No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DESHUN THOMAS,

Petitioner,

VS.

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

Respondent.

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

APPENDICES

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Appendix A

Fifth Circuit's Denial of Petition for Rehearing and Dissent from Denial of Rehearing
(980 F.3d 1043 (5th Cir. 2020))

United States Court of Appeals for the Fifth Circuit

No. 17-20661

DESHUN THOMAS,

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 Southern District of Texas
USDC No. 4:14-CV-290

ON PETITION FOR REHEARING EN BANC

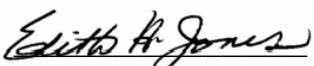
(Opinion 7/29/20, 968 F.3d 352 (5th Cir. 2020)

BEFORE DAVIS, JONES, AND ENGELHARDT, *Circuit Judges*.
PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Circ. R. 35), the petition for rehearing en banc is **DENIED.**

In the en banc poll, 6 judges voted in favor of rehearing (Judges Stewart, Dennis, Elrod, Graves, Higginson, and Willett), and 11 judges voted against rehearing (Chief Judge Owen and Judges Jones, Smith, Southwick, Haynes, Costa, Ho, Duncan, Engelhardt, Oldham and Wilson).

ENTERED FOR THE COURT:



EDITH H. JONES
United States Circuit Judge

JAMES E. GRAVES, JR., *Circuit Judge*, dissenting from the denial of rehearing en banc, joined by ELROD, *Circuit Judge*:

Because the panel opinion is contrary to both *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002) and *United States v. Cronic*, 466 U.S. 648 (1984), I respectfully dissent from the denial of rehearing en banc.

This court granted a certificate of appealability on Deshun Thomas' claim that his trial counsel failed to subject the prosecution's case to meaningful adversarial testing in violation of *Cronic*. The panel found no error and affirmed. In doing so, the panel concluded that Thomas' claim failed regardless of whether de novo review or AEDPA applied.[1]

To prevail on a claim of ineffective assistance of counsel, a petitioner must typically satisfy the two-prong test of deficiency and prejudice under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show that counsel's performance was deficient, "requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* at 687 (internal marks omitted). To establish prejudice, a petitioner must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

As the panel stated, *Cronic* created a limited exception to the application of *Strickland*'s two-part test where prejudice is presumed in

[1] I agree that de novo review applies. However, I would conclude that Thomas is entitled to relief under either de novo review or AEDPA deference.

certain situations. *See Haynes*, 298 F.3d at 380. Prejudice is presumed in three situations, (1) the complete denial of counsel at a critical stage; (2) if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *See Bell v. Cone*, 535 U.S. 685, 695-96 (2002); *see also Haynes*, 298 F.3d at 380; and *Cronic*, 466 U.S. at 659. Thomas relies on the second exception.

The panel noted that the state Fourteenth Court of Appeals "held that Thomas's trial counsel's closing arguments were professionally incompetent in violation of *Strickland v. Washington*, 466 U.S. 668 . . . (1984) because they essentially conceded his client's guilt, but appellate counsel had waived any showing, pursuant to the other *Strickland* prong, of prejudice to Thomas." *Thomas v. Davis*, 968 F.3d 352, 353 n.1 (5th Cir. 2020). The panel further found it "rather odd" that neither the state habeas court nor the Texas Court of Criminal Appeals addressed the state appellate court's holding. But the panel concluded that the discrepancy did not matter. *Id*. at n.2.

Specifically, the Fourteenth Court of Appeals affirmed the conviction and sentence but said:

> However, given trial counsel's closing argument in the punishment phase, in which he made specific reference to trial counsel's concession of appellant's guilt in closing argument in the punishment phase, combined with counsel's references to the overwhelmingly powerful evidence at the guilt-innocence phase, the totality of the representation amounts to conduct so outrageous that it falls well-below professional

> standards. Appellant's trial counsel emphasized the strength of the evidence against appellant and affirmatively argued both for finding appellant guilty and for assessing a substantial sentence. Under the circumstances of this case, no plausible basis exists and no strategic motivation could explain why trial counsel fashioned his arguments as he did. Appellant has rebutted the presumption that counsel's conduct was reasonably professional and motivated by sound trial strategy because counsel's closing arguments amount to conduct "so outrageous that no competent attorney would have engaged in it." Appellant has satisfied the first prong in *Strickland* by showing his trial counsel's conduct was deficient such that it fell below the standard of professional norms.

See Thomas v. State, No. 14-06-00540-CR, 2008 WL 596228, *4 (Tex. App. Mar. 6, 2008)(*Thomas II*)(internal citations omitted). But, after finding that Thomas established the deficiency prong of *Strickland*, the court then found that he had "waived error as to *Strickland*'s second prong by failing to adequately brief it on appeal." *Id*. at *5.

The panel here relied on *Haynes* to conclude that Thomas' trial counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing. *Thomas*, 968 F.3d at 355; *see also Haynes*, 298 F.3d at 381. In doing so the panel directed us to the district court's opinion, which said that counsel advocated on Thomas' behalf throughout trial, moved to suppress evidence and cross-examined witnesses. It further concluded that counsel did not concede the only factual issue in dispute, but merely described evidence against Thomas as "really strong," "substantial," "persuasive," and "pretty powerful." *Thomas*, 968 F.3d at 355. The panel also pointed to counsel's admonishment to the jury that any reasonable doubt

required them to acquit, before concluding that, read in context, counsel's "summation indicates that his comments were strategically made to maintain credibility with the jury." *Id.* at 356. Finally, it concluded that counsel's sentencing arguments during the punishment phase confirmed this "strategy," while noting that counsel died after trying this case and was never available for post-conviction inquiry about the defense or any alleged strategy. *Id.* at n.6.

However, the record does not support these conclusions, which conflict with controlling authority. As an initial matter, strategy goes to counsel's performance, not the prejudice factor. *Strickland*, 466 U.S. at 698-99. The state appellate court already found that Thomas had established deficient performance. The only issue remaining was whether the deficient performance prejudiced Thomas, which the court said Thomas had failed to brief. The panel and the district court disregarded the state appellate court's finding and reweighed the performance factor to determine that counsel's deficient performance was mere strategy.

As the panel conceded, "*Cronic* applies to concessions only when they result in a 'complete abandonment of counsel'; that is, the attorney must concede 'the only factual issues in dispute.'" *Thomas*, 968 F.3d at 355 (quoting *Haynes*, 298 F.3d at 381).[2] Again, the panel concluded that counsel

[2] The panel cites *Barbee v. Davis*, 728 F. App'x 259, 264 (5th Cir. 2018) for the proposition that the "Supreme Court has held that even defense counsel's full concession of guilt is not necessarily an indication that counsel has entirely failed to function as the client's advocate." *Id.* (quoting *Florida v. Nixon*, 543 U.S. 175, 189–91 (2004)) (internal marks and emphasis omitted). *Nixon* is easily distinguished as counsel there explained his

had not conceded the only factual issues in dispute, pointing to various actions taken by counsel throughout the trial. However, regardless of what counsel did earlier at trial, he conceded the only factual issues in dispute when he admitted Thomas' guilt during closing and, thus, abandoned any attempt to subject the prosecution's case to meaningful adversarial testing. Moreover, following the concession in *Haynes*, counsel "remained active at trial, probing weaknesses in the prosecution's case on the issue of intent," and cross-examining witnesses. *Id.* 298 F.3d at 382. Here, counsel conceded guilt during closing arguments. Thus, there was no opportunity for counsel to rectify his concession during some later portion of the proceedings.

Specifically, counsel repeatedly assured the jury of his trial experience and made numerous explicit statements regarding Thomas' guilt, such as: (1) "it seems really strong to me that this young man is guilty, this person I'm representing is guilty;"(2) he was "convinced that the evidence [of Thomas's guilt] [was] pretty powerful;" (3) there was "a substantial amount of evidence" demonstrating Thomas' guilt; and (4) "If you reach a verdict that says he's guilty, that's the way it is. I appreciate it." *Thomas II*, 2008 WL 596228, ** 1-2 (emphasis omitted). The jury convicted Thomas, and the trial proceeded to the punishment phase, where defense counsel first acknowledged that he had "practically consented to a guilty verdict in this case, because I thought the evidence was overwhelming based on the many

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strategy to Nixon several times to "concede guilt and to home in, instead, on the life or death penalty issue." *Id.* at 189. Counsel here neither explained his strategy nor attempted to get a shorter sentence. In fact, counsel here failed to offer any mitigation.

years of experience of trying cases" and reiterated that the evidence against Thomas was "overwhelming." *Id.* at 2 (emphasis omitted). Counsel then argued that "[a]ll of the evidence—and I would be a fool if I suggested otherwise, and I'm not—is compelling that this young man deserves a pretty substantial sentence. I'm not talking about of [sic] sentence of 15 years. All of the evidence is compelling." Counsel then told the jury he wanted them to take into consideration that "[a] young man lost his life, destroyed his mother practically" and all of Thomas' prior convictions before stating, "I can assure you I'm a fairly wordy individual, but I know I can't deter you from the things you ought to do in this case. And in this case, I'm convinced, based on all of the facts, he deserves a substantial sentence." *Thomas II*, 2008 WL 596228, 2. Counsel offered nothing in mitigation and told the jury he could not quarrel with any sentence the jury selected. *Id.*

That complete abandonment of counsel falls squarely within *Cronic*. *See Haynes*, 298 F.3d at 381. When there is a "breakdown of the adversarial process," prejudice is presumed. *Cronic*, 466 U.S. at 657–58. Counsel's explicit concession of guilt on the only offense and request for a substantial sentence as a result is a breakdown of the adversarial process. Further, the subsequent objection regarding Thomas' failure to testify does not in any way correct this breakdown. The panel ultimately concluded that counsel's "strategy" paid off because Thomas received only seventy-five years imprisonment rather than life. The record in this matter clearly demonstrates that Thomas received seventy-five years instead of life in spite of counsel's performance, not because of counsel's performance. Counsel

did not admit Thomas' guilt only to a lesser-included offense; counsel admitted Thomas' guilt to the only offense. Counsel did not concede guilt in an attempt to get a lighter sentence; counsel conceded guilt and asked for a substantial sentence while failing to present anything in mitigation. At the point that counsel conceded guilt, he failed to mount a defense regardless of anything he had done prior to that concession. At the point that counsel asked for a substantial sentence, he verified that this was not an attempt at strategy. Thus, the panel decision is contrary to both *Haynes* and *Cronic*.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

Appendix B

Fifth Circuit's Opinion
(968 F.3d 352 (5th Cir. 2020))

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 29, 2020
Lyle W. Cayce
Clerk

No. 17-20661

DESHUN THOMAS,

Petitioner - Appellant

v.

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

Respondent - Appellee

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

Before DAVIS, JONES, and ENGELHARDT, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This court granted a certificate of appealability on habeas petitioner Deshun Thomas's claim that his trial counsel failed to subject the prosecution's case to meaningful adversarial testing in violation of *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039 (1984). Counsel was appointed for Thomas. After reviewing the parties' supplemental briefs, and finding no error in the federal district court's rejection of that claim, we affirm.

I.

In 2006, after a second jury trial, a Texas jury convicted Thomas of aggravated robbery and sentenced him to seventy-five years' imprisonment. During closing argument and sentencing, Thomas's trial counsel, Ken McLean,

acknowledged the strength of the prosecution's evidence and indicated that Thomas deserved a "substantial sentence." After his conviction and sentence were affirmed on direct appeal,[1] Thomas filed a *pro se* habeas petition in state court, asserting, *inter alia*, ineffective assistance of counsel based on McLean's statements during summation and sentencing. Thomas's petition cited to both *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) and *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039 (1984). The state district court denied Thomas relief in a reasoned opinion that tracked *Strickland* but did not expressly reference *Cronic*. The Texas Court of Criminal Appeals subsequently denied relief without written order, adopting the findings of the state district court.[2]

In 2014, Thomas filed the instant federal petition pursuant to 28 U.S.C. § 2254, asserting, *inter alia*, that McLean's statements at trial amounted to an abandonment of Thomas in violation of *Cronic*. Applying the deferential standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996, the federal district court denied Thomas relief. The court reasoned that *Strickland*, not *Cronic*, governed Thomas's claim, and that, under *Strickland*, Thomas failed to show McLean was constitutionally ineffective or that Thomas was otherwise prejudiced. In 2018, another panel of this court granted a certificate of appealability solely on Thomas's *Cronic*

[1] An intermediate Texas appellate court affirmed the judgment on direct appeal. In so doing, however, it held that Thomas's trial counsel's closing arguments were professionally incompetent in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) because they essentially conceded his client's guilt, but appellate counsel had waived any showing, pursuant to the other *Strickland* prong, of prejudice to Thomas.

[2] That neither the state habeas court nor the TCCA addressed the state appellate court's holding regarding deficiency is rather odd, but since we exercise discretion to review Thomas's *Cronic* claim *de novo*, the discrepancy does not matter.

claim[3] and instructed the parties (after appointment of counsel for Thomas) to address whether that claim was exhausted and adjudicated in state court, and whether AEDPA applies.

II.

Thomas contends he exhausted his *Cronic* claim, but the state habeas court failed to adjudicate the claim on the merits. Thus, according to Thomas, the federal district court should have reviewed the claim *de novo* rather than applying AEDPA deference. The State now concedes that Thomas exhausted his claim. We therefore consider that issue waived and turn to the standard of review question. *See* 28 U.S.C. § 2254(b)(3); *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999) (finding waiver when the State admitted that the petitioner "ha[d] sufficiently exhausted his state remedies").

Under AEDPA, "we must defer to the state habeas court unless its decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Haynes v. Cain*, 298 F.3d 375, 379 (5th Cir. 2002) (en banc) (quoting 28 U.S.C. § 2254(d)(1)). But AEDPA only applies to claims that are "adjudicated on the merits" in the state habeas proceedings. *Johnson v. Williams*, 568 U.S. 289, 292, 133 S. Ct. 1088, 1091 (2013). If a claim is properly raised but is not adjudicated on the merits, we review the claim *de novo*. *See Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997).

Thomas argues the state habeas court failed to adjudicate his *Cronic* claim on the merits, thus triggering *de novo* review, because the court cast its decision in *Strickland* terms and failed to expressly reference the *Cronic* standard. We presume the claim was adjudicated on the merits. *See Johnson*,

[3] Thomas did not brief the prejudice prong of *Strickland* on his appeal to this court, and consequently, that issue was waived. In any event, prejudice could not be shown on the record before us.

568 U.S. at 301, 133 S. Ct. at 1096 ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits . . . ."). Although we are not entirely convinced that Thomas has rebutted this presumption,[4] Thomas's *Cronic* claim fails even when reviewed *de novo*.[5]

"Ordinarily, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must satisfy *Strickland's* familiar two-part test." *Haynes*, 298 F.3d at 380 (citing *Strickland*, 466 U.S. at 700, 104 S. Ct. at 2071). The petitioner must show that (1) counsel's "representation fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068. *Cronic* created "a very limited exception to the application of *Strickland's* two-part test," whereby prejudice is presumed "in situations that 'are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified.'" *Haynes*, 298 F.3d at 380 (quoting *Cronic*, 466 U.S. at 658, 104 S. Ct at 2046). The Supreme Court has identified three such situations, one of which Thomas relies on here. *See Bell v. Cone*, 535 U.S. 685, 695, 122 S. Ct. 1843, 1850 (2002). Specifically, prejudice is presumed when the "petitioner is represented by counsel at trial, but his or her counsel 'entirely

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[4] The allegations underlying Thomas's relevant *Strickland* claim (that McLean conceded guilt during summation and argued for a substantial sentence) are identical to those underlying his *Cronic* claim. And the state habeas court's reason for denying the *Strickland* claim (that McLean's statements were strategic) explains why the court did not apply *Cronic*. *See Haynes*, 298 F.3d at 381 ("[S]trategic or tactical decisions are evaluated under *Strickland's* traditional two-pronged test for deficiency and prejudice."). Thus, while the state court could have expressly stated that "Thomas's *Cronic* claim fails for the same reason as his *Strickland* claim," that finding seems implicit in its decision.

[5] "Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies . . . ." *Berghuis v. Thompkins*, 560 U.S. 370, 390, 130 S. Ct. 2250, 2265 (2010).

fails to subject the prosecution's case to meaningful adversarial testing.'" *Haynes*, 298 F.3d at 380 (citing *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047).

Thomas argues he satisfies this exception based on McLean's statements during summation and sentencing. We disagree. As *Cronic* suggests—and we have stressed—prejudice is not presumed unless an attorney *entirely* fails to defend his client. *See Bell*, 535 U.S. at 695, 122 S. Ct. at 1851. Thus, in *Haynes,* this court distinguished between "counsel's failure to oppose the prosecution entirely" and counsel's failure to do so "at specific points during trial." 298 F.3d at 381. Prejudice is presumed only in the former scenario because "it is as if the defendant had no representation at all." *Id.* In the same vein, *Cronic* applies to concessions only when they result in a "complete abandonment of counsel"; that is, the attorney must concede "the only factual issues in dispute." *Id.* In contrast, particular strategic or tactical concessions, such as those made to garner credibility with the jury at sentencing or on more severe counts, are subject to *Strickland*. *Id.*

Here, McLean did not entirely fail to subject the prosecution's case to meaningful adversarial testing. As the district court detailed in its thorough opinion, McLean actively advocated on Thomas's behalf throughout trial. He moved to suppress evidence. He cross-examined the State's witnesses on their identification of Thomas as the culprit, ultimately impeaching several of them and prompting the arguably most critical witness to admit she lied to the police. He also cross-examined the detectives involved in the underlying investigation on their search and arrest of Thomas, as well as their subsequent handling of evidence.

Moreover, McLean did not abandon Thomas by conceding the only factual issues in dispute. Faced with overwhelming evidence of guilt, McLean described the evidence as "really strong," "substantial," "persuasive," and "pretty powerful" during his summation at the end of the guilt/innocence phase

of trial. But he also emphasized that the jury must look at the evidence and twice admonished them to acquit "if you have a reasonable doubt" about Thomas's guilt. McLean pressed on the jury the weaknesses in the prosecution's case, emphasized the high burden of proof, and pointed to several potential sources of reasonable doubt. When read in context, McLean's summation indicates that his comments were strategically made to maintain credibility with the jury.

McLean's sentencing arguments during the punishment phase confirm this strategy.[6] Testimony during sentencing established that Thomas had an extensive criminal history, including nine felony and misdemeanor convictions, three of them following this crime, and he was likely involved in drug trafficking. This crime had devastating effects on the victim, who died from complications caused by his wounds after testifying at the first trial. The victim had survived, cared for by his mother, for several years in constant pain, endured at least eight surgeries resulting from Thomas's actions, and ultimately succumbed to a morphine overdose. The prosecution was seeking a life sentence.

Once again, to maintain credibility, McLean acknowledged these facts and stated that he "would be a fool if [he] suggested" that Thomas did not "deserve[] a pretty substantial sentence" that was more than the minimum of fifteen years. McLean also successfully lodged objections during the prosecution's argument:

> [THE PROSECUTION]: Asking a jury for a life sentence is a big thing. And I recognize that. And it's a tough thing. It's a tough thing for any jury to do, but in this case, even you were looking at Deshun Thomas and saying, buddy, give me something, give me some

[6] McLean died after he tried this case and was never available for post-conviction inquiry into the defense.

> reason why you don't serve the maximum punishment in this—
>
> MCLEAN: Objection. That's a comment on his failure to testify.
>
> THE COURT: Sustained.
>
> [THE PROSECUTION]: Show us something—
>
> THE COURT: Again, get away from that. They are under no obligation to do anything.

And throughout the punishment phase, he continued to contest search issues raised previously at trial and extensively cross-examined a police officer on a more recent search. Ultimately, McLean's strategy paid off: Thomas avoided a life sentence.

Cronic does not proscribe defense counsel's approach. *See* 466 U.S. at 656 n.19, 104 S. Ct. at 2045 n.19 ("Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."). But more importantly, no Supreme Court case has applied *Cronic* to overturn a conviction solely because of counsel's alleged trial errors. In *Bell,* for instance, the Court contrasted *Strickland* and *Cronic,* noting that those cases had been decided on the same day and that *Cronic* applied only when counsel's failure to mount a meaningful defense was "complete." 535 U.S. at 697, 122 S. Ct. at 1851. Counsel's mere failure to oppose the prosecution's sentencing case "at specific points" did not satisfy *Cronic* because the difference between that case and *Strickland* was a "difference . . . not of degree but of kind." *Id.* Consequently, the Court held, counsel's "failure to adduce mitigating evidence and the waiver of closing argument"—during the sentencing stage of a capital case—"are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components." *Id.* at 697–98 (collecting cases).

Likewise, in *Florida v. Nixon,* the Court reiterated that *Cronic* is "a narrow exception" to *Strickland*. 543 U.S. 175, 190, 125 S. Ct. 551, 562 (2004). The Court then observed that "just how infrequently" *Cronic* will apply was demonstrated in *Cronic* itself, where the Court refused to find such structural error based on a claim of prejudicially incompetent representation by an "inexperienced, underprepared attorney in a complex mail fraud trial." *Id.*[7]

Nevertheless, pointing to our *en banc* decision in *Haynes*, Thomas contends that *Cronic* applies because McLean's statements do not qualify as a "partial concession." In *Haynes*, we held *Cronic* inapplicable to an attorney's strategic concession to a lesser-included offense in a multi-count indictment. *See Haynes*, 298 F.3d at 382. In reaching that conclusion, we recognized that "those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions" and thus not subject to *Cronic*. *Id.* at 381.

Thomas attempts to distinguish this case from *Haynes* by arguing that he was facing one count, and McLean's concession was therefore "full and complete." As noted, however, McLean did not concede the only factual issues in dispute. In any event, *Haynes* was not so limited. "[T]he Supreme Court [has] held that even defense counsel's *full* concession of guilt is not necessarily an indication that 'counsel has entirely failed to function as the client's advocate . . . .'" *Barbee v. Davis*, 728 F. App'x 259, 264 (5th Cir. 2018) (emphasis added) (quoting *Nixon*, 543 U.S. at 189–91, 125 S. Ct. at 560). Indeed, we have stated that "counsel may make strategic decisions to

[7] The Supreme Court's more recent decision in *McCoy v. Louisiana,* 138 S. Ct. 1500 (2018) is not to the contrary. *McCoy* held that counsel violates the Sixth Amendment by conceding a client's guilt to the jury over the client's objections. No issue was raised here about Thomas's objecting to McLean's approach in his summation and sentencing arguments.

acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty, in order to establish credibility with the jury." *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997).

The common thread is strategy. McLean's statements did not amount to a "complete" failure to mount a defense. *Cronic* does not apply.

For the foregoing reasons, the judgment of the district court denying habeas relief is **AFFIRMED**.

Appendix C

Opinion of the U.S. District Court for the Southern District of Texas

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

DESHUN THOMAS, (TDCJ-CID #882625)	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. H-14-0290
LORIE DAVIS,	§	
Respondent.	§	

MEMORANDUM AND OPINION

Petitioner, Deshun Thomas, seeks habeas corpus relief under 28 U.S.C. § 2254, challenging a conviction in the 209th Judicial District Court of Harris County, Texas. Respondent filed a motion for summary judgment, (Docket Entry No. 27), and copies of the state court record. Thomas has filed his response. (Docket Entry No. 28).

I. Background

Thomas was initially convicted by a jury of the felony offense of aggravated robbery on June 30, 1999. The jury sentenced Thomas to a prison term of fifty-five years. The Fourteenth Court of Appeals issued an opinion on December 7, 2000 reversing Thomas's conviction based upon the trial court's refusal to submit a proper charge under Article 38.23 of the Code of Criminal Procedure. *Thomas v. State,* No. 14-99-00949-CR, 2000 WL 1785110 (Tex. App. - Houston [14th Dist.] 2000, pet. ref'd)(not designated for publication). On June 16, 2006, the jury found Thomas guilty of the felony offense of aggravated robbery and sentenced Thomas to seventy-five years imprisonment.

The Fourteenth Court of Appeals of Texas affirmed Thomas's conviction on March 6, 2008. Thomas did not file a petition for discretionary review in the Texas Court of Criminal Appeals.

Thomas filed an application for state habeas corpus relief on March 4, 2009. On February 6, 2014, this court received Thomas's federal petition. Thomas contends that his conviction is void for the following reasons:

(1) Appellate counsel, Frances M. Northcutt, rendered ineffective assistance by:

a. denying him the right to file a petition for discretionary review; and

b. failing to brief the prejudice prong of *Strickland;*

(2) Trial counsel, Ken McLean, rendered ineffective assistance by:

a. abandoning representation of him and joining forces with the prosecutor; and

b. committing cumulative errors and omissions;

(3) The trial court erred in denying his motion to suppress;

(4) The State engaged in prosecutorial misconduct; and

(5) He is factually innocent of the offense of aggravated robbery.

(Docket Entry No. 1, Petition for Writ of Habeas Corpus, pp. 6-29).

On September 30, 2014, respondent filed a motion to dismiss the petition for writ of habeas corpus for failure to exhaust available state court remedies. (Docket Entry No. 17). Respondent argued that Thomas's claims must be dismissed because he had failed to exhaust his state court remedies as to all of the claims raised in Thomas's federal petition. (Docket Entry No. 17, Respondent's Motion to Dismiss, p. 1). The respondent argued that Thomas's state application for a writ of habeas corpus was still pending in the 209th Judicial District Court of Harris County, Texas. As a result, the respondent argued that Thomas's federal petition should be dismissed for

failure to exhaust state court remedies. Thomas responded that his state application had been pending in the state courts for over five years and that the exhaustion requirement should be excused. In an order entered on April 2, 2015, this court denied the respondent's motion to dismiss for nonexhaustion and excused Thomas's noncompliance with the exhaustion doctrine because the inordinate delay was wholly and completely the fault of the state. (Docket Entry No. 21). Respondent filed a motion for reconsideration, (Docket Entry No. 22), arguing that Thomas's state application was still pending in the Texas Court of Criminal Appeals. The state habeas court issued findings of fact and conclusions of law on April 20, 2015. (Docket Entry No. 27-1, pp. 2-13). On September 16, 2015, the Texas Court of Criminal Appeals denied relief without written order, on findings of the trial court, without a hearing. http://www.search.txcourts.gov/Case.aspx?cn=WR-75,971-03&coa=coscca. Respondent filed the instant motion for summary judgment on August 31, 2015. (Docket Entry No. 27).

II. The Statement of Facts

The Fourteenth Court of Appeals summarized the evidence, as follows:

> On the night of April 7, 1998, the complainant, Charles McCulloch, then a salesperson at a local car dealership, sought a woman by the name of Elena Rodriguez in order to retake a car that the dealership had loaned her. McCulloch and two of his employees located the car at Rodriguez's apartment complex. McCulloch confirmed that the car belonged to the dealership, and he turned to one of the employees and instructed her to drive it back to the dealership. As McCulloch turned and began walking back to his own car, he was accosted by an individual brandishing a handgun and standing some ten to fifteen feet away. The individual, later identified by McCulloch as appellant, said, "Give me your watch." McCulloch refused, and was proceeding back to his vehicle when the gunman shot him.
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> In a statement to police, Rodriguez denied knowing who shot McCulloch. Rodriguez's co-worker, who was with her on the evening

> of the shooting, confirmed that she also did not know who shot McCulloch. Three months later, Rodriguez recanted her prior statement to police and provided a new statement naming appellant as the gunman. Around the same time, the co-worker also met with police and stated that she and Rodriguez met with appellant in the early hours of April 8 and that appellant admitted shooting McCulloch. Based on this new information, the police procured and executed an arrest warrant for appellant. After appellant's arrest, police searched appellant's room in the home he shared with his mother and found a handgun later confirmed to be the one used to shoot McCulloch.
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> Appellant was convicted of aggravated robbery, but on appeal, this court reversed his conviction and remanded this case to the trial court for a new trial. *See Thomas v. State,* No. 14-99-00949-CV, 2000 WL 1785110, at *8 (Tex. App. - Houston [14th Dist .] Dec. 7, 2000, pet. ref'd) (not designated for publication).
>
> . . .
> On retrial, appellant was again convicted of aggravated robbery, and the jury assessed punishment at seventy-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

Thomas v. State, No. 14-06-00540-CR, 2008 WL 596228, at *1-2 (Tex. App. -- Houston [14th Dist.] no pet.)(not designated for publication).

III. The Applicable Legal Standards

This court reviews Thomas's petition for writ of habeas corpus under the federal habeas statutes, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254; *Woods v. Cockrell*, 307 F.3d 353, 356 (5th Cir. 2002); *Nobles v. Johnson*, 127 F.3d 409, 413 (5th Cir. 1997), citing *Lindh v. Murphy*, 521 U.S. 320 (1997).

Sections 2254(d)(1) and (2) of AEDPA set out the standards of review for questions of fact, questions of law, and mixed questions of fact and law that result in an adjudication on the merits. An adjudication on the merits "is a term of art that refers to whether a court's disposition of the case

is substantive, as opposed to procedural." *Miller v. Johnson,* 200 F.3d 274, 281 (5th Cir. 2000). A state-court determination of questions of law and mixed questions of law and fact is reviewed under 28 U.S.C. § 2254(d)(1) and receives deference unless it "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *Hill v. Johnson,* 210 F.3d 481, 485 (5th Cir. 2000). A state-court decision is "contrary to" Supreme Court precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) the "state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at an opposite result. *Williams v. Taylor,* 120 S. Ct. 1495 (2000). A state court unreasonably applies Supreme Court precedent if it unreasonably applies the correct legal rule to the facts of a particular case, or it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 1495. Questions of fact found by the state court are "presumed to be correct . . . and [receive] deference . . . unless it 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Hill*, 210 F.3d at 485 (quoting 28 U.S.C. § 2254(d)(2)).

A state court's factual findings are entitled to deference on federal habeas corpus review and are presumed correct under section 2254(e)(1) unless the petitioner rebuts those findings with "clear and convincing evidence." *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006) (citing *Hughes v. Dretke*, 412 F.3d 582, 589 (5th Cir. 2005) and 28 U.S.C. § 2254(e)(1)). This deference extends not only to express findings of fact, but to the implicit findings of the state court as well. *Garcia*,

454 F.3d at 444-45 (citing *Summers v. Dretke*, 431 F.3d 861, 876 (5th Cir. 2005); *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004)).

While, "[a]s a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases," *Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir.), *cert. denied,* 531 U.S. 831 (2000), the rule applies only to the extent that it does not conflict with the habeas rules. Section 2254(e)(1) – which mandates that findings of fact made by a state court are "presumed to be correct" – overrides the ordinary rule that, in a summary judgment proceeding, all disputed facts must be construed in the light most favorable to the nonmoving party. Unless the petitioner can "rebut[ ] the presumption of correctness by clear and convincing evidence" as to the state court's findings of fact, those findings must be accepted as correct. *Smith v. Cockrell,* 311 F.3d 661, 668 (5th Cir. 2002).

Thomas is proceeding *pro se*. A *pro se* habeas petition is construed liberally and not held to the same stringent and rigorous standards as pleadings filed by lawyers. *See Martin v. Maxey,* 98 F.3d 844, 847 n.4 (5th Cir. 1996); *Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988); *Woodall v. Foti,* 648 F.2d 268, 271 (5th Cir. Unit A June 1981). This court broadly interprets Thomas's state and federal habeas petitions. *Bledsue v. Johnson,* 188 F.3d 250, 255 (5th Cir. 1999).

Thomas argues that this court should not accord AEDPA to the opinion of the Texas Court of Criminal Appeals because it was filed after the respondent filed his motion for summary judgment. (Docket Entry No. 28, p. 7). As noted, respondent filed the instant motion for summary judgment on August 31, 2015. (Docket Entry No. 27). Online research reveals that the Texas Court of Criminal Appeals denied Thomas's state application for habeas corpus relief on September 16, 2015.

"When one reasoned state court decision rejects a federal claim, subsequent unexplained orders upholding that judgment or rejecting the same claim are considered to rest on the same ground as did the reasoned state judgment." *Bledsue v. Johnson,* 188 F.3d 250, 256 (5th Cir. 1999). This "look through" doctrine enables a federal habeas court "to ignore—and hence, look through—an unexplained state court denial and evaluate the last reasoned state court decision." *Id.; see also Renz v. Scott,* 28 F.3d 431, 432 (5th Cir. 1994) (finding that the denial of relief "on the findings of the trial court" by the Texas Court of Criminal Appeals adopts an express finding by the trial court that a claim was procedurally barred from habeas review); *Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.").

In this case, the state habeas court rejected Thomas's application for post-conviction relief. Because the Tenth Court of Appeals issued the last reasoned opinion on this matter, this court "looks through" the Texas Court of Criminal Appeals' order to the state habeas court's decision.

IV. The Claim of Ineffective Assistance of Trial Counsel

Thomas asserts that McLean abandoned the defense and joined forces with the prosecution by urging that he was guilty during closing argument at the guilt/innocence stage of trial. He also claims McLean assisted the prosecution in obtaining a substantial seventy-five-year sentence as a result of his closing argument during punishment. (Docket Entry No. 3, pp. 5-6; Docket Entry No. 1, p. 16). During his closing argument in the punishment phase, McLean argued that the evidence against Thomas was overwhelming. In light of the facts of the case and Thomas's extensive criminal history, counsel conceded that Thomas deserved a substantial sentence.

To establish an ineffective assistance of counsel claim, a petitioner must show that his counsel's performance was deficient and that he was actually prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 68 (1984). Whether counsel's performance was deficient is determined by an objective standard of reasonableness. *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999). "[S]crutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690-91; *see also United States v. Jones*, 287 F.3d 325, 331 (5th Cir.)("Informed strategic decisions of counsel are given a heavy measure of deference and should not be second guessed."), *cert. denied*, 537 U.S. 1018 (2002); *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (*Strickland* requires deference to counsel's "informed strategic choices"). "So long as counsel made an adequate investigation, any strategic decisions made as a result of that investigation fall within the wide range of objectively reasonable professional assistance." *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (internal quotation marks and citation omitted).

"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." *Jones*, 287 F.3d at 331. To overcome the deference given to informed strategic decisions, a petitioner must show that his counsel "blundered through trial, attempted to put on an unsupported defense, abandoned a trial tactic, failed to pursue a reasonable alternative course, or surrendered his client." *Id.*; *see also Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir. 1999) ("*Strickland* does not require deference to those decisions of counsel that, viewed in light

of the facts known at the time of the purported decision, do not serve any conceivable strategic purpose.").

Even if a petitioner establishes that his counsel's performance was deficient, he must also establish that "prejudice caused by the deficiency is such that there is a reasonable probability that the result of the proceedings would have been different." *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997). A petitioner must show that the prejudice made the trial outcome "fundamentally unfair or unreliable." *Id.* (quoting *Lockhart v. Fretwell*, 506 U.S. 364 (1993)).

The state habeas court found:

> 4. The applicant fails to show that McLean's conduct fell below an objective standard of reasonableness and that, but for trial counsel's alleged deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. at 686; *Hernandez v. State,* 726 S.W.2d at 57; *Narvaiz v. State*, 840 S.W.2d at 434.
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> . . .
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> 6. The totality of the representation afforded the applicant by McLean was sufficient to protect his right to reasonably effective assistance of counsel in the primary case.

(Docket Entry No. 27-1, pp. 10-11).

Under AEDPA, this court must give proper deference to the state court's determination that trial counsel rendered effective assistance. *See Ladd v. Cockrell*, 311 F.3d 349, 351 (5th Cir. 2002). Because the state court properly identified *Strickland* as the governing legal principle, the "unreasonable application" prong of section 2254(d)(1) provides the standard that governs this court's review of the state court's decision on Thomas's ineffective counsel claims. *Bell v. Cone*, 535 U.S. 685, 694-695 (2002). This court must determine whether the state court's application of *Strickland* was objectively unreasonable. *Id.*; *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (en

banc), *cert. denied*, 537 U.S. 1104 (2003). Under section 2254(d)(1), "[w]e have no authority to grant habeas corpus relief simply because we conclude, in our independent judgment, that a state supreme court's application of *Strickland* is erroneous or incorrect." *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002) (quoting *Neal*, 286 F.3d at 236). "The federal-habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state court decision is objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002).

A. The *Cronic* Claim

Thomas argues that prejudice should be presumed because he was actually or constructively denied counsel at a critical stage of the proceeding. (Docket Entry No. 3, p. 5).

In *United States v. Cronic,* 466 U.S. 648 (1984), the Supreme Court created a very limited exception to the *Strickland* two-part test in situations that "are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified." 466 U.S. at 658. The Supreme Court has specified three instances where the court will presume prejudice: 1) when a petitioner is denied counsel at a critical stage of the proceeding; 2) when petitioner's attorney fails to subject the prosecution's case to meaningful adversarial testing; and 3) when circumstances surrounding a trial prevent an attorney from rendering effective assistance. *Bell v. Cone,* 535 U.S. 685, 695-96 (2002) (applying *Strickland* rather than *Cronic,* though counsel's strategy involved conceding certain elements or remaining inactive at specific points at trial).

Thomas's claim does not suggest a complete denial of counsel at a critical stage of the proceeding or that circumstances prevented his attorney from rendering effective assistance. Therefore, the claim itself appears to fall within —though it does not meet—the second *Strickland*

exception, that his attorney's closing argument failed to subject the State's case to meaningful adversarial testing. The *Bell* Court explained that the term 'lack of meaningful adversarial testing' means that an attorney completely failed to challenge the prosecution's case, not just individual elements of it. *Bell,* 535 U.S. at 697. When applying *Strickland* or *Cronic* the Court noted a distinction between when counsel fails to oppose the prosecution entirely or fails to do so at specific points during trial. *Id.* When counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision. *Id.* Such a tactical decision does not amount to client abandonment, nor does it indicate a failure to challenge the prosecution's case. *Haynes v. Cain,* 298 F.3d 375, 381 (5th Cir. 2002) (finding *Cronic* does not apply when counsel made the tactical decision to concede guilt in an effort to avoid the death penalty). *Cronic* is reserved only for extreme cases where counsel fails to present any defense. Strategic or tactical decisions are evaluated under *Strickland.*

When analyzing an attorney's decision to concede guilt at trial, courts have found a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute. *Haynes,* 298 F.3d 381. In *Haynes v. Caine,* Haynes's attorneys conceded guilt during opening statement by acknowledging that the prosecution's evidence that Haynes kidnaped, raped, and robbed the victim was overwhelming. The court found that prejudice could not be presumed under *Cronic;* rather, the two-prong test of *Strickland* was the appropriate standard of review. *Id.* at 381-382. The *Haynes* court pointed out that courts have consistently found those situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses to be tactical decisions, and not a denial of the right to counsel; while an attorney who informs the jury there is no reasonable doubt about the only fact issue in dispute, fails to subject the

prosecution's case to meaningful adversarial testing. 298 F.3d at 381. The court then went on to find that Haynes had failed to establish *Strickland* prejudice. *Id.* The decision to concede guilt was the result of a reasoned trial strategy to achieve the best outcome by avoiding the death penalty. *Id.* The court reasoned that Haynes's defense counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing; defense counsel remained active throughout the trial by effectively cross-examining State's witnesses and eliciting favorable testimony. *Id.* at 382. The court concluded, considering the nearly conclusive evidence that Haynes committed the offense in question, Haynes had failed to establish that without the concession strategy, he would have been acquitted of first degree murder. *Id.; see also Gochicoa v. Johnson,* 238 F.3d 278, 285 (5th Cir. 2000) (holding that "[w]hen the defendant receives at least some meaningful assistance, he must prove prejudice in order to obtain relief for ineffective assistance of counsel" (quoting *Goodwin v. Johnson,* 132 F.3d 162, 176 n.10 (5th Cir. 1997))).

In the instant case, McLean did not entirely fail to oppose the prosecution's case. McLean actively defended Thomas throughout the trial by filing and vigorously arguing motions to suppress and methodically and thoroughly exposing the weaknesses in the State's case through his cross-examination of the State's witnesses.

McLean argued a motion to suppress the arrest and search based on the warrant's execution at 2:00 a.m., the intimidating number of officers present, and the lack of consent from Thomas. (Docket Entry No. 14-30, pp. 3-9). He informed the court on the law of the case, distinguishing these issues from the consent to search issue that was litigated on direct appeal. (Docket Entry No. 14-30, pp. 4-6). He also argued the motion to suppress Thomas's statement to police. (Docket Entry No. 14-30, pp. 12-45).

He rigorously cross-examined the State's witnesses. In particular he impeached Amanda Flores with her statement to police on the fact that she did not give the police a description of the suspect, (Docket Entry No. 14-32, pp. 86-87), and he grilled her on the minute details of the night she saw the suspect approach the complainant, and her identification of him. (Docket Entry No. 14-32, pp. 90-100). On both cross-examination and re-cross, he emphasized that she only got a glimpse of the suspect for a couple of seconds. (Docket Entry No. 14-32, pp. 95, 107-110).

He cross-examined Detective Kuhlman on Amanda Flores's statement to police, in particular her lack of a description of a suspect. (Docket Entry No. 14-32, pp. 121-124).

McLean cross-examined Kevin Collesano on his inability to identify Thomas from the photo spread, and on the details of the night the complainant was shot, focusing on the numerous details Collesano did not witness, and his merely instantaneous glimpse of the suspect. (Docket Entry No. 14-32, pp. 146-155).

He cross-examined Detective Holtke on the condition of the evidence he collected and the chain of custody. (Docket Entry No. 14-32, pp. 182-185, 186-187).

He questioned Elena Rodriguez (Alvarez) on her relationship with Thomas, and her different statements to the police, until she admitted that she lied to police. (Docket Entry No. 14-33, pp. 8-4). He impeached her statements to the jury that she was afraid of Thomas, eliciting testimony that she had lunch with him during the time period that she said she felt threatened by him. (Docket Entry No. 14-33, p. 25).

He cross-examined Detectives Valero and Davis on the consent to search and arrest of Thomas, emphasizing through his questions, the same grounds he argued at the motion to suppress

hearing as to why the search and arrest should be viewed as unfair to Thomas. (Docket Entry No. 14-33, pp. 39-48, 49-54, 60-63).

McLean further questioned Robert Baldwin, laboratory manager of the Harris County Sheriff's Office Firearms Lab, on the condition of the semi-automatic rifle found in Thomas's bedroom. (Docket Entry No. 14-33, pp. 75-78). In questioning Officer Pinkins about the search and arrest of Thomas, McLean focused on the fact that he failed to obtain consent from Thomas to search his bedroom. (Docket Entry No. 14-33, pp. 103-110).

Finally, he cross-examined the complainant, Mr. McCullough on his identification of Thomas and his relationship with Elena Rodriguez. (Docket Entry No. 14-33, pp. 135-154).

The record shows that McLean pointed out the weaknesses in the State's case at every opportunity. Thomas's ineffective assistance of counsel claim focuses only on a specific point in trial. *Bell,* 535 U.S. at 697; *Haynes,* 298 F.3d at 381. Moreover, a review of McLean's closing arguments shows that they do not rise to the level of a *Cronic* claim; nor does McLean's performance satisfy the prejudice prong of *Strickland.* Thomas's claim does not present a situation so egregious that prejudice should be presumed.

B. The Improper Closing Argument Claim

Thomas argues that McLean rendered ineffective assistance during his closing argument by conceding that the evidence was strong and that Thomas was guilty. (Docket Entry No. 3, p. 11). In deciding whether counsel's closing argument was ineffective, a court must consider the closing statements in their entirety. *Teague v. Scott,* 60 F.3d 1167, 1173 (5th Cir. 1995). The Fifth Circuit has said it will not fault counsel for not arguing the absurd or burdening the jury with the obvious. *Nixon v. Epps,* 405 F.3d 318, 328 (5th Cir. 2005) (finding counsel's reference to other heinous, cruel

atrocious crimes in closing argument in keeping with the strategic decision to plead for Nixon's life). In *Carter v. Johnson,* 131 F.3d 452, 466 (5th Cir. 1997), defense counsel implied that Carter might have committed other criminal acts, questioned whether he could and should live in society, wondered aloud whether death was a greater punishment than life imprisonment, and conceded that the jury could sentence him to death with a clear conscience. *Id.* at 704. Yet, after considering closing argument in its entirety, the Fifth Circuit found that the remarks fell within the wide range of reasonable professional assistance. *Id.*

Similarly, in *Riley v. Cockrell,* 339 F.3d 308 (5th Cir. 2003) the court found defense counsel's strategy of choosing a no-mitigation argument in order to gain credibility with the jury to be plausible and therefore not ineffective assistance. *See also Florida v. Nixon,* 543 U.S. 175, 187 (2004) (rejecting a claim of ineffective assistance where defense counsel strategically chose to concede guilt during trial and focus on begging for his client's life); *and see Woodward v. Epps*, 580 F.3d 318, 328 (5th Cir. 2009) (Counsel's strategic decision to admit to a lesser crime than what was charged in the indictment was not unreasonable in light of the overwhelming evidence presented.); *United States v. Short,* 181 F.3d 620, 624 (5th Cir. 1999) (To establish credibility with the jury, counsel may make a tactical decision to "acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty."); *Kitchens v. Johnson,* 190 F.3d 698 (5th Cir. 1999)(Defense counsel's characterization of charged murder as "brutal" and "savage" in closing argument at guilt phase of trial, in an effort to bolster his credibility with jury, was reasonable trial strategy.); *Rushing v. Butler,* 868 F.2d 800, 805 (5th Cir. 1989)(Defense counsel's concession of guilt during closing was an accurate reflection of the record.).

In this case, McLean's closing argument reveals his strategy of gaining credibility with the jury by acknowledging the overwhelming evidence against Thomas, while at the same time emphasizing the weaknesses in the State's case, which he sought to expose throughout the trial. McLean made the following closing argument during the guilt/innocence stage of trial:

> Thank you for the attention that you have paid to this short case. As you know, if you've heard evidence, you're required to acquit the person if you have a reasonable doubt about his or her guilt. My question is Why would you find somebody guilty if you are convinced beyond a reasonable doubt that that person is guilty. I can assure you I'm a long way from being naive. And I'm certainly not a green horn. And so, as I viewed this evidence, it seems really strong to me that this young man is guilty, this person I'm representing is guilty. But before you can be warranted in finding him guilty, you have to believe what Elena Rodriguez says because you can't find him guilty based on what Mr. Collesano said, nor can you find him guilty on the lack of identification by Mr. McCullough. And we all know that Ms. Flores got like a four-second look, a side view, of this person that fired the shot into Mr. McCullough. So, all I'm saying to you is I would like for you to look at it. And the way this case stands today, the evidence is pretty persuasive. I have been doing this a very long time, more than 30 years, longer than some of you people have been alive. Like I said, I'm a practical person and I'm not going to stand up here and try to divert you from what you think is the right thing to do. All I ask you to do is consider all of the evidence and if you are convinced beyond a reasonable doubt that this young man is guilty, then you are required to find him guilty. And if you have a reasonable doubt, wherever it may come from in this evidence, you are required to have a reasonable doubt and say by your verdict not guilty however. Normally I could be up here for an hour in some cases, but there is not that much to say because the case was short. And like I said, I'm convinced that the evidence is pretty powerful. If I were to argue to you that there is a great room for doubt, you would probably think I'm a moron. So, I have got to be honest about the way I feel and I have got to be honest with this young man I represent. The way this case stands, there is a substantial amount of evidence saying he's guilty. I would like you to look at all of the evidence, take a look at it, dissect it a little bit. If you reach a verdict that says he's guilty, that's the way it is. I appreciate it. Thank you.

(Docket Entry No. 14-33, pp. 159-160).

McLean begins by establishing himself as likable and trustworthy, by describing himself as 'a long way from being naive,' 'not a green horn,' and 'someone who has been doing this for a very long time.' He continues in this vein, acknowledging that the evidence is strong, substantial, and powerful. But he does not join forces with the prosecutor; rather, he points out the testimony that raises reasonable doubt. He focuses on the flaws in the evidence, essentially reminding the jury of the weaknesses in the testimony of each of the State's primary witnesses: Mr. Collesano's testimony was not sufficient to conclude Thomas's guilt; Mr. McCullough was unable to sufficiently identify Thomas; and Ms. Flores's identification should also be discounted as weak. McLean told the jury, if you're going to find him guilty you must set aside any credibility concerns you may have with Elena Rodriguez and believe what she says, which is especially relevant in light of his cross-examination and impeachment of Rodriguez's credibility. (Docket Entry No. 14-33, pp. 8-27). He reminded the jury members of their job to dissect the evidence for themselves, consider all the evidence. Twice, he emphasized the jury's duty to determine if the evidence meets the beyond a reasonable doubt standard.

McLean's decision to focus on his own experience and lack of naivete, while also acknowledging the strength of the State's evidence, is in keeping with Fifth Circuit precedent. Such a tactical decision on McLean's part is no different than those cases in which trial counsel made a strategic decision to acknowledge the defendant's culpability, concede that the jury would be justified in imposing the death penalty, emphasize the brutality of the crime, and recognize the overwhelming evidence against a defendant. *See Carter,* 131 F.3d at 466; *Riley,* 339 F.3d 308;

Woodward, 580 F.3d at 328 (5th Cir. 2009); *Short,* 181 F.3d at 624; *Kitchens,* 190 F.3d 698; *Rushing,* 868 F.2d at 805.

C. The Prejudice Prong

Thomas cannot show that he was prejudiced by trial counsel's closing arguments because the evidence against him was overwhelming. If facts adduced at trial point so overwhelmingly to defendant's guilt that even the most competent attorney would be unlikely to obtain an acquittal, defendant's ineffective assistance of counsel claim must fail. *Wilkerson v. Whitley,* 16 F.3d 64, 68, (5th Cir. 1994), *opinion reinstated in part on other grounds,* 28 F. 3d 498, *cert. denied,* 513 U.S. 1085 (1995). The state habeas court detailed the evidence in its findings of fact as follows:

> 8. The Court finds that the Complainant's testimony from the applicant's first trial was read into evidence due to the Complainant dying before the applicant's re-trial. The Complainant identified the applicant as the person who asked for his watch and shot him (V R.R. at 123-124, 131-132, 139).
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> 9. The Court finds that the applicant was identified, both in a photo spread and in court, by Amanda Flores as the person who pointed a firearm at the Complainant shortly before she heard a gunshot (IV R.R. 66, 74, 98-99, 102-103, 119). Kevin Cosselano, the applicant's other co-worker also positively identified the applicant as the gunman in the courtroom (IV R.R. at 141-142).
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> 10. The Court finds that Elena Rodriguez (Alvarez) testified during the applicant's trial. Rodriguez stated that she knows the applicant (IV R.R. at 188-189). On the night of the shooting, the applicant called Rodriguez and he appeared to be upset, frantic, and was mumbling (IV R.R. at 208-209). The applicant stated that he thought he shot the Complainant as he went for the Complainant's Rolex. (IV R.R. at 210-212, 228). The applicant also told Rodriguez not to say anything and threatened to kill her if she did (IV R.R. at 213). The applicant called Rodriguez from jail and they talked about her lying on the stand and saying that the applicant was not involved. (IV R.R. at 222, 224).

11. The Court finds, based on the court reporter's record, that the applicant admitted to shooting the Complainant. (State's Exhibit 17).

12. The Court finds that a recovered fired .9 millimeter shell casing was recovered at the scene of the shooting (IV R.R. at 170-171). A fired bullet was also recovered at the scene (IV R.R. at 177). A search of the applicant's house, specifically his bedroom, led to the recovery of two handguns (V R.R. at 36). One handgun was a .380 handgun, that can be loaded .9 millimeter bullets. The other handgun was a loaded Sig Sauer, a .9 millimeter (V R.R. at 59, 63; State's Exhibit 1). The recovered .9 millimeter shell casing and the fired bullet both were fired from the Sig Sauer (V R.R. at 74-75).

13. The Court finds, based on the court reporter's record, that in the face of the overwhelming evidence presented by the State of the applicant's guilt during the guilt/innocence stage that McLean chose to acknowledge the evidence of the applicant's guilt but still reminded the jury of the requirement that they must be satisfied beyond a reasonable doubt of the applicant's guilt (V R.R. at 159-160).

14. The Court finds that it could have been reasonable trial strategy for McLean to not lose credibility by arguing fiercely that the applicant was not guilty when the evidence clearly demonstrated the applicant's guilt. This is particularly true because of the jury's role in deciding the applicant's punishment. Indeed, McLean indicated this was strategy during his argument in punishment. (VII R.R. at 48).

15. The Court finds that there was overwhelming evidence that as a direct result of the applicant's decision to rob and shoot the Complainant the Complainant suffered catastrophic injuries that led to immense pain and ultimately to his own death.

(Docket Entry No. 27-1, pp. 5-6). Due to the amount and quality of the evidence, Thomas cannot establish that the jury would have found him not guilty or that he would have received a lesser sentence if not for his counsel's closing argument.

D. The Closing Argument at the Punishment Stage

Thomas complains that McLean's closing argument during punishment assisted the prosecution in obtaining a lengthy sentence. McLean made the following closing argument:

> Ladies and gentleman, I know you remember I practically consented to a guilty verdict in this case because I thought the evidence was overwhelming based on the many years of experience of trying cases. I cannot generate facts in cases when those facts are not available. I can only defend this case the best way I can. All of the evidence and I would be a fool if I suggested otherwise, and I'm not is compelling that this young man deserves a pretty substantial sentence. I'm not talking about a sentence of 15 years. All of the evidence is compelling. A young man lost his life, destroyed his mother practically. And so, that has to be taken into consideration. I want you to do that. I could go over all of his prior convictions, but I'm not going to do that. You are well aware of that. You are well of the facts of this case. And in this case, I'm convinced, based on all the facts, he deserves a substantial sentence. I certainly can't quarrel with you, whatever you do. Thank you.

(Docket Entry No. 14-34, pp. 48-49). Again, in an attempt to build credibility with the jury, McLean acknowledged that with as many prior convictions as Thomas had had, he would likely not receive the minimum sentence of fifteen years, but would likely receive a substantial one.

The state habeas court found:

> 16. The Court finds, based on the court reporter's record, that the applicant pled true to one felony enhancement paragraph (VI R.R. at 3). As a result, the applicant's punishment range increased to a minimum of fifteen (15) years to a maximum of ninety-nine (99) years or life in the Texas Department of Corrections-Institutional Division.
>
> 17. The Court finds, based on the court reporter's record, that the applicant also stipulated that before the primary offense he had been previously convicted of the felony offense of burglary of a motor vehicle in 1994, two misdemeanor offenses of evading arrest, the misdemeanor offense of criminal trespass, the misdemeanor offense of theft, the felony offense of perjury, the misdemeanor offense of

obstructing a highway or other passageway, the misdemeanor offense of possession of a dangerous drug. (VI R.R. at 3-4): State's Exhibits 57, 23-28). Therefore, the applicant had three (3) felony convictions and six (6) misdemeanor convictions at the time of his 2006 re-trial, including three offenses occurring after the primary offense.

18. The Court finds that beyond the applicant's (9) convictions the State also presented evidence that law enforcement conducted a search of the applicant's room in February 2004 and found what appeared to be a ledger for money that's owed by certain individuals and that such ledgers are common in drug-related activity (VI R.R. at 13). Also, five thousand and five dollars ($5005) in cash, approximately twenty ounces of marihuana, and a gram scale was also recovered from the applicant's room (VI R.R. at 13- 14, 16-17).

19. The State also presented the Complainant's mother during the punishment stage and she testified as to how when the applicant was released from the hospital he still had a central line to feed him and he had to be given morphine injections (VII R.R. at 35). The applicant, according to his mother, was in constant pain and became addicted to morphine (VII R.R. at 36-38). The applicant had to leave the United States and move back to England because he could not work due to his injuries and he had to sell his house to help pay for his medical costs (VII R. R. at 39). The Complainant's mother also testified that the applicant was aware that he was dying and that he seemed to prefer to die than to live (VII R.R. at 47-48).

20. The Court finds, based on the court reporter's record, that the State opened during its punishment argument and indicated that it was asking for a life sentence. (VII R.R. at 47-48).

21. The Court finds that McLean argued during punishment that [] the evidence indicates that the applicant deserves a substantial sentence (VII R.R. at 48-49).

22. The Court finds that although McLean indicated that the applicant should not be sentenced to the minimum of fifteen years and that he deserved a substantial sentence that again he was faced with the task of defending the applicant in light of overwhelming evidence.

(Docket Entry No. 27-1, pp. 6-8).

The record shows that McLean never stopped advocating for Thomas during the punishment phase of trial. He proffered a bill of exceptions on the search issue that he contested throughout the trial. (Docket Entry No. 14-33, p. 8). He objected to the admission of evidence resulting from a 2004 search of Thomas's mother's house. (Docket Entry No. 14-35, p. 5). He extensively cross-examined Officer LeCompte on this most recent search. (Docket Entry No. 14-35, pp. 21-28). McLean did not completely fail to subject the prosecution's case to meaningful adversarial testing. He remained actively involved in defending Thomas during the punishment stage. *Haynes,* 298 F.3d 382; *Bell,* 535 U.S. 685.

Thomas received a sentence of seventy-five years, significantly less than the life sentence he could have received. In light of his numerous prior convictions, the heinous and cold-blooded nature of the crime, the devastating effect of his assault on the complainant, the overwhelming evidence against him, and counsel's relentless defense throughout the trial, Thomas cannot show that McLean's closing argument during punishment so prejudiced the trial that he would have received a lesser sentence.

E. The Cumulative Error Claim

Thomas asserts that he was denied effective assistance of counsel as a result of McLean's cumulative errors and omissions. (Docket Entry No. 1, p. 21; Docket Entry No. 3, p. 9). He proceeds to list claims (a) through (j). However, these claims should be dismissed as conclusory. Thomas has failed to establish any error with regard to these new claims, much less cumulative error.

Federal habeas corpus relief is only granted for cumulative errors that are of a constitutional dimension. *See Coble v. Quarterman,* 496 F.3d 330, 440 (5th Cir. 2007) (citing *Livingston v. Johnson,* 107 F.3d 297, 309 (5th Cir. 1997); *see also Leal v. Dretke,* 428 F.3d 543, 552-53 (5th Cir.

2005) (holding the cumulative errors of trial counsel did not warrant a certificate of appealability where none of the errors satisfied the prejudice prong of *Strickland*); *Yohey v. Collins,* 985 F.2d 222, 229 (5th Cir. 1993) ("[Federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional law rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors so infected the entire trial the resulting conviction violates due process.") (citing *Derden v. McNeel,* 978 F.2d 1453, 1454 (5th Cir. 1992)) (en banc). *See United States v. Williams,* 264 F.3d 561, 572 (5th Cir. 2001) (no cumulative error where defendant failed to identify single error in jury selection); *Miller v. Johnson,* 200 F.3d 274, 286 (5th Cir. 2000) (petitioner who failed to demonstrate any error during trial could not establish cumulative error).

Thomas presents a list of claims without providing evidentiary support. "Mere conclusory statements do not raise a constitutional issue in a habeas case." *Schlang v. Heard,* 691 F.2d 796, 799 (5th Cir. 1982) (citations omitted). Under Rule 2(c) of the Rules Governing Section 2254 cases, a petitioner is required to plead facts in support of his claims. (West 2014). The Fifth Circuit has held "[a]bsent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition, unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle,* 694 F.2d 1008, 1011 (5th Cir. 1983). Because Thomas has presented only conclusory allegations without establishing any error, he fails to meet the requirements of the cumulative error doctrine. Thomas is not entitled to habeas relief on this claim.

V. The Claim Based on Ineffective Assistance of Appellate Counsel (Grounds 1 and 2)

A. Failure to File a PDR

Thomas claims that he was denied effective assistance of counsel on appeal when his appellate attorney, Northcutt, failed to file a petition for discretionary review. He alleges that Northcutt, misled him into believing that she would file the petition but then failed to do so. (Docket Entry No. 1, pp. 6-8; Docket Entry No. 3, pp. 1-3). However, Thomas has failed to meet his burden of proof.

Persons convicted of a crime are entitled to effective assistance of counsel on direct appeal. *See Evitts v. Lucey,* 469 U.S. 387 (1985). This court reviews counsel's appellate performance under *Strickland v. Washington,* 466 U.S. 668 (1984). *See Goodwin v. Johnson,* 132 F.3d 162, 170 (5th Cir. 1998). Thomas must allege and present facts that, if proven, would show that his attorney's representation was deficient and that the deficient performance caused Thomas prejudice. *See Strickland,* 466 U.S. at 687-88, 692; *Jones v. Jones,* 163 F.3d 285, 300 (5th Cir. 1998).

The first element requires Thomas to show that Northcutt's conduct "fell below an objective standard of reasonableness." *United States v. Williamson,* 183 F.3d 458, 463 (5th Cir. 1999)(quoting *Strickland,* 466 U.S. at 688). This court's review is deferential, presuming that "counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Effective assistance of appellate counsel does not mean counsel will raise every available nonfrivolous ground for appeal. *See Evitts,* 469 U.S. at 394; *West v. Johnson,* 92 F.3d 1385, 1396 (5th Cir. 1996). Rather, it means, as it does at trial, that counsel performs in a reasonably effective manner. *See Evitts,* 469 U.S. at 394.

A reasonable attorney has an obligation to research relevant facts and law and make informed decisions as to whether avenues will, or will not, prove fruitful. *See Strickland,* 466 U.S. at 690-91.

To show prejudice, Thomas must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Jones,* 163 F.3d at 302 (quoting *Strickland,* 466 U.S. at 694). Such a reasonable probability makes the proceeding unfair or unreliable, so as to undermine confidence in the outcome. *Green v. Johnson,* 160 F.3d 1029, 1043 (5th Cir. 1998)(citing *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993)).

In Texas, a PDR is considered to be part of the direct review process, which ends when the petition is denied or when the time available for filing the petition lapses. *Roberts v. Cockrell,* 319 F.3d 690, 693 (5th Cir. 2003). It is well-settled that a criminal defendant does not have a right to counsel for the preparation of petitions for discretionary review. *See Blankenship v. Johnson,* 118 F.3d 312, 317 (5th Cir. 1997)(citing *Ross v. Moffitt,* 417 U.S. 600 (1974)). However, if "appellate counsel's action or inaction denies a defendant his opportunity to prepare and file a petition for discretionary review, that defendant has been denied his sixth amendment right to effective assistance of counsel." *Ex parte Wilson,* 956 5.W.2d 25, 26 (Tex. Crim. App. 1997). An appellate counsel has the obligation to inform a defendant that his conviction has been affirmed and that the defendant can pursue discretionary review on his own. *Id.* at 28. But counsel need not discuss the merits of further appellate review. *Id.* This information "sufficiently protects a defendant's right to file a petition for discretionary review. Counsel has no other constitutional obligation because a defendant has no right to counsel for purposes of discretionary review." *Id.* It is the petitioner's burden to prove appellate counsel failed to inform him of his right to file a pro se petition for discretionary review. *See State v. Guerrero,* 400 5.W.3d 576, 583 (Tex. Crim. App. 2013).

In an affidavit to the state habeas court, Northcutt explained her recollection of Thomas's case and her ultimate advice to him to file the PDR himself in accordance with procedures she recently outlined for him. *See* Docket Entry No. 27, Exhibit B (Affidavit of Frances Northcutt). The state habeas court found:

> 24. The Court finds the affidavit of Frances M. Northcutt to be credible and the facts asserted therein to be true. *See* State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.
>
> 25. The Court finds, based on the credible affidavit of Northcutt, that Northcutt was not able to locate the applicant's appellate file and does not have any records in electronic format. *See* State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.
>
> 26. The Court, finds based on Northcutt's affidavit, that based upon Northcutt's recollection she sent the applicant a copy of the opinion along with a letter about the process for filing a Petition for Discretionary Review and a set of excerpts from the appellate rules about the PDR process when Northcutt received the opinion affirming the applicant's appeal. *See* State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.
>
> 27. The Court finds, based on Northcutt's affidavit, that Northcutt initially informed the applicant that she would file a PDR on the applicant's behalf but subsequently informed the applicant that she would not do so because she did not believe that a PDR would be granted. *See* State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.
>
> 28. The Court finds, based on Northcutt's affidavit, that Northcutt informed the applicant that if he wished to pursue a PDR pro se that he should follow the procedures set out in Northcutt's previous letter and Northcutt advised the applicant that an extension of time had been filed so the applicant had adequate time to file a PDR. *See* State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.

Thomas asserts that Northcutt told him she would file the PDR on his behalf. Northcutt responded that she would not be filing the PDR; he would need to file it himself. Judge McSpadden,

the same judge who appointed Northcutt as Thomas's appellate attorney, found her affidavit to be credible and that she was not ineffective. (Docket Entry No. 14-26, p. 48; Docket Entry No. 27-1, pp. 8, 10, Finding No. 24, Conclusion No. 1). Judge Michael McSpadden was ideally suited to make the credibility determinations necessary to resolve Thomas's habeas claims.

> [W]hen a state trial judge is also the judge hearing the state habeas claim, that judge is in an optimal position to assess the credibility of the affidavits. This is true because the state judge had the benefit of observing the witnesses and attorneys and hearing testimony at trial. The state trial judge could make credibility determinations based on the demeanor of the witnesses he heard at trial, without holding a separate hearing to take live testimony from the witnesses.

Baldree v. Johnson, 99 F.3d 659, 663 (5th Cir. 1996) (citing *Buxton v. Collins,* 879 F.2d 140, 146 (5th Cir. 1989)). Thus, because the trial court had the opportunity for personal observation of the affiants, the fact-finding procedure employed in petitioner's case was more than sufficient to entitle the state court's findings to the presumption of correctness. In contrast, Thomas has not met his burden of proving that his attorney failed to inform him of his right to file a pro se petition for discretionary review. *Guerrero,* 400 S.W.3d at 583. "Mere conclusory statements do not raise a constitutional issue in a habeas case." *Schlang,* 691 F.2d at 799; *and see Blackledge v. Allison,* 431 U.S. 63, 74 (1977) (finding "the presentation of conclusory allegations unsupported by specifics, subject to summary dismissal."). Thomas has failed to satisfy his burden of proof.

Thomas is not entitled to habeas relief on this claim.

B. Failure to Brief *Strickland* Prejudice

Thomas alleges that Northcutt was ineffective for failing to brief the prejudice prong of *Strickland.* (Docket Entry No. 1, p. 10). He points out that the Fourteenth Court of Appeals found

trial counsel deficient and believes that if Northcutt had briefed prejudice, his case would have been reversed and remanded for a new trial. (*Id.* at 11-12).

The Fifth Circuit has held that appellate counsel's failure to raise certain issues on appeal does not deprive an appellant of effective assistance of counsel where the petitioner did not show the existence of any trial errors with even arguable merit. *Hooks v. Roberts,* 480 F.2d 1196, 1198 (5th Cir. 1973). In the same case, the Fifth Circuit also held that counsel is not required to consult with his client about the legal issues to be presented on appeal. *Id.* at 1197. Additionally, in *Jones v. Barnes,* 463 U.S. 745, 749 (1983), the Supreme Court noted the federal district court's holding on this issue, as follows: "It is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach." The Supreme Court went on to hold that "[n]either *Anders* [*Anders v. California,* 386 U.S. 738 (1967)] nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Id.* 463 U.S. at 751.

In this case, Northcutt decided, based on her own professional judgment that the record did not support the issue of prejudice. *Jones,* 463 U.S. at 749. Northcutt stated in her affidavit that after studying the appellate court opinion she did not believe the record showed the harm in trial counsel's errors. (Docket Entry No, 27, Exhibit B). Moreover, the court has considered the underlying ineffective assistance of counsel claim and established that Thomas cannot show *Strickland* prejudice. McLean advocated for Thomas strenuously throughout both stages of trial, counsel's choices in closing argument were the result of a reasoned trial strategy, and the overwhelming

evidence during guilt/innocence and Thomas's numerous prior convictions establish that the result of the trial would not have been different if not for McLean's closing argument. Thomas has failed to show that he would have prevailed on appeal. This claim lacks merit.

Thomas is not entitled to habeas relief on this claim.

VI. The Trial Court Error Claim

(Ground 4)

Thomas alleges that the trial court erred in denying his motion to suppress his written confession because it was taken in violation of his right to the protection against self-incrimination. (Docket Entry No. 1, p. 13). He claims Officer Pinkins continued questioning him after Thomas asserted that he did not want to make a statement. (*Id.* at 18-19). However, an examination of the case law in conjunction with Officer Pinkins's testimony at the hearing supports the trial court's denial of the motion to suppress. Thomas reinitiated questioning and voluntarily provided a written statement to Officer Pinkins.

"Federal habeas relief cannot be had 'absent the allegation by a petitioner that he or she has been deprived of some right secured to him or her by the United States Constitution or the laws of the United States.'" *Malchi v. Thaler,* 211 F.3d 953, 957 (5th Cir. 2000) (citing *Orellana v. Kyle,* 65 F.3d 29, 31 (5th Cir. 1995)). In federal habeas corpus actions, federal courts do not sit to review the mere admissibility of evidence under state law or errors under state law. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("[w]e have stated many times that 'federal habeas corpus relief does not lie for errors of state law.' In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, law, or treaties of the United States."); *Hill v. Johnson,* 210 F.3d 481, 491 (5th Cir. 2000); *Little v. Johnson,* 162 F.3d 855, 862 (5th Cir. 1998); *Derden v. Mc*

Neel, 978 F.2d 1453, 1458 (5th Cir. 1992) ("errors of state law, including evidentiary errors, are not cognizable in habeas corpus"). Habeas relief is warranted only when an erroneous admission played a crucial, critical, and highly significant role in the trial. *Skillern v. Estelle,* 720 F.2d 839, 852 (5th Cir. 1983); *Bailey v. Procunier,* 744 F.2d 1166, 1168-69 (5th Cir. 1984).

Moreover, on federal habeas review of state court convictions, a federal harmless error standard applies. *See Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1993). Therefore, to be actionable, the trial court error must have "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht,* 507 U.S. at 637 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). Under this standard, a petitioner is not entitled to federal habeas relief based on trial error unless he can establish that the error resulted in actual prejudice. *See Brecht,* 507 U.S. at 637. "[A] state defendant has no constitutional right to an errorless trial." *Bailey,* 744 F.2d at 1168; *accord Banks v. McGougan,* 717 F.2d 186, 190 (5th Cir. 1983).

Miranda v. Arizona requires that certain procedural safeguards be employed to protect a defendant's Fifth Amendment privilege against self-incrimination, before statements made during custodial interrogation can be used against a defendant at trial. 384 U.S. 436, 478-79 (1966). These procedural safeguards are met when a defendant is warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that an attorney will be provided for him if he cannot afford one. *Id.* at 479. However, the Supreme Court has made clear that *Miranda* did not create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, even if a person has indicated a desire to remain silent. *Michigan v. Mosley,* 423 U.S. 96, 102-103 (1975). It "depends under *Miranda* on whether a person's 'right to cut off questioning' was 'scrupulously

honored.'" *Id.* at 104 (footnote omitted). This is determined on the unique facts and circumstances of each case. *Charles v. Smith,* 894 F.2d 718, 726 (5th Cir. 1990) (finding the officer failed to scrupulously honor Charles's right to remain silent, when he asked two questions just a few minutes after Charles twice declined to give a statement).

In *United States v. Rieves,* 584 F.2d 740, 745 (5th Cir. 1978), a case with facts similar to this one, DEA agents ceased questioning the defendant when he asked for a lawyer. However, they made several comments to him that any cooperation would be made known to the court. *Id.* He later volunteered inculpatory remarks. *Id.* The Fifth Circuit determined that he affirmatively demonstrated that he wished to waive his right to remain silent when he reinitiated, unprompted by further interrogation, the dialogue with a DEA agent. *Id.* Similarly, in *US. v. Cavallino,* the suspect received Miranda warnings, denied knowledge of the offense, and requested an attorney. *US. v. Cavallino,* 498 F.2d 1200, 1203 (5th Cir. 1974). The interview was terminated, and he was returned to the "booking cage." After meeting with his woman companion, Cavallino attempted to make a deal. *Id.* Cavallino was taken to another room and again read his constitutional rights. He then confessed to the robbery. *Id.* The court determined that waiver may be inferred from the language, acts, conduct and demeanor of a defendant. *Id.* at 1203, 1204. *See also United States v. Hopkins,* 433 F.2d 1041 (5th Cir. 1970)(when accused initiates the conversation, his statements do not result from "interrogations" and are therefore admissible); *United States v. Anthony,* 474 F.2d 770 (5th Cir. 1973) (questions asked by the FBI agent were designed merely to pursue line of inquiry begun by appellant).

In the instant case, the trial court determined that Thomas reinitiated the dialogue with police officers when he gave his written confession, and the record supports this conclusion. (Docket Entry

No. 14-30, p. 45). Thomas's attorney filed a motion to suppress Thomas's statement to the police, and a hearing was held. (Docket Entry No. 14-30, p. 12). Detective Pinkins testified that he executed an arrest warrant for Thomas on July 2, 1998 at his mother's house. (Docket Entry No. 14-30, pp. 14, 22). Thomas was read his Miranda warnings. (Docket Entry No. 14-30, p. 22). He took Thomas to an interview room and asked him if he wanted to make a statement, to which Thomas answered, "No." (Docket Entry No. 14-30, pp. 14, 16-17, 23). However, Officer Pinkins talked to him for a while longer before he terminated the interview. (Docket Entry No. 14-30, pp. 15, 19, 24). Thomas was then brought out of the interview room and seated on a bench in a common office area to await transport, while Officer Pinkins attended to paperwork. (Docket Entry No. 14-30, p. 23). While he was waiting, Thomas reinitiated the interview by flagging down Officer Pinkins. (Docket Entry No. 14-30, p. 26). Officer Pinkins sat down at his computer and pulled up the form to take Thomas's statement, while Thomas sat next to him and viewed the screen as Officer Pinkins typed. (Docket Entry No. 14-30, pp. 29-30). Thomas initialed each of the Miranda warnings on that form. (Docket Entry No. 14-30, pp. 27, 31). When Officer Pinkins was finished typing, he asked Thomas if he wanted to make changes. (Docket Entry No. 14-30, p. 30). Thomas indicated by his initials that he had no changes he wanted to make. (Docket Entry No. 14-30, pp. 30, 31). Thus, the record supports the trial court's conclusion that Thomas reinitiated the interview, all warnings were provided to him, and he waived them. (Docket Entry No. 14-30, pp. 32, 45); *Rieves,* 584 F.2d at 745, *Cavallino,* 498 F.2d 1203; *Hopkins,* 433 F.2d 1041.

Even if this court were to find error, Thomas cannot show that the trial court's decision had a substantial and erroneous effect on the jury's verdict. *Id.* The written statement does not admit guilt; it puts Thomas at the scene of the crime, with the purpose of stealing a car, and with a gun in

his hand, which he shoots at the man who got out of a jeep and spoke to him. State's Exhibit 17. Had the statement been suppressed, plenty of other evidence supported the jury's verdict, specifically, two eyewitness identifications and Elena Rodriguez's testimony that he shot McCullough. Thus, Thomas cannot show that the trial court erred in denying his motion to suppress. *Brecht,* 507 U.S. at 637.

VII. The Prosecutorial Error Claim

(Ground 5)

Thomas next claims that he was denied a fair trial due to prosecutorial misconduct by introducing misleading evidence and perjured testimony. (Docket Entry No. 1, p. 20; Docket Entry No. 3, pp. 7-9). Thomas alleges that the prosecutor withheld exculpatory evidence until the day before the evidence was introduced during trial, thereby depriving McLean of the opportunity to prepare a defense. The State's eyewitnesses initially identified another suspect, Edward Powell, who was with Elena Rodriquez on the night of the incident. (Docket Entry No. 1, p. 20). This claim has no merit.

Prosecutorial misconduct, when alleged in habeas corpus proceedings, is reviewed to determine whether it "'so infected the [trial] with unfairness as to make the resulting [conviction] a denial of due process.'" *Barrientes v. Johnson,* 221 F.3d 741, 753 (5th Cir. 2000) (quoting *Ables v. Scott,* 73 F.3d 5911,592 n.2 (5th Cir.)); *Greer v. Miller,* 483 U.S. 756, 765 (1987). This means the alleged conduct must render the trial fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment. *Darden v. Wainwright,* 477 U.S. 168, 180-181 (1986); *Dowthitt v. Johnson,* 203 F.3d 733, 755 (5th Cir. 2000). "To constitute a due process violation, the prosecutorial misconduct must be of 'sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Greer,* 483 U.S. at 765 (citation and internal citation omitted). In turn, a trial

will not be deemed fundamentally unfair unless "there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Barrientes*, 221 F.3d at 753 (quoting *Foy v. Donnelly,* 959 F.2d 1307, 1317 (5th Cir. 1992)).

The Supreme Court in *Brady v. Maryland,* held that the suppression by the prosecution of evidence favorable to an accused, after a request, violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. 83, 87 (1963). To establish a *Brady* violation, the petitioner must prove that: (1) the prosecution *suppressed* evidence, (2) the evidence was *favorable,* (3) the evidence was *material* to either guilt or punishment, and (4) discovery of the allegedly favorable evidence was not the result of a lack of due diligence. *Rector v. Johnson,* 120 F.3d 551, 558 (5th Cir. 1997) (emphasis added).

A. The Photo Array

Thomas argues that the identification testimony was the result of unnecessarily suggestive procedures that lead to an irreparably mistaken identification. Thomas alleges that the prosecutor admitted a photo array into evidence which contained a picture of Thomas with his lips pursed, such that his photo was distinguishable from the others in the photo array. (Docket Entry No. 1, p. 20; Docket Entry No. 3, pp. 7-9). In addition, Thomas maintains that the prosecutor failed to disclose evidence that Amanda Flores initially chose someone else, but instead stated that she did not choose anyone from the photo lineup. (*Id.*).

The record shows that the prosecutor disclosed all of the evidence pertaining to the mix-up with the photo array prior to trial and that he told the court and the defense exactly what happened in a hearing outside of the jury's presence during trial. (Docket Entry No. 14-32, pp. 77-80). The prosecutor began by saying, "I have already explained this to Mr. McLean yesterday." (Docket Entry

No. 14-32, p. 77). Then, the prosecutor explained that the police initially believed that Edward Powell was the primary suspect, and placed his picture in a photo lineup. (Docket Entry No. 14-32, pp. 77-78). Thomas's picture was not included in that lineup. (Docket Entry No. 14-32, p. 78). Amanda Flores did not identify anyone from that photo lineup because Thomas's photo was not included. (Docket Entry No. 14-32, p. 78). Then the police created a photo spread that included Thomas's photo. (Docket Entry No. 14-32, p. 78). Mr. Collesano tentatively identified Thomas; Mr. McCullough did not identify anyone. (Docket Entry No. 14-32, p. 79). On the way to show the photo spread to Amanda Flores, Detective Kuhlman became concerned with the way Thomas had his mouth pursed "because it might look different from the other people in that photo spread." (Docket Entry No. 14-32, p. 79). Before he showed the photo spread to Amanda Flores, police substituted the photo of Thomas for one where he did not have his lips pursed. (Docket Entry No. 14-32, p. 79). Flores identified Thomas, but when police gave her a copy to initial, they inadvertently gave her the original photo spread that did not have a photo of Thomas. (Docket Entry No. 14-32, p. 80). She initialed the photo that was in the same position where Thomas's photo had been. (Docket Entry No. 14-32, p. 80). When the police realized their mistake, she re-identified Thomas correctly. (Docket Entry No. 14-32, p. 80).

In court Amanda Flores stated that she was unable to identify the shooter in the initial photo spread the police showed her. (Docket Entry No. 14-32, p. 72). However, she did identify him in the second photo spread, State's exhibit 42. (Docket Entry No. 14-32, p. 74). However, the officers gave her State's exhibit 43 and told her to "circle the position and sign it and date it." (Docket Entry No. 14-32, p. 75). She later confirmed that the photo she originally positively identified in the photo

spread (State's exhibit 42) was of the guy she saw shoot McCullough. (Docket Entry No. 14-32, p. 98).

Mr. Collesano testified in court that when police showed him the photo spread, he could not identify Thomas. (Docket Entry No. 14-32, p. 147). Mr. McCullough testified that he was shown a photo spread while he was in the hospital, under a lot of medication, and he could not identify Thomas. (Docket Entry No. 14-32, p. 138). Again, Thomas's claim is that the prosecutor withheld evidence that Flores initially chose someone else. He has failed to support this claim with evidence from the record. The record shows that Flores inadvertently circled and initialed the wrong photograph. The prosecutor explained what happened prior to trial and in a hearing outside of the jury's presence. There is no evidence on record that Flores, Collesano, or McCullough testified otherwise. As noted, to establish a *Brady* violation, Thomas must prove that: (1) the prosecution suppressed evidence, (2) the evidence was favorable, (3) the evidence was material to either guilt or punishment, and (4) discovery of the allegedly favorable evidence was not the result of a lack of due diligence. Thomas has failed to meet the first *Brady* requirement, that the prosecution suppressed evidence. And, he has therefore failed to meet his burden of proof. *Brady,* 373 U.S. at 87; *Rector,* 120 F.3d at 558.

Thomas also fails to show how the admission of a photo array with Thomas's lips pursed "'so infected the [trial] with unfairness as to make the resulting [conviction] a denial of due process.'" *Barrientes,* 221 F.3d at 753. Indeed, in order to thoroughly explain what happened, it seems the prosecutor would be required to submit the photo that showed his lips pursed. *See United States v. Sonderup,* 639 F.2d 294, 298 (5th Cir. 1981) (When the government fails to preserve the photographic array used in a pretrial line-up "there shall exist a presumption that the array is

impermissibly suggestive."). Thomas has not shown that the identification testimony was the result of unnecessarily suggestive procedures that lead to an irreparably mistaken identification.

B. The Gunfire Test Results

Thomas asserts that the prosecutor submitted false evidence of gunfire test results. He alleges that the prosecutor wrongfully admitted "gunfire test results showing his gun as the one used in the commission of the offense, although the prosecutor knew the test came back inconclusive through the state's own expert at his initial trial, where for such reason, conviction was set aside." (Docket Entry No. 1, p. 20).

To establish a basis for relief, a petitioner must prove that the prosecution knowingly presented false testimony. *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173 (1959). Mere inconsistencies or errors in a witness's testimony do not, standing alone, establish the existence of perjury. *Koch v. Puckett,* 907 F.2d 524, 531 (5th Cir. 1990). The jury heard the testimony of the expert witness, and they could decide whether the discrepancies in his testimony affected the credibility of his testimony. Thomas's conclusional assertions that the expert witness's testimony was false is insufficient to show that the State knowingly presented false, material testimony. *See United States v. Leahy,* 82 F.3d 624, 632 (5th Cir. 1996); *United States v. Washington,* 44 F.3d 1271, 1282 (5th Cir. 1995).

Although it offends constitutional due process for a prosecutor to knowingly use or intentionally fail to correct testimony that he knows to be false, nothing in the record suggests that the testimony of the expert witness was false or that the State prosecutors knew their testimony to be false in any respect. *See Napue v. Illinois*, 360 U.S. 264, 271 (1959). Discrepancies in witnesses' testimony merely establish a credibility question for the jury and do not suffice to establish that the

testimony was false. *See Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990); *Little v. Butler*, 848 F.2d 73, 76 (5th Cir. 1988).

Thomas's first conviction was not set aside because gunfire test results were admitted, but because the trial court failed to give an Article 38.23 jury instruction on consent to search. *Thomas,* 2000 WL 1785110, at *4-8. The Fourteenth Court of Appeals overruled Thomas's claims concerning the constitutionality of the search and the admission of the gun. *Id.* at *2-4. Moreover, the state's expert in the initial trial, David Tanner did not testify that the gunfire test results were inconclusive. On the contrary, Tanner stated that the shell casing and fired projectile collected from the crime scene (State's Exhibits 14 and 15) were fired from the Sig Sauer P226 semiautomatic weapon that was recovered from Thomas's room. (Docket Entry No. 14-32, pp. 140, 147). *See* court reporter's record from Thomas's 1999 conviction. At his second trial, Thomas challenged the testimony of Robert Baldwin, laboratory manager at the Harris County Sheriff's Officer Firearms laboratory. Baldwin testified that State's Exhibits 14 and 15, the shell casing and fired projectile, were fired from the Sig Saur P226 semiautomatic from Thomas's room. (Docket Entry No. 14-33, p. 74).

Thomas has failed to show that the prosecutor submitted false evidence. Therefore he has not established that his trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment. *Darden,* 477 U.S. at 180-181.

Thomas is not entitled to habeas relief on this claim.

VIII. The Actual Innocence Claim

Thomas claims he is factually innocent of the offense of aggravated robbery; he maintains, but for prosecutorial misconduct and ineffective assistance of counsel, it is more likely than not that

no jury would have convicted him. (Docket Entry No. 1, pp. 23-29). Thomas has not shown that he has reliable new evidence that establishes his actual innocence. *See Schlup v. Delo*, 513 U.S. 298 (1995).

An actual innocence claim carries a heavy burden:

> To establish the requisite probability that he was actually innocent, the [movant] must support his allegations with new, reliable evidence that was not presented at trial and must show that it was "more likely than not that no reasonable juror would have convicted him in the light of the new evidence."

Fairman v. Anderson, 188 F.3d 635, 644 (5th Cir. 1999)(quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *accord Finley v. Johnson*, 243 F.3d 215, 221 (5th Cir. 2001); *United States v. Jones*, 172 F.3d 381, 384 (5th Cir. 1999).

In *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), the Supreme Court considered whether a plea of actual innocence can overcome the habeas statute of limitations. The district court first determined that Perkins's claim was filed well beyond AEDPA's limitations period and that equitable tolling was unavailable to Perkins because he could demonstrate neither exceptional circumstances nor diligence. The district court then found that Perkins's alleged newly discovered evidence, *i.e.*, the information contained in three affidavits, was "substantially available to [Perkins] at trial." The district court further found the proffered evidence, even if "new," was hardly adequate to show that, had it been presented at trial, no reasonable juror would have convicted Perkins. The Sixth Circuit granted a certificate of appealability limited to the question whether reasonable diligence was a precondition to reliance on actual innocence as a gateway to adjudication of a federal habeas petition on the merits. The Sixth Circuit reversed the district court's judgment. Acknowledging that Perkins's petition was untimely and that he had not diligently pursued his rights,

the Sixth Circuit held that Perkins's actual-innocence claim allowed him to present his ineffective-assistance-of-counsel claim as if it had been filed on time. In so ruling, the Sixth Circuit apparently considered Perkins's delay irrelevant to appraisal of his actual-innocence claim.

The Supreme Court held that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup v. Delo,* 513 U.S. 298 (1995), and *House v. Bell,* 547 U.S. 518 (2006), or expiration of the AEDPA statute of limitations. The Supreme Court explained:

> We have explained that untimeliness, although not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence proffered to show actual innocence.
> On remand, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s actual-innocence standard should be dispositive, absent cause, which we do not currently see, for the Sixth Circuit to upset that evaluation. We stress once again that the *Schlup* standard is demanding. The gateway should open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." 513 U.S., at 316, 115 S. Ct. 851.

McQuiggin v. Perkins, 133 S. Ct. 1924, 1936 (2013).

Thomas refers to taped conversations between Thomas and Elena Rodriguez while Thomas was in the Harris County Jail. He claims that these tapes could have been used to impeach Rodriguez. The record shows that counsel, McLean, was aware of these tapes and questioned Rodriguez about her statements. Thomas has not met his heavy burden of showing that he is actually innocent by reference to these recordings. Thomas has not shown that it is more likely than not that no reasonable juror would have convicted him in light of new evidence not submitted at trial.

Thomas is not entitled to habeas relief on this claim.

The state court's decision was not contrary to clearly established federal law. Thomas is not entitled to habeas relief. 28 U.S.C. § 2254(d)(1).

IX. Conclusion

Respondent's Motion for Summary Judgment, (Docket Entry No. 27), is GRANTED. Thomas's petition for a writ of habeas corpus is DENIED. This case is DISMISSED. Any remaining pending motions are DENIED as moot.

The Supreme Court has stated that the showing necessary for a Certificate of Appealability is a substantial showing of the denial of a constitutional right. *Hernandez v. Johnson,* 213 F.3d 243, 248 (5th Cir. 2000) (citing *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000)). Under that standard, an applicant makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further. *See Clark v. Johnson,* 202 F.3d 760, 763 (5th Cir. 2000). Where a district court has rejected a prisoner's constitutional claims on the merits, the applicant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack,* 529 U.S. 484.

This court denies Thomas's petition after careful consideration of the merits of his constitutional claims. This court denies a COA because Thomas has not made the necessary showing for issuance. Accordingly, a certificate of appealability is DENIED.

SIGNED at Houston, Texas, on Sept. 25, 2017.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

Appendix D

Texas Court of Criminal Appeals' Order Denying Habeas Relief

APPLICANT DESHUN THOMAS APPLICATION NO. WR-75,971-03

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

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

September 16, 2015

JUDGE DATE

Appendix E

Harris County, Texas District Court's Denying Habeas Relief

Cause No. 786932-A

EX PARTE	§	IN THE 209th DISTRICT COURT
	§	OF
DESHUN THOMAS, Applicant	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has considered the application for writ of habeas corpus, the State's Original Answer, the affidavit of Ms. Frances M. Northcutt, and official court records in the above-captioned cause. The Court finds that there are no controverted, previously unresolved facts material to the legality of the applicant's confinement which require an evidentiary hearing and recommends that the relief requested be denied for the following reasons:

FINDINGS OF FACT

1. The Court finds based on the clerk's record that the applicant was initially convicted by a jury of the felony offense of aggravated robbery on June 30, 1999. The jury assessed the applicant's punishment, enhanced by one prior felony conviction, at fifty-five years confinement in the Texas Department of Criminal Justice – Correctional Institutions Division. The Fourteenth Court of Appeals issued an opinion on December 7, 2000 reversing the applicant's conviction based upon the trial court's refusal to submit a proper charge under Article 38.23 of the Code of Criminal Procedure. *Thomas v. State*, No. 14-99-00949-CR, 2000 WL 1785110 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd)(not designated for publication).

FILED
4:09
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2. The applicant was again convicted of the felony offense of aggravated robbery on June 15, 2006. The jury assessed the applicant's punishment, enhanced by one prior felony conviction, at seventy-five (75) years confinement in the Texas Department of Criminal Justice – Correctional Institutions Division. The applicant is currently confined based upon this conviction.

3. The Fourteenth Court of Appeals affirmed the applicant's conviction on March 6, 2008. *Thomas v. State*, No. 14-06-00540-CR, 2008 WL 596228 (Tex. App. – Houston [14th Dist.] 2008, no pet.)(mem. op.' not designated for publication). The mandate issued on May 23, 2008. The appellate court held that appellate counsel showed that applicant's trial counsel provided deficient conduct but due to improper briefing by appellate counsel as to the issue of prejudice, the applicant failed to carry his burden under *Strickland v. Washington. Id.* at *3; 466 U.S. 668 (1984).

4. The Court finds that the applicant filed an initial application for writ of habeas corpus on March 4, 2009, alleging five grounds for relief. The applicant on September 8, 2009, filed a document titled, "Motion for Leave to Amend Applicant's Original Application for a Writ of Habeas Corpus Seeking Relief from Final Felony Conviction under Code of Criminal Procedure, Article 11.07", that alleged three additional grounds to the initial application. On July 31, 2013, the applicant filed a document titled, "Supplemental Habeas Corpus", that alleged two additional grounds for relief and repeated the first two grounds for relief alleged in his initial and "amended" application.

5. The Court finds that the applicant was represented by Mr. Ken McLean during his first trial and his 2006 re-trial.

6. The Court finds that McLean died on February 13, 2009. *See State's Exhibit A, Houston Chronicle, Ex-A&M football star, lawyer Ken McLean dies at 65.*

7. The Court finds, based on the court reporter's record, that on April 7, 1998, the applicant shot Charles McCulloch, the complainant, a car salesman, who was attempting to retrieve a vehicle with two other co-workers, Amanda Flores, and Kevin Cosellano (IV R.R. at 128-129). The Complainant had provided the vehicle to a woman named Elena Rodriguez who the Complainant began seeing after the two had met at the Executive Club (IV R.R. at 36, 38, 44-45, 195). The Executive Club was a men's/strip club (IV R.R. at 36-37). McCulloch went to Rodriguez's apartment complex to retrieve the vehicle when he was approached by the applicant, who had had been tipped off by Rodriguez, and the applicant shot the complainant after demanding the Complainant's Rolex watch and money (IV R.R. at 52, 146, 205-206; V R.R. at 125). As a result, the Complainant almost died at the scene and in the hospital (IV R.R. at 25-26, 144-145). The Complainant endured through approximately eight to ten surgeries over a four month period and the applicant was still left with an open abdomen that left his intestines exposed (IV R.R. at 13, 17-19, 21-22). Due to the trajectory of the bullet the contents of the applicant's liver would spill out and that would cause the surrounding skin and local tissue to be excoriated and be very painful to the Complainant (IV R.R. at 16-17, 132-133). The Complainant also suffered a pulmonary embolism after developing deep vein thrombosis (IV R.R. at 17). The applicant was never returned to a state of being a functional person per his treating physician (IV R.R. at 18, 25). As a result of the pain from the shooting and the subsequent surgeries the applicant became addicted to the pain killer methadone (IV R.R. at 23). The Complainant died in 2002 as a result of a methadone overdose (IV R.R. at 28).

8. The Court finds that the Complainant's testimony from the applicant's first trial was read into evidence due to the Complainant dying before the applicant's re-trial. The Complainant identified the applicant as the person who asked for his watch and shot him (V R.R. at 123-124, 131-132, 139).

9. The Court finds that the applicant was identified, both in a photo spread and in court, by Amanda Flores as the person who pointed a firearm at the Complainant shortly before she heard a gunshot (IV R.R. at 66, 74, 98-99, 102-103, 119). Kevin Cosselano, the applicant's other co-worked also positively identified the applicant as the gunman in the courtroom (IV R.R. at 141-142).

10. The Court finds that Elena Rodriguez (Alvarez) testified during the applicant's trial. Rodriguez stated that she knows the applicant (IV R.R. at 188-189). On the night of the shooting, the applicant called Rodriguez and he appeared to be upset, frantic, and was mumbling (IV R.R. at 208-209). The applicant stated that he though he shot the Complainant as he went for the Complainant's Rolex. (IV R.R. at 210-212, 228). The applicant also told Rodriguez not to say anything and threatened to kill her if she did (IV R.R. at 213). The applicant called Rodriguez from jail and they talked about her lying on the stand and saying that the applicant was not involved (IV R.R. at 222, 224).

11. The Court finds, based on the court reporter's record, that the applicant admitted to shooting the Complainant. (State's Exhibit 17).

12. The Court finds that a recovered fired .9 millimeter shell casing was recovered at the scene of the shooting (IV R.R. at 170-171). A fired bullet was also recovered at the scene (IV R.R. at 177). A search of the applicant's house, specifically his bedroom, led to the recovery of two handguns (V R.R. at 36). One handgun was a .380 handgun, that can be loaded .9 millimeter

bullets. The other handgun was a loaded Sig Sauer, .9 millimeter (V R.R. at 59, 63; State's Exhibit 1). The recovered .9 millimeter shell casing and the fired bullet both were fired from the Sig Sauer. (V R.R. at 74-75).

13. The Court finds, based on the court reporter's record, that in the face of the overwhelming evidence presented by the State of the applicant's guilt during the guilt/innocence stage that McLean chose to acknowledge the evidence of the applicant's guilt but still reminded the jury of the requirement that they must be satisfied beyond a reasonable doubt of the applicant's guilt (V R.R. at 159-160).

14. The Court finds that it could have been reasonable trial strategy for McLean to not lose credibility by arguing fiercely that the applicant was not guilty when the evidence clearly demonstrated the applicant's guilt. This is particularly true because of the jury's role in deciding the applicant's punishment. Indeed, McLean indicated this was strategy during his argument in punishment (VII R.R. at 48).

15. The Court finds that there was overwhelming evidence that as a direct result of the applicant's decision to rob and shoot the Complainant the Complainant suffered catastrophic injuries that led to immense pain and ultimately his own death.

16. The Court finds, based on the court reporter's record, that the applicant pled true to one felony enhancement paragraph (VI R.R. at 3). As a result, the applicant's punishment range increased to a minimum of fifteen (15) years to a maximum of ninety-nine (99) years or life in the Texas Department of Corrections – Institutional Division.

17. The Court finds, based on the court reporter's record, that the applicant also stipulated that before the primary offense he had been previously convicted of the felony offense of burglary of a motor vehicle in 1994, two misdemeanor offenses of evading arrest, the

misdemeanor offense of criminal trespass, the misdemeanor offense of theft, the felony offense of perjury, the misdemeanor offense of obstructing a highway or other passageway, the misdemeanor offense of possession of a dangerous drug, (VI R.R. at 3-4; State's Exhibits 57, 23-28). Therefore, the applicant had three (3) felony convictions and six (6) misdemeanor convictions at the time of his 2006 re-trial, including three offenses occurring after the primary offense.

18. The Court finds that beyond the applicant's nine (9) convictions the State also presented evidence that law enforcement conducted a search of the applicant's room in February 2004 and found what appeared to be a ledger for money that's owed by certain individuals and that such ledgers are common in drug-related activity (VI R.R. at 13). Also, five thousand and five dollars ($5005) in cash, approximately twenty ounces of marihuana, and a gram scale was also recovered from the applicant's room (VI R.R. at 13-14, 16-17).

19. The State also presented the Complainant's mother during the punishment stage and she testified as to how when the applicant was released from the hospital he still had a central line to feed him and he had to be given morphine injections (VII R.R. at 35). The applicant, according to his mother, was in constantly in pain and became addicted to morphine (VII R.R. at 36-38). The applicant had to leave the United States and move back to England because he could not work due to his injuries and he had to sell his house to help pay for his medical costs (VII R.R. at 39). The Complainant's mother also testified that the applicant was aware that he was dying and that he seemed to prefer to die than to live (VII R.R. at 41).

20. The Court finds, based on the court reporter's record, that the State opened during its punishment argument and indicated that it was asking for a life sentence (VII R.R. at 47-48).

21. The Court finds that McLean argued during punishment that though the evidence indicates that the applicant deserves a substantial sentence (VII R.R. at 48-49).

22. The Court finds that although McLean indicated that the applicant should not be sentenced to the minimum of fifteen years and that he deserved a substantial sentence that again he was faced with the task of defending the applicant in light of overwhelming aggravating evidence and no mitigation evidence.

23. The Court finds that the applicant was represented by Ms. Frances M. Northcutt during his appeal of his 2006 conviction.

24. The Court finds the affidavit of Frances M. Northcutt to be credible and the facts asserted therein to be true. *See State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.*

25. The Court finds, based on the credible affidavit of Northcutt, that Northcutt was unable to locate the applicant's appellate file and does not have any records in electronic format. *See State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.*

26. The Court, finds based on Northcutt's affidavit, that Northcutt that based upon Northcutt's recollection she sent the applicant a copy of the opinion along with a letter about the process for filing a Petition for Discretionary Review and a set of excerpts from the appellate rules about the PDR process when Northcutt received the opinion affirming the applicant's appeal. *See State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.*

27. The Court finds, based on Northcutt's affidavit, that Northcutt initially informed the applicant that she would file a PDR on the applicant's behalf but subsequently informed the applicant that she would not do so because she did not believe that a PDR would be granted. *See State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.*

28. The Court finds, based on Northcutt's affidavit, that Northcutt informed the applicant that if he wished to pursue a PDR *pro se* that he should follow the procedures set out in Northcutt's previous letter and Northcutt advised the applicant that an extension of time had been filed so the applicant had adequate time to file a PDR. *See State's Exhibit B, Affidavit of Frances M. Northcutt, October 3, 2014.*

29. The Court finds, based on the 2008 appellate opinion, that the Fourteenth Court of Appeals held that applicant's trial counsel provided deficient conduct based upon his closing arguments during the guilt and punishment stages of the applicant's trial. *Thomas*, at *4.

30. The Court finds, based on the 2008 appellate opinion, that Northcutt failed to brief the second prong of the *Strickland* analysis and thus waived error. *Thomas*, at *5.

31. The Court finds that due to McLean's death he cannot respond as to why he chose to argue in the manner that he did.

32. The Court finds that the applicant fails to show that the State intentionally and knowingly submitted false evidence at trial.

CONCLUSIONS OF LAW

1. The applicant fails to show that Northcutt's conduct fell below an objective standard of reasonableness and that, but for trial counsel's alleged deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas); and *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (defining the two-part *Strickland* standard).

2. The Court finds that though Northcutt failed to brief the issue of prejudice in the *Strickland* analysis that the applicant has not shown that he was prejudiced by Northcutt's failure. While McLean's closings might have been deficient there was overwhelming evidence that the applicant was guilty of the primary offense. Additionally, there was considerable punishment evidence presented by the State that included the extensive pain and suffering of the Complainant caused by the applicant, and the applicant's lengthy criminal history before and after the primary offense was committed. Even if Northcutt had briefed the prejudice prong of the *Strickland* analysis it is evident from a review of the court reporter's record that the applicant was not prejudiced by McLean's closing arguments.

3. The totality of the representation afforded the applicant by Northcutt was sufficient to protect his right to reasonably effective assistance of counsel in the primary case.

4. The applicant fails to show that McLean's conduct fell below an objective standard of reasonableness and that, but for trial counsel's alleged deficient conduct, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. at 686; *Hernandez v. State*, 726 S.W.2d at 57; *Narvaiz v. State*, 840 S.W.2d at 434.

5. The applicant fails to show that trial counsel's failure to file motions to suppress was ineffective assistance. To successfully assert that trial counsel's failure to object amounted to ineffective assistance, an applicant must show that the trial judge would have committed error in overruling such an objection. *Ex parte White*, 160 S.W.3d 46 (Tex. Crim. App. 2004); *Vaughn v. State*, 931 S.W.2d 564 (Tex. Crim. App. 1996).

6. The totality of the representation afforded the applicant by McLean was sufficient to protect his right to reasonably effective assistance of counsel in the primary case.

7. Applicant's challenges to the trial court's rulings are procedurally defaulted. Issues raised and rejected on direct appeal may not be reconsidered on a post-conviction writ. *Ex parte Schuessler*, 846 S.W.2d 850 (Tex. Crim. App. 1993).

8. Applicant fails to show that the State failed to comply with its duty to disclose all material, exculpatory evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83 (1963).

9. In all things, the applicant has failed to demonstrate that his conviction was improperly obtained.

Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Cause No. 786932-A

EX PARTE	§	IN THE 209th DISTRICT COURT
	§	OF
DESHUN THOMAS, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 786932-A and transmit same to the Court of Criminal Appeals as provided by TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3. The transcript shall include certified copies of the following documents:

1. the application for writ of habeas corpus;
2. the State's answer along with any attachments;
3. the Court's order;
4. the indictment, judgment and sentence, and docket sheets in cause number 786932 (unless they have been sent to the Texas Court of Criminal Appeals pursuant to a post-conviction writ of habeas corpus order);
5. the court reporter's record in cause no. 786932;
6. the affidavit of France M. Northcutt filed in cause number 786932-A on October 3, 2014;
7. the Court's Findings of Fact and Conclusions of Law; and
8. the State's and Applicant's Proposed Findings of Fact and Conclusions of Law (if any).

THE CLERK is further ORDERED to send a copy of this order to the applicant, Deshun Thomas, # 00882625 – Wynne Unit, 810 FM 2821, Huntsville, TX 77349, and to counsel for the State, Andrew J. Smith, Assistant District Attorney, Harris County District Attorney's Office, 1201 Franklin, Suite 600, Houston, Texas 77002.

By the following signature, the Court adopts the Respondent's Proposed Findings of Fact, Conclusions of Law and Order in Cause No. 786932-A.

SIGNED this 20 day of April, 2015.

JUDGE PRESIDING

Appendix F

Texas Court of Criminal Appeals' Opinion on Direct Appeal

2008 WL 596228
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Do Not Publish-Tex. R.App. P. 47.2(b).
Court of Appeals of Texas,
Houston (14th Dist.).

Deshun THOMAS, Appellant
v.
The STATE of Texas, Appellee.

No. 14-06-00540-CR.
|
March 6, 2008.

On Appeal from the 209th District Court, Harris County, Texas, Trial Court Cause No. 786932.

Attorneys and Law Firms

Frances M. Northcutt, for Deshun Thomas.

William J. Delmore III, for The State of Texas.

Panel consists of Chief Justice HEDGES and Justices ANDERSON and FROST.

MEMORANDUM OPINION

KEM THOMPSON FROST, Justice.

***1** Appellant Deshun Thomas challenges his conviction for aggravated robbery, arguing he was denied effective assistance of counsel. We affirm.

I. Factual and Procedural Background

On the night of April 7, 1998, the complainant, Charles McCulloch, then a salesperson at a local car dealership, sought a woman by the name of Elena Rodriguez in order to retake a car that the dealership had loaned her. McCulloch and two of his employees located the car at Rodriguez's apartment complex. McCulloch confirmed that the car belonged to the dealership, and he turned to one of the employees and instructed her to drive it back to the dealership. As McCulloch turned and began walking back to his own car, he was accosted by an individual brandishing a handgun and standing some ten to fifteen feet away. The individual, later identified by McCulloch as appellant, said, "Give me your watch." McCulloch refused, and was proceeding back to his vehicle when the gunman shot him.

In a statement to police, Rodriguez denied knowing who shot McCulloch. Rodriguez's co-worker, who was with her on the evening of the shooting, confirmed that she also did not know who shot McCulloch. Three months later, Rodriguez recanted her prior statement to police and provided a new statement naming appellant as the gunman. Around the same time, the co-worker also met with police and stated that she and Rodriguez met with appellant in the early hours of April 8 and that appellant admitted shooting McCulloch. Based on this new information, the police procured and executed an arrest warrant for appellant. After appellant's arrest, police searched appellant's room in the home he shared with his mother and found a handgun later confirmed to be the one used to shoot McCulloch.

Appellant was convicted of aggravated robbery, but on appeal, this court reversed his conviction and remanded this case to the trial court for a new trial. *See Thomas v. State,* No. 14-99-00949-CV, 2000 WL 1785110, at *8 (Tex.App.-Houston [14th Dist .] Dec. 7, 2000, pet. ref'd) (not designated for publication). During the retrial, at the end of the guilt-innocence phase, appellant's counsel addressed the jury in his closing argument, stating:

> ...
>
> I can assure you I am a long way from being naive. And I'm certainly not a green horn. And so, as *I viewed this evidence, it seems really strong to me that this young man is guilty, this person I'm representing is guilty.* But before you can be warranted in finding him guilty, you have to believe what Elena Rodriguez says because you can't find him guilty based on what Mr. Collesano said, nor can you find him guilty on the lack of identification by Mr. McCullough [sic].
>
> And we all know that Ms. Flores got like a four-second look, a side view, of this person that fired the shot into Mr. McCullough [sic]. So all I'm saying

to you is I would like for you to look at it. *And the way this case stands today, the evidence is pretty persuasive.*

***2** I have been doing this a very long time, more than 30 years, longer than some of you people have been alive. Like I said, I'm a practical person and I'm not going to stand up here and try to divert you from what you think is the right thing to do. All I ask you to do is consider all of this evidence and if you are convinced beyond a reasonable doubt this young man is guilty, then you are required to find him guilty.

And if you have a reasonable doubt, wherever it may come from in this evidence, you are required to have a reasonable doubt and say by your verdict not guilty however. Normally I could be up here for an hour in some cases, but there is not much to say because the case was short. *And like I said, I'm convinced that the evidence is pretty powerful. If I were to argue to you that there is a great room for doubt, you would probably think I'm a moran [sic].* So, I have got to be honest about the way I feel and I have got to be honest with this young man I represent. *The way this case stands, there is a substantial amount of evidence saying he's guilty.*

I would like you to look at all of the evidence, take a look at it, dissect it a little bit. *If you reach a verdict that says he's guilty, that's the way it is.* I appreciate it. Thank you. [1]

At the punishment phase of the retrial, appellant's trial counsel made the following closing statement:

...

Ladies and gentlemen, *I know you remember I practically consented to a guilty verdict in this case, because I thought the evidence was overwhelming based on the many years of experience of trying cases.* I can assure you I am not a magician. I cannot generate facts in cases when those facts are not available. I can only defend this case the best way that I can.

All of the evidence-and I would be a fool if I suggested otherwise, and I'm not-is compelling that this young man deserves a pretty substantial sentence. I'm not talking about of [sic] sentence of 15 years. All of the evidence is compelling. A young man lost his life, destroyed his mother practically. And so, that has to be taken into consideration. I want you to do that. I could go over all his prior convictions, but I'm not going to do that. You are well aware of that. You are well aware of the facts in this case. *I can assure you I'm a fairly wordy individual, but I know I can't deter you from the things you ought to do in this case. And in this case, I'm convinced, based on all of the facts, he deserves a substantial sentence.* That's just life. Part of life.

All I can do is ask you to consider all of the facts and come up with the sentence. I certainly can't quarrel with you, whatever you do. Thank you. [2]

On retrial, appellant was again convicted of aggravated robbery, and the jury assessed punishment at seventy-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

II. Issue and Analysis

***3** Appellant asserts that because of his trial counsel's remarks on retrial during the guilt-innocence and the punishment phases, he received ineffective assistance of counsel. Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. Const. amend. VI; Tex. Const. art. I, '10; *see* Tex.Code Crim. Proc. Ann. art. 1.051 (Vernon 2005). This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Ex parte Gonzales,* 945 S.W.2d 830, 835 (Tex.Crim.App.1997). To prove ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. This standard applies to claims of ineffective assistance of counsel in both the guilt-innocence phase and the punishment phase in non-

capital trials. *Hernandez v. State,* 988 S.W.2d 770, 770 (Tex .Crim.App.1999). Appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State,* 973 S.W.2d 954, 956 (Tex.Crim.App.1998).

In assessing appellant's claim, we apply a strong presumption that trial counsel was competent. *Thompson v. State,* 9 S.W.3d 808, 813 (Tex.Crim.App.1999). We presume that trial counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy, unless that presumption is rebutted. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex.Crim.App.1994); *Thompson,* 9 S.W.3d at 814. Nevertheless, the standard has never been interpreted to mean that the accused is entitled to errorless or perfect counsel. *Ex parte Welborn,* 785 S.W.2d 391, 393 (Tex.Crim.App.1990). When reviewing a claim of ineffective assistance, we look to the totality of the representation and not to isolated instances of error or to only a portion of the trial, to determine that he was denied a fair trial. *Thompson,* 9 S.W.3d at 813; *McFarland v. State,* 928 S.W.2d 482, 500 (Tex.Crim.App.1996).

A claim for ineffective assistance of counsel must be firmly supported in the record. *Bone v. State,* 77 S.W.3d 828, 833 n. 13 (Tex.Crim.App.2002). When, as in this case, there is no proper evidentiary record developed at a hearing on a motion for new trial, it is difficult to show that trial counsel's performance was deficient. *See id.* at 833. If there is no hearing or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. *Stults v. State,* 23 S.W.3d 198, 208-09 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd). On such a silent record, this court can find ineffective assistance of counsel only if the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State,* 187 S.W .3d 390, 392 (Tex.Crim.App.2005).

***4** Appellant argues that through his closing arguments in the guilt-innocence phase and in the punishment phase, appellant's counsel essentially joined forces with the prosecutor. In assessing an ineffective-assistance-of-counsel claim, we presume closing arguments are based on reasonable trial strategy. *See Flemming v. State,* 949 S.W.2d 876, 881 (Tex.App.-Houston [14th Dist.] 1997, no writ). Matters of trial strategy will be reviewed only if an attorney's actions are without any plausible basis. *See Garcia v. State,* 57 S.W.3d 436, 440 (Tex.Crim.App.2001) (noting that appellate courts will commonly assume strategic motivation if any can possibly be imagined).

In his closing argument at the guilt-innocence phase, appellant's trial counsel emphasized his own thirty years' experience as defense counsel in assessing similar evidence and told the jury that in the case they were to decide the evidence is "really strong" that appellant was guilty. He indicated that he was convinced the evidence was "pretty powerful" and that in assessing evidence, only a "moron" would argue for "great room for doubt." Near the end of his closing argument, appellant's counsel offered, "The way this case stands, there is a substantial amount of evidence saying he's guilty." It is conceivable that trial counsel's argument conceding guilt in the guilt-innocence phase could have been calculated convince the jury of his candor and trustworthiness, perhaps in an attempt to mitigate punishment in the punishment phase, but that is not the case presented by our record. *See Flemming,* 949 S.W.2d at 881. At the punishment phase, appellant's trial counsel reminded the jury that in the guilt-innocence phase, he "practically consented to a guilty verdict" based on the overwhelming evidence given his "many years of experience." Moreover, he argued that "all of the evidence ... is compelling that [appellant] deserves a substantial sentence." Appellant's counsel specifically told the jury that he did not consider fifteen years' confinement, the minimum sentence in this case, to be substantial. In his concluding remarks, ostensibly made on appellant's behalf, appellant's counsel reiterated that appellant deserved a "substantial sentence." The jury found appellant guilty and assessed a sentence of seventy-five years' confinement.

Individually, trial counsel's conduct during each phase of trial may not alone sustain an ineffective-assistance-of-counsel claim.[3] *See Thompson,* 9 S.W.3d at 813 ("[A]n appellate court should be especially hesitant to declare counsel ineffective based on a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation

behind counsel's actions."). However, given trial counsel's closing argument in the punishment phase, in which he made specific reference to trial counsel's concession of appellant's guilt in closing argument in the punishment phase, combined with counsel's references to the overwhelmingly powerful evidence at the guilt-innocence phase, the totality of the representation amounts to conduct so outrageous that it falls well-below professional standards. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Bone,* 77 S.W.3d at 833; *Garcia,* 57 S.W.3d at 440; *see, e.g ., Welborn,* 785 S.W.2d at 396 (concluding that although no one instance alone is sufficient proof for ineffective assistance of counsel claim, counsel's performance taken as a whole compels such a holding). Appellant's trial counsel emphasized the strength of the evidence against appellant and affirmatively argued both for finding appellant guilty and for assessing a substantial sentence. Under the circumstances of this case, no plausible basis exists and no strategic motivation could explain why trial counsel fashioned his arguments as he did. *See Garcia,* 57 S.W.3d at 440; *Flemming,* 949 S.W.2d at 881. Appellant has rebutted the presumption that counsel's conduct was reasonably professional and motivated by sound trial strategy because counsel's closing arguments amount to conduct "so outrageous that no competent attorney would have engaged in it." *See Goodspeed,* 187 S.W.3d at 392; *Thompson,* 9 S.W.3d at 814. Appellant has satisfied the first prong in *Strickland* by showing his trial counsel's conduct was deficient such that it fell below the standard of professional norms. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Bone,* 77 S.W.3d at 833.

***5** To satisfy the second prong of *Strickland,* appellant must affirmatively prove there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2067-69; *McFarland,* 928 S.W.2d at 500. A reasonable probability is one sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Mitchell v. State,* 68 S.W.3d 640, 642 (Tex.Crim.App.2002). It is not enough for an appellant to show that the errors, if any, had some conceivable effect on the outcome of the proceeding. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Ex parte Varelas,* 45 S.W.3d 627, 629 (Tex.Crim.App.2001). This stringent burden requires that appellant point to objective facts in the record to support any lack of confidence in the conviction, i.e. proof of prejudice. *Bone,* 77 S.W.3d at 837.

In this case, appellant has waived error as to *Strickland's* second prong by failing to adequately brief it on appeal. To present an issue for appellate review, the "brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex.R.App. P. 38.1(h). With regard to *Strickland's* second prong, appellant has not presented any facts within the record to support a reasonable probability that the result of the proceeding would have been different but for his trial counsel's deficient performance. Appellant has not applied any governing legal principles to the facts of this case to prove prejudice from his trial counsel's conduct. *See King v. State,* 17 S.W.3d 7, 22 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd). This is especially true when the evidence tends to support a guilty verdict and when the range of punishment was between fifteen and ninety-nine years or life. *See Bone,* 77 S.W.3d at 836 (requiring evidence in the record that probably would have led to a "not guilty" verdict or a lesser punishment); *McFarland,* 928 S.W.2d at 500 (determining reasonable probability by reviewing the totality of the evidence before the jury). Appellant bears the burden of proving his claims by a preponderance of the evidence, and he has failed to meet this burden. *See Jackson,* 973 S.W.2d at 956. In his brief appellant argues only that he "had no meaningful assistance of counsel at his side," and that such conduct in a trial cannot amount to a fair trial. Conclusory statements which contain no citations to authority present nothing for appellate review. *Id.; see also Vuong v. State,* 830 S.W.2d 929, 940 (Tex.Crim.App.1992). Failure to make the required showing of sufficient prejudice defeats an ineffectiveness claim. *Strickland,* 466 U.S. at 700, 104 S.Ct. at 2071; *McFarland,* 928 S.W.2d at 500. Because appellant did not affirmatively prove prejudice in the second prong, he cannot prevail. Accordingly, we overrule appellant's sole issue on appeal and affirm the trial court's judgment.

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Footnotes

1 Emphasis added.

2 Emphasis added.

3 This is especially true when in his closing argument in the guilt-innocence phase, counsel raised credibility issues with several of the State's witnesses and also made reference to the lack of a definitive identification of appellant by the complainant and the eyewitnesses. *See Thompson*, 9 S.W.3d at 813 (reviewing whether an ineffective-assistance-of-counsel claim meets the *Strickland* standard by reviewing the "totality of the representation" rather than isolated acts or omissions). Additionally, we recognize that the test for determining an ineffective-assistance-of-counsel claim is applied at the time of trial and not in hindsight. *Stafford v. State*, 813 S.W.2d 503, 506 (Tex.Crim.App.1991).