APPENDIX

APPENDIX TAB A:

JUNE 15, 2018 REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Fifth Cir. ROA.272-300)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

CYNTHIA A. HUDSON, #1696397	§	
VS.	§	CIVIL ACTION NO. 2:17cv216
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Cynthia Ann Hudson, through counsel, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging her Cass County conviction. The cause of action was referred for findings of fact, conclusions of law, and recommendations for the disposition of the petition.

I. Procedural Background

A jury convicted Hudson of capital murder and she was sentenced to life imprisonment without the possibility of parole. The Sixth District Court of Appeals reversed her conviction, finding that she was entitled to a manslaughter instruction. *See Hudson v. State*, 366 S.W.3d 878 (Tex. App.—Texarkana 2012). The Texas Court of Criminal Appeals then reversed the appellate court, remanding the case back to the appellate court to determine whether the evidence supported other "greater" lesser-included offenses. *See Hudson v. State*, 394 S.W.3d 522 (Tex. Crim. App. 2013). On remand, the appellate court affirmed her conviction—finding that (1) felony murder, based on felony injury to a child, was indeed a lesser-included offense of capital murder as charged; (2) sufficient evidence existed to warrant an instruction on felony murder; and (3) evidence did not establish recklessness, which did not entitle Hudson to a jury instruction on manslaughter. *See Hudson v. State*, 415 S.W.3d 891, 893; 896-97 (Tex. App.—Texarkana 2013).

Subsequently, the Texas Court of Criminal Appeals affirmed that judgment. Hudson "was not entitled to a lesser-included instruction on manslaughter because the proof upon which she

relied was also sufficient to prove another, greater lesser-included offense of capital murder, felony murder based on felonious injury to a child." *See Hudson v. State*, 449 S.W.3d 495, 498 (Tex. Crim. App. 2014).

Hudson filed a state habeas application in 2016. After a hearing, the trial court issued findings of fact and conclusions of law, recommending that the habeas application be denied. The Texas Court of Criminal Appeals then denied her application in 2017 based on the trial court's findings after the hearing. Hudson then filed this federal petition in March 2017.

II. Factual Background

While the name of the deceased victim is Samuel, for purposes of confidentiality, the appellate court used pseudonyms for the other minor children referenced. This Court will do the same. The Sixth Court of Appeals summarized the facts as follows:

> Late on the fateful day, Hudson's husband, William (Bill), called 9-1-1 to report Samuel's death, which he initially said was the result of choking. The responding paramedic Tim Tolleson and first deputy on the scene both were struck by the sight of the dead boy, clad only in "spotless" briefs, lying in the center of a bare room. The child bore bruising, "stripes," from his neck to his feet. Some wounds were fresh; some were partially healed. By the time Tolleson arrived, rigor mortis had sent in, and Samuel's body was cold and stiff. When he asked the parents about the plethora of wounds and marks on the boy's body, they explained he had "reactive attachment disorder," or "RAD" and had a history of self-mutilation. The surviving children were removed that night to the home of the family's pastor. When the children's clothing was delivered to them a day or two later, hidden in the clothing left for Samuel's brother Gary, was a note from Hudson suggesting to him that he had not seen her beat Samuel and telling him to dispose of the note.
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> A couple of days later, Hudson was found, bleeding, at a roadside park. She had cut her arms inside the elbows and left a note "for the cops" claiming responsibility for beating Gary and Samuel, and for "murder[ing]" Samuel.
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> Gary, Samuel, and Elaine were all blood-siblings adopted by Hudson and Bill. In the few days between Thanksgiving Day and December 3, 2008, Samuel had been confined to his room and "fasted," that is, deprived of food. Gary's testimony—and his written statement, also admitted into evidence—regarding the events preceding, and on the afternoon of, December 3 constituted central evidence at trial. The evidence painted a brutal picture.
>
> Gary testified that, to be released from his room, Samuel needed to "repent" of lustful thoughts.

Starting at or soon after 2:30 p.m., December 3, Hudson beat Samuel periodically, with various implements. The first implement used to beat Samuel appears to have been a broom handle. During those early beatings, Samuel reportedly said, "I repent," but the beatings continued. When the broom handle broke, Hudson asked Gary to bring a mop with a metal handle, which ultimately bent under the continued beatings of Samuel. Hudson then sent Gary out for a red and black metal rake, with which she continued the beatings. The rake handle apparently bent also, prompting Hudson to emerge from Samuel's room expressing the desire for something that would not bend. Hudson's solution was a white, metal baseball bat, with which she beat Samuel more. During the beating with the bat, Hudson reportedly told Samuel to move his head, Samuel said that she was breaking his bones, and she said, "I told you to move your head."

After telling Samuel to sit up, Hudson then left the room. When she returned, Samuel was still lying on the floor. She responded by hitting him with a green computer cord, but he remained on the floor. She warned him that, if he did not get up, she would get the bat. He stayed on the floor. She hit him until she got tired. Hudson directed Gary to come into the room and help stand Samuel up. She removed zip ties from Samuel's wrists, because his hands were turning blue. Samuel was having trouble standing up, in spite of Hudson's directions that he do so; he said he felt like he was "dying." Hudson dropped Samuel to the floor and left him for twenty minutes, only to return with the bat, sit him upright, and continue the beatings with the bat, hitting him in the chest, arms, and legs, and kicking him in the ribs.

At some point late in the afternoon, Hudson called Bill, who came home around 7:00 p.m.—much earlier than usual. Gary said the two parents spoke in the "prayer room" (also referred to as the "book room") for a time, then Bill went to Samuel's room; Gary heard a slapping sound. Hudson then sent the children to the prayer room and instructed them to pray. A few minutes later, she came in and told the children Samuel had committed suicide. Gary said this made him mad and sad because he knew Samuel had not committed suicide. Gary said that Hudson then told him and Bill to "gather up all the tools that she whipped him with …. the ones that, you know, all the ones that I gotted [sic] for her and the ones that she used to beat us with." Gary said he and Bill gathered the implements and weapons before paramedics were called. Bill took them to his shop, a building behind the house. Gary went outside and looked in the window to see Samuel on the floor of this room, with a blanket over him and his eyes halfway opened. The lights were on, and he had nothing wrapped around his neck. Before the police arrived, Hudson "told us what to say, but to be honest." She told Gary to tell police that he and Samuel "had wars with switches and stuff to explain the stripes that were on him." After this, the children were removed from the Hudson home. Soon a note came from Hudson, directed to Gary:

> I love you. You saw nothing of Samuel's spankings. You never saw him get whipped. [REDACTED.] Nothing—no part at all. Flush this. Make sure it goes down. I love you, Mom.

Samuel's sister Elaine corroborated much of the abuse described by Gary. On Thanksgiving, a few days before Samuel's death, Elaine saw "brownish-reddish marks, looks like bruises on Samuel's arms." After Thanksgiving dinner, Elaine and Samuel swapped their usual chores—Elaine cleaned the dishes in the kitchen, and Samuel cleaned

the bathroom because "Hudson didn't want anybody to see Samuel's marks whenever he pulled up his t-shirt." Elaine said that, at some point in the day, Hudson made Samuel change from a short-sleeve to a longsleeve shirt. Elaine also saw bruises on Samuel's back and neck, and said Hudson, sitting close to Samuel, frequently adjusted his shirt, apparently so the marks would not be visible.

On the afternoon of December 3, Hudson told Elaine that Samuel could not leave his room because Hudson "felt the spirit of lust." That day, Elaine heard Hudson's voice in Samuel's room and heard Samuel screaming, "saying that he doesn't want to live. He was saying let him die" and "that he repents." Samuel sounded as if was in pain. Elaine said she also heard noises of possible discipline from Samuel's room:

> It was a pace of an item beating on Samuel … you could follow the trace of it. You could tell that whenever she lifts up and then down, (claps hands together) it'd be like that. (Claps hands together). And again.

After Samuel's death, Hudson told Elaine and the other children what to do when the police arrived—to tell them Samuel committed suicide and for the children "not to tell on her for beating him." Hudson told Gary to "hide some of the evidence." Hudson instructed the children:

> She was telling us that she'll get us fast, she'll get us back fast, soon as possible, and she was telling us that she didn't kill him, kill Samuel, and she was telling us not to tell—not—if we tell on her, she'll whoop us until the cows come home.

Elaine testified she never saw Samuel refuse food or hurt himself.

The medical examiner, Dr. Chester Gwin of Southwest Institute of Forensic Science, testified the cause of death was blunt force trauma and starvation. He classified the death as homicide. The body had bruises and abrasions on his face, neck, chest, back, arms, hands, legs, and the tops of his feet. Some injuries had "squared-off ends," and some looped; the looped-shaped injuries could have been caused by a cord. Some of the injuries were scabbing, indicating having been present "awhile" and were in the process of healing. Others had been created more recently. Samuel had two fractures in his left ulna, one being "fresh" or "very recent." Gwin, however, did not offer any opinion as to the age of the other break. There was also a significant amount of hemorrhaging, ranging from Samuel's sub-scalp, under his shoulder blades, between his ribs, the back of his neck, and arms.

Gwin included starvation in his cause of death based on the ketone level in Samuel's blood. The levels were those seen in someone with diabetes, alcoholism, or starvation; and there was no indication Samuel was afflicted by the first two. Contrary to the testimony of Elaine and Gary, both Hudson and Bill testified there was ample food always available to the children; food was not withheld as punishment. Hudson said both Elaine and Samuel hoarded food in their rooms.

Gwin said that, in his opinion, the wounds to Samuel could not have been self-inflicted. He also said that it was impossible for someone to choke themselves to death, especially given

> Samuel's broken arm would increase the degree of difficulty to generate the arm strength to occlude his own blood flow to choke himself.
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> Hudson explained that she and Bill adopted "at risk" children and claimed Gary beat and killed Samuel. Hudson said that, when she attempted suicide and left a note confession to the killing a few days after Samuel's death, she had been attempting to take the blame for Gary and keep the family together. After being interviewed by law enforcement in the days after the death, she told Bill she believed authorities were "going to try to pin this on [Gary]." When asked at trial why, subsequently, she accused Gary of the killing, she said Gary was "a group of six…. The state's taken the children that I was trying to protect with him." Hudson testified she believed Gary killed Samuel while she was taking a walk around the property on December 3, 2008. She testified that, when she returned from her hour-long walk, she did not check on Samuel. In her interview with Ray Copeland, Hudson claimed Samuel was alive and acting out, "mad," using "profanities," around 4:30 p.m. when she came back into the house; and, around 6:00 p.m., she called Bill to come home. After she and Bill spoke for a while at the house, Bill went to Samuel's room and found him dead.
>
> Both parents testified that, in the weeks before his death, Samuel had been refusing to eat and kicking his bed to hurt himself. Hudson said Samuel's worsening behavior had included "storming," the Hudsons' term for having tantrums or acting out. For some time, Samuel had been exhibiting aggressive behavior and urinating in his room. Hudson said, "[H]e's angry at the mother figure because of the damage in his life." She testified he had RAD, evidencing seventy-five to eighty percent of the symptoms. Neither parent said what those symptoms were; each acknowledged Samuel had not been taken to a doctor, psychologist, or psychiatrist to have this condition diagnosed or treated. Hudson and Bill did claim that they had gone to Dallas looking for a specialist to treat this condition. When confronted by the prosecutor about a journal entry where Hudson wrote, "May 21, I am fasting the children again until June 1," Hudson claimed to have inadvertently omitted "for," such that the entry meant she was fasting for her children. Hudson denied making the statements about the spirit of lust.
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> As is often the case in homicides, there is no direct evidence Hudson intended to cause Samuel's death. Evidence showed Hudson beat and starved the boy, as part of a maniacal discipline system. But there was nothing overt to show that she had the purpose to kill the child. It is certainly possible to interpret the evidence to show only her intent to punish or injure the child. In the middle of the beatings, she stopped to switch implements, to get one that would "affect him." In her "suicide" note, Hudson admits "murder[ing]" Samuel; but the note also claims that the beatings she administered were because Samuel urinated on the floor of his room. The note contains a timeline of the events of December 3. Late in the detail of events, Hudson wrote that, at 6:00 p.m., she "Got scared Samuel was quite [sic] too long," and she called her husband.

Hudson, 366 S.W.3d at 882-85.

III. Hudson's Federal Habeas Petition and the Response

Hudson first maintains that her due process rights were violated when the state habeas court refused to allow her presence at the postconviction evidentiary hearing. Moreover, she also asserts that trial counsel was ineffective for failing to (1) request a lesser-included instruction on felony murder; (2) seek DNA testing on a rake; (3) file a written motion for a continuance so that the rake could be tested for DNA; and (4) investigate and offer expert testimony concerning Reactive Attachment Disorder (RAD). In response, Respondent argues that Hudson did not have a constitutionally protected right to be present at the habeas evidentiary hearing and that trial counsel was not ineffective.

IV. Standard of Review

1. Federal Habeas Review

The role of federal courts in reviewing habeas corpus petitions filed by state prisoners is exceedingly narrow. A prisoner seeking federal habeas corpus review must assert a violation of a federal constitutional right; federal relief is unavailable to correct errors of state constitutional, statutory, or procedural law unless a federal issue is also present. *See Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993); *see also Estelle v. McGuire*, 503 F.3d 408, 413 (5th Cir. 2007) ("We first note that 'federal habeas corpus relief does not lie for errors of state law.'") (internal citation omitted). When reviewing state proceedings, a federal court will not act as a "super state supreme court" to review error under state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007).

Furthermore, federal habeas review of state court proceedings is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Under the AEDPA, which imposed a number of habeas corpus reforms, a petitioner who is in custody "pursuant to the judgment of State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established law, as determined by the Supreme Court of the United States; or
>
> 2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). The AEDPA imposes a "highly deferential standard for evaluating state court rulings," which demands that federal courts give state court decisions "the benefit of the doubt." *See Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted); *see also Cardenas v. Stephens*, 820 F.3d 197, 201-02 (5th Cir. 2016) ("Federal habeas review under the AEDPA is therefore highly deferential: The question is not whether we, in our independent judgment, believe that the state court reached the wrong result. Rather, we ask only whether the state court's judgment was so obviously incorrect as to be an objectively unreasonable resolution of the claim."). Given the high deferential standard, a state court's findings of fact are entitled to a presumption of correctness and a petitioner can only overcome that burden through clear and convincing evidence. *Reed v. Quarterman*, 504 F.3d 465, 490 (5th Cir. 2007).

2. Ineffective Assistance of Counsel

To show that trial counsel was ineffective, Hudson must demonstrate both deficient performance and ensuing prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). In evaluating whether an attorney's conduct was deficient, the question becomes whether the attorney's conduct fell below an objective standard of reasonableness based on "prevailing norms of practice." *See Loden v. McCarty*, 778 F.3d 484, 494 (5th Cir. 2016).

Moreover, to establish prejudice, the petitioner must show that there is a reasonable probability that—absent counsel's deficient performance—the outcome or result of the proceedings would have been different. *Id.*; *see also Reed v. Stephens*, 739 F.3d 753, 773 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687)). It is well-settled that a "reasonable probability" is one that is sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466

U.S. at 694. Importantly, the petitioner alleging ineffective assistance must show both deficient performance and prejudice. *See Charles v. Stephens*, 736 F.3d 380, 388 (5th Cir. 2013) ("A failure to establish either element is fatal to a petitioner's claim.") (internal citation omitted). Given the already highly deferential standard under the AEDPA, establishing a state court's application whether counsel was ineffective "is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Charles*, 736 F.3d at 389 ("Both the *Strickland* standard and the AEDPA standard are highly deferential, and when the two apply in tandem, review is doubly so.") (internal quotations and citation omitted).

V. Discussion and Analysis

1. Presence at Habeas Evidentiary Hearing

In her first claim, Hudson maintains that her due process rights were violated when the trial court refused to allow her to attend the evidentiary hearing on her state habeas application. She argues that because criminal defendants are not generally permitted to challenge counsel's effectiveness on direct appeal, the first available opportunity to bring such a claim is through a state habeas application and, as a result, her attendance was required. Hudson insists that denying her presence at the evidentiary hearing resulted in the denial of her right to confront her purportedly ineffective trial counsel, her right to testify on her own behalf, and the right to consult with her habeas attorney throughout the hearing.

A criminal defendant has the right to be present at all stages of a criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *see also Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1937) (explaining that a criminal defendant has the due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to fullness of his opportunity to defend against the charge."). This right is rooted in the Confrontation Clause, as a

criminal defendant has the right, among many others, to confront the witnesses against her. *See Faretta v. California*, 422 U.S. 806, 818 (1975). "The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *See U.S. v. Gagnon*, 470 U.S. 522, 526 (1985) (internal citations and quotations omitted).

However, postconviction proceedings are not considered criminal proceedings but, rather, an "independent and collateral inquiry into the validity of the conviction." *See U.S v. Hayman*, 342 U.S. 205, 222 (1952); *see also Murray v. Giarratano*, 492 U.S. 1, 2 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceeding and serve a different and more limited purposes than either the trial or appeal.").

Because postconviction proceedings are not part of actual criminal proceedings, a convicted criminal defendant does not have the constitutional right to attend postconviction hearings. *See Hayes*, 342 U.S. at 222 (explaining that a defendant's presence is not required in a postconviction proceeding because "[u]nlike a criminal trial where the guilt of the defendant is in issue and his presence is required by the Sixth Amendment, a proceeding under section 2255 [post-conviction proceedings of convicted federal prisoners] is an independent and collateral inquiry into the validity of his conviction."); *see also Oken v. Warden, MSP*, 233 F.3d 86, 92 (1st Cir. 2000) ("However, Oken points to no authority (and we likewise find none) that directly supports the extension to state (or federal) post-conviction proceedings of a criminal defendant's constitutional right to personally confront one's accuser's); *Burgess v. King*, 130 F.2d 761, 762 (8th Cir. 1942) ("The constitutional right of an accused to be confronted with the witnesses against him is applicable only to criminal proceedings, and hence, it cannot be claimed that the petitioner had the right of confrontation [in post-conviction proceedings]."). There is no constitutional right to attend a post-conviction hearing.

Moreover, Texas courts have repeatedly and consistently held that a prisoner does not have a constitutional right to attend postconviction hearings. *See Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000) ("But an application for the post-conviction writ of habeas corpus enjoys neither a presumption of innocence nor a constitutional right to be present at a hearing."); *Cravin v. State*, 95 S.W.3d 506, 510 (Tex. App.—Houston 2002, pet. ref'd) ("The Court of Criminal Appeals has held that a defendant has no constitutional right to be present at post-conviction writ of habeas corpus proceedings."); *Rose v. State*, 198 S.W.3d 271, 272 (Tex. App.—San Antonio 2006, pet. ref'd) ("A defendant does not enjoy a constitutional right to be present at a post-conviction writ of habeas corpus hearing."). Because there is no constitutional right to attend post-conviction hearings, Hudson's claim is without merit.

To the extent that she challenges Texas's habeas jurisprudence, the Court notes that any purported infirmities within state habeas proceedings do not present a constitutional issue. *See Kinsel v. Cain*, 647 F.3d 265, 273 (5th Cir. 2011) ("We, as federal appeals court entertaining a federal habeas corpus application, are without jurisdiction to review the constitutionality of Kinsel's state postconviction proceedings. Indeed, we are barred from doing so by our 'no state habeas infirmities rule.'"); *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999) ("Our circuit precedent makes clear that Trevino's claim fails because infirmities in state habeas proceedings do not constitute grounds for relief in federal court."). The Fifth Circuit further explained its rationale behind the "no state habeas infirmities rule":

> [E]rrors in a state habeas proceeding cannot serve as a basis for setting aside a valid original conviction. An attack on a state habeas proceeding does not entitle the petition to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself.

Nichols v. Scott, 69 F.3d 1255, 1275 (5th Cir. 1995). Accordingly, because Hudson had no constitutional right to attend her state habeas proceeding, this claim should be dismissed.

In her reply to Respondent's answer, Hudson insists that due process protections entitled her to be present at the habeas hearing because credibility of her attorney was an issue and in light of the holding in *Panetti v. Quarterman*, 551 U.S. 930 (2007). Contrary to Hudson's contention, *Panetti* is not analogous to her case.

Panetti involves the question of whether Panetti, a criminal defendant sentenced to death, can be executed if he is incompetent. The Court held that Panetti, who made a substantial showing of incompetency, was not afforded due process protections of a "fair hearing" on his claim of incompetency to be executed—protections that included the "opportunity to be heard." *Panetti*, 551 U.S. at 949. The Court further held that Panetti was entitled to the "basic requirements" of procedural due process, which include "an opportunity to submit evidence and argument from petitioner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Id*. at 950. Ultimately, the Court found that the state failed to provide Panetti with an opportunity to be heard on his incompetency claim, as he was not given an opportunity to present evidence to make an adequate response to the expert evidence solicited by the state. *Id*. at 952.

Here, while Hudson was convicted of capital murder, she was not sentenced to death, is not awaiting execution, and has not presented a claim of incompetency. *Panetti* is therefore not analogous. Furthermore, under the requirements elucidated in *Panetti*, Hudson was provided an opportunity to be heard at her habeas hearing. Specifically, she presented evidence through the direct testimony of Dr. McCann and her sister-in-law regarding RAD; she also placed defense counsel on the stand, who was cross-examined. Hudson provided Dr. McCann's affidavit to the state habeas court, which provided the basis for his testimony at the habeas hearing. Accordingly, Hudson was provided the opportunity to be heard under *Panetti*—by presenting her claims of ineffective assistance of counsel and the RAD issue—regardless if she was actually present.

Nonetheless, Hudson's presence was not foreclosed. After Hudson's habeas counsel argued that her presence was necessary, the court explained that it would seek another habeas hearing if the court determined that further information was necessary. (Dkt. #12, pg. id. #2539). Hudson's first argument should be dismissed as it is meritless.

2. Claims of Ineffective Assistance

Hudson claims that her trial counsel was ineffective for a variety of reasons. As mentioned, she must show both deficient performance and ensuing prejudice. *See Strickland*, 466 U.S. at 668.

A. Lesser-Included Instruction—Felony Murder

Hudson first maintains that trial counsel was ineffective for failing to request a charge or instruction on felony murder, based on the felony offense of injury to a child. Specifically, she highlights how trial counsel sought an invalid manslaughter charge—which shows his "lack of thoroughness on the law and without consultation with his client." Hudson insists that this was not trial strategy but, rather, evidence of counsel's lack of understanding. Furthermore, she argues that the appellate courts found that the evidence supported a felony murder charge; however, due to counsel's ineptness, she never received the benefit of that charge.

A review of the record demonstrates that Hudson raised this claim in her state habeas application, which was ultimately denied by the Texas Court of Criminal Appeals on the findings of the trial court. Trial counsel, David James, supplied a May 2016 affidavit in response to Hudson's habeas application and testified at the evidentiary hearing—addressing this claim in detail. In his affidavit, counsel explained:

> As to Issue One in the petition regarding the felony murder instruction, I do not recall my specific thoughts with regard to the lesser included offenses of felony murder and manslaughter. Even if I had believed that we were entitled to numerous lesser included offense instructions, I would not have necessarily requested them all. For example, my reaction is that felony murder (based upon injury to a child) does not fit with our defense theory at trial. Additionally, had we been given a manslaughter instruction, but not a felony murder instruction, it could have forced a jury into a manslaughter finding as opposed to a felony murder finding. Accordingly, the decision not to request the felony murder

> instruction was trial strategy. Finally, Hudson had numerous and strong instructions to me at trial with regard to every facet and level of the trial procedure, many of which were contrary to my advice. Hudson was absolutely adamant that she would not admit to any acts underlying the offense. Accordingly, she refused any action at trial which she interpreted as an admission. For this reason, she would have forbid a requested instruction on felony murder. In fact, I am surprised that we were able to request a manslaughter instruction in light of her position.

(Dkt. #12, pg. id. #2387-88). Furthermore, at the September 2016 habeas evidentiary hearing, counsel testified—reiterating his strategy and Hudson's refusal to admit any underlying acts, in relevant parts:

> MR. JAMES: Mrs. Hudson's statement to me, and specifically when I took to her an offer that had been made by the State that she plead to murder for fifty years was, "David, I wouldn't plead to three days. I did not commit the crime as charged."
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> . . .
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> MR. JAMES: To say that I had with her a detailed discussion concerning felony murder, I don't recollect the, whether or not that concept came up, in the posture of—the lesser-included offense would then be endangerment to a child, in that when I brought that up that there was no endangerment to the victim by her. There were stories about, and testimony at trial, about their behavior. But there were also stories about them taking trips and having positive interactions, and her adamant position to me was, "I have not done anything wrong. I want to take the stand and tell the jury that," and we kind of went from there. So, I'm trying to give you a recollection of my thinking at my meetings with her. It was to discuss the other siblings, their behavior during the pertinent times, and questioning, and to indicate that I was going to try and see if the Court would consider a manslaughter charge, not to try and undercut the credibility of what she was telling me, but that I thought it was important to do that; and then we would be looking at a 2-20 as opposed to the felony murder scenario, which I do state to the Court I don't really recollect the specifics of a discussion surrounding a concept called felony murder to her. But then of course, possibly looking at life—and even though parole is possible—and that at her age she would spend most of the rest of her life in prison, our goal was to exonerate her and, if not, at least have the jury consider the factual testimony of the other family members about behavior and have the judge charge manslaughter. Judge Burgess decided not to do that.

(Dkt. #12, pg. id. #2541-43). On cross-examination, James further explained that Hudson would not admit to any criminal act, which basically forced the defense team to pursue an "all or nothing" defense—as that strategy stemmed from Hudson repeatedly telling him that she "certainly didn't murder anybody, but number two, I didn't abuse a child either." (Dkt. #12, pg. id. #2553).

The state habeas court then issued findings of fact and conclusion of law in December 2016. (Dkt. #12, pg. id. #2191). On the felony murder issue, the court highlighted how Hudson "had numerous and strong instructions," which were contrary to counsel's advice. The court specifically found that "trial counsel was not deficient for not requesting an instruction on the lesser-included offense of felony murder, which would have been contrary to trial strategy and the Defendant's position at trial regarding the facts." (Dkt. #12, pg. id. #2194).

A review of the entire record shows that the state habeas court's adjudication of this claim was not unreasonable. A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Crane v. Johnson*, 178 F.3d 309, 314 (5th Cir. 1999) (quoting *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983)); *Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable."). A person commits felony murder if she:

> "[C]ommits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in the immediate flight from the commission or attempt, [she] commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

See Tex. Penal Code §19.02(b)(3). Moreover, a person commits felony injury to a child where she "intentionally, knowingly, recklessly, or with criminal negligence, by act …, causes, inter alia, serious bodily injury or injury to a child." *See Hudson*, 415 S.W.3d at 895; *see also* Tex. Penal Code §22.04(a).

Here, given that Hudson was absolutely adamant about not admitting to any underlying offense and that she did nothing wrong—essentially forcing defense counsel to pursue an "all or nothing" approach—requesting a felony murder charge would have been antithetical to that strategy. The record shows that Hudson would not admit to injuring her child, as she explained to counsel that she "certainly didn't murder anybody, but number two, [she] didn't abuse a child

either." Because a felony murder charge in this case would have rested upon Hudson injuring the child, counsel's decision not to pursue that charge was reasonably sound trial strategy in light of Hudson's demands. Petitioner has failed to demonstrate that the state court's adjudication of this claim was unreasonable.

The habeas court also found that Hudson was not harmed by counsel's failure to request a felony murder instruction. A claim of ineffective assistance of counsel will fail "if the facts against adduced at trial point so overwhelmingly to the defendant's guilt that even the most competent attorney would be unlikely to have obtained an acquittal." *See Green v. Lynaugh*, 868 F.2d 176, 177 (5th Cir. 1989); *see also Salazar v. Quarterman*, 260 F. App'x 643, 650 (5th Cir. 2007) (citing *Green*, 868 F.2d at 177) (unpublished) *Jones v. Jones*, 163 F.3d 285, 304 (5th Cir. 1998) (same).

Here, the record contains strong and ample evidence of Hudson's guilt of capital murder through the felony offense of kidnapping. The record shows that Hudson confessed to murdering Samuel through a note "to the cops." Moreover, two of her other children testified at trial about her confining Samuel to his room, starving, beating, and torturing him with a variety of instruments while he was tied up by zip ties—and how he begged for his life by "repenting," stating that she was breaking his bones as she kept striking him, and articulating that he was "dying." The evidence showed, and the child witnesses corroborated, that she repeatedly beat Samuel to the extent that the various instruments utilized broke—at which point she ordered one of the children to fetch her a stronger instrument that would withstand additional beatings.

After finding Samuel deceased, she ordered one of the children to "hide the evidence," threatened them that "she'll get [them] back fast" if they told on her, and then informed law enforcement that Samuel committed suicide. She then blamed another child for his death. Hudson even wrote a letter to one of the children ordering him to "flush this" because he did not witness any spankings. Members of law enforcement that arrived on the scene testified how Samuel's

many bruises and abrasions were abnormal and not consistent with suicide. The medical examiner testified that Samuel died from blunt force trauma and starvation.

Given this overwhelming evidence of Hudson's guilt—which does not even cover all of the evidence presented at trial—the Court is confident that the outcome of the trial would not have been different if the jury had the option to convict her of felony murder, especially given how the jury returned a guilty verdict for capital murder in less than two hours. Because Hudson cannot show that counsel was ineffective for failing to request and argue a felony murder instruction, this claim should be dismissed. *See Strickland*, 466 U.S. at 696 (explaining that a court analyzing a claim of ineffective assistance "must consider the totality of the evidence before the judge or jury.").

B. Failure to Test the Rake for DNA and Seek Continuance for DNA Testing

Next, Hudson maintains that counsel was ineffective for failing to seek DNA testing on the rake, which was one of the murder weapons as alleged. She also contends that counsel was ineffective for failing to file a formal motion for a continuance so that the rake could be tested. Hudson asserts that counsel failed to conduct an independent investigation into the DNA, as the child who testified about the rake could have been impeached. Moreover, she argues that DNA evidence on the rake was relevant to her case because "[i]f Petitioner's DNA was not on the rake, it would have supported her defensive theory at trial that she did not commit the offense as alleged." Conversely, "[i]f her DNA was on the rake, that alone would not have been probative since it was a household item and her DNA could have been present due to regular use." Finally, no matter the results, she alleges, DNA testing "would have informed counsel's trial strategy without having to go to trial blind, as he did."

Under Texas law, a convicted person may move for forensic DNA testing of evidence containing bodily material. *See* Tex. Code Crim. P. Ann. art. 64.01. The trial court may **only** order

testing if it finds that the evidence still exists and is in the condition that makes DNA testing possible, has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect, and identity was or is an issue in the case. *See* Tex. Code Crim. P. Ann. art. 64.03(a)(1)(A),(B),(C) (emphasis supplied). Importantly, the movant must also establish, by a preponderance of the evidence, that she would not have been convicted if exculpatory results were obtained through DNA testing. *See* Tex. Code Crim. P. Ann. art. 64.03(a)(2)(A); *see also Kinney v. Shannon*, 630 F. App'x 258, 261 (5th Cir. 2015) (unpublished) ("Texas courts routinely affirm the denial of motions for post-conviction DNA testing when a defendant fails to establish, by a preponderance of evidence, that he would not have been convicted if exculpatory results had been obtained through DNA testing.").

A review of the record reveals several areas of pre-trial discussion and trial testimony regarding DNA on the rake. During a pre-trial hearing, the State admitted that various items were submitted for DNA testing, but no analysis had been completed. (Dkt. #10, pg. id. #249). The State explained that, after discussions with the sheriff's department and the Dallas lab, a rake was submitted for analysis. (Dkt. #10, pg. id. #240). However, one of the officers subsequently told the lab to "hold off" on testing the rake for DNA. *Id*. The State indicated that it could proceed to trial regardless of the DNA situation because "we frankly don't feel like that's going to be a key element of our case." *Id*.

With that exchange, the Judge placed the officer handing the DNA requests, Officer Page, under oath. Officer Page explained that the Southwestern Institute of Forensic Science received fourteen different items that the sheriff's office submitted for DNA analysis. (Dkt. #10, pg. id. #242). A member of the analytic team at the Institute contacted Captain Copeland and "asked him if he wanted them to proceed on doing the DNA analysis, testing it against the defendant and against the victim." *Id*. Captain Copeland said "hold off" on the testing because he did not know

if he would need it. *Id*. Testing was never done because the institute never heard back from Captain Copeland.

After hearing testimony, the trial court inquired about the relevancy of the testing (or lack of testing). The court acknowledged that no motion for a continuance had been filed, and questioned whether the lack of evidence would be relevant for the court to decide. The State immediately responded, stating "whatever DNA analysis had been conducted, we certainly reserve the right to introduce that evidence." However, the State stated that "in terms of the items listed on that piece of paper [which included the rake], that lab submission form from the Institute of Forensic Sciences, we do not feel that that is central to our case and we would not be seeking to introduce any evidence in regard to what's listed on that form." (Dkt. #10, pg. id. #244). Defense counsel then moved for a continuance, "so that we can have time to analyze that," which the court denied.

While the record shows that DNA evidence on the rake was not introduced into evidence, Captain Copeland testified at trial regarding the rake. He first testified that he seized the rake during a search warrant and placed it into evidence. (Dkt. #10, pg. id. #488). Captain Copeland then identified the rake in open court and explained that the victim's brother, Gary, identified that rake as being used to beat Samuel. (Dkt. #10, pg. id. #489).

On cross-examination, defense counsel highlighted that there was no DNA analysis of the rake, to which Captain Copeland responded in the affirmative. Defense counsel then asked Captain Copeland to explain to the jury why there was no DNA analysis on any of the items listed. Captain Copeland explained that after receiving the lab examination, there were some DNAs found on some objects; however, after going through it and "thinking about it and everything, I couldn't see where getting DNA that would match Ms. Hudson or Samuel to help the case any, since the samples were taken from Samuel's bedroom, which it also, you know—it doesn't have a time on

the DNA. It can be put there weeks prior, months, years prior. And they both had access to these items of this room, and so I just didn't see any use in it." (Dkt. #10, pg. id. #491-92). When asked again, Captain Copeland reiterated how both Hudson and Samuel had access to the rake over a period of time, so "there's no way to telling if they were, whose DNA it was." *Id*. He also explained that since they already had a perpetrator named—as they were not looking for a strange individual—he did not see any use in DNA analysis. (Dkt. #10, pg. id. #493).

The state habeas court issued findings of fact and conclusions of law on this issue. The court found that Hudson failed to specify whose DNA on the rake would have been relevant and what she contends the DNA testing would have established. (Dkt. #12, pg. id. #2199). Moreover, the court determined:

> If the results of testing established the rake contained the victim's DNA, it would have supported the child [witness's] testimony and strengthened the State's case. On the other hand, the lack of the victim's DNA on the rake would not have established that the child witness did not take the rake to the Applicant, as he testified, and would not establish Applicant did not strike the victim with the rake.

(Dkt. #12, pg. id. #2199). While the court noted that trial counsel's failure to file a written motion for a continuance failed to preserve the issue for appeal, the court reasoned that Hudson failed to establish that—had counsel filed the written motion for a continuance—that the outcome would have been different. *Id*.

A review of the entire record shows that the state habeas court's adjudication of this claim was not unreasonable. Hudson cannot show prejudice for counsel's failure to test the rake or seek a continuance to have the rake tested. She cannot show that any DNA testing on the rake would have revealed exculpatory evidence or that the outcome would have been different. As mentioned, the State explained that it was not planning on having the rake tested because it was not a key element of its case. This reasoning is exemplified by Captain Copeland's testimony that any DNA testing on the rake would not have been useful because both Hudson and the victim had access to

the rake over a period of time. Furthermore, given that law enforcement was not searching for an unknown suspect—as they believed they had their perpetrator given the totality of the evidence—Captain Copeland and the State felt it unnecessary to test the rake for DNA. Accordingly, because both Hudson and the victim had access to the rake over a period of time, DNA evidence would not have necessarily been exculpatory.

Importantly, as the Respondent alludes to, the trial record further demonstrates that Hudson cannot show that the outcome of the proceedings would have been different had the rake ultimately been tested for DNA. As mentioned, Captain Copeland testified that the victim's brother, Gary, identified the rake and explained that it was used to beat the victim to death. Moreover, Gary testified at trial that Hudson "had me go get the metal garden rake that was outside" and brought it to her—at which point the beatings continued. (Dkt. #10, pg. id. #719). Given that the child witness—who painted a gruesome picture of the torture and murder of the victim—explained that the rake was used to murder the victim, after Captain Copeland testified that Gary identified the rake, DNA results on the rake would not have changed the outcome of the proceedings. Both Hudson and the victim had access to the rake and, more crucially, Gary testified that the rake was used on the victim—along with a significant amount of additional evidence pointing to Hudson's guilt.

In other words, Hudson cannot show that the outcome of the trial would have been different had the rake been tested for DNA or had counsel filed a motion for continence to have it tested. In this way, the state habeas court's adjudication of this claim was not unreasonable or contrary to federal law. *See, e.g.*, *Vasquez v. Thaler*, 505 F. App'x 319, 328 (5th Cir. 2013) (unpublished) ("As a result, reasonable jurists would not disagree with the district court's decision that there is no reasonable probability that, but for the absence of the new DNA expert's testimony, the trial's outcome would have been different, and we deny COA on this ground."); *Elam v. Lykos*, 470 F.

App'x 275, 276 (5th Cir. 2012) (unpublished) ("Any further DNA testing of the evidence from Elam's trial would not be probative on the issue of Elam's guilt or innocence."). This claim should therefore be dismissed.

C. Failure to Investigate and Raise Reactive Attachment Disorder Defense

In her final claim, Hudson maintains that counsel was ineffective for failing to investigate and then assert a defense surrounding Reactive Attachment Disorder (RAD) or various behavioral characteristics and parenting styles concerning at-risk foster children. Specifically, Hudson insists that counsel should have pursued a defense theory surrounding the notion that at-risk foster children are behaviorally different from biological children under the DSM-V and how her parenting disciplinary techniques were used to address the specific demands of at-risk foster children.

Moreover, Hudson states that she provided defense counsel with numerous materials regarding at-risk foster children and the names of experts who could best explain how her parenting style—the use of door alarms, the deprivation of food, the removal of bedroom furniture, and whippings—was "not outside the realm of acceptable approaches to dealing with at-risk adoptees." She attached an affidavit from Dr. McCann, who, she contends, "would have been able to explain how such children frequently require an approach which might seem harsh to observers." Dr. McCann was available and would have testified to offer and explain how RAD applied to this case. Hudson argues that the jury—rather than "being unduly inflamed by the unconventional childrearing methods employed"—would then have been given a rational explanation for the conditions at home. Counsel's failure to investigate and present such expert testimony, she opines, was inexcusable given the "horrendous facts."

Hudson raised this claim in her state habeas application. After an evidentiary hearing, the Texas Court of Criminal Appeals denied relief on the findings of the trial court. Dr. McCann,

licensed psychologist with forty years' experience, provided the 2016 affidavit to the habeas court, which provided the following in relevant part:

> In September of 2011, I received a letter from Mr. Bill Hudson asking my availability and willingness to serve as an advisor to his attorney and, possibility, as an expert witness at trial. There was no further contact, including any communication or conversations with either Mr. Hudson or any attorney representing either him or Mrs. Hudson, at that time or since.
>
> In the recent weeks, at the request of Mr. John Jasuta, attorney, I have examined materials relating to the case of Cynthia Ann Hudson who was tried for capital murder of her adopted son, Samuel Hudson.
>
> Had I reviewed the documents at the time of her trial, I believe I would have been in a position to provide the jury with an understanding of the unique psychological problems which troubled adoptees can manifest. I could have informed jurors of the serious behavior problems some children present in their adoptive families. Because of my experience with more than 200 adoptive families seen in my practice, I could have described the pervasive mistrust, the deep shame, the impulsiveness, anger and desperation within some maladjusted adoptees. These troubles, which are uncommon in children from stable and caring backgrounds, sadly, are not uncommon in those unfortunate adoptees with histories similar to the reported pre-adoption histories of the Hudson children, [].
>
> As part of my explanation to jurors, I could have explained that the development of conscience, empathy and social awareness in children requires loving emotional attachments and well-attuned care during early formative years. Without these positive early experiences, neglected, abused and chronically insecure children often remain entirely self-centered, oppositional and oblivious to the needs and feelings of those around them. This sub-group of the most impaired adoptees often manipulate people for their own immediate advantage. The more damaged among them cheat, lie and steal without apparent guilt or discomfort. Like much younger children, they act with no regard for their own reputations and they seem to experience little or no loyalty to those on whom they are dependent. Also like pre-schoolers, conscience-impaired children fail to see the long term consequences of their behavior and thus act on the impulses of the moment. Stealing from a friend is an example of the kind of impaired judgment which results from a lack of early emotional attachments to others.
>
> …
>
> I would have explained that the attitudes and behaviors characteristic of emotionally disturbed adoptees are very difficult for well-raised adults to comprehend or imagine. Even a teacher or a pediatrician with years of experience may not have encountered an adoptive family with a very troubled child who has been severely damaged during a period of pre-adoption rejection, neglect and abuse.
>
> I would have told the jury that adopted children who display some of these problems are often described as manifesting an "attachment disorder." Those with full range of

> impairments would qualify for the formal psychiatric disorder called Reactive Attachment Disorder, or "RAD," which is included in the current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association.
>
> . . .
>
> Parenting methods which would be helpful and effective with a well-bonded child are often entirely ineffective with a troubled adoptee who feels no motivation to please the parent or adopt the values of the family. Control battles are common with such children. They have particular difficulty in relinquishing control to adults and, like toddlers in the "terrible-two's," often defy and provoke in their efforts to make themselves feel more powerful, safe and independent. Parents coping with such adopted children commonly describe the experience as being the most difficult task they have faced in their life.
>
> Therapeutic parenting of deeply mistrustful adoptees requires firm, even-handed child management which holds the child accountable to other for behaviors which have been grossly disrespectful or have caused inconvenience and harm. Parents learn to be alert to manipulations, excuse-making, subtle threats, insincere promises and a variety of behaviors seldom encountered in managing emotionally attached children. Assigning disciplinary work tasks, restricting access to playmates, television and toys and physically holding or isolating a severely disruptive child may be necessary. Ensuring the safety of a child who willfully defies adults usually requires a "tough love" approach including mandatory reparations, door alarms, restrictions to the house and other methods which may seem harsh or needlessly controlling to parents whose children more readily comply with directions and requests. Well-accepted parenting techniques for problem adoptees are set out in the often recommended book by parent trainer, Nancy L. Thomas, entitled <u>When Love is Not Enough: A Guide to Parenting Children with RAD—Reactive Attachment Disorder</u> (2005 Edition).
>
> Reportedly, the Hudson family utilized some of the techniques recommended by Nancy Thomas in dealing with their emotionally disturbed adoptive children. These techniques, in my opinion, would be viewed by most specialists in the field as being within the bounds of ordinary treatment for troubled children who are suffering from Reactive Attachment Disorders.

(Dkt. #12, pg. id. #2379-83). In defense counsel's amended affidavit to the state habeas court, counsel elaborated on this RAD claim:

> As to Issue Two in the petition regarding evidence of RAD syndrome, I recall my conscious decision to avoid the RAD syndrome issue for fear of providing jurors with a potential motive, assuming it would even be admitted by the trial court in the first place. Accordingly, the decision to avoid the RAD syndrome issue was trial strategy. I did not fail to investigate RAD syndrome. Rather, in light of our defense strategy, the RAD syndrome issue simply didn't fit because our defense was straight forward, Hudson wasn't involved. No investigation of RAD syndrome could overcome that contradiction. Stated another way, there is no potential RAD defense in light of our trial strategy. Hudson

> certainly discussed RAD syndrome with me and discussed potential expert witnesses. However, I explained my opinion and explained it was based upon our trial strategy and Hudson did not object or instruct me to act otherwise.

(Dkt. #1, pg. id. #157).

At the habeas evidentiary hearing, defense counsel testified similarly. He explained that Mr. Hudson provided him with "ample" material on RAD. (Dkt. #12, pg. id. #2543). Counsel then described how he met with Mr. Hudson to go over trial strategy and how RAD would affect "us at trial vis-à-vis anybody that says I haven't hit anybody with a rake or with a baseball or a broom—I've not done anything like this." *Id*. Counsel then stated that he did not want to "open the door" to any notion that the Hudsons adopted at-risk children and would then use this, "this kind of concept of behavior with no M.D. backing it up to open the door for a serious conviction of a client who's telling me, 'I'm innocent.'" *Id*.

When asked about how he was provided names of experts to consult with, counsel explained that he read a lot of materials, but did not "line up anyone for trial" because the RAD defense may make "things even worse for her, in that she said, 'I didn't do this. It was tough dealing with these children, but I dealt with it. I didn't murder anybody." *Id*. Crucially, defense counsel explained that Hudson did not seek any medical diagnosis and did not have any medical records to authenticate RAD, even though she suspected the children suffered from RAD. (Dkt. #12, pg. id. #2546). As a result, counsel believed that it was purely speculative that the children suffered from the condition and he "didn't want it to hurt her" or become an "excuse for homicidal behavior." *Id*.

Hudson's sister-in-law, Doris Hudson, also testified at the evidentiary hearing regarding RAD. As a licensed clinical social worker, she explained that she was qualified to diagnose RAD from both her education and experiences. She explained that she spoke with defense counsel concerning RAD, and noted that defense counsel was "receptive" to the concept. (Dkt. #12, pg.

id. #2574). Moreover, she testified that her impression was that defense counsel was going to call her to testify, even though she was never subpoenaed. While she was present at trial, placed under the Rule, and excluded from the courtroom during trial as a potential witness, she was never called. *Id*.

After the hearing, the state habeas court entered findings of fact and conclusions of law. With respect to the RAD defense, the court found that "counsel was informed about RAD syndrome and had a witness available at trial as to RAD syndrome, but chose not to call the witness during the trial as part of a reasonable trial strategy." (Dkt. #12, pg. id. #2197). Moreover, the habeas court found that because counsel investigated RAD, any claim that counsel failed to investigate RAD was meritless. *Id*.

A review of both the trial and habeas record illustrates that the state habeas court's adjudication of this claim was not unreasonable or contrary to federal law. Hudson cannot show that trial counsel was ineffective on this issue. Trial counsel has a duty to make a reasonable investigation of a criminal defendant's case or to make a reasonable decision that an investigation is not necessary. *See Ransom v. Johnson*, 126 F.3d 716, 722 (5th Cir. 1997); *Green v. Cockrell*, 67 F. App'x 248, 2003 WL 2114722 *3 (5th Cir. 2003) (unpublished). A habeas petitioner alleging that an investigation was inadequate or nonexistent must allege—with specificity—what the purported investigation would have revealed and how it would have affected the outcome of the trial. *See Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011) (quoting *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993)).

Here, however, the record demonstrates that trial counsel investigated RAD syndrome. He read various materials on the subject, interviewed Hudson's sister-in-law, and discussed the condition with Mr. Hudson. Simply because counsel subsequently decided not to call the sister-in-law or raise the issue at length does not mean that he failed to investigate. To the contrary, the

record shows that counsel investigated the RAD issue and consciously chose not to proceed any further because he believed it would harm his client. Accordingly, the state habeas court's finding that counsel actually investigated the condition is completely reasonable.

Importantly, Hudson cannot show prejudice for counsel's failure to present a RAD defense theory. As mentioned previously, "a conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *See Crane*, 178 F.3d at 314. Moreover, an informed decision to forgo presenting "double-edged" evidence—once that could either help or harm a defendant—is reasonable trial strategy. *See Hopkins v. Cockrell*, 325 F.3d 579, 586 (5th Cir. 2003) ("This Court has held that a tactical decision not to pursue and present potential mitigating evidence on the ground that it is double-edged in nature is objectively reasonable.").

The record shows that the defense throughout trial was that Hudson was completely innocent; she would not admit to any wrongdoing, including any abuse of her children. By highlighting the differences between "at-risk foster children" and biological children, the jurors may very well have believed that Hudson was providing an excuse for homicidal behavior—especially because there was no actual official medical diagnosis. It is entirely possible that such a defense could have further inflamed the jury as well. Accordingly, counsel's conscious decision—a decision he made after actually investigating RAD—was pure trial strategy that did not prejudice Hudson's trial. *See, e.g.*, *Crane v. Johnson*, 178 F.3d 309, 315 (5th Cir. 1999) ("All of the evidence that Crane contends should have been presented at the punishment phase of his trial had a double-edge quality. Trial counsel decided the evidence was potentially more harmful than helpful."); *Mann v. Scott*, 41 F.3d 968, 984-85 (5th Cir. 1994) ("In this case, Mann's trial counsel admitted in an affidavit that he made a strategic choice not to introduce evidence of his

low intelligence or abusive childhood because such evidence had a 'double-edged' nature which may have harmed Mann's case.").

Hudson insists that a defense theory surrounding RAD would have shown the jurors how her parenting disciplinary techniques were used to address the specific demands of an at-risk foster child suffering from RAD. However, as the Respondent highlights, the argument concerning behavioral issues and alternative-disciplinary techniques were presented at trial and, ultimately, rejected by the jury. Specifically, Mr. Hudson testified that Samuel resided in a bedroom with an alarm on the door and with no furniture because he urinated on himself, was confined to his room every day like all of the children, acted out, allegedly harmed himself and refused to eat, and demonstrated a proclivity for lying that resulted in punishment.

However, despite Samuel's "acting out" and urinating on himself, Mr. Hudson admitted that they never sought medical treatment or a diagnosis. (Dkt. #10, pg. id. #647). Moreover, Mr. Hudson explained that the siblings were sometimes "combative" and that one of the siblings had killed Samuel despite no personal knowledge or evidence to support such a claim. Accordingly, Mr. Hudson provided the jury with a variety of explanations for their parenting styles and Samuel's death—all of which was rejected by the jury. Because the jury heard such testimony, Hudson cannot show that the outcome would have been any different with an official RAD defense. Accordingly, the state court's adjudication of this claim was not unreasonable.

VI. Conclusion

Hudson has failed to show that the state habeas court's adjudication of her claims resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Her application for federal habeas corpus relief is thus without merit.

VII. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Petitioner has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. 773 (quoting *Miller-El,* 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

Here, Hudson failed to present a substantial showing of a denial of a constitutional right or that the issues she has presented are debatable among jurists of reason. She also failed to demonstrate that a court could resolve the issues in a different manner or that questions exist warranting further proceedings. Accordingly, she is not entitled to a certificate of appealability.

RECOMMENDATION

For the foregoing reasons, it is recommended that the above-styled application for the writ of habeas corpus be dismissed with prejudice. It is further recommended that Petitioner Hudson be denied a certificate of appeal *sua sponte*.

Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 15th day of June, 2018.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX TAB B:

MAY 10, 2019 U.S. DISTRICT COURT'S ORDER OF DISMISSAL AND FINAL JUDGMENT

(Fifth Cir. ROA.331-333)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

CYNTHIA A. HUDSON, #1696397	§	
VS.	§	CIVIL ACTION NO. 2:17cv216
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner Cynthia Ann Hudson, through counsel, filed this petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging her Cass County conviction. The cause of action was referred to the United States Magistrate Judge, the Honorable Judge Roy S. Payne, for findings of fact, conclusions of law, and recommendations for the disposition of the petition.

Judge Payne issued a Report, (Dkt. #19), recommending that Petitioner's federal habeas petition should be dismissed, with prejudice. Judge Payne also recommended that she be denied a certificate of appealability *sua sponte*. Petitioner, through counsel, has filed timely objections, (Dkt. #21).

The court has conducted a careful *de novo* review of record and the Magistrate Judge's proposed findings and recommendations. *See* 28 U.S.C. §636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Upon such *de novo* review, the court has determined that Report of the United States Magistrate Judge is correct and Petitioner's objections are without merit. Accordingly, it is

ORDERED that Petitioner's objections, (Dkt. #21), are overruled. The Report of the United States Magistrate Judge, (Dkt. #19), is **ADOPTED** as the opinion of the District Court. It is also

ORDERED that the above-styled habeas petition is **DISMISSED** with prejudice. Further, it is

ORDERED that Petitioner is also **DENIED** a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby **DENIED**.

So ORDERED and SIGNED this 10th day of May, 2019.

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

CYNTHIA A. HUDSON, #1696397	§	
VS.	§	CIVIL ACTION NO. 2:17cv216
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

The court having considered Petitioner's case and rendered its decision by opinion issued this same date, it is hereby **ORDERED** that Petitioner's case is **DISMISSED** with prejudice.

So ORDERED and SIGNED this 10th day of May, 2019.

RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

APPENDIX TAB C:

AUGUST 14, 2020 FIFTH CIRCUIT ORDER BY SINGLE JUDGE DENYING CERTIFICATE OF APPEALABILITY

United States Court of Appeals for the Fifth Circuit

No. 19-40533

CYNTHIA ANN HUDSON,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

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

ORDER:

Cynthia Ann Hudson, Texas prisoner # 1696397, was convicted after a jury trial of capital murder and sentenced to life imprisonment without the possibility of parole. *Hudson v. State*, 449 S.W.3d 495, 496-97 (Tex. Crim. App. 2014).

She now seeks a certificate of appealability (COA) to appeal the district court's denial of her 28 U.S.C. § 2254 application challenging these convictions. Before this court, Hudson contends that her trial counsel rendered ineffective assistance by failing to request a jury charge or instruction on the lesser-included offense of felony murder, failing to investigate and raise as a possible defense that the child victim suffered from

reactive attachment disorder and to introduce into evidence testimony that the child exhibited the characteristics and behaviors associated with reactive attachment disorder, and failing to have certain evidence submitted for DNA testing and failing to file a written motion for a continuance after counsel's oral motion for continuance for DNA testing was denied. To the extent that Hudson also asserts that the state habeas court had an obligation to permit her to attend the evidentiary hearing on her postconviction application, this argument is not cognizable in a § 2254 proceeding. *See Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004).

To obtain a COA, Hudson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Because the district court rejected her ineffective assistance claims on the merits, Hudson "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. She has failed to make the requisite showing. Accordingly, Hudson's motion for a COA is DENIED.

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

APPENDIX TAB D:

SEPTEMBER 22, 2020 FIFTH CIRCUIT ORDER DENYING MOTION FOR RECONSIDERATION BY THREE-JUDGE PANEL

United States Court of Appeals for the Fifth Circuit

No. 19-40533

CYNTHIA ANN HUDSON,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 2:17-CV-216

Before CLEMENT, ELROD, and HAYNES, *Circuit Judges*.

PER CURIAM:

A member of this panel previously DENIED a certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

APPENDIX TAB E:

JUNE 22, 2016 ORDER FROM COURT OF CRIMINAL APPEALS OF TEXAS REMANDING TO STATE HABEAS COURT FOR EVIDENTIARY HEARING

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,809-01

EX PARTE CYNTHIA ANN HUDSON, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 2009F00005 IN THE 5TH DISTRICT COURT FROM CASS COUNTY

***Per curiam*.**

O R D E R

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of capital murder and sentenced to life imprisonment. The Sixth Court of Appeals affirmed her conviction in *Hudson v. State*, 415 S.W.3d 891, 897 (Tex. App.—Texarkana 2013), *aff'd,* 449 S.W.3d 495 (Tex. Crim. App. 2014).

Applicant contends that her trial counsel rendered ineffective assistance because counsel failed to request a jury instruction on the lesser included offense of felony murder. Applicant also alleges that counsel failed to investigate and present evidence regarding the primary witnesses' and

deceased's psychological state; namely, the syndrome known as Reactive Attachment Disorder (RAD).

Applicant has alleged facts that, if true, might entitle her to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Patterson*, 993 S.W.2d 114, 115 (Tex. Crim. App. 1999). In these circumstances, additional facts are needed. Counsel has provided an affidavit. However, it is this Court's opinion that more information is needed before this Court can render a decision on the aforementioned grounds for review, and because this Court cannot hear evidence, *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d).

It appears that Applicant is represented by counsel. The trial court shall determine whether Applicant is represented by counsel, and if not, whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact as to whether counsel was following his client's commands by not requesting the instruction on the lesser included offense of felony murder. The trial court also shall make findings of fact as to whether counsel's failure to request an instruction on the lesser included offense of felony murder was deficient or was based on reasonable trial strategy. If the trial court finds counsel did not have a reasonable trial strategy for failing to object to the jury charge, then the court shall determine whether Applicant was prejudiced under the second prong of *Strickland*. The trial court shall make findings of fact as to whether counsel conducted an independent investigation into the RAD syndrome. If the trial court finds that counsel did not conduct an investigation into the RAD syndrome, then the court shall determine whether counsel's

failure to investigate amounts to deficient performance. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claim for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be forwarded to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: June 22, 2016
Do not publish

APPENDIX TAB F:

DECEMBER 8, 2016 TEXAS STATE HABEAS COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DENIAL OF MOTION FOR DNA TESTING

(Fifth Cir. ROA.2609-2618)

COURT OF CRIMINAL APPEALS NO. WR-84,809-01
TRIAL CAUSE NO. 2009F00005-A

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
v.	§	**OF CASS COUNTY, TEXAS**
	§	
CYNTHIA ANN HUDSON	§	**5th JUDICIAL DISTRICT**

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DENIAL OF MOTION FOR DNA TESTING

On this day, the Court considered Applicant's Application for Writ of Habeas Corpus and Supplemental Application for Writ of Habeas Corpus, filed pursuant to art. 11.07, Texas Code of Criminal Procedure. Having reviewed Applicant's Application and Supplemental Application, together with Memorandums in Support of each, the applicable law, Respondent's Original Answer, together with Affidavit of trial counsel, Reply to Answer of the State of Texas and Request for an Evidentiary Hearing, Amended Affidavit of trial counsel and the evidence presented at the evidentiary hearing, and the Record, the Court makes the following Findings of Fact and Conclusions of Law.

BACKGROUND

1. Following a jury trial in this matter, Applicant was found guilty of the offense of Capital Murder and was thereafter sentenced to a term of life without parole in the Texas Department of Criminal Justice – Institutional Division.

2. Applicant appealed her conviction to the Sixth Court of Appeals, which reversed her conviction based on its holding that there was evidence raising a jury question on whether she acted recklessly in causing the victim's death and that the trial court harmfully erred in failing to instruct the jury on the lesser-included offense of manslaughter. *Hudson v. State*, 366 W.W. 3d 878 (Tex. App. — Texarkana 2012, *rev'd by,* 394 S.W.3d 522 (Tex. Crim. App. 2013)).

3. The Texas Court of Criminal Appeals subsequently reversed and remanded, ruling that the Sixth Court of Appeals should have examined potential offenses, lying between the charged offense of capital murder and the requested offense of manslaughter, to determine if such potential offenses were, in truth, immediate lesser-included offenses for which the mental state was consistent with the reckless mental state Applicant claimed qualified for the manslaughter instruction. *Hudson v. State,* 394 S.W.3d 522 (Tex. Crim. App. 2013).

4. On remand, the Sixth Court of Appeals affirmed the judgment of the trial court on or about May 11, 2012, holding that because there was at least one such intermediate lesser-included offense established by the same evidence, Applicant was not entitled to an instruction on manslaughter. *Hudson v. State,* 415 S.W.3d 891 (Tex. App. — Texarkana 2013, *aff'd* by 449 S.W.3d 495 (Tex. Crim. App. 2014).

5. Applicant filed a Petition for Discretionary Review, and the judgment was affirmed on December 10, 2014. *Hudson v. State*, 449 S.W.3d 495 (Tex. Crim. App. 2014).

6. Applicant filed her Application for Writ of Habeas Corpus.

7. The State of Texas filed its Original Answer, together with trial counsel's affidavit.

8. Applicant filed her Reply to Answer of the State of Texas and Request for an Evidentiary Hearing, wherein it responded to the Affidavit of trial counsel.

9. Thereafter, pursuant to an Order of the trial court, trial counsel filed an amended affidavit.

10. The Court held an evidentiary hearing on September 1, 2016.

11. Trial counsel has practiced law for forty-one years.

12. For the majority of the time trial counsel has practiced law, a significant portion of his practice has been criminal law.

LEGAL STANDARD

13. To obtain habeas corpus relief for ineffective assistance of counsel under the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), an applicant must show that counsel's performance "was deficient and that a probability exists, sufficient to undermine our confidence in the result, that the outcome would have been different but for counsel's deficient performance." *Ex Parte White*, 160 S.W.3d 46, 49 (Tex. Crim. App. 2004).

14. Moreover, "applicant must overcome the 'strong presumption that counsel's conduct fell within the wide range of professional assistance.'" *Ex Parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005).

15. "[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengable." *Strickland*, 466 U.S. at 690.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO REQUEST INSTRUCTION ON LESSER INCLUDED OFFENSE OF FELONY MURDER

16. The jury charge in this case, in addition to a charge for capital murder, also included instructions on murder and injury to a child.

17. A "benefit of the doubt" instruction was given.

18. Applicant requested but was refused an instruction on manslaughter, which was the subject of her appeal and her Petition for Discretionary Review.

19. In its opinion, the Court of Criminal Appeals stated "although Appellant may have been entitled to a different lesser-included-offense instruction if she had requested one,

such as felony murder, Appellant made no such request, and that issue is not before us." *Hudson*, 449 S.W.3d at 500.

20. Applicant now contends trial counsel was ineffective for not requesting an instruction on the lesser-included offense of felony murder.

21. Trial counsel contends that even if he felt Applicant was entitled to numerous lesser-included offense instructions, he wouldn't have necessarily requested them all. *Affidavit of Trial Counsel*, February 24, 2016, p. 1.

22. Felony murder, based upon injury to a child, did not fit with the defense theory at trial. *Id.*

23. Trial counsel believed that had Applicant been given the manslaughter instruction requested, but not a felony murder instruction, it could have forced the jury into a manslaughter finding as opposed to a higher punishment level finding. *Id.*; *Record of Evidentiary Hearing*, p. 10, 20-21.

24. The decision to request *only* the manslaughter instruction was trial strategy.

25. Applicant had numerous and strong instructions at trial with regard to every fact and level of the trial procedure, many of which were contrary to trial counsel's advice.

26. Applicant was adamant she would not admit to any acts underlying the offense, and accordingly, refused any action at trial that she interpreted as an admission. *Affidavit of Trial Counsel*, February 24, 2016, p. 2; *Record of Evidentiary Hearing*, p. 9-11, 20-21.

27. The trial court finds that trial counsel was not deficient for not requesting an instruction on the lesser-included offense of felony murder, which would have been contrary to trial strategy and the Defendant's position at trial regarding the facts.

28. No relief should be granted Applicant, even if trial counsel's failure to request a felony murder instruction was deficient, because as the Court of Criminal Appeals affirmed, "Appellant was not entitled to a lesser-included instruction on manslaughter" because "Appellant cannot prove that she is guilty of only manslaughter..." *Hudson*, *supra*, 449 S.W.3d at 498. The Sixth Court of Appeals and the Court of Criminal Appeals did not hold that Applicant was not entitled to the lesser included offense of manslaughter because trial counsel failed to request felony murder *also*, but rather because even if both had been requested, manslaughter could not properly have been given. *Id.*, at 499.

29. In a case in which the State does not seek the death penalty, Capital Murder is punishable by life in prison without parole.

30. Murder, charged by the trial court, and felony murder, not requested by Defendant or charged by the trial court, are both offenses of the first degree and carry the same range of possible punishment.

31. Murder is punishable by imprisonment for life or any term of not more than 99 years or less than 5 years. Felony murder is also punishable by imprisonment for life or any term of not more than 99 years or less than 5 years.

32. Even if trial counsel had been deficient in failing to request an instruction on the lesser included offense of felony murder, a finding this trial court does not make, a probability does not exist, sufficient to undermine confidence in the result, that the outcome would have been different but for counsel's deficient performance. The jury had the opportunity to find Applicant guilty of murder, a first degree felony, which would have been punishable by imprisonment for life or any term of not more than 99 years or less than 5 years, the same punishment range for felony murder, but elected not to. Therefore, Applicant was not harmed,

and cannot show harm, by trial counsel's failure to request the lesser included offense of felony murder, or trial counsel's failure to request felony murder and manslaughter. The trial court therefor recommends denial of the Application for Writ of Habeas Corpus on this ground.

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE AND PRESENT RELEVANT EVIDENCE REGARDING PRIMARY WITNESSES' AND DECEASED'S PSYCHOLOGICAL STATE

33. Applicant contends that her defense at trial was that she did not do any of the acts which resulted in the death of the victim, contrary to two adopted children who testified to her commission of the acts. She contends they lied.

34. Applicant contends that despite being requested to investigate the adopted children's psychological problems and their manifestations, trial counsel did not conduct an independent investigation into Reactive Attachment Disorder ("RAD"), thereby leaving his client unsupported.

35. Trial counsel testified he did not fail to investigate RAD. *Affidavit of Trial Counsel*, May 20, 2016, p. 2. He reviewed materials presented by Defendant's husband, books and materials on the subject of RAD syndrome, and discussed RAD syndrome and potential experts with Applicant. *Id.*; *Record of Evidentiary Hearing*, p. 26-27, 30. Trial counsel also discussed RAD with Doris Hudson. *See*, ¶¶ 41- 45 below.

36. There had not been a prior medical diagnosis of RAD syndrome with regard to Applicant's adopted children, so whether they had it was speculative. *Record of Evidentiary Hearing*, p. 28, 30.

37. To the extent Applicant contends trial counsel should have investigated RAD syndrome as to the victim, RAD syndrome did not fit within the defense strategy because

Applicant's defense was that she was not involved. *Affidavit of Trial Counsel*, May 20, 2016, p. 2; *Record of Evidentiary Hearing*, p. 9-11, 20-21.

38. Trial counsel states he made a conscious decision to avoid the RAD syndrome issue for fear of providing jurors with a potential motive, assuming it would be admissible. *Record of Evidentiary Hearing*, p. 29-31.

39. The decision to avoid the RAD syndrome issue was trial strategy. *Affidavit of Trial Counsel*, May 20, 2016, p. 2; *Record of Evidentiary Hearing*, p. 29-31.

40. Applicant did not object or instruct trial counsel to act otherwise. *Affidavit of Trial Counsel*, May 20, 2016, p. 2.

41. Doris Hudson is Applicant's sister-in-law and is a licensed clinical social worker, with a Master's Degree in social work. *Record of Evidentiary Hearing*, p. 33, 40-42.

42. At the evidentiary hearing, Doris Hudson testified she is qualified to diagnose RAD syndrome, not only because of her credentials but because of her experience having worked with therapeutic foster care children and school-based services. *Id.*

43. It was Doris Hudson's understanding, from trial counsel, that she may have been called to testify at trial, even though she was not subpoenaed. *Record of Evidentiary Hearing*, p. 42-43.

44. Doris Hudson was present for trial, placed under the Rule and excluded from the courtroom during trial as a potential witness. *Id.*

45. Accordingly, the Court finds that trial counsel was informed about RAD syndrome and had a witness available at trial under the Rule to testify as to RAD syndrome, but chose not to call the witness during the trial as part of a reasonable trial strategy.

46. Trial counsel investigated RAD syndrome, and therefore, there is no merit to Applicant's contention trial counsel was ineffective for failing to investigate RAD syndrome. The trial court therefor recommends denial of the Application for Writ of Habeas Corpus on this ground.

SUPPLEMENTAL APPLICATION FOR WRIT OF HABEAS CORPUS

47. On or about September 30, 2016, Applicant filed her Supplemental Application for Writ of Habeas Corpus, together with Memorandum in Support, asserting her trial counsel was ineffective for failing to ensure that evidentiary items he knew would be admitted into evidence were subject to DNA testing and for failing to file a Motion for Continuance in writing, despite there being adequate time to do so.

48. In particular, the rake admitted into evidence was not submitted for forensic testing.

49. Applicant contends that trial counsel's failure to have the rake tested denied her the ability to challenge its use during trial.

50. As part of her Supplemental Application, Applicant moves the Court to order DNA testing of the rake.

51. The Motion for DNA Testing included in the Supplemental Application is effectively a motion under Chapter 64 of the Texas Code of Criminal Procedure.

52. Article 64.01(a-1) of the Texas Code of Criminal Procedure requires a motion for forensic DNA testing to be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.

53. The motion for DNA testing in question is not supported by Hudson's Affidavit containing statements in support of the motion.

54. Therefore, the Court denies the motion for DNA testing.

55. Applicant contends that the child witness, Jeremiah's, testimony that a rake was used by Applicant to beat the victim could "possibly" have been impeached had forensic testing been conducted on the rake.

56. In connection with the ineffective assistance of trial counsel claims, Applicant has failed to specify whose DNA on the rake would have been relevant and what she contends the results of DNA testing would have established.

57. Trial counsel secured a forensic DNA expert.

58. If the results of testing established the rake contained the victim's DNA, it would have supported the child witness' testimony and strengthened the State's case. On the other hand, the lack of the victim's DNA on the rake would not have established that the child witness did not take the rake to Applicant, as he testified, and would not establish Applicant did not strike the victim with the rake.

59. Applicant has failed to meet her burden that counsel was ineffective for failing to have DNA testing of the rake.

60. Trial counsel did not file a written motion for continuance, based on the rake not being submitted for testing.

61. Failure to file a written motion for continuance failed to preserve the issue for appeal.

62. Applicant has failed to establish that had trial counsel filed a written motion for continuance, preserving the issue for appeal, the outcome would have been different.

63. The District Clerk shall transmit to the Court of Criminal Appeals the following: a certified copy of these Findings of Fact and Conclusions of Law; Trial Counsel's

Amended Affidavit; the transcript of the Evidentiary Hearing and any documents not previously forwarded for review by that Court as provided by law.

Signed this the 8th day of December 2016.

4:34 pm, December 08, 2016
Unique Digital Signature Identifier:
962903883837754100-1481236448776

Bill Miller, Judge Presiding
5th Judicial District Court
Cass County, Texas

APPENDIX TAB G:

FEBRUARY 8, 2017 ORDER OF TEXAS COURT OF CRIMINAL APPEALS DENYING POST-CONVICTION WRIT

(Fifth Cir. ROA.2309)

APPLICANT CYNTHIA ANN HUDSON **APPLICATION NO.** WR-84,809-01

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS AFTER REMAND

ACTION TAKEN

DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT HEARING.

February 8, 2017

JUDGE **DATE**

APPENDIX TAB H:

MARCH 1, 2017 ORDER OF TEXAS COURT OF CRIMINAL APPEALS DENYING RECONSIDERATION ON COURT'S OWN MOTION

(Fifth Cir. ROA.2529-2530)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,809-01

EX PARTE CYNTHIA ANN HUDSON, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2009F00005 IN THE 5TH DISTRICT COURT
FROM CASS COUNTY**

***Per curiam*.**

O R D E R

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of capital murder and sentenced to life imprisonment. The Sixth Court of Appeals affirmed her conviction. *Hudson v. State*, No. 415 S.W.3d 891, 897 (Tex. App.—Texarkana 2013), *aff'd*, 449 S.W.3d 495 (Tex. Crim. App. 2014).

Applicant contends that trial counsel rendered ineffective assistance. On February 8, 2017, we denied this application, based on the trial court's findings, without a hearing. Subsequently, Applicant filed a request to reconsider, on our own motion, our ruling and alerting the Court that a

habeas hearing was conducted by the trial court on September 1, 2016. Therefore, we reconsider the original disposition, and deny this application, based on the trial court's findings, after a hearing. All other suggestions for reconsideration on the Court's own initiative in Applicant's motion are denied.

Filed: March 1, 2017
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