S.Ct. 477.

25 *Id.*

26 *Id.* at 179, 106 S.Ct. 477.

27 *Id.* at 179–80, 106 S.Ct. 477.

> [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.[28]

28 *Id.* at 180, 106 S.Ct. 477.

That same term the Court decided *Moran v. Burbine.*[29] In that case, the defendant was arrested for burglary. While he was in custody and without his knowledge, his sister attempted to retain the services of the Public Defender's Officer for him. A lawyer from that office called the station and was told that officers would not question the defendant until the following day. Nevertheless, when officers received information implicating the defendant in a murder, they approached him. After waiving his *Miranda*[30] rights, he confessed to the murder. His confession was admitted at his murder trial.

29 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

30 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

After rejecting the defendant's Fifth Amendment arguments, the Supreme Court analyzed the facts under the Sixth Amendment.[31] The Court began with the fundamental notion that the accused is entitled to counsel, but not until the right to counsel attaches.[32] The Court concluded that the interrogation of Burbine took place before his right to counsel had attached with regard to the murder, so Burbine's right to counsel was not violated.[33]

31 *Burbine,* 475 U.S. at 428, 106 S.Ct. 1135.

32 *Id.*

33 *Id.*

Burbine argued that, regardless of the fact that adversary judicial proceedings had not yet begun, his right to counsel had attached simply because a lawyer had been ***274** obtained for him. In rejecting this contention, the Supreme Court elaborated on "the

underlying purposes of the right to counsel."[34] It explained that "[t]he Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any criminal prosecution, the accused shall not be left to his own devices in facing the prosecutorial forces of organized society."[35]

34 *Id.* at 430, 106 S.Ct. 1135.

35 *Id.* (internal citations and quotation marks omitted).

Finally, there is *McNeil v. Wisconsin.*[36] There, the defendant was in custody awaiting trial for armed robbery. Counsel had been appointed for that offense. On several occasions, officers approached the defendant in jail and asked him about an unrelated murder, attempted murder, and burglary. Each time, the officers informed the defendant of his *Miranda* rights and he waived those rights. Eventually, the defendant admitted his involvement in those crimes. He was charged with and later convicted of those offenses, with his incriminating statements being admitted against him.

36 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).

The defendant argued that his Sixth Amendment right to counsel attached when counsel was appointed in the armed robbery case, so the subsequent questioning of him violated that right. The Supreme Court disagreed. The Court held that the Sixth Amendment right is "offense specific. It cannot be invoked once for all future prosecutions."[37] The Court, quoting from *Moulton,* acknowledged the State's interest in investigating new and additional crimes.[38] The Court concluded that the defendant's statements pertained to offenses for which his right to counsel had not yet attached and, therefore, the Sixth Amendment had not been violated in obtaining them.[39]

37 *Id.* at 175, 111 S.Ct. 2204.

38 *Id.* at 175–76, 111 S.Ct. 2204.

39 *See id.* at 176, 111 S.Ct. 2204.

Several overriding principles emerge from these cases. First, the attachment of the right to counsel is paramount. If the right to counsel has not yet attached through the initiation of adversary judicial proceedings, then interrogating the defendant, either through obvious police questioning or surreptitious informant questioning, does not violate the Sixth Amendment. A second important principle is that the right to counsel is "offense specific." Though the Court did not use that particular phrase until *McNeil,* the concept existed as far back as *Moulton.* Because it is offense specific, the fact that the right to counsel has attached with regard to one offense does not mean that it has attached with regard to another offense. Instead, each offense must be evaluated individually. The Supreme Court pointedly reminded us of this principle recently in *Texas v. Cobb.*[40] I got it the first time. They don't have to tell me twice more.

40 532 U.S. 162, 174, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001).

Finally, the right to counsel is not a "protective cloak" which prevents the police from continuing to investigate the defendant in other crimes. The purpose of the Sixth Amendment, like its application, is "offense specific." The Sixth Amendment exists to protect the defendant, in ***275** the prosecution of a particular offense, from the "prosecutorial forces of organized society, so that he is not left alone."[41] It is not intended to shield the defendant from being interrogated about new and additional crimes.

41 *Burbine,* 475 U.S. at 430, 106 S.Ct. 1135.

Of course, each of the preceding cases differs factually from ours today in a significant respect. In each of the above cases, the State sought to admit at the defendant's trial evidence of the defendant's guilt of that offense. In this case, however, the State

sought to admit at the punishment phase of Thompson's trial evidence of Thompson's committing an entirely different offense. The task is to apply the Supreme Court authority to these unique facts.

B. Analysis of Moulton

1. What it Says and Doesn't Say

I now analyze the critical language from *Moulton* one phrase at a time. The first sentence of the oft-quoted excerpt states that "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." This sentence has three important elements. First, it tells us that, in analyzing whether the defendant's right to counsel has attached, we consider "evidence pertaining to [those] charges." In other words, the content of the statement is relevant. We should consider, in our analysis, what charges the statement addresses. If the statement pertains to charges where the right to counsel has not yet attached, then the statement has been obtained legally and should be admitted. On the other hand, if the statement pertains to charges as to which the right to counsel had attached when the statements were made, then the statement may have been obtained illegally and may need to be excluded.

Second, this sentence reminds us that the critical time period in terms of analyzing a Sixth Amendment violation is "the time the evidence was obtained." Finally, the above sentence recognizes that the public has an interest in the investigation of criminal activities, and this interest may be pursued even when a defendant has pending charges where his right to counsel has attached. The sentence leaves no doubt that the mere attachment of the right to counsel with regard to pending charges does not prevent the police from investigating the defendant's involvement in other uncharged crimes.

In the next sentence, the Court states the following: "Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." This sentence, too, is multi-dimensional. It says that if the police obtain incriminating statements from the defendant in violation of his right to counsel, those statements are not admissible at the trial of those particular charges. Once again, the Court confirms that the Sixth Amendment violation, if any, occurs at the time the statements are obtained. Additionally, the Court makes clear that statements obtained in violation of the Sixth Amendment which incriminate the defendant on a particular charge are inadmissible at the trial of that charge.

***276** Let me point out what this sentence does not say. It does not say that incriminating statements by the defendant pertaining to a new and different offense are inadmissible at the trial of the charged offense. Instead, it says only that incriminating statements by the defendant pertaining to the charged offense are inadmissible at the trial of the charged offense. I will address this point in detail in Subsection 3.

So *Moulton* says that the police may investigate a new crime when a pending charge exists. During this investigation, if they obtain evidence pertaining to the new crime, the acquisition of this evidence does not violate the Sixth Amendment because the Sixth Amendment right to counsel had not yet attached with regard to that crime. This holding makes sense in light of the principles to be gathered from the *Massiah* line of cases.

- The right to counsel cannot be violated until it has attached.
- Just because it has attached with regard to one offense does not mean it has attached with regard to another offense.
- The purpose of the right to counsel is not to shield a defendant from further investigation and prosecution by the State on new and different offenses.

When a defendant is in custody awaiting trial on a charged offense, his Sixth Amendment right to counsel has attached with regard to that offense. When police simultaneously investigate that defendant for a new, uncharged crime, the defendant's Sixth Amendment right to counsel with regard to that uncharged crime has not yet attached. So if the police, either uniformed, undercover, or through an informant, obtain incriminating statements from the defendant with regard to that new, uncharged offense, no Sixth Amendment violation has occurred.

It does not matter at which trial the statements are admitted. What matters is the content of the statement. If the statement incriminates the defendant on the charged offense, obtaining the statement violated the defendant's right to counsel, because his right to counsel had attached with regard to that offense. Likewise, if the statement pertains to an uncharged offense, obtaining the statement did not violate the defendant's right to counsel because his right to counsel had not yet attached with regard to that offense.

It defies common sense to hold that statements by a defendant are admissible at one trial (the trial of the new, uncharged offense), but inadmissible at another trial (the trial of the pending charge). Either a Sixth Amendment violation has occurred in obtaining the statements, or it has not. And once that question is resolved, the statements are either admissible at all trials or inadmissible at all trials. The Supreme Court made clear in *Moulton* that statements pertaining to a new, uncharged offense would be admissible at a trial for that offense. The statements would therefore necessarily also be admissible at a trial for the charged offense.

2. Virginia's and Wisconsin's Analyses

The Supreme Court of Virginia recognized this in a case almost identical to this one, *Frye v. Commonwealth.*[42] In *Frye,* the defendant was in custody awaiting trial on capital murder charges when he approached a fellow inmate about an escape plan. The inmate informed authorities, and an investigator asked the inmate to let him know if Frye supplied any more information.

42 231 Va. 370, 345 S.E.2d 267 (Va.1986).

***277** The Commonwealth argued that the inmate-informant's actions had not violated the Sixth Amendment because Frye had initiated the relationship, not the informant. The Virginia Court rejected this notion, relying on *Moulton* and *Henry.*[43] But the Court also recognized that *Moulton* was not directly on point. The *Frye* Court emphasized that the Supreme Court limited *Moulton* 's holding "in one crucial respect. The proscription against knowing circumvention of the right of the accused to have counsel present ... extends only to *pending charges* concerning which the right of counsel has attached.... Thus, only such statements as incriminate the defendant on the pending charges are obtained in violation of the Sixth Amendment and must be excluded."[44] The Court concluded that the evidence of the escape plan was admissible at the punishment phase of Frye's capital murder trial because it was "unrelated to the offense for which he was on trial."[45]

43 *Id.* at 391, 345 S.E.2d at 282.

44 *Id.* at 391–92, 345 S.E.2d at 282–83 (emphasis in original).

45 *Id.* at 392, 345 S.E.2d at 282–83.

Another useful case comes from the court of appeals in Wisconsin. In *State v. Lale.*[46] the defendant was out on bail after being arrested for attempted murder. Although he had retained counsel for that charge, no complaint had been filed and so no formal adversary proceedings had begun. Several days later, a complaint was filed against him for possession of illegal weapons. That same day, officers contacted Lale's girlfriend and persuaded her to encourage Lale to talk to the police about the attempted murder.

46 141 Wis.2d 480, 415 N.W.2d 847 (Wis.Ct.App.1987).

The defendant complained that these conversations violated his Sixth Amendment right to counsel, but the court concluded that his right to counsel had not yet attached on the attempted murder. The court explained:

> We conclude that the language in *Moulton* requiring suppression of evidence refers to situations where police obtain incriminating statements pertaining to the crime for which a defendant has been formally charged, but justify their action by reasoning that they meant to investigate other unfiled charges; where, however, the police obtain incriminating statements on charges unrelated to the filed charge, the *Moulton* and *Moran* courts hold that the sixth amendment rights are not implicated.[47]

47 *Id.* at 489, 415 N.W.2d at 851.

Admittedly, *Lale* is different from this case because in *Lale,* the defendant made incriminating statements about an uncharged offense and those statements were admitted at the trial for that offense. This makes *Lale* more similar to the Supreme Court precedent in the preceding section rather than to the unique facts of this case.

Nevertheless, the language in *Lale* provides guidance. The court recognized that *Moulton* "refers to situations where police obtain incriminating statements pertaining to the crime for which a defendant has been formally charged, but justify their action by reasoning that they meant to investigate other unfiled charges."[48] This case does not involve such facts, because here, the statements at issue pertain to a new, uncharged offense, not the pending charge. Additionally, the *Lale* court acknowledged that when "the police obtain incriminating statements on charges unrelated to the filed charge, the *Moulton* and ***278** *Moran* courts hold that the sixth amendment rights are not implicated."[49] So both Virginia and Wisconsin agree that statements pertaining to a new, uncharged offense are obtained legally and are therefore admissible at a trial of the charged offense.

48 *Id.*

49 *Id.*

3. Denying the Antecedent

The *Moulton* Court was clear in stating that evidence obtained regarding the uncharged crime would be admissible at a trial of those charges. And in a footnote, the Court added that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses."[50] Some courts have concluded from this language that *Moulton* also held that the converse is true—that is, if the statements regarding that uncharged crime are admissible at the trial of that offense, then they must be inadmissible at any other trial, specifically the trial of the charged offense.[51] But the Supreme Court did not say this, and drawing that conclusion from the Court's holding employs the logical fallacy known as denying the antecedent.

50 474 U.S. at 180 n. 16, 106 S.Ct. 477.

51 *See, e.g., Jackson v. State,* 643 A.2d 1360, 1372 (Del.1994); *Bruno v. State,* 93 Md.App. 501, 509–10, 613 A.2d 440, 444–45 (Md.Ct.Spec.App.1992).

Douglas Lind describes this fallacy in his book *Logic and Legal Reasoning.*[52] He uses the following example:

52 DOUGLAS LIND, LOGIC AND LEGAL REASONING 207–08 (2001).

(1) If Socrates is human, then Socrates is mortal.

(2) Socrates is not human.

(3) Therefore, Socrates is not mortal.[53]

53 *Id.*

Lind explains that this is a logical fallacy because "Socrates could well be mortal, even if not human."[54]

54 *Id.* at 208.

The same is true here. The courts that employ this fallacy reason as follows:

(1) If the trial concerns the uncharged offense, then the evidence is admissible. (*Moulton* 's holding).

(2) This trial did not concern the uncharged offense.

(3) Therefore, the evidence is not admissible.[55]

55 *Jackson,* 643 A.2d at 1372 (Del.1994); *Bruno,* 93 Md.App. at 509–10, 613 A.2d at 444–45.

But the evidence could well be admissible, even though the trial concerned the pending charge rather than the uncharged offense.

The courts employing this fallacy have sometimes relied on the Supreme Court's *dicta* in *Burbine* as support. In addition to other language, the *Burbine* Court also set forth in *dicta* its interpretation of *Moulton* as holding that "the evidence concerning the crime for which the defendant had not been indicted ... would be admissible at a trial limited to those charges."[56] Some courts tend to view the word "limited" as implying that the statement would be admissible only at a trial on that particular charge. But the *Burbine* Court was not faced with facts like this case where the State sought to admit the statement at the punishment phase of the trial of the pending charge.

56 *Burbine,* 475 U.S. at 431, 106 S.Ct. 1135

Moreover, this one sentence in *Burbine* should not be taken so far in light of the *Burbine* Court's stated awareness that (1) ***279** Sixth Amendment violations are to be evaluated at the time that the evidence is obtained rather than at the time that it is admitted at trial,[57] and (2) the Sixth Amendment does not wrap "a protective cloak around the attorney-client relationship." Under *Burbine,* the statements in this case would be admissible at the trial of the pending charge because, first, no Sixth Amendment violation occurred in obtaining the statements since the right to counsel had not yet attached with regard to the new, uncharged crime. The statements would also be admissible because the Sixth Amendment should not be used to protect a person from being prosecuted for new, uncharged offenses that he commits. *Burbine* did not address whether the statements would be admissible at the trial for the pending charge. And a careful reading of *Burbine* indicates that the opposite conclusion is more true to the Court's rationale, which emphasized the public's interest in investigating crime.

57 *Id.* at 428, 106 S.Ct. 1135 (interrogation of Burbine took place before his right to counsel had attached with regard to the murder, so Burbine's right to counsel was not violated).

4. Offense Specificity

Objectors may contend that the statements elicited from the defendant regarding the uncharged offense are incriminating not only with respect to that uncharged offense but also with respect to the pending charge. That is, the argument goes, the evidence will "incriminate" the defendant at the punishment stage of the pending charge and likely affect the jury's decision on punishment, to the defendant's detriment. As a result, they would argue, this evidence cannot be admissible at the punishment phase of the

pending charge because, since it is incriminating, it was obtained in violation of the defendant's right to counsel on the pending charge.

The problem with this argument is that the right to counsel does not protect a defendant from being interrogated with regard to anything which could remotely affect the punishment phase of his trial. Instead, the right to counsel is "offense specific" and protects only against interrogations related to the pending charge. The Sixth Amendment is not a blanket which forbids all communication between the defendant and law enforcement in the absence of the defendant's counsel. Rather, it forbids interrogation of the defendant regarding the pending charge without his lawyer.

III.

This Court is reluctant to overrule precedent. But when one of our opinions conflicts with Supreme Court authority, we should overrule it. *Wesbrook* misinterpreted and conflicts with *Moulton.*

In *Wesbrook,* the defendant, in custody awaiting trial on capital murder, told a fellow inmate that he wanted to hire someone to kill two people. The inmate told the police, and the police arranged a plan with the inmate. The inmate told the defendant that he knew of a hit man, who was really undercover officer Gary Johnson (the same undercover officer in today's case). The defendant was interested and had five more people he wanted killed, four of whom were to be witnesses at his trial. The defendant spoke to Johnson on the phone to hire him, then later spoke to Johnson in person, but he eventually backed out of the murder plan because he was afraid the police were on to him. The State introduced evidence of the solicitation at the punishment phase of the defendant's capital murder trial.

Our analysis was flawed. First, although we cited *Moulton* generally for the ***280** proposition that "[t]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent,"[58] we failed to acknowledge that *Moulton* specifically limited this holding to "incriminating statements pertaining to pending charges." In *Wesbrook,* we applied *Moulton* 's holding to incriminating statements pertaining to a new offense, solicitation of capital murder. But nothing in *Moulton* supports this extension.

58 *Wesbrook,* 29 S.W.3d at 117.

Second, we recognized the rules concerning cellmates as government agents "deliberately eliciting" information from the defendant. We then without elaboration applied this doctrine of law to the facts of the case, concluding that the State "intentionally created a situation likely to induce appellant to make incriminating statements without the assistance of counsel, the State violated appellant's Sixth Amendment right to counsel."[59] The problem with that leap in logic was that we never considered whether Wesbrook's right to counsel had attached with regard to the solicitation offense. If we had done so, we would have been forced to realize that the defendant's right to counsel had not attached with regard to that offense.

59 *Id.* at 118.

We should analyze the issue anew today and recognize that the statements were not obtained in violation of Wesbrook's right to counsel because they pertained to a solicitation offense for which he had not yet been charged. The statements were therefore admissible at the punishment phase of the trial of the pending charge.

We should overrule that portion of *Wesbrook* which dealt with Wesbrook's sixth point of error. I must admit that I joined the plurality that handed down the judgment in *Wesbrook.* Upon reconsideration, I conclude that I was wrong. I therefore join Justice Jackson in admitting that

> [p]recedent ... is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others.... Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary —"Ignorance, sir, ignorance." But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good naturedly surrendering former views to a better considered opinion, I invoke them all.[60]

60 *McGrath v. Kristensen,* 340 U.S. 162, 177–78, 71 S.Ct. 224, 95 L.Ed. 173 (1950) (Jackson, J., concurring).

IV.

Thompson was under indictment and in custody awaiting trial for capital murder. Obviously, adversary criminal proceedings had been initiated with respect to the capital murder, and Thompson's Sixth Amendment right to counsel had attached with respect to that charge.

While in custody, Thompson made statements concerning an additional offense, a plan to murder a witness at his trial. This was a new offense. No adversary criminal proceedings had been initiated with respect to this offense. Thompson's right to counsel had not attached with respect to this offense. Obtaining these statements from Thompson did not violate the Sixth Amendment because his right to counsel ***281** had not yet attached with respect to this offense. Since obtaining the statements did not violate the Sixth Amendment, the statements were admissible, not only at his trial for that offense, but also at his trial for the pending charge.

All Citations

108 S.W.3d 269 (Mem)

End of Document

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70008

CHARLES VICTOR THOMPSON,

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 Southern District of Texas

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham

UNITED STATES CIRCUIT JUDGE

Appendix G

AGREEMENT

On this the 6TH day of AUGUST, 1993 the following agreement was made between ROBERT LEE, GARY E. PATTERSON, Attorney for LEE, Officer F.WINKLER of the Houston Police Department assigned to the Harris County Organized Crime Narcotics Task Force, and JOAN HUFFMAN of the Harris County District Attorney's Office.

(1) That ROBERT LEE is presently charged with the offense of THEFT in cause no 667239 and THEFT OF SERVICE in cause number 667238 in the 248th District Court of Harris County, Texas.

(2) That he has agreed to cooperate with Officer Winkler and other law enforcement officers in working with this Officer in the investigation of narcotics trafficking in the Harris County area of which he has knowledge.

(3) That Lee, upon receipt of a letter from a Supervisor in the division or department to which Winkler is assigned (Lt. grade or above) to the District Attorney's Office notifying the State that all terms of this agreement have been fully complied with, will receive for his cooperation and assistance a dismissal in cause number 667239 and three years felony probation in Cause number 667238 with_____ _____in restitution to the Complainaing witness.

(4) That he will provide all information and assistance to Officer Winkler leading to the arrest and indictment of one or more individuals for a State or Federal Felony Offense possession or delivery which leads to a seizure of at least three ounces of cocaine.

(5) That the law in regards to entrapment has been explained to Lee and he agrees and understands that any case wherein the District Attorney's Office believes was made by entrapment will not count towards the satisfaction of the requirement indicated in paragraph 4 above, and the State will void this contract.

(6) Further that all said information must be truthful, and that should law enforcement present evidence that said information is untruthful, or said evidence comes to the attention of the Harris County District Attorney's Office, this agreement is void.

(7) That he fully understand that he must, during the course of the above investigation, follow the directions and instructions of Winkler or his fellow law enforcement officers and failure to do so will void this agreement.

(8) That he understands that he will receive no consideration in his case until he complies fully with provision (4) of this agreement, and that good faith attempts do not constitute

compliance, and that less than full compliance will not obligate the Harris County District Attorney's Office in any respect.

(9) That he further understands that this agreement will in no way authorize him to break any State or Federal laws.

(10) Further, he agrees that he will contact Winkler or his designee at least every day, or at other such intervals that Rodriguez may direct during the course of this agreement, and that failure to comply with this term will constitute a violation of this agreement, subjecting the agreement to be considered void at discretion of Huffman.

(11) That he further understand that all conditions under the terms of this agreement are to be accomplished on or before November 8, 1993.

(12) That all parties agree that no statements made by Lee during the course of this agreement may be used in a subsequent prosecution of the above cases presently pending against him.

(13) That Lee understands that if he fails to fulfill the above agreement the State of Texas will not be bound to the agreement as set out in paragraph three (3).

(14) That Lee may be required to wear transmitting and recording devices during the course of any investigations in pursuit of this contract and hereby consents to the recording of conversations in that pursuit.

(15) That Lee may be required to testify either at a Grand Jury or in the trial of any of individual(s) arrested and indicted as a result of this investigation and agrees to waive receipt of legal process compelling his testimony.

(16) That Lee understands that he is not permitted to be in possession or in the immediate presence of any illegal controlled substance or marijuana, and that at any time he becomes aware of same he is to immediately inform Officer Winkler. Further, any contact with narcotics must be within the view of a peace officer or be electronically monitored and recorded by law enforcement. Violation of this paragraph will immediately void this agreement.

Robert Lee

Gary E. Patterson

Floyd Winkler

Joan Huffman

Appendix H

THE STATE OF TEXAS

IN THE 248 DISTRICT COURT

VS.

Robert Lee

OF

HARRIS COUNTY, TEXAS

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and through her District Attorney, and respectfully requests the Court to dismiss the above entitled and numbered criminal action for the following reason:

- [X] The Defendant was convicted in another case or count.
- [ ] In custody elsewhere.
- [ ] Old case, no arrest.
- [ ] Missing witness.
- [ ] Request of complaining witness.
- [ ] Motion to suppress granted.
- [ ] Co-Defendant tried, this Defendant testify.
- [ ] Insufficient evidence.
- [ ] Co-Defendant convicted, insufficient evidence this Defendant.
- [ ] Case refiled.
- [ ] Other.

EXPLANATION:

As per Joan Huffman's contract agreement

WHEREFORE, PREMISES CONSIDERED, it is requested that the above entitled and numbered cause be dismissed.

Respectfully submitted,

Pat Stilley

Assistant District Attorney
Harris County, Texas

ORDER

The foregoing motion having been presented to me on this the 09 day of Sept, A.D. 1993 and the same having been considered, it is, therefore, ORDERED, ADJUDGED and DECREED that said above entitled and numbered cause be and the same is hereby dismissed.

Appendix I

STATE of TEXAS
VS
ROBIN RHODES
AKA ~~Robin Lee~~
Robert Lee

6-30-91 Denied [signature] JUDGE

208TH DISTRICT COURT
IN AND FOR
HARRIS COUNTY TEXAS

MOTION TO Reduce SENTENCE

NOW INTO COURT comes ROBIN RHODES Defendant moves the COURT TO Reduce the SENTENCE THAT WAS imposed on REVOCATION of the Defendants community supervision. in this cause AND in support of this MOTION SHOWS:

I

DEFENDANT ORIGINALLY Plead GUILTY TO the offenses of THEFT OF SERVICES AND CREDIT CARD ABUSE ON OCTOBER 12 1993. ON OCTOBER 12 1993 10 YEARS WAS Assessed. THE PUNISHMENT WAS SUSPENDED WHEN THE Defendant WAS PLACED ON COMMUNITY SUPERVISION. THE PERIOD ASSESSED WAS 10 YEARS BEGINNING ON OCT 12 1993

II

THE Defendants SATISFACTORILY completed 4 YEARS PRIOR TO THE VIOLATION ON WHICH REVOCATION OF COMMUNITY SUPERVISION WAS BASED.

III

Defendant WAS REVOKED ON THIS COMMUNITY SUPERVISION AND SENTENCED TO A TERM of 2 YEARS IN TEXAS DEPARTMENT OF CORRECTIONS ON MAY 13, 1997

IV

DURING THE PERIOD IN WHICH defendant WAS ON COMMUNITY SUPERVISION AND SINCE HIS SENTENCE SEVERAL

7-7-97 [illegible] 10 Sm GGG GGG 13 Sm GGIV GGDV

VZ188 P0987

EVENTS HAVE TAKEN PLACE WHICH WOULD PLACE THE DEFENDANT IN GREAT DANGER IF ACTUALLY PLACED IN T.D.C. CUSTODY. DEFENDANT HAS CO-OPERATED IN EXTENSIVE NARCOTICS INVESTIGATIONS. APPROXIMATELY (20) TWENTY - TWENTY-FIVE (25) IN NUMBER. DEFENDANT HAS NO WAY TO ASCERTAIN ALL OF THE NAMES OF PERSONS HE HAS HELPED PLACE INTO THE CONFINES OF T.D.C. DEFENDANT CO-OPERATED WITH THE HARRIS COUNTY ORGANIZED CRIME TASK FORCE SINCE 1993. TO DATE.

V

DEFENDANT HAS AN INFANT SON AGED 1 YEAR WITH RELIES UPON HIM FOR SUPPORT. DEFENDANT IS ALSO A SUPPORTING FACTOR IN THE SUPPORT OF HIS AGED PARENTS MR & MRS. R.C. RHODES. AGED 83 & 70 RESPECTIVELY. MR RHODES IS CURRENTLY HOSPITALIZED WITH A LIVER CONDITION AND RECENTLY (1995) HAD OPEN HEART SURGERY. DEFENDANT RESIDES WITH PARENTS. THEREFORE FURTHER CUSTODY WOULD CAUSE SEVERE HARDSHIP TO THE DEFENDANTS FAMILY.

PRAYER

WHEREFORE DEFENDANT PRAYS THE COURT GRANT THIS MOTION AND REDUCE THE SENTENCE IMPOSED TO A LESSER SENTENCE OR REINSTATE DEFENDANTS COMMUNITY SUPERVISION OR A SENTENCE DEFENDANT COULD SERVE IN THE HARRIS COUNTY JAIL WHICH WOULD ALLOW HIM TO WORK AND SUPPORT HIS FAMILY WHILE SATISFYING THE INTERESTS OF JUSTICE.

V2188 P0988

TO Reduce SENTENCE

VI - CONTINUED

Defendant was informed TODAY 6-17-96 THAT His FATHER Roy L. LHODES HAS CANCER of THE LIVER AND HAS ABOUT 3 MONTHS TO LIVE. Giving FURTHER EVIDENCE OF THE MITIGATING CIRCUMSTANCES, FURTHER INCARCERATION would CAUSE SEVERE HARDSHIP And EMOTIONAL HARDSHIP ON both Defendant & his FAMILY.

V2188 P0989

Please file the enclosed MOTION into the court records. Would you please notify me of said filing as well as any court date or ruling on same? Thanking you in advance

Sincerely,
Robin Rhodes #18237
1301 Franklin 8-A-4
Houston TX 77002

CAUSE NO: 667238
674316

P.S. Clerk I added an additional section to part II of mitigating circumstances (see attached) my father is dying (3 mos) to live pls. file A.S.A.P.

THANX!
Robin

FILED
CHARLES BACARISSE
District Clerk

JUN 26 1997

Time: 11:30 AM
Harris County, Texas
By: Deputy

V2188 P0990

Appendix J

DON STRICKLIN
FIRST ASSISTANT

DISTRICT ATTORNEY'S BUILDING
201 FANNIN, SUITE 200
HOUSTON, TEXAS 77002-1901

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

INTEROFFICE MEMORANDUM

TO: FILE

FROM: Mike Kelly, Investigator

SUBJECT: Defendant: Charles Victor Thompson, Cause #

DATE: August 25, 1998

CC:

Report of Investigation
August 25, 1998

On Tuesday, August 26, 1998 I was contacted by the witness in this case Robin Rhodes w/m 12/19/1955, SPN# 00183237. Mr. Rhodes left a message that he needed to talk with me concerning Charles ctor Thompson. Thompson is charged with Capital Murder and Solicitation to Commit Capital Murder in the 262nd District Court.
I met with Robin Rhodes this date, the following statement details the information Rhodes provided this investigator.

Statement of Robin Rhodes;

On or about 8/21/98 I spoke with inmate Charles Thompson (who is housed in cell #12) at recreation. We had previously spoken regarding his situation. He indicated to me that he had someone who wanted to invest some money in a narcotics transaction. On this particular day he asked me if I would be willing to convince "some people not to or be able not to come to trial. I told him I'd consider it. He then gave me a piece of paper w/ some names, descriptions, addresses, & schedules. Monday 8/24/98 I asked him what did he wanted me to do. He said either kill them or persuade them not to be there he did not care. He told me his life depended on it.

If need be I will testify & or will wear a wire to record our conversation (Charles Thompson). My only requirements are that I be moved as the inmate grapevine is quite efficient. I'd like to go to one of the Pct. Offices Pct 1 etc. or Baker Street as anywhere else people have daily contact with prisoners in this bldg.

End of statement of Robin Rhodes.

During the interview with Robin Rhodes he also provided me with the piece of paper given to him by Charles Thompson. Robin states that the writing is Charles Thompsons, and the handwritten note names Diane Hernia the Complainant in the Solicitation case with a physical description, her address, telephone number, vehicle description, residence description, and a partial schedule. The note also lists Gary F. Johnson with the word "entrapment" preceding his name, There is also a physical description and occupation (D.A. Investigator) listed. The note lists Mike Donaghy, and wife Cindy. Mr. Donaghy is the brother of Complainant Denise Hayslip in the capital murder case against Thompson. The note describes what part of town he lives in, place of employment, and a partial schedule. The last person listed on the note is Jack Reid. Reid's name is preceded by the word "snitch". The note gives a brief description of Reid and some criminal history information about him.

I took the note from Robin Rhodes to be processed for latent prints, and possibly for handwriting analysis. During the interview with Robin Rhodes he described information about the original capital murder case Thompson is charged in. Rhodes states that Thompson told him that he shot the male victim, Darren Cain first, and that during a struggle over the gun Thompson shot himself in the arm. He then shot Denise Hayslip. Thompson told Rhodes that he got mad because Cain was attempting to flee the apartment so he walk to Cain shooting him at the base of the neck and the skull, Cain fell over. Thompson told Rhodes that he meant to shoot him in the back of the head and missed. Thompson told Rhodes that the gun was a .380 caliber and has been discarded in 4-6 feet of water with the chamber open. Thompson also informed Rhodes that the cause of death of Denise Hayslip was pneumonia and not a gunshot wound. Rhodes states after talking to Thompson he made a list of notes based on his conversation with Thompson. I have also secured that list of notes, making them a part of this report.

Following the interview with Rhodes I returned to District Attorney's Office and presented the new information to A.D.A. Vic Wisner of the 262nd District Court. A.D.A. Wisner advised to document the information, and advise Investigator Johnson of the new information, and to have Thompson isolated in the jail to prevent contact with other inmates. I advised Investigator Johnson of the new information and provided him with a copy of the note from Thompson. I then secured the note in a transparent plastic sheath and submitted same to the Harris County Sheriff's Department Identification Division for the purpose of processing it for latent fingerprints, and comparing same to Charles Thompson. The evidence was submitted to Deputy Culver under case number 9806130289. (Laboratory Submission Form Attached).

I contacted the Classification Division of the Harris County Sheriff's Department and spoke with Lt. G. Moore. I requested from Lt. Moore that Thompson be placed in isolation pending trial. I requested that contact with other inmates be revoked, all visitation, other than attorney visits be revoked, and no access to any telephones. I explained to Lt. Moore this action was necessary for the safety of witnesses involved in his case. I followed up the conversation with Lt. Moore by providing him a written request sent to him by fax and hand delivering the original to his office. I have been informed by Lt. Moore that Thompson has been placed in isolation with no contact other than his attorney, and Sheriff's personnel.

This investigation is pending the findings of the fingerprint analysis being conducted by the Sheriff's Department Identification Division.

Appendix K

Robin Rhodes 281 796-7316

2911 Sycamore Springs
Kingwood TX 77339

Mother
#913 Audree Rhodes
281 360-2473 312

→ testified before Pasadena
1241376 ct 12
"bitch had it coming" - worthless bitch
- wired on gonna wire $
- contacted Floyd, set in hand
- thought only witness

Appendix L

gave statement

Appears to be from trial Counsel #1's Notes

Robin Rhodes ⇒ talking to Mike Kelly

1/13/98 inmate contacted by Charles ("very knowledgable about law")

(a) substantial narc. transaction
(b) to recvr weapon
"Thompson never disclosed loc."
"led to believe same as murder"

MRP parole ⇒ technicals
duty UAs
Non-Rpts
to get s/o to check status

felony 8/12/96
theft
theft - CC # 12
felony @ 5-13-97
theft

habitual felon

8/24/98 on 8/21/98 Charles gave names + addresses to Robin Rhodes —
"to keep some people from coming to Ct"

⇒ want to be moved to a precinct or Bakers Street