APPENDIX

APPENDIX A

United States
Court of Appeals
Fifth Circuit
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Lyle W. Cayce
Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-70002

ANDRE LEE THOMAS,
Petitioner - Appellant

v.

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

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:09-CV-644

Before JONES, SOUTHWICK, and HIGGINSON, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

Andre Lee Thomas, an inmate on death row in Texas, filed a federal *habeas* application, arguing that his counsel was constitutionally ineffective in numerous ways at trial and sentencing. We granted a certificate of appealability on four of Thomas's issues. We now AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

On March 27, 2004, Andre Lee Thomas broke into the Sherman, Texas apartment of his estranged wife, Laura Christine Boren. He stabbed his wife; their four-year-old son, Andre Lee Boren; and one-year-old Leyha Marie Hughes, Thomas's stepdaughter. All three were killed. He then used separate knives on each victim and attempted to remove their hearts, leaving gaping wounds in their chests. He believed that by taking their hearts he would "set them free from evil." He also stabbed himself three times, but his injuries were not fatal. Thomas left the apartment shortly thereafter. Later that day, he went to the Sherman police station and confessed.

In June 2004, Thomas was indicted for the capital murder of Leyha Marie Hughes, his stepdaughter. He was assigned R.J. Hagood and Bobbie Peterson as counsel. While awaiting trial, Thomas removed one of his eyeballs. Years later, he would remove the other and eat it. At trial, Thomas pled not guilty by reason of insanity, arguing that his actions were because of an acute psychosis resulting from lifelong mental illness. The State agreed that Thomas was psychotic but argued his psychosis was voluntarily

induced just before the killings through ingestion of the cough medicine Coricidin. The State presented expert testimony that high doses of Coricidin can cause irrational behavior. There is no doubt that Thomas has significant emotional and mental problems. Their effect on his conviction is a central issue in this appeal.

In March 2005, an all-white jury found Thomas guilty of capital murder and sentenced him to death. Another significant issue for us is the sufficiency of the questioning of jurors on their views about interracial marriage, relevant because Thomas is a black man and his wife was a white woman.

Greater detail about Thomas's killing of his wife and the children, and about the trial, is in the opinion affirming his conviction on appeal. *Thomas v. State*, No. AP–75,218, 2008 WL 4531976 (Tex. Crim. App. Oct. 8, 2008).

While his first appeal was pending, Thomas also brought claims under state *habeas corpus* procedures. As required under Texas law, Thomas's application for relief was filed in the court of conviction. On March 28, 2008, that court recommended findings and conclusions for consideration by the Texas Court of Criminal Appeals. *See* TEX. CODE CRIM. PROC. art. 11.071, §§ 9(f), 11. On March 18, 2009, the Court of Criminal Appeals "adopt[ed] the trial judge's findings and conclusions" and denied all relief. *Ex parte Thomas,* No. WR–69,859-01, 2009 WL 693606, at *1 (Tex. Crim. App. Mar. 18, 2009).

Thomas filed a federal *habeas* application under 28 U.S.C. § 2254. On September 19, 2016, the United States District Court, in a 128-page opinion, analyzed and rejected all claims. *Thomas v. Director, TDCJ-CID,* No. 4:09-cv-644, 2016 WL 4988257, at *1 (E.D. Tex. Sept. 19, 2016) (on Westlaw, the entire opinion is 86 pages). The district court also denied Thomas's application for a certificate of appealability ("COA"). *Id.* at *86. Thomas filed a timely motion under Rule 59(e) to alter or amend judgment, but the motion was denied on December 13, 2016. On January 11, 2017, Thomas filed a notice of appeal.

We granted Thomas's motion for a COA on four issues. *Thomas v. Davis,* 726 F. App'x 243 (5th Cir. 2018). We will analyze each of them. After the initial briefing and just before oral argument, the State submitted notice to the court of a possible jurisdictional defect in the appeal. We must address jurisdiction and do so first.

DISCUSSION

I. Potentially late notice of appeal

This appeal fails if the State's late-discovered defect in our jurisdiction proves valid. The question posed was whether Thomas's notice of appeal was untimely. Our answer depends on whether Thomas's earlier Rule 59(e) motion, which was filed before the deadline for a notice of appeal, tolled the time for filing the appeal. The answer to that is governed by whether it is appropriate for the court to examine a Rule 59(e) motion to alter or amend a judgment with the same attention to detail as is required for

examining a Rule 60(b) motion. We must review Rule 60(b) motions to see if they are in fact though not in form successive applications under Section 2244(b), in which new claims are presented instead of alleged mistakes, or fraud, or new evidence, or some other valid basis under Rule 60(b). *See Gonzalez v. Crosby,* 545 U.S. 524, 532–34 (2005). We extended the Supreme Court's reasoning to motions under Rule 59(e). *See Williams v. Thaler,* 602 F.3d 291, 302–04 (5th Cir. 2010). Based on *Williams,* the State in a Rule 28(j) letter argued that we lacked jurisdiction because Thomas's Rule 59(e) motion to alter or amend the district court's judgment was in fact a successive *habeas* application and did not suspend the time to file the notice of appeal. FED. R. APP. P. 4.

We were wrong in *Williams.* After the Rule 28(j) letter was submitted, the Supreme Court held that Rule 59(e) motions should not be recategorized as successive applications regardless of their contents. *Banister v. Davis*, 140 S. Ct. 1698, 1711 (2020). Thomas's notice of appeal was timely, and we have jurisdiction.

II. Federal court review of state court decisions

To obtain *habeas* relief, the prisoner must show that the state court's decision "(1) . . . was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) . . . was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). A state court's decision is contrary to clearly established precedent if

the rule it applies "contradicts the governing law set forth in the Supreme Court's cases," or if the state court confronts facts that are materially indistinguishable from a decision of the Supreme Court yet reaches a different result. *Wooten v. Thaler*, 598 F.3d 215, 218 (5th Cir. 2010) (brackets omitted). If fair-minded jurists could disagree about whether the state court's decision was correct, deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA") precludes federal *habeas* relief. *Harrington v. Richter,* 562 U.S. 86, 101 (2011). This deference has also been said to require that a state court's legal conclusion "must be more than merely incorrect in order to constitute an unreasonable application of federal law; it must be objectively unreasonable." *Miller v. Dretke,* 420 F.3d 356, 360 (5th Cir. 2005). We presume the state court's factual findings are correct unless rebutted with clear and convincing evidence. *Wooten*, 598 F.3d at 218.

The standard of review becomes doubly deferential when, as in most of the claims raised here, the petitioner is seeking *habeas* relief for ineffective assistance of counsel. *Richter*, 562 U.S. at 105. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Id.* at 101. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. at 102. To obtain federal *habeas* relief, the petitioner must prove that the state court's decision "was so lacking in justification that there was an error well understood and

comprehended in existing law beyond any possibility for" reasonable disagreement. *Id.* at 103.

The prisoner must prove both deficient performance and prejudice to succeed on a claim for ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 697 (1984). An attorney's performance is deficient if it falls "below an objective standard of reasonableness." *Id*. at 688. A petitioner is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. There is a strong presumption that defense counsel's strategic and tactical decisions are "within the wide range of reasonable professional assistance." *Id.* at 689.

III.Claims allowed by the certificate of appealability

We granted a COA on four claims, which we will discuss in the following order: (A) the jury was tainted with racial bias, and the state court unreasonably held that defense counsel provided effective assistance during *voir dire*; (B) the state court unreasonably held that defense counsel provided effective assistance despite their failure to challenge Thomas's competency to stand trial; (C) the state court unreasonably held that defense counsel provided effective assistance despite their failure to present an expert in pharmacology to rebut the State's evidence that Thomas's psychosis was voluntarily induced; and (D) the state court unreasonably held that defense counsel provided effective assistance, despite their failure to prepare

and present an effective mitigation case at sentencing. *Thomas,* 726 F. App'x at 243.

A. Racial bias on jury

We granted a COA on a two-part claim regarding racial bias, that "the jury was tainted with racial bias, and the state court unreasonably held that defense counsel provided effective assistance during *voir dire*, despite their failure to challenge the biased jurors." Though the claims are related and merged at times in briefing, to the extent possible we analyze them separately.

1. Was the jury tainted with racial bias?

Thomas emphasizes to this court that "his jury included three jurors who admitted that they harbored bias against 'people of different racial groups marrying and/or having children.'" As we previously discussed, attitudes about interracial marriage were explored because the defendant Thomas, who is a black man, married Laura Christine Boren, a white woman. Though Thomas killed his wife and their own interracial child, Andre Jr., the murder for which he was tried was that of Leyha Marie, his wife's child by her later relationship. The briefing does not indicate the race of that victim, nor does it raise any issues about race having affected the trial beyond juror attitudes about an interracial marriage and the couple having a child together.

Evidence on this claim comes both from answers on a jury questionnaire and from *voir dire*. The following are the relevant parts of the questionnaire:

103. What is your church or spiritual affiliation's position on interracial marriages?

104. Do you (___) Agree or (___) Disagree with this position? Please tell us why you feel this way:

105. The Defendant in this case, Andre Thomas, and his ex-wife, Laura Boren Thomas, are of different racial backgrounds. Which of the following best reflects your feelings or opinions about people of different racial backgrounds marrying and/or having children:

(___) I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so.

(___) I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my feelings to myself.

(___) I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children.

(___) I think people should be able to marry or be with anyone they wish.

PLEASE TELL US WHY YOU FEEL THIS WAY: [blank provided].

The only one of the three contested jurors to check the first block on Question 105 was Marty Ulmer,

indicating he "vigorously oppose[d] people of different racial backgrounds marrying and/or having children and [was] not afraid to say so." In the blank provided for explanation, he wrote that he did not "believe God intended for this."

Ulmer was the only one of those three jurors who was questioned on *voir dire* specifically about racial attitudes. Counsel asked how Ulmer would feel about sitting on a capital case where the black male defendant was accused of killing his wife, a white female. He answered,

> Well, I think — I think it's wrong to have those relationships, my view, but we are all human beings and God made every one of us. And, you know, as far as — I don't care if it is white/white, black/black, that don't matter to me. If you've done it, you are a human being, you have got to own up to your responsibility.
>
> Q. So, the color of anyone's skin would not have any impact or bearing upon your deliberations?
>
> A. No, not according to that, no.
>
> Q. Okay.
>
> A. Not whether they were guilty or innocent.

Defense counsel then asked again whether Ulmer would take into account the defendant's or victim's race in deciding whether to impose the death penalty. Ulmer answered: "No, I wouldn't judge a man for

murder or something like that according to something like that, no, I would not."

Another juror, Charles Copeland, checked the option on the questionnaire that his church's position was that there "should not be" interracial marriage, and Copeland indicated he agreed with that view. In response to Question 105, Copeland checked the option that he "oppose[d] people of different racial backgrounds marrying and/or having children, but [he] tr[ied] to keep [his] feelings to [himself]." Copeland was not specifically questioned about these answers. When the court asked him during *voir dire* if he could "make up [his] mind solely upon the evidence" presented, Copeland answered that he could.

The final relevant juror is Barbara Armstrong. She indicated that her church or spiritual affiliation did not have a position on interracial marriage, and she added: "It is not the church['s] place to have a position on matters such as this." Like Copeland, she checked the option on Question 105 that she opposed interracial marriage and such couples having children but tried to keep those feelings to herself. She added her own explanation: "I think it is harmful for the children involved because they do not have a specific race to belong to." Armstrong was not questioned about her answers at *voir dire*. The court asked whether she could assess the case based only on the evidence presented in the courtroom, and she stated that she could.

All three of those jurors were accepted, as defense counsel made neither a for-cause nor a peremptory

challenge to exclude any of them. There was also an alternate juror who expressed misgivings about interracial marriage, but because she was dismissed before deliberations began, we do not discuss her.

Thomas also refers us to one final piece of evidence related to juror bias. As the prosecutor completed his argument before jurors began their deliberations on Thomas's sentence, he may have alluded to race:

> Are you going to take the risk about him asking your daughter out, or your granddaughter out? After watching the string of girls that came up here and apparently could talk him into — that he could talk into being with him, are you going to take that change?

We are uncertain if it is completely fair to characterize this as injecting a racial component into deliberations, in part because we do not know the race of the other witnesses and also because it is the kind of argument that could well be made in a case in which race was not a factor. Further, Thomas's COA is not broad enough to include a direct challenge to the prosecutor's words or its effect on the trial.

In order to understand the claims about juror racial bias presented in state court, we examine the state *habeas* application. Counsel filed 44 claims for relief in state court. The only one relevant for jury bias itself (as opposed to ineffectiveness of counsel on the issue) was Claim 20, which stated that the "presence of jurors opposed to interracial relationships deprived Mr. Thomas of a fair trial." Thomas argued that the presence of racially biased

jurors "raises overwhelming concerns that significant racial bias affected the decision-making process in Mr. Thomas's capital trial." He also contended it was "highly likely that the views of the four impaneled jurors who opposed interracial marriage prevented or substantially impaired 'the performance of [their] duties as [] juror[s] in accordance with [their] instructions and [their] oath.'"

The only relevant fact findings by the state *habeas* court were these:

> All members of Mr. Thomas's jury were white.
>
> There is no evidence that the jury's decision was racially motivated.
>
> No objection was ever made by the Applicant to the purported racial bias of any juror that was seated.

There were no legal conclusions about jury racial bias other than as to the effectiveness of counsel. We will address counsel effectiveness in the next section of the opinion. The above findings and conclusions were adopted by the Court of Criminal Appeals. *Ex parte Thomas,* 2009 WL 693606, at *1.

In his federal *habeas* application, Thomas asserted "there is no requirement that Mr. Thomas show that the jury's decision was racially motivated, as a showing that a jury was not impartial creates a structural error." *See Neder v. United States,* 527 U.S.

1, 8 (1999); *Virgil v. Dretke,* 446 F.3d 598, 607 (5th Cir. 2006).

We begin our analysis of the law with essential points: "blatant racial prejudice is antithetical to the functioning of the jury system." *Pena-Rodriguez v. Colorado,* 137 S. Ct. 855, 871 (2017). It is undeniable "that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Id.* at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Any "defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum,* 505 U.S. 42, 58 (1992). If a defendant is denied the right to an impartial decisionmaker, regardless of the nature of the bias, any subsequent conviction is tainted with constitutional infirmity. *See Virgil,* 446 F.3d at 607. Any juror who "the defendant has specific reason to believe would be incapable of confronting and suppressing their racism" should be removed from the jury. *See McCollum,* 505 U.S. at 58. If a juror should have been removed for cause, then seating that juror requires reversal. *United States v. Martinez-Salazar,* 528 U.S. 304, 316 (2000).

A defendant's right to an impartial jury, though fundamental, does not mean that jurors who have preconceived notions cannot be validly seated. To the contrary, as the Supreme Court has instructed:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's

> impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723 (1961).

Thomas presented his argument on this claim to the state *habeas* court in four short paragraphs. Quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), he argued that it was "likely that the views of the four impaneled jurors who opposed interracial marriage prevented or substantially impaired 'the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath."

In response to this argument, the state court found "[t]here is no evidence that the jury's decision was racially motivated." That finding is not directly on point as to whether any juror with a relevant bias that made him or her unable to be impartial was seated on the jury. Though we can identify no state-court findings directly on the point of whether a biased juror was seated, AEDPA deference may still be owed. We also apply a presumption of correctness where a "finding was necessarily part of the court's rejection of the defendant's claim." *Valdez v. Cockrell,* 274 F.3d 941, 948 n.11 (5th Cir. 2001) (citing *Marshall v. Lonberger,* 459 U.S. 422, 433 (1983)). Indeed, "determining whether a state court's decision resulted from an unreasonable…factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Richter,* 562 U.S. at 98. Rather, a federal court will deny *habeas*

relief "if there was a reasonable justification for the state court's decision" in the record. *Id.* at 109.

The issue before us, then, is whether it was "objectively unreasonable" for the state *habeas* court to reject Thomas's claim that his right to an impartial jury was violated. *See Miller,* 420 F.3d at 360. In reviewing whether the state court erred when it did not find that someone with disqualifying racial attitudes was seated as a juror, we should consider any "reasonable justification for the state court's decision." *See Richter,* 562 U.S. at 109. A necessary implicit finding within the state court's explicit finding is that no juror would base his decision on race rather than on the evidence presented. To rephrase, any bias of a juror could be set aside in determining guilt or a punishment. We now turn to determine whether that finding was "objectively unreasonable." *See Miller,* 420 F. 3d at 360.

In evaluating the state *habeas* court's finding and any possible reasonable justifications, we consider the answers Ulmer gave during *voir dire.* The questioning did not cause Ulmer to retreat on his beliefs about interracial marriage. Still, when asked if "the color of anyone's skin would…have any impact or bearing upon [his] deliberations," Ulmer responded," No, not according to that, no." He "wouldn't judge a man for murder or something like that according to something like [race], no, I would not." Ulmer also said that he didn't "care if it was white/white, black/black, that don't matter."

On that record, the state court found "no evidence that the jury's decision was racially motivated." We

consider it a reasonable understanding of that finding that Ulmer's answers, if accepted as true, which the state *habeas* court was entitled to do, were clear that his moral judgment would not affect his fact finding. That would mean that whatever biases this juror brought to deliberations, they were not ones that would affect his decision on guilt, innocence, or the ultimate penalty; he certainly stated they would not. *See Irvin*, 366 U.S. at 723 ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."). We conclude that the state *habeas* court's finding that Ulmer could serve as an impartial juror was not objectively unreasonable.

We now consider the other two relevant jurors. Armstrong and Copeland disapproved of interracial marriage but not "vigorously," and they liked to keep such opinions to themselves. After Ulmer, who was "vigorously oppose[d]" to interracial marriage, agreed that he could set aside his opinions in determining guilt, innocence, or a punishment, defense counsel did not question Armstrong or Copeland about their views on interracial marriage.

Thomas's argument that racially biased jurors were seated is unavoidably linked to his claim that counsel was ineffective in its handling of those jurors at *voir dire*. Despite our efforts to divide our analysis between the two, there is inevitable overlap: a counsel's failure to object to the seating of a juror who expressed an inability to be impartial is ineffective assistance. *See Virgil,* 446 F.3d at 613–614. Here, of course, these two members of the venire did not make an "unequivocal express[ion] that they could not sit as

fair and impartial jurors." *See id.* at 613. We cannot say based on these questionnaire answers alone that the state *habeas* court was objectively unreasonable in concluding that Armstrong and Copeland decided the case solely on the evidence presented. A different subject is whether their questionnaire answers expressed a view that required Thomas's counsel to question them in *voir dire*, as was done for Ulmer. To the extent the issue is whether Armstrong and Copeland could be seated without some further probing by counsel into their potential partiality, that is a claim about ineffective representation. We address that point in the next section.

A few final points about the law. We agree with the dissent that Thomas has a Sixth Amendment right to an impartial jury without overt racial bias. We interpret the dissent as concluding that Ulmer could not be seated because of his questionnaire answers showing his opposition to interracial marriage. We disagree because we find no clearly established law from the Supreme Court that the state *habeas* court's decision contravened. We have already discussed Supreme Court decisions that jurors who are "incapable of confronting and suppressing their racism" should be removed from the jury. *See McCollum*, 505 U.S. at 58. That is not the same thing as saying any juror who has expressed even strong opposition to interracial marriage cannot be seated in a case involving a defendant who did marry someone of a different race if the person indicates an ability to confront and suppress those opinions.

We conclude that fair-minded jurists could disagree about whether the state court's decision was correct as to jury bias, which means that AEDPA deference is owed that decision. *Richter*, 562 U.S. at 101. Thomas is not entitled to relief on the basis that the state court improperly resolved the claim that any partial jurors were seated.

2. Was defense counsel ineffective in addressing jury bias?

The second issue arising from the jury service of Ulmer, Copeland, and Armstrong concerns possible ineffective assistance of counsel. This was Claim 21 in Thomas's state *habeas* application. Thomas argues that defense counsel's representation in jury selection was deficient because "[n]o reasonable lawyer would have allowed multiple jurors who openly admitted moral opposition to interracial relationships to be seated in a capital trial of a black defendant accused of murdering his white wife and interracial child." At the very least, Thomas contends that defense counsel should have questioned "them regarding their biases." He asserts that defense counsel asked only minimal questions of one juror and none of the other two. He claims that the "white jurors here admittedly harbored a specific bias against black men like Thomas who disobeyed 'God['s] intent[ions]' and muddied white 'bloodline[s]' by marrying and having children with a white woman." Prejudice, Thomas argues, resulted from what was unknown about the jurors' biases. The state *habeas* court determined that Thomas "failed to overcome the presumption that trial counsel was effective during *voir dire*

questioning." The court made no explicit factual findings to support that conclusion.

The issue before this court is whether it was objectively unreasonable for the state *habeas* court to conclude that defense counsel's representation during *voir dire* was constitutionally adequate. *See Richter,* 562 U.S. at 102–03. In making that determination, we look for any "reasonable justification for the state court's decision." *See id.* at 109. A presumption of correctness "not only applies to explicit findings of fact [by a state *habeas* court], but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez,* 274 F.3d at 948 n.11.

Certainly, the jury was questioned about racial prejudice in the context of this case. All prospective jurors were asked about racial bias, at least in the questionnaires. They knew this case involved an interracial marriage. The relevant question is whether defense counsel should have probed further during *voir dire* any juror whose written answers were concerning.

Defense counsel questioned Ulmer specifically on his beliefs about interracial marriage. The questioning did not cause Ulmer to retreat on his beliefs about such marriages, but when asked if "the color of anyone's skin would…have any impact or bearing upon [his] deliberations," Ulmer responded, "No, not according to that, no." He stated that he "wouldn't judge a man for murder or something like that according to something like [race], no, I would not." Ulmer also said that he didn't "care if it was

white/white, black/black, that don't matter." Under our "doubly deferential" review, *Cullen v. Pinholster,* 563 U.S. 170, 190 (2011), the questioning of Ulmer was sufficient, and the state *habeas* court was not objectively unreasonable when it concluded that Thomas did not rebut the presumption of counsel's effectiveness as to Ulmer.

We turn next to Copeland and Armstrong. The only *voir dire* supplementation of information about Armstrong's and Copeland's attitudes and impartiality was the trial judge's eliciting that each of them could decide the case solely on the evidence presented to them at trial. The Supreme Court has observed that "[g]eneric questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'" *Pena-Rodriguez,* 137 S. Ct. at 869 (quoting *Rosales-Lopez v. United States,* 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring in result)). We do not interpret that language as invalidating the generic questioning of Armstrong and Copeland. It does, however, demonstrate the difficulty for counsel.

The state *habeas* court made no specific factual findings relevant to jurors Armstrong and Copeland and the effectiveness of counsel regarding them. The following legal conclusions are on point (we have omitted the numerous citations to state court decisions):

> A trial court has wide discretion in conducting *voir dire*, and its rulings are

> reviewed under an abuse of discretion standard. If the subject could possibly be raised during trial, the attorneys are entitled to *voir dire* on that issue. Generally speaking, a *voir dire* topic is proper if it seeks to discover a juror's views on an issue applicable to the case.
>
> *Strickland* encompasses the prohibition against second-guessing counsel's trial strategy on *voir dire*. Not every attorney will conduct *voir dire* in the same manner, and, with hindsight, every attorney may have wished that additional questions were asked. However, the fact that another attorney might have pursued other areas of questioning during *voir dire* will not support a finding of ineffective assistance.
>
> The applicant has failed to overcome the presumption that trial counsel was effective during *voir dire* questioning.
>
> The applicant has not demonstrated that his counsel's performance fell below a reasonable objective standard, and he has not demonstrated that any alleged error prejudiced his defense.

The issue of whether the *voir dire* questioning satisfied counsel's obligations is a mixed question of law and fact. *See Strickland,* 466 U.S. at 698. Factually, we know what happened. Counsel each asserted that a balance was struck between the costs and benefits of more specific questioning. We accept

that the state court made factual findings to support its rejection of relief. *See Valdez*, 274 F.3d at 948 n.11. The state *habeas* court's legal conclusions, already quoted, emphasize the discretion of counsel on how to proceed with a criminal defense, including the conducting of *voir dire*. The difficult issue is whether the state court made an unreasonable application of the clearly established law.

The evidence on defense counsel's decisions about *voir dire* and about other issues during trial comes from four affidavits, two from each of the defense attorneys. According to the briefing, the first affidavits from each trial counsel were obtained at the initiative of Thomas's *habeas* counsel, while the second pair was obtained by the State a few months later. In each situation, the procuring party was given affidavits largely supportive of its arguments on the effectiveness of trial counsel. The earlier affidavit of each attorney seems to be describing all that counsel did wrong; the later, the many efforts to do things right. They almost seem to be describing different events. All four affidavits were presented to the state *habeas* court.

The lead attorney was R.J. Hagood. In his June 2007 affidavit, he stated that his "failure to ask few, if any, follow up questions of the members of the jury who had indicated on their jury questionnaires that they were opposed to interracial marriage was not intentional; I simply didn't do it." In November 2007 though, Hagood provided an affidavit that said he had carefully considered how to question prospective jurors.

> [Thomas] states that we were ineffective for failing to inquire into the racial bias of each juror. Strategically, I would never ask pointed questions regarding racial bias from a juror without a real basis to do so. *Voir dire* can be delicate in that you do not want to alienate a juror who may end up on the jury. Accusing someone of racism is a good way to do that. Nona Dodson had suggested several questions to pose to jurors. I followed some of her [advice] which, based on many years as a trial attorney, I believed would be useful. I did not take all of her suggestions. In fact, I found some of those questions offensive and inappropriate to propound to a rural jury. I cannot recall any questions suggested by Ms. Dodson that I outright refused to ask. . . . For those jurors who expressed some problem with interracial relationships, either [co-counsel] Ms. Peterson or I questioned them to the extent necessary for us to request a strike for cause or make a decision to use a strike against them. Often time, there were much worse jurors upon whom we exercised our strikes.

Co-counsel Bobbie Peterson Cate also submitted two affidavits. Her June 2007 statement contained nothing about the decision-making for juror questioning. Her December 2007 affidavit largely mirrored Hagood's on this issue, suggesting careful consideration of how to handle questioning during *voir dire* about racial biases.

These are strikingly different representations, between just not thinking to ask about interracial

marriage and making a careful consideration of the issue. We at least know that sufficient attention was given the issue to create several written questions for prospective jurors about interracial marriage. Without doubt, though, Armstrong and Copeland were not asked about their racial attitudes in *voir dire*. It could be, as Hagood asserted in his second affidavit, that he considered the suggested questions, asked some of Ulmer, but decided to ask none of Armstrong and Copeland. Once the juror who more "vigorously oppose[d]" than the other two agreed to set aside his bias, Hagood may have strategically avoided the risk of alienating Armstrong and Copeland.

Hagood also stated in his second affidavit that he had tried many cases in Grayson County, Texas, in which his clients were "black defendants found not guilty by all-white" juries. There could be strategic reasons for not further inquiring into the potential jurors' feelings about race and interracial relationships, and the record supports that Hagood was experienced in dealing with these concerns on *voir dire*. According to his second affidavit, Hagood's decisions were strategic attempts to avoid alienating potential jurors based on his trial experience in rural areas like Grayson County. Certainly, counsel must make difficult tactical judgments.

In considering the effectiveness of counsel, we note the differences between the two who were not questioned, Armstrong and Copeland, and Ulmer, who was. One distinction is that Armstrong and Copeland indicated that they did not like to discuss with others their beliefs about interracial marriage.

Copeland and Armstrong also did not indicate that they were "vigorously" opposed to interracial marriage. Finally, Ulmer was questioned and seated before Armstrong and Copeland. We must decide whether the state *habeas* court was objectively unreasonable to find that Thomas has not shown ineffective assistance in deciding not to question or strike Armstrong or Copeland after questioning Ulmer.

Other circuits have emphasized the difficulty defense counsel faces in deciding how to discover potential racial bias without over-emphasizing it. The facts of a Third Circuit capital case involved "an interracial sexual relationship between an African-American man and his white girlfriend" whom the man killed. *Jacobs v. Horn,* 395 F.3d 92, 98, 119 (3d Cir. 2005). The court analyzed counsel's failure to ask racial-bias questions as being reasonable if counsel "believed that probing the jurors' potential racial prejudices might unduly emphasize the racial differences." *Id*. at 118. The court held there was no counsel ineffectiveness due largely to the fact that the record did not support that race had anything to do with why the defendant killed his girlfriend. *Id.* There is no such evidence here either. *Jacobs* did not discuss the need to inquire about jurors' potential objections to interracial relationships.

Another example is a capital murder trial conducted in Illinois on facts similar to those in *Jacobs, i.e.,* the absence of any evidence that there was a racial motive behind a black man's killing of a white victim; there was no questioning of prospective jurors about racial attitudes. *Lear v. Cowan,* 220 F.3d

825, 829 (7th Cir. 2000). The Seventh Circuit found no ineffectiveness in the decision to avoid emphasizing the racial component of the facts, as counsel
"testified that he thought he had dealt with the issue adequately by asking general questions about bias without focusing on race." *Id.*

To be clear, the racial issues in the case before us were considered by counsel and the court as more central than in the two decisions we just discussed. Though no briefing here has suggestioned that Thomas had a racial motive for the killings, the district court agreed that the interracial marriage and the couple having children had potential to affect some jurors' objective view of the evidence and justified questioning the venire.

Nonetheless, these other circuits' opinions support that there is considerable discretion in deciding how much questioning, if any, is required even as to possible racial biases. The Supreme Court has said that "inquiry into racial prejudice at *voir dire* [is] not constitutionally required [when] the facts of the case [do] not suggest a significant likelihood that racial prejudice might infect [the defendant's] trial." *Turner v. Murray*, 476 U.S. 28, 32 (1986) (third alteration in original) (quotation marks omitted). The *Turner* plurality based its reason for finding *voir dire* inadequate "on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case." *Id.* at 37. We have those three here, but unlike in *Turner,*

some questions were asked at this trial about prospective jurors' racial attitudes.

As we discussed in the juror-racial-bias analysis, this case is also different from *Virgil v. Dretke,* in which two jurors "each unequivocally expressed that they could not sit as fair and impartial jurors." 446 F.3d at 613. Failure to challenge for cause or use a peremptory strike was ineffective assistance where counsel also did not question "either [juror] as to whether they would be able to set aside their preconceived notions and adjudicate . . . with an open mind, honestly and competently considering all the relevant evidence." *Id.* If Armstrong and Copeland had unequivocally expressed their inability to remain impartial, this would be an easier case.

We also have AEDPA, under which we show broad, if limited, deference to the decision of the state court. That was not an issue in *Turner*. The limitations are that facts not be unreasonably determined and that the Supreme Court's clearly established law not be unreasonably applied. § 2254(d)(1)–(2).

The jurors were questioned about racial prejudices in their questionnaire, and defense counsel provided a colorable reason not to question further. The state *habeas* court approved. Perhaps it applied *Strickland* incorrectly, but to be reversed, the state court must have erred unreasonably.

As to legal conclusions, we do not interpret Supreme Court authority as requiring counsel to have probed further in response to the "dilemma" of what

to do with potential racial bias. Hagood expressed concern that other jurors who might serve in place of Armstrong and Copeland were more troubling. The questionnaire answers could have been interpreted by counsel as not reflecting the kind of animosities to a black defendant that would motivate them to convict regardless of the evidence. Counsel also could have viewed further questioning of the potential jurors about their feelings on interracial relationships as likely to alienate jurors who would not be struck for cause. Counsel had experience with black defendants being found not guilty by all-white juries, and counsel's actions can be interpreted as mindful of the potential negative effect of further questioning jurors in Grayson County on their racial biases. It was not objectively unreasonable for the state *habeas* court to hold that defense counsel complied with *Strickland*.

Thomas is not entitled to *habeas* relief on the basis of the claim involving the jurors who expressed opposition to interracial marriage.

B. Ineffective assistance in failing to challenge Thomas's competency to stand trial

Thomas argues that his counsel was ineffective for failing to challenge his competency to stand trial, which was Claim 16 in his state *habeas* application. In June 2004, Thomas was declared incompetent to stand trial, a conclusion that no one challenged. Thomas was then sent to a psychiatric treatment facility at the Maximum Security Unit of North Texas State Hospital – Vernon Campus ("Vernon") for several weeks. While at Vernon, Thomas underwent a series of tests and examinations. Dr. Thomas Gray,

a clinical psychologist, wrote in his medical report on July 23, 2004, that the test results "strongly indicated gross exaggeration of [Thomas's] symptoms." The report further provided that the "test results strongly indicate that he had been exaggerating any symptoms that he may be experiencing at present." The report concluded that Thomas was "diagnosed with malingering," meaning that "[h]e has clearly exaggerated symptoms that he might be experiencing and may have even fabricated some symptoms of psychosis."

In its findings, the state *habeas* court recognized Dr. Gray's conclusion that Thomas was competent to stand trial. It also found that "Dr. [Edward] Gripon's testimony that the applicant was competent at the time of trial was credible." When Hagood was asked by the trial court after Thomas returned from the Vernon facility whether he was raising a second challenge to competency, Hagood answered that he was not "at that time." The state *habeas* court later found that defense counsel should have objected to the competency finding upon Thomas's return from Vernon, but it still found that Thomas "was competent to stand trial." The court's legal conclusion that we review is this: "The record does not support the applicant's claim that he was incompetent to stand trial or that his attorney was ineffective for failing to raise the competency issue a second time."

Thomas argues that trial counsel's failure to investigate his competency after he returned from Vernon was ineffective assistance of counsel. Further, the failure to investigate was prejudicial because there was a reasonable probability Thomas

would have been found incompetent to stand trial if counsel had made a challenge at that time. "Counsel could have submitted evidence of their own interaction with" him or "have obtained a further expert competency evaluation."

It is clearly established law that an incompetent person cannot be put on trial. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975). A defendant is not competent unless he has "a rational as well as factual understanding of the proceedings against him," and a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Indiana v. Edwards,* 554 U.S. 164, 170 (2008) (emphasis and citation omitted). A mentally ill defendant can still be competent to stand trial, however. *Mays v. Stephens,* 757 F.3d 211, 216 (5th Cir. 2014). If the defendant has a history of mental illness, defense counsel has a duty to investigate or request a hearing on competency. *Bouchillon v. Collins,* 907 F.2d 589, 597 (5th Cir. 1990). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required." *Drope*, 420 U.S. at 180. On collateral review, the question is whether, based on what was then known to the state trial court, "the failure to make further inquiry into [the defendant's] competence to stand trial[] denied [the defendant] a fair trial." *Id.* at 174-75.

To succeed on a claim that counsel failed to investigate, "a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial."

Miller, 420 F.3d at 361. If defense counsel is aware of a fact that would cause a reasonable attorney to investigate further, then the failure to investigate further is likely deficient performance. *See id.* at 364. As we have already stated, there is a strong presumption under *Strickland* that defense counsel's strategic and tactical decisions fell "within the wide range of reasonable professional assistance." 466 U.S. at 689. *Strickland* also prohibits this court from evaluating defense counsel's choices through the "distorting lens of hindsight." *Id.*

We examine the evidence on the attorney's actions. Hagood admitted in his first affidavit that he "should have filed an objection to the competency report and should have urged a new competency hearing" after Thomas returned from Vernon. His second affidavit, though, sought to justify his not seeking another hearing:

> [We] did not request a new competency hearing. The reason for this was simple: the applicant was not incompetent when we began his trial. Although heavily medicated and still suffering from mental illness, I was able to talk to the applicant and discuss the case with him. The applicant was able to participate in our conversations and help me with his defense. In fact, based on some of our conversations and the applicant's ability to recall events and make suggestions, there was no question at that time that the applicant was competent to stand trial. The trial court specifically asked me if I was claiming incompetency. I avoided the question as much as I could, but eventually

> had to tell the judge that we were not challenging competency at that time because I had no new evidence to dispute the findings at Vernon or suggest the applicant was incompetent.

When Thomas returned from Vernon, the official report was that Thomas was severely manufacturing and exaggerating his psychotic symptoms. Based on that report, defense counsel may have understandably discounted signs in Thomas of potential incompetence. Thomas's erratic actions, in light of the medical evaluation, arguably did not place counsel on notice that further inquiry was needed. It is true that the state *habeas* court credited a portion of Hagood's first explanation — that he should have made a second competency objection. In deciding if this constituted an unreasonable factual finding, we accept that the state court could have treated the assertion in the first affidavit as Hagood's *post hoc* realization that he should have done more, while that in the second affidavit reflects Hagood's belief the challenge would not have been successful.

We acknowledge that a reasonable jurist could have concluded that defense counsel's dismissal of signs of incompetence and failure to challenge competency a second time was ineffective representation under *Strickland*. We must analyze the decision, though, by applying the standard of whether it was objectively unreasonable for the state *habeas* court to conclude that defense counsel complied with *Strickland*. In considering the facts known to defense counsel on the eve of trial, which are the facts the state *habeas* court considered, we cannot

say that it was objectively unreasonable for the state court to conclude that defense counsel's representation complied with *Strickland*. Thomas is not entitled to *habeas* relief on this ground.

C. Ineffective assistance in rebutting the voluntary-intoxication theory

Thomas argues that defense counsel's representation was inadequate because they failed to present "appropriate expert testimony to rebut th[e] central prosecution theory," which was that Thomas's undisputed psychosis at the time of the killings was self-induced. In Texas, "[v]oluntary intoxication does not constitute a defense to the commission of crime." TEX. PENAL CODE § 8.04(a). Thomas contends that the cause of his psychosis "was the 'real fight' in the guilt phase," and counsel knew it. The State and another doctor had both informed defense counsel that they should retain an expert who could testify about the effects of Thomas's recreational abuse of dextromethorphan ("DXM") contained in the cough suppressant Coricidin. Instead, defense counsel called two of the State's experts and also a psychiatrist, though the latter was not qualified to testify as a pharmacologist. Thomas reasons that his counsel's "failure to obtain appropriate expert testimony to rebut the prosecution's central theory was deficient" because it allowed the State to present an unchallenged factual predicate for its main argument. Thomas's arguments regarding the ineffectiveness of his counsel in rebutting the voluntary-intoxication theory were presented as Claims 29, 30, and 31 in his state *habeas* application.

Thomas also contends that his counsel's performance was prejudicial because "[a]t least one reasonable juror could have decided in light of [other] witnesses' expert evaluations that Thomas's psychosis did not result from cough medicine or other substances, but from his severe organic mental illness." Thomas further argues that the state court applied the wrong legal standard because it imposed a preponderance of the evidence standard while *Strickland* requires only a reasonable probability of a different outcome.

In an effort to demonstrate what further trial counsel could have done, Thomas in the state *habeas* proceedings submitted affidavits from three other doctors. They supported Thomas's defense in these ways: Dr. Jonathan Lipman, an expert in neuropharmacology, would have testified that Thomas's psychosis was involuntary and not substance induced; Dr. Myla Young, an expert in neuropsychology, would have testified that Thomas's psychosis was the result of "significant brain dysfunction . . . like that demonstrated in several neurological, psychiatric and neurodevelopmental disorders": Dr. Ruben Gur, also a neuropsychologist, would have testified that Thomas suffered from schizophrenia and that his psychosis was organic.

A defense attorney must reasonably investigate possible defenses or "make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. A decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Id. Again, to obtain *habeas* relief, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

A petitioner for *habeas* relief has the burden to support both that counsel was constitutionally ineffective and that prejudice resulted. *Rector v. Johnson,* 120 F.3d 551, 563 (5th Cir. 1997). The state *habeas* court here found insufficient proof "that counsel's performance was constitutionally deficient and [counsel] was not acting as a reasonably competent attorney, and his advice was not within the range of competence demanded of attorneys in criminal cases." As to prejudice, the court articulated the correct legal standard, that "a 'reasonable probability' the result would have been different is merely 'probability sufficient to undermine confidence in the outcome' of trial." The court then found that Thomas failed to prove that his counsel's performance "prejudiced his defense and that based on the opinions of Gur, Young, and Lipman there is a reasonable probability that, but for counsels unprofessional errs the results of the proceeding would have been different."

To support his argument on this issue, Thomas largely relies on *Draughon v. Dretke,* 427 F.3d 286 (5th Cir. 2005). Of course, only the Supreme Court's decisions constitute clearly established law under Section 2254(d)(1). Our review of *Draughon,* then, is to see whether it precedentially held what had already been clearly established by the Supreme

Court. *See Marshall v. Rodgers*, 569 U.S. 58, 64 (2013). We held that *habeas* relief was warranted because defense counsel failed to present expert testimony challenging the main factual predicate of the prosecution's case. *Draughon*, 427 F.3d at 296. Draughon was charged with capital murder; he argued that the killing was accidental, thus making his intent to kill the primary issue at trial. *Id.* at 289–91. A witness testified that she saw the defendant pull a gun and shoot the victim. *Id.* at 290. The defense did not counter this testimony with any expert evidence about the trajectory of the bullet. *Id.* at 294. In *habeas* proceedings, a forensics expert testified that the defendant had not shot the victim directly, rather the bullet had ricocheted off the ground into the defendant. *Id.* at 291.

We take from *Draughon* that the clearly established law from the Supreme Court is that effective representation requires an attorney to conduct a reasonable investigation into the law and facts of the case. *Strickland*, 466 U.S. at 691. We applied that law in *Draughon* and held that on those facts, the defense counsel had to hire an expert witness to counter the main factual predicate of the state. In *Draughon*, if defense counsel did not put a forensics expert on the witness stand, then only the defendant could counter that testimony. 427 F.3d at 297. Thomas argues that his case is like *Draughon* because defense counsel failed to retain an expert witness to rebut the State's central theory that Thomas's psychosis was voluntarily induced from his ingestion of DXM in the Coricidin.

It is true that Hagood stated in his first affidavit that he "did not do an independent investigation of the experts." Whatever Hagood meant by that, he did offer a psychiatrist, Dr. Edward Gripon, who testified that Thomas's psychosis was organic. Dr. Gripon explained that he had reviewed thousands of pages of documentation on Thomas's mental condition; interviewed Thomas multiples times; and reviewed "offense reports, crime-scene photographs, witness statements, videotapes, audiotapes . . . jail records . . . medical records . . . treatment records . . . [and] expert reports." He testified that Thomas had a chronic schizophrenic condition and was insane at the time of the offenses. Dr. Gripon rejected that abusing DXM could have caused Thomas's actions.

In addition, defense counsel talked to two other medical experts who were ultimately not called to testify. As the state *habeas* court found, "Dr. Jay Crowder, a psychiatrist hired by the defense but not called at trial, informed the defense that he could not rule out the possibility that the psychotic episode leading up to the murders was induced by his use of a combination of drugs and alcohol." Hagood explained that he also had talked to Dr. Richard Rogers who "indicated that testing showed [Thomas] was manipulative and 'blew the top off' the questions indicating malingering."

Our concern is not whether counsel at trial could have done more. That is often, maybe always, the case. Thomas's counsel did introduce testimony to contradict the main factual predicate for the State's theory. Given that defense counsel presented

testimony to counter the State's main factual predicate, no deficiency under *Draughon* exists.

Finally, Thomas also argues that his counsel provided ineffective representation on expert testimony when they "inexplicably resorted to calling the prosecution's experts." He further writes that "even if that strategy [was] reasonable . . . the resulting testimony confirms it was not." Such an argument fails. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. Hagood explained that he hoped by calling the State's witnesses he could "diffuse some of the more damaging testimony against" Thomas. That trial counsel's strategy proved unsuccessful cannot be used as a reason to question the reasonableness of the strategy. *Id.*

Based on these facts, it was not objectively unreasonable for the state *habeas* court to conclude that Thomas had not carried his burden under *Strickland* to show defense counsel's representation was constitutionally inadequate. Thomas is not entitled to relief on this ground.

D. Ineffective assistance in presenting a mitigation defense

Thomas argues that his trial counsel provided constitutionally deficient representation at sentencing, which prejudiced him because there was

a substantial probability that a reasonable juror would have reached a different outcome if the mitigation defense had been adequate. This argument was presented as Claim 34 to the state *habeas* court. As we have already stated, Thomas must show that the state court's application of the *Strickland* standard was objectively unreasonable to his claim of ineffective assistance of counsel at sentencing, a substantially higher burden.

First, Thomas contends that his trial counsel's investigation of mitigating evidence was deficient, which prevented the jury from hearing the tragic story of his life. The story of his life, he asserts, was filled with "mental-health issues, abuse, and neglect." Those problems were compounded with alcohol and drug abuse. He writes that he attempted suicide at a young age with no objection from his parents; tragically, his parents encouraged it. He argues that these facts were well known to his friends and family, that defense counsel was deficient by failing both to investigate this personal history and to present evidence of it to jurors.

Next, Thomas argues that "there is at least a reasonable probability that one juror would have decided against the death penalty," and thus trial counsel's deficient performance was prejudicial to him. More importantly, he argues that "the state *habeas* court's conclusion that [he] failed to prove prejudice reasonably applied clearly established law." He contends that "the state court completely ignored what [the other] witnesses would have said and how their testimony would have altered the picture before the jury at sentencing. Ultimately, Thomas asserts

that defense counsel's representation at sentencing "painted an overwhelmingly incomplete and misleading picture."

The question before this court is whether it was objectively unreasonable for the state *habeas* court to conclude that defense counsel's representation at sentencing complied with *Strickland*. If reasonable jurists could disagree about the reasonableness of the state court's decision, then AEDPA precludes federal *habeas* relief because "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102. AEDPA requires deference to the state court's decision if there is a reasonable basis for it. *Id.*

A defense attorney's obligations in a capital case include conducting a thorough investigation into potential mitigating evidence. *See Wiggins v. Smith*, 539 U.S. 510, 522 (2003). In citing to the ABA guidelines for performance of defense counsel in death-penalty cases, the Supreme Court stated that counsel should investigate and consider presenting testimony about the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. *Id*. at 524. "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). At the same time, defense counsel must begin preparation for sentencing with adequate time for investigation into the defendant's background. *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

We have examined the principal evidence on counsel's performance that was presented to the state *habeas* court. The affidavits from each of the trial counsel discuss the mitigation case. Some of the information in the affidavits raises doubts about the preparation of a case for mitigation of sentence. Hagood's first affidavit states he met only twice on his own with Shelli Schade, the person he hired as an expert to prepare the mitigation case, whom the record shows was recommended to Hagood by the Texas Defender Service. That recommendation gives at least initial reasonableness to Hagood's reliance that Schade knew what to do and would do it. He was "disappointed with the work" she did and said it could have been his or co-counsel's fault for not "giving her enough direction." Hagood's first affidavit indicated some involvement in the decisions being made, such as rejecting Schade's suggestion to seek testimony from two particular family members because Hagood did not think they would be worth the effort. He was interested in having Thomas's mother testify, but "shortly before trial she disappeared."

Hagood's second affidavit describes much more thorough preparation. That affidavit discusses such matters as the witnesses he considered, efforts he made to prepare useful ones to testify, and judgments he made at trial regarding the value of their testimony:

> The applicant claims that we were not prepared to present our punishment case. This is patently false. Ms. Peterson and I spent many months preparing all aspects of the case. I had talked to several family members

> regarding the applicant's background and childhood.
>
> The applicant's mother was angry at the applicant for killing her grandson. Although I could have gleaned useful background information from her testimony, I did not do so. She had left the state and I made no attempt to subpoena her or get her back to Grayson Cunty, Texas for the trial. I was too afraid of what might come out of her mouth and further damage she might [do] to the applicant. I had no intention of putting her on the stand and preferred that the State did not have that opportunity either.
>
> I believed the applicant's aunt, Doris Gonzales, would be my primary witness regarding mitigation. When I interviewed her she was articulate and passionate about the trial and obstacles faced by the applicant. Once on the stand, however, she collapsed. She was unable to relate to the jury, despite my best attempts, in as clear and convincing a manner as she had during trial preparation.
>
> I had also prepared two of the applicant's brothers and his father. They, too, had done a much better job in my office than they were able to in court. Once I realized that they were not coming across well, I abandoned my questioning of those three witnesses.

On appeal here, Thomas emphasizes counsel Peterson's statement in her first affidavit that "[l]ate

in the trial, Mr. Hagood asked me who we had for the punishment phase … [which was when she] realized that [they] were not prepared for the punishment phase." Peterson's second affidavit gave what could be seen as a more comprehensive explanation. She restated her earlier assertions, and described her understanding of what Shelli Schade was supposed to be doing:

> I did not think Mr. Hagood had spoken to any witnesses, I was not privy to any witness he may have talked to or the reasons behind much of Mr. Hagood's strategy at trial.
>
> The applicant's mother was not cooperative. I procured Kate Allen with Mr. Hagood's consent.
>
> I do not know what instructions Ms. Schade was given by Mr. Hagood. All materials possessed by Mr. Hagood and myself were available to Ms. Schade. Ms. Schade requested more documents from me as the trial went on and I provided everything possible.

Since the state *habeas* court decision is what we must review, we quote some of its factual findings on this issue. It largely accepted the assertions Hagood made in his second affidavit that we have already quoted. Importantly, it found that "Hagood spent many months preparing all aspects of the case. He stated that he had talked to several family members regarding the applicant's background and childhood." It further found that Hagood believed Thomas's aunt would be the defense's principal mitigation witness

but abandoned questioning her because she collapsed on the stand and "was unable to relate to the jury." The state court similarly found that Hagood abandoned questioning of Thomas's father and brothers when "he realized that they were not coming across well." Further, the state court found that "Hagood was aware of the family background and history of mental problems and alcohol abuse," and he "felt that such information to a juror could cut both ways."

Other factual findings reflect an acknowledgement by the state court that counsel had not done all that could have been done. For example, the court found that counsel "did not initially retain any experts for the mitigation phase of the case." "Members of Mr. Thomas's family, friends and community leaders were available at the time of Mr. Thomas's trial to inform counsel, experts, and jurors about Mr. Thomas's life. The defense team did not contact all of Mr. Thomas's family members. Nor did Ms. Schade draft a social history or mitigation report."

We must defer to these factual findings, which are presumed correct, unless rebutted with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Thomas asserts it was unreasonable for the state court to find that Hagood spent months preparing because some of Hagood's claims, such as speaking with Thomas's family members, were "demonstrably untrue" based on later evidence that was gathered. As we have stated regarding other claims, though, Thomas must convince that the state court made "an unreasonable determination of the facts" by considering "the

evidence presented in the State court proceeding." § 2254(d)(2). The record we can consider is only the one before the state court.

Moreover, it is not only the sentencing-phase evidence that is relevant to mitigation. As the federal district court pointed out, Hagood had already presented substantial mitigating evidence during the guilt phase of the trial; offering the evidence at the sentencing phase would have been cumulative. For example, Thomas's father, Danny Thomas, testified about Thomas's upbringing and childhood. He testified that Thomas had appeared to have "mental problems," describing nervous-breakdown behavior and depression.

Also testifying at the guilt phase was Carmen Hayes, Thomas's girlfriend at the time of the murders. She testified that Thomas spoke often about the book of Revelation and believed that "all women were Jezebels," meaning that "women were lustful." She also testified that two days before the murders, Thomas said, "God, forgive me for my sins," before stabbing himself in the chest, and saying he wanted to "fly with the angels." He would also put duct tape over his mouth because "he felt like he was the devil and if he stopped talking for 24 hours, the world would be right." Hayes, along with Paul Boren, Amy Ingle, and Rose Soto Caballero, testified to Thomas's frequent use of the term "déjà vu." Hayes testified that Thomas believed that "God was making him relive days when he was smoking marijuana [as p]unishment."

Isaiah Gibbs, Thomas's lifelong friend, testified about Thomas's relationship with his mother, Rochelle Thomas. Ms. Thomas regularly took her son and Gibbs to church. When Gibbs and Thomas were with "some girl" she did not like, Ms. Thomas referred to her as "Jezebel." Gibbs spoke to the strong influence that she had on Thomas, and how she would give whippings with belts or shoes to Gibbs and Thomas.

Ingle, Hayes, Bryant Hughes, Boren, and Rae Baird each testified about Thomas's religious obsession. Ingle testified that he cut out the words in Revelation to reword it. Hughes testified that Thomas believed the angels were "bound in hell" and that Thomas wanted to free them. Boren relayed a story about Thomas's claiming that "if everyone would just stop and say, peace, love, that would bring about the end of world."

The State also called Eric Ross, Thomas's older brother, at the sentencing stage. That brother testified to Thomas's childhood and stated that he loved his brother. When Thomas finally began presenting mitigating evidence at the sentencing stage, substantial background information and mitigating evidence had already been presented to the jury.

The defense called nine additional witnesses for further mitigation. Included was Danny Ross, Thomas's brother, who testified about Thomas's childhood and how he strove for knowledge as a young student. Ross's wife Wendy Ross also testified that she loved Thomas and that he had been there for her.

She testified that Thomas had watched her children for her and that she never had any fears or concerns about Thomas's watching her children, but that his behavior changed in the months leading up to the murders. Thomas's aunt Doris Gonzales also testified, describing her visits with Thomas and his brothers as full of "[l]aughter, happiness, joking, [and] kidding.

Dr. Kate Allen, a clinical social worker and family sociologist, also testified for Thomas. In her opinion, Thomas was essentially raised by himself and his two brothers, suffered from schizophrenia, and had traits of a borderline personality disorder and antisocial personality disorder. She further testified that her opinion was that "his mental illness was, by far, the driving force" of the murders.

The defense had presented much mitigation evidence at the guilty phase, then supplemented that evidence at sentencing. The state *habeas* court's conclusion that defense counsel complied with *Strickland* was not objectively unreasonable.

Thomas's case is distinguishable from the cases he cites. For example, he refers us to *Porter v. McCollum*, 558 U.S. 30 (2009), to argue that ignoring pertinent paths of investigation was deficient performance under *Strickland*. In *Porter,* however, defense counsel failed to "obtain *any* of [the defendant's] school, medical, or military service records or interview *any* members of [the defendant's] family." *Id.* at 39 (emphasis added). Here, the state court found that Hagood had spent months preparing and had interviewed various members of the family.

Thus, unlike the defense attorney in *Porter* whose failure to investigate prevented him from making a strategic choice about what to tell the jury, Hagood's investigation into Thomas's past allowed him to make a strategic choice. In his brief on appeal, Thomas writes that because of defense counsel's ineffectiveness "the jury never heard . . . that [he] badly needed medical help from a young age and never received it – a very different portrait of his humanity and culpability." To the extent the jury did not hear this story, it was arguably because Thomas's counsel made a strategic decision not to share this story for fear that it would hurt Thomas's case. Even if that decision was incorrect and against clearly established law requiring more of defense counsel, it was not objectively unreasonable for the state court to conclude that defense counsel complied with *Strickland*. *See Miller*, 420 F.3d at 360. Thomas is not entitled to *habeas* relief on this claim.

We view the current arguments about the effectiveness of counsel's preparation of a mitigation case primarily to present factual questions. The state *habeas* court had to make credibility choices, considering all the evidence before it. Though some of the information in these affidavits makes the preparation of a case on mitigation appear worrisomely slapdash, Hagood's second affidavit shows meaningful effort, with some mistakes and surprises, but not constitutionally ineffective performance. We cannot conclude that the state *habeas* court made an unreasonable determination of the facts when it accepted the assertions that it did.

We conclude that Thomas has not overcome the state *habeas* court's factual finding that counsel was aware of Thomas's extensively troubled past. Hagood asserts he was making choices about which witnesses to put on the stand, and the state *habeas* court found those choices did not make Hagood ineffective.

AFFIRMED.

STEPHEN A. HIGGINSON, Circuit Judge, concurring in part and dissenting in part:

An all-white jury found Thomas, a black man, guilty of capital murder and sentenced him to death for killing his wife, a white woman, and two children, including their interracial child. That jury included three jurors who acknowledged bias against interracial marriage. Empaneling them—affirming their capital verdict and death sentence—was objectively unreasonable, contradicting the clearly established Supreme Court and Fifth Circuit caselaw aptly summarized in the majority opinion[1]:

> It is undeniable "that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" [*Pena-Rodriguez*, 137 S. Ct. 855,] 868 [(2017)] (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Any "defendant has the right to an

[1] I appreciatively concur in the majority opinion's resolution of Thomas's other COA issues except for whether his counsel was ineffective in addressing jury bias. As to that issue, because I see AEDPA error under *Irvin v. Dowd,* 366 U.S. 717, 722 (1961), and *Parker v. Gladden,* 385 U.S. 363, 366 (1966) (a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"), denying Thomas his Sixth Amendment right to an impartial jury, above all a jury without overt racial bias, *Pena-Rodriguez*, 137 S. Ct. 855, 868 (2017); *see also United States v Booker*, 480 F.2d 1310, 1311 (7th Cir. 1973) ("if even one member of the jury harbors racial prejudice against the accused, his right to trial by an impartial jury is impaired"), I do not reach whether Thomas's trial counsel, who undertook either no or negligible voir dire inquiry into jurors' avowals of actual racial bias, was constitutionally deficient under *Turner v. Murray*, 476 U.S. 28, 36–37 (1986), and *Mu'Min v. Virginia,* 500 U.S. 415, 431–32 (1991).

> impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). If a defendant is denied the right to an impartial decisionmaker, regardless of the nature of the bias, any subsequent conviction is tainted with constitutional infirmity. *Virgil* [*v. Dretke*], 446 F.3d [598,] 607 [(5th Cir. 2006)]. Any juror who "the defendant has specific reason to believe would be incapable of confronting and suppressing their racism" should be removed from the jury. *See McCollum*, 505 U.S. at 58. If a juror should have been removed for cause, then seating that juror requires reversal. *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

The facts of Thomas's violent crime are undisputed and the majority recognizes that racial issues were inextricably bound up with his murders. *See Rosales-Lopez v. United States,* 451 U.S. 182, 189–90 (1981). Indeed, the fact of Thomas's interracial relationship with his victim was at the crux of the State's case, urging the all-white jury to vote for capital punishment:

> Are you going to take the risk about him asking your daughter out, or your granddaughter out? After watching the string of girls that came up here and apparently could talk him into—that he could talk into being with him, are you going to take that chance?

Adjudicating this horrific crime would challenge any juror, but it is constitutionally prohibited for a

racially biased juror who "vigorously oppose[s]" (Juror Ulmer) (or "oppose[s]"—Jurors Copeland and Armstrong) "people of different racial backgrounds marrying and/or having children."

As we both celebrate and enforce, the Constitution rests our "criminal justice system . . . firmly on the proposition that before a person's liberty can be deprived, guilt must be found, beyond a reasonable doubt, by an impartial decisionmaker. The Sixth Amendment provides in part: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed.' Put simply, 'The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.'" *Virgil v. Dretke*, 446 F.3d 598, 605 & nn. 22, 23 (5th Cir. 2006) (quoting the Sith Amendment and clearly established Supreme Court caselaw, including *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), and *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam)) (alterations in original).

In Thomas's state habeas proceeding, the state court's cursory conclusion about juror bias was that "[t]here is no evidence that the jury's decision was racially motivated." I agree with the majority that this finding gave no resolution to Thomas's structural error claim that jurors with actual, disqualifying bias were seated. Where I disagree is with the majority's compensating inference that Ulmer's admitted-to racial bias was impliedly disclaimed by him as a "moral judgment" he "could set aside…in determining guilt." Although Ulmer separately stated that he would not let the color of Thomas's skin affect his

judgment of him, the majority candidly acknowledges that he never retreated from his "beliefs about interracial marriage." "Belief" is dignifying here. Ulmer admitted to racial animus—condemned by the unanimous Supreme Court one half century ago in *Loving v. Virginia* as "odious," "invidious" and "repugnant"—here against the *exact* interracial circumstance of the offense Thomas was sentenced to death for. 388 U.S. 1, 11 & n.11 (1967).

I would apply clearly established Supreme Court law to forbid persons from being privileged to participate in the judicial process to make life or death judgment about brutal murders involving interracial marriage and offspring those jurors openly confirm they have racial bias against. The law rightly condemned this repugnancy when enacted as law by lawmakers, just as it might condemned it when we ask citizens to join us as judges.

APPENDIX B

United States
Court of Appeals
Fifth Circuit
FILED
June 7, 2018

Lyle W. Cayce
Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-70002

ANDRE LEE 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 Eastern District of Texas
USDC No. 4:09-CV-644

Before JONES, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Andre Lee Thomas, a Texas state prisoner, was convicted of capital murder and sentenced to death. The district court denied his Section 2254 petition and also denied him a Certificate of Appealability ("COA"). Here he moves for a COA on five issues: (1) whether the jury composition was tainted by racial bias and whether defense counsel was ineffective for failing to question the allegedly biased jurors; (2) whether defense counsel was ineffective for not investigating Thomas's competency to stand trial; (3) whether defense counsel was ineffective in rebutting the State's voluntary-intoxication theory; (4) whether defense counsel was ineffective in presenting a mitigation defense in the penalty phase; and (5) whether execution of the severely mentally ill violates the Eighth Amendment.

Without expressing any view on the merits, we conclude that reasonable jurists could disagree about the resolution of the first four issues. Therefore, we grant a COA on those issues. We deny a COA on the issue of whether execution of the severely mentally ill violates the Eighth Amendment. This issue is foreclosed under our precedent.

The Clerk's Office will set a briefing schedule.

Motion for COA GRANTED IN PART AND DENIED IN PART.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX C

2016 WL 4988257
Only the Westlaw citation is currently available.
United States District Court, E.D. Texas, Sherman Division.

Andre Lee THOMAS, #999493, Petitioner,
v.
DIRECTOR, TDCJ-CID, Respondent.
CIVIL ACTION NO. 4:09cv644
|
Signed 09/19/2016

Attorneys and Law Firms

Maurie Amanda Levin, Maurie Amanda Levin, [sic] Attorney at Law, Philadelphia, PA, Donald Lee Bailey, Attorney at Law, Sherman, TX, Marilyn Clark, Patrick J. McLaughlin, Dorsey & Whitney LLP, Minneapolis, MN, for Petitioner.

Fredericka Searle Sargent, Attorney General's Office, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER OF DISMISSAL

MICHAEL H. SCHNEIDER, UNITED STATES DISTRICT JUDGE

*1 Petitioner Andre Lee Thomas, an inmate confined in the Texas prison system, filed the above-

styled and numbered petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is challenging his capital murder conviction and death sentence imposed by the 15th Judicial District Court of Grayson County, Texas in Cause Number 051858, in a case styled *The State of Texas v. Andre Thomas*. For reasons set forth below, the Court finds that the petition is not well-taken and that it will be denied.

Procedural History of the Case

In March 2005, Petitioner was convicted of the capital murder of thirteen month old Leyha Marie Hughes, by cutting or stabbing her with a knife, in violation of Tex. Penal Code § 19.03(a)(8). He was found guilty after the jury rejected his plea of not guilty by reason of insanity. The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and death sentence. *Thomas v. State*, No. AP-75218, 2008 WL 4531976 (Tex. Crim. App. Oct. 8, 2008) (unpublished). Petitioner did not file a petition for a writ of certiorari.

Petitioner filed his first application for a writ of habeas corpus in state court on June 8, 2007. The state trial court issued extensive findings of fact and conclusions of law on March 28, 2008. The TCCA subsequently denied relief based on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, No. WR-69859-01, 2009 WL 693606 (Tex. Crim. App. March 18, 2009) (unpublished).

Petitioner began the present proceedings on December 27, 2009. He filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March

16, 2010 (docket entry #7). On April 22, 2010, the Court granted his unopposed motion to stay and hold the proceedings in abeyance while he pursued a second application for a writ of habeas corpus in state court. The application was dismissed as successive pursuant to Texas Code of Criminal Procedure Article 11.071 § 5. *Ex parte Thomas*, No. WR-69859-02, 2010 WL 1795738 (Tex. Crim. App. May 5, 2010) (unpublished). On June 9, 2010, the Director was ordered to show cause why relief should not be granted. He filed an answer (docket entry #23) on May 11, 2011. Petitioner filed a reply (docket entry #35) on March 21, 2012.

Factual Background of the Case

The facts of the case were summarized in the concurring opinion denying habeas relief in state court as follows:

> [Petitioner] has a severe mental illness. He suffers from psychotic delusions and perhaps from schizophrenia. He also has a long history of drug and alcohol abuse. Because of his drug abuse, he was frequently truant, quit school in the ninth grade, and had a series of juvenile and adult arrests. Dr. Axelrad, called by both the State and defense, testified that the twenty-one-year-old [Petitioner] told him that he had been abusing alcohol since age ten and marijuana since age thirteen, and, in the month before the murders, had been taking large doses of Coricidin, a cold medicine, for recreational purposes.

[Petitioner's] behavior in the months before the killings became increasingly "bizarre": He put duct tape over his mouth and refused to speak; he talked about how the dollar bill contains the meaning of life; he stated that he was experiencing *deja vu* and reliving events time and again; he had a religious fixation and heard the voice of God. In the weeks before the murders, [Petitioner] was heard by others talking about his auditory and visual hallucinations of God and demons.

*2 About twenty days before the killings, he took Coricidin and then tried to commit suicide by overdosing on other medications. He was taken to the local MHMR facility, but then walked away before he could be treated. Two days before the killings, he drank vodka and took about ten Coricidin tablets and then stabbed himself. His mother took him to the local hospital. But again, [Petitioner] left the hospital before he could be committed for observation or psychiatric treatment. On two occasions in the days before the killings, [Petitioner] was seen by friends to be highly intoxicated; they described him as vomiting, delirious, incapacitated, and lying on the floor.

At around 7:00 p.m. on March 26th, just one day after stabbing himself, [Petitioner] went to his estranged wife's apartment where she and her boyfriend, Bryant Hughes, were listening to religious audiotapes. According to [Petitioner's] statement to police, he had come to believe that God wanted him to kill his wife,

Laura, because she was "Jezebel," to kill his four-year-old son, Andre, Jr., because he was the "Anti-Christ," and to kill his wife's daughter, thirteen-month old Leyha, because she, too, was evil. That evening, [Petitioner] saw Bryant twisting an extension cord as they listened to the religious tapes, and he thought that Bryant also wanted to strangle Laura and the children. [Petitioner] wanted to make "the first move," so he walked into Laura's kitchen to find a knife, but then decided that it was not the right time. Bryant drove applicant home around 10:00 p.m.

[Petitioner] reported that the next morning he woke up and heard a voice that he thought was God telling him that he needed to stab and kill his wife and the children using three different knives so as not to "cross contaminate" their blood and "allow the demons inside them to live." He walked over to Laura's apartment. He saw Bryant drive by and wave, so [Petitioner] believed that this was a signal that he was doing "the right thing" by killing his wife and the children.

He burst into the apartment, then stabbed and killed Laura and the two children. He used a different knife on each one of the victims, and then he carved out the children's hearts and stuffed them into his pockets. He mistakenly cut out part of Laura's lung, instead of her heart, and put that into his pocket. He then stabbed himself in the heart which, he thought, would assure the death of the demons that had

inhabited his wife and the children. But he did not die, so he walked home, changed his clothes, and put the hearts into a paper bag and threw them in the trash. He walked to his father's house with the intention of calling Laura, whom he had just killed. He called Laura's parents instead and left a message on their answering machine:

> Um, Sherry, this is Andre. I need y'alls help, something bad is happening to me and it keeps happening and I don't know what's going on. I need some help, I think I'm in hell. I need help. Somebody needs to come and help me. I need help bad. I'm desperate. I'm afraid to go to sleep. So when you get this message, come by the house, please. Hello?

[Petitioner] then walked back to his trailer where his girlfriend, Carmen Hayes, and his cousin, Isaiah Gibbs, were waiting for him. He told them that he had just killed his wife and the two children. Ms. Hayes took him to the Sherman Police Department and he told the police what he had done. After he was hospitalized for his chest wound, he was taken to jail, and he gave a videotaped statement to the police. In that videotaped statement, [Petitioner] gives a very calm, complete, and coherent account of his activities and his reasons for them.

*3 Five days after the killings, [Petitioner] was in his cell with his Bible. After reading a

Bible verse to the effect that, "If thy right eye offends thee, pluck it out," [Petitioner] gouged out his right eye. [Petitioner] was examined for competency to stand trial by two psychologists and was evaluated by a treating psychologist in jail, all of whom agreed that [Petitioner] was not then competent to stand trial. All three provided a diagnosis or opinion of "Schizophreniform Disorder with a Rule out of Substance Induced Psychotic Disorder due to [Petitioner's] recent history of abusing Coricidin."

After approximately five weeks of treatment and medication in the Vernon State Hospital, [Petitioner] was found to have regained his competency to stand trial. During his stay at Vernon, [Petitioner] was placed on Zyprexa, a strong anti-psychotic medication, and did not display "bizarre or unusual behaviors," but he did make "hyper-religious statements throughout his stay." The attending psychiatrist at Vernon updated applicant's diagnosis as being Substance-Induced Psychosis with Delusions and Hallucinations. He also diagnosed [Petitioner] as malingering (as did a psychologist).

[Petitioner] was returned to Grayson County to stand trial. Several different psychiatrists and psychologists-both for the State and [Petitioner]-interviewed and tested [Petitioner] in anticipation for the capital murder trial. By that time, [Petitioner] was fully alert, conversant, and attentive. His

> memory tested well, he spoke at a level consistent with his tested I.Q. of 112, and he behaved appropriately during the interviews. He told one psychiatrist in December 2004 that he had not experienced any hallucinations since September, although he was severely depressed.
>
> At trial, the jury rejected his insanity plea and found [Petitioner] guilty of the capital murder of thirteen-month-old Leyha. Based upon the jury's answers to the special punishment issues, the trial judge sentenced him to death.

Ex parte Thomas, 2009 WL 693606, at *1-3 (Cochran, J., concurring) (footnotes omitted).

Grounds for Relief

Petitioner brings the following grounds for relief:

1. Petitioner was deprived of his right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution because he was not competent to stand trial.

2. Defense counsels' failure to move for a competency hearing following Petitioner's return from Vernon State Hospital was constitutionally ineffective.

3. Race dynamics pervaded every aspect of Petitioner's trial in violation of the Sixth and Fourteenth Amendments.

4. Petitioner's jury was selected in a racially discriminatory manner in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

5. The Defense's failure to challenge the State's jury shuffle and disparate questioning of the only African American venire member to make it to voir dire constituted ineffective assistance of counsel under the Sixth and Fourteenth Amendments.

6. The presence of jurors opposed to interracial relationships deprived Petitioner of a fair trial and violated his right to equal protection under the Sixth and Fourteenth Amendments.

7. Defense counsels' failure to inquire into racial prejudice deprived Petitioner of his constitutional right to effective assistance of counsel.

8. The State withheld evidence that undermined Petitioner's theory of substance-induced psychosis in violation of *Brady v. Maryland*.

9. Defense counsels' failure to hire an expert in neuropharmacology was constitutionally ineffective.

*4 10. Defense counsels' failure to obtain a neuropsychological examination and the testimony of a neuropsychologist was constitutionally ineffective.

11. Defense counsels' reliance on the State's experts to prove key issues was constitutionally ineffective.

12. Defense counsels' failure to elicit opinions on sanity from Drs. Harrison and McGirk further rendered its counsel constitutionally ineffective.

13. Defense counsels' failure to present evidence of or seek a jury instruction on diminished capacity constituted constitutionally ineffective assistance of counsel.

14. Defense counsels' performance at the punishment phase of Petitioner's trial was constitutionally ineffective.

15. The trial court placed unconstitutional limitations on Petitioner's presentation of mitigating evidence.

16. Sentencing Petitioner to death violates the prohibition on cruel and unusual punishment set forth in the Eighth Amendment to the United States Constitution because Petitioner is indisputably and severely mentally ill.

17. As Petitioner is no longer a future danger, his death sentence violates the Eighth and Fourteenth Amendments.

18. Defense counsels' copious failures in handling expert witnesses further deprived Petitioner of effective assistance of counsel.

19. Defense counsels' repeated failures to object to inadmissible evidence was constitutionally ineffective.

20. Counsel was constitutionally ineffective for failing to object to the court's erroneous instruction on, and the entire evidence regarding, voluntary intoxication as there was no intoxication, and it should have never been allowed to infect the trial.

21. The cumulative evidence of counsel's failures at both phases of Petitioner's trial unequivocally constitutes constitutionally ineffective assistance of counsel.

22. The State violated Petitioner's due process rights under the Fifth, Sixth and Fourteenth Amendments when the State knowingly presented false and misleading testimony in violation of *Napue v. Illinois* and its progeny.

23. The trial court's refusal to define "reasonable doubt" denied Petitioner of his right to due process under the Fourteenth Amendment.

24. Petitioner was deprived of his Fifth Amendment privilege against self-incrimination because the jury used Petitioner's decision not to testify against him in imposing a sentence of death.

25. Petitioner's death sentence is unconstitutional under *Roper v. Simmons* because the State used prior convictions based on acts committed by Petitioner when he was a juvenile to establish an aggravating factor.

26. Petitioner was deprived of his right to a fair trial under the Sixth Amendment because his

attorney had a conflict of interest that was not waived.

27. Petitioner's appellate counsel was constitutionally ineffective.

Standard of Review

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997). Federal courts do "not sit as a super state supreme court on a habeas corpus proceeding to review error under state law." *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007) (citations omitted), *cert. denied*, 552 U.S. 1314 (2008); *Skillern v. Estelle*, 720 F.2d 839, 852 (5th Cir. 1983), *cert. denied*, 469 U.S. 873 (1984).

*5 The petition was filed in 2010, thus review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas corpus relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

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

28 U.S.C. § 2254(d). "By its terms § 2254 bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). AEDPA imposes a "highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations and internal quotation marks omitted). With respect to the first provision, a "state court decision is 'contrary to' clearly established federal law if (1) the state court 'applies a rule that contradicts the governing law' announced in Supreme Court cases, or (2) the state court decides a case differently than the Supreme Court did on a set of materially indistinguishable facts." *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (en banc) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003)), *cert. denied*, 551 U.S. 1141 (2007). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011). As such, "evidence later introduced in federal court is irrelevant to § 2254(d)(1) review." *Id.* at 184. "The same rule necessarily applies to a federal

court's review of purely factual determinations under § 2254(d)(2), as all nine Justices acknowledged." *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 105 (2012). The Supreme Court has specified that a Texas court's factual findings are presumed to be sound unless a petitioner rebuts the "presumption of correctness by clear and convincing evidence." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (citing 28 U.S.C. § 2254(e)(1)). The "standard is demanding but not insatiable;... [d]eference does not by definition preclude relief." *Id.* (citation and internal quotation marks omitted). More recently, the Supreme Court held that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (citation omitted). *See also Clark v. Thaler*, 673 F.3d 410, 421-22 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 179 (2012). The Supreme Court has explained that the provisions of AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). Federal habeas corpus relief is not available just because a state court decision may have been incorrect; instead, a petitioner must show that a state court decision was unreasonable. *Id.* at 694. Furthermore, when a state court provides alternative reasons for denying relief, a federal court may not grant relief "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Wetzel v. Lambert*, 565

U.S. ____, ____, 132 S. Ct. 1195, 1199 (2012) (emphasis in original).

Discussion and Analysis

Claim Number 1: Petitioner was deprived of his right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution because he was not competent to stand trial.

*6 Petitioner initially argues that he is entitled to relief because he was not competent to stand trial. He stressed that the Supreme Court has specified that "[i]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992). He noted that the test for competency is whether the defendant has the ability to understand the charges against him and the ability to communicate effectively with defense counsel. *Dusky v. United States*, 362 U.S. 402, 402 (1960). He asserts that a defendant must prove incompetence only by a preponderance of the evidence. *Cooper v. Oklahoma*, 517 U.S. 348, 355-56 (1996).

In support of the claim, Petitioner observed that he had plucked out one of his eyes just prior to trial and had been declared to be schizophrenic and psychotic. He states that members of the defense team had reported that he was unable to communicate effectively with them. Shelli Schade, a mitigation specialist, stated that Petitioner was very childlike, quiet and sad, and it was difficult to engage

him in conversation. She observed that he appeared drugged during trial. He asserted that Bobbie Peterson, who sat second chair as defense counsel, stated that he was unresponsive, disinterested, and unhelpful. Leah Eastep, legal assistant to the defense, stated that he just ate Skittles, or anything else sweet, all day long. Petitioner noted that he was given Zyprexa, a drug used for acute and maintenance treatment of schizophrenia and related psychotic disorders. He started out on 10 mg. of Zyprexa on June 24, 2004. Within a matter of two weeks, he was receiving the maximum dosage of 40 mg. per day.

The record in this case reveals that the issue of whether Petitioner was competent to stand trial was a major concern at trial, and the trial court went to great lengths to make sure that he was competent before going forward with the trial. There was no doubt at the time of trial that he suffered from schizophrenia, but his condition did not mean that he was incompetent to stand trial. "A defendant can be both mentally ill and competent to stand trial." *Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015). On direct appeal, the TCCA addressed Petitioner's claim that he was not competent at the time of his trial as follows:

> In April 2004, defense counsel and the prosecutor both filed motions requesting that [Petitioner] be examined to determine his competency to stand trial. The trial court ordered two psychologists to examine and evaluate [Petitioner] for competency, both of whom subsequently filed reports determining [Petitioner] to be incompetent to stand trial.

> On June 16, 2004, the trial court, having considered the psychological reports, found [Petitioner] to be incompetent to stand trial and ordered him to be committed to the Texas Department of Mental Health and Mental Retardation—Vernon Campus for restoration to competency. In late July 2004, [Petitioner] was returned to Grayson County. A report that [Petitioner] was competent was filed by Dr. Joseph Black, Chief Psychiatrist for the Competency Program at the Vernon Campus, with copies for both parties. At trial in February 2005, after the State rested, defense counsel moved for a directed verdict because the trial court had proceeded to trial without determining that [Petitioner's] competency had been restored. The trial court overruled [Petitioner's] motion for a directed verdict, and found, pursuant to Article 46B.084 and after having taken judicial notice of Dr. Black's report, that [Petitioner] was competent to stand trial....
>
> *7 [D]efense counsel specifically told the trial court he was not claiming [Petitioner] was not competent to stand trial. Without an objection or a claim of incompetency, the trial court was authorized to make the determination of competency as directed by Art 46B.084(a).
>
> Point of error seven is overruled.

Thomas v. State, 2008 WL 4531976, at *13-14 (footnotes omitted).

The issue was raised again in the state habeas corpus proceedings in claim number fifteen. 1 SHCR 152-54.1.[1] In claim sixteen, Petitioner also claimed that his attorney was ineffective on this issue. 1 SHCR 154-58. In response, defense counsel and other members of the defense team, as well as the prosecutors, filed affidavits with the state habeas court.

Lead counsel R. J. Hagood filed two affidavits. In his first affidavit, dated June 13, 2007, he stated: "We should have filed an objection to the competency report and should have urged a new competency hearing. When the State rested its case and I was asked whether the defense wanted to raise an incompetency issue in the middle of the trial and I said no I do not have any new evidence regarding competency." 2 SHCR 495 (¶ 10). The second, dated November 30, 2007, provided the following response to this issue:

> [Petitioner] claims in his fifteenth ground that [he] was incompetent to stand trial. In his sixteenth ground he claims that he received ineffective assistance of counsel because we did not request a new competency hearing. The reason for this was simple: [Petitioner] was not incompetent when we begun his trial. Although heavily medicated and still suffering from mental illness, I was able to talk to [Petitioner] and discuss the case with him. [Petitioner] was able to participate in our conversations and

[1] "SHCR" refers to the state habeas clerk's record preceded by the volume number and followed by the page number.

> help me with his defense. In fact, based on some of our conversations and [Petitioner's] ability to recall events and make suggestions, there was no question at that time that [Petitioner] was competent to stand trial. The trial court specifically asked me if I was claiming incompetency. I avoided the question as much as I could, but eventually had to tell the judge that we were not challenging competency at that time because I had no new evidence to dispute the findings at Vernon or suggest [Petitioner] was incompetent. Although I will work diligently for my clients, I will not lie to the court or file motions, the basis of which I know are not true.

6 SHCR 2145-46. In the remainder of this section of his affidavit, counsel noted that Ms. Schade disagreed with his assessment, but he expressed the opinion that her vehement beliefs against the death penalty clouded her judgment. Id. at 2146.

Co-counsel Bobbie Peterson also filed two affidavits. In her second affidavit, she specified that she "never stated that [she] believed [Petitioner] was incompetent. Although heavily medicated and completely disinterested in the proceeding, under the limited definition of competency in Texas, I cannot say with certainty that he was incompetent." 6 SHCR 2163 (¶ 14).

*8 Mitigation specialist Shelli Schade provided the following observations about Petitioner's competency in her affidavit:

> 12. [Petitioner's] ability to assist me was severely limited. He always had mittens on and was in a glass cell, on display twenty-four hours a day. He was extremely depressed. He was very childlike, quiet and sad, and it was not easy to start a conversation with him. He did not understand what we needed and could not identify or help locate witnesses. I know [Petitioner] was on a maximum dose of drugs before and during trial.
>
> 17. I heard they were giving [Petitioner] a high dose of a new drug, a psychotropic. I could tell he was drugged because he had such a flat affect, he was child-like and soft spoken, and did not make a lot of eye contact. [Petitioner] had been maintained on the drug for months.

1 Supp. SHCR 24, 25.

Leah Eastep, a legal assistant to the defense, stated that "Petitioner was on the maximum dosage of Zyprexa during the trial and wore leg braces during court. During the trial, he ate only [S]kittles, or anything sweet, all day long." 2 SHCR 432 (¶ 37).

Lead prosecutor Joseph Brown responded to the claim Petitioner was incompetent as follows in his affidavit:

> 9. [Petitioner] claims in his fifteenth ground that he was incompetent to stand trial. In his sixteenth ground he claims that he received ineffective assistance of counsel because defense counsel did not request a new

> competency hearing. I personally observed [Petitioner] during trial. Although he was medicated, he was able to communicate with his attorneys and the court. He was not actively psychotic. The trial court specifically asked Mr. Hagood if [Petitioner] was claiming incompetency. Mr. Hagood told the judge that they were not challenging competency at that time because he had no new evidence to dispute the findings at Vernon Hospital or suggest that [Petitioner] was incompetent. Had I believed that [Petitioner] was incompetent, I myself would have recommended that the court hold a hearing.

7 SHCR 2340.

The final relevant affidavit before the state trial court was provided by Kerye Ashmore, the second chair for the prosecution, who gave the following statement:

> [Petitioner] claims in his fifteenth ground that he was incompetent to stand trial. In his sixteenth ground he claims that he received ineffective assistance of counsel because defense counsel did not request a new competency hearing.
>
> [Petitioner] was evaluated by three experts retained by the State after his obtaining competency at Vernon State Hospital. None of those experts in any way suggested that [Petitioner] was anything but competent to stand trial.

> More importantly, I asked defense psychiatrist, Dr. Gripon, whether [Petitioner] was competent to stand trial during Gripon's testimony in front of the jury. His response was an unequivocal 'yes.'[2]
>
> It is difficult to understand now how [Petitioner] maintains that he was not competent to stand trial when even the defense's own star expert psychiatric witness indicated that he was.

6 SHCR 2327 (¶ 12). He likewise specified that he would have recommended a hearing if he had believed that Petitioner was incompetent. *Id.* at 2328 (¶ 13).

*9 After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact:

> 91. Dr. Gripon's testimony that [Petitioner] was competent at the time of trial was credible.
>
> 90.[3] Initially, [Petitioner] was found incompetent and sent to Vernon State Hospital for treatment. [ ] [Petitioner] was returned to Grayson County to stand trial after doctors at Vernon State Hospital found that he was then competent to stand trial. [ ]
>
> 91. No second claim of competency was raised.

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[2] 36 RR 101.

[3] It is noted that the state court findings are misnumbered.

92. The trial court specifically asked Mr. Hagood if [Petitioner] was claiming incompetency. Mr. Hagood told the judge that [Petitioner] was not challenging competency at that time.

93. The trial court on at least one occasion addressed [Petitioner] directly and asked him a question regarding Ms. Peterson (Cate's) representation. Ms. Cate had told the court that she had explained to [Petitioner] that while Ms. Peterson (Cate) was a prosecutor she had worked on a case against [Petitioner], that he understood and wished Ms. Peterson (Cate) to continue as co-counsel. ([7 RR 4-5]). This court did not observe [Petitioner] to be incompetent.

94. At no time did Ms. Peterson (Cate) suggest that [Petitioner] was unable to understand her.

95. During trial, [Petitioner] was treated for his schizophrenia with an antipsychotic drug called Zyprexa. As is widely recognized, antipsychotic drugs can have a "sedation-like" effect, and in severe cases, may affect thought processes. *Riggins v. Nevada*, 504 U.S. 127, 143 (1992) [ ].

96. As Mr. Hagood explains, the defense team should have objected to the competency when [Petitioner] returned from the state hospital. [ ] While his attorney recognized that

> the report should have been objected to, the defense team did not object to the findings.
>
> 97. Defendant was competent to stand trial.

10 SHCR 3539-40 (some citations omitted as indicated by brackets).

The state trial court went on to issue the following conclusions of law:

> 45. In ground 15, [Petitioner] claims that he was denied due process because he was not competent to stand trial. This ground was not objected to at trial and has been waived. In *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974), the Court of Criminal Appeals held that "the failure of petitioner, as defendant, to object at trial, and to pursue vindication of a constitutional right of which he was put on notice on appeal, constitutes a waiver of the position he now asserts" on a writ of habeas corpus; *see also Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (citing *Bagley* and noting that "[o]rdinarily, the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal").
>
> 46. Under Texas law, [Petitioner] was competent to stand trial.
>
> 47. A person is legally incompetent to stand trial if he lacks either (1) sufficient present ability to consult with his lawyer with a

reasonable degree of rational understanding or (2) a rational as well as factual understanding of the proceedings against him. *See* Tex. Code Crim. Proc. Ann. art. 46.02 §§ 1A (Vernon Supp. 2001); *Moore v. State*, 999 S.W.2d 385, 392 (Tex. Crim. App. 1999); *Guzman v. State*, 923 S.W.2d 792, 795 (Tex. App. – Corpus Christi 1996, no pet.). Evidence of mental impairment alone does not require a competency hearing where no evidence indicates that a defendant is incapable of consulting with counsel or understanding the proceedings against him. *Townsend v. State*, 949 S.W.2d 24, 26-27 (Tex. App. – San Antonio 1997, no pet.) (evidence that defendant was depressed and suicidal did not warrant an incompetency hearing); *Linger felt v. State*, 629 S.W.2d 216 (Tex. App. – Dallas 1982, pet. ref'd) (testimony from psychiatrist that defendant suffered from schizophrenia did not warrant a competency hearing). Generally, to raise the issue of incompetency, there must be evidence of recent severe mental illness or bizarre acts by the defendant or evidence of moderate retardation. *Guzman v. State*, 923 S.W.2d 792, 797-98 (Tex. App. – Corpus Christi 1994, no pet.).

*10 48. The record does not support [Petitioner's] claim that he was incompetent to stand trial or that his attorney was ineffective for failing to raise the competency issue a second time.

> 49. [Petitioner] has failed to prove that he was incompetent to stand trial or that his attorney was ineffective for failing to raise the competency issue a second time.

10 SHCR 3572-73. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

The analysis of the present ground for relief must begin with the fact that Petitioner did not raise the competency issue when the trial began or at any time during the trial. The TCCA on direct appeal observed that "counsel specifically told the trial court he was not claiming [Petitioner] was not competent to stand trial." *Thomas v. State*, 2008 WL 4531976, at *14. In the state habeas proceedings, the trial court made the conclusion of law that the ground was not objected to and was waived. 10 SHCR 3572 ¶ 45. The TCCA adopted the trial court's findings and conclusions in denying relief.

The Director argues that the competency claim is procedurally defaulted in light of the decisions issued by the state courts. The procedural default doctrine was announced by the Supreme Court in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court explained the doctrine as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of

> the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. Applying this principle, the Fifth Circuit has held that the "procedural-default doctrine precludes federal habeas review when the last reasoned state-court opinion addressing a claim explicitly rejects it on a state procedural ground." *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (citation omitted), *cert. denied*, 543 U.S. 1124 (2005). With this in mind, the Fifth Circuit has consistently held that the Texas contemporaneous objection rule constitutes an adequate and independent ground that procedurally bars federal habeas review of a petitioner's claims. *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir.), *cert. denied*, 551 U.S. 1193 (2007); *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005), *cert. denied*, 548 U.S. 925 (2006); *Dowthitt v. Johnson*, 230 F.3d 733, 752 (5th Cir. 2000) ("[T]he Texas contemporaneous objection rule is strictly or regularly applied evenhandedly to the vast majority of similar claims, and is therefore an adequate procedural bar."), *cert. denied*, 532 U.S. 915 (2001). The state habeas court explicitly rejected the competency claim because Petitioner did not object to it at trial. Petitioner made no attempt to overcome the procedural default by demonstrating either cause and prejudice or a fundamental miscarriage of justice; thus, the claim in procedurally defaulted. *See Turner*, 481 F.3d at 301.

*11 In the alternative, the state habeas court considered the claim on the merits and found that Petitioner was competent. It is abundantly clear that the Constitution "does not permit trial of an individual who lacks 'mental competency.' " *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (citing *Dusky*, 362 U.S. at 402). The test for competence is (1) whether the defendant has "a rational as well as factual understanding of the proceedings against him" and (2) whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Id.* The test on collateral review is "whether, in light of what was then known [by the state trial court], the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial." *Drope v. Missouri*, 420 U.S. 162, 174-75 (1975). A state court's factual finding of competency is presumed to be correct. *Deville v. Whitley*, 21 F.3d 654, 656 (5th Cir.), *cert. denied*, 513 U.S. 968 (1994).

In the present case, the trial court was clearly concerned with the issue of Petitioner's competency. The trial court had him sent to Vernon State Hospital when told that he was incompetent. The trial was begun only after doctors at Vernon State Hospital informed the trial court that he had been restored to competency. During the trial, the judge specifically asked Mr. Hagood if he was claiming that Petitioner was incompetent. The trial continued because Mr. Hagood said that he was not challenging competency at that time. The trial court fulfilled its responsibility of inquiring into the issue of whether Petitioner was competent.

Moreover, the finding that Petitioner was competent was supported by the record before the state court. First of all, Petitioner was returned to Grayson County from Vernon State Hospital after Dr. Black found that he was competent. Dr. B. Thomas Gray, a clinical psychologist, reported that Petitioner had been diagnosed as "malingering" and that it was "possible he may engage in gestures or behaviors, including possibly those involving self-harm, in a bid to appear more seriously mentally ill than he is, and to avoid the consequences of the current charges he faces." 3 SHCR 894. Petitioner's own expert, Dr. Gripon, testified that he was competent. 36 RR 101. Petitioner's lead counsel, R. J. Hagood, specified that Petitioner was not incompetent when the trial began. Although heavily medicated, Petitioner was able to talk to his attorney and discuss the case with him. Counsel stressed that Petitioner was able to participate in conversations and help with the defense. He added that Petitioner had the ability to recall events and make suggestions. Counsel was of the opinion that "there was no question at that time that [Petitioner] was competent to stand trial." 6 SHCR 2146. Co-counsel Peterson likewise stated that she was of the opinion that he was competent. Similarly, the prosecutors were of the opinion that he was competent. Petitioner attempts to counter this evidence by citing the opinions of Leah Eastep and Shelli Schade. He has not, however, rebutted the finding of fact that he was competent with clear and convincing evidence. With respect to the conclusion of law that Petitioner was competent, he at best has only shown that fairminded jurists could disagree about the correctness of the state court's decision;

thus, the decision was not unreasonable. *Coleman v. Thaler*, 716 F.3d 895, 902 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1306 (2014). Overall, with respect to the first ground for relief, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The first ground for relief is procedurally defaulted and, in the alternative, lacks merit. Petitioner also failed to overcome § 2254(d). All relief should be denied.

Claim Number 2: Defense counsels' failure to move for a competency hearing following Petitioner's return from Vernon State Hospital was constitutionally ineffective.

*12 Petitioner's second ground for relief is a continuation of his first ground for relief. This time, he alleges that his attorney was ineffective for failing to move for a competency hearing when he returned to Grayson County from the state mental hospital.

Ineffective assistance of counsel claims are governed by the Supreme Court's standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides a two-pronged standard, and the petitioner bears the burden of proving both prongs. *Id.* at 687. Under the first prong, he must show that counsel's performance was deficient. *Id.* To establish deficient performance, he must show that

"counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Id.* at 688. The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* at 690. Under the second prong, the petitioner must show that his attorney's deficient performance resulted in prejudice. *Id.* at 687. To satisfy the prejudice prong, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An ineffective assistance of counsel claim fails if a petitioner cannot satisfy either the deficient performance or prejudice prong; a court need not evaluate both if he makes an insufficient showing as to either. *Id.* at 697.

In the present case, although counsel indicated, and the state court found, that counsel should have raised the issue of competency a second time when Petitioner was returned from Vernon State Hospital, the fact remains that counsel did not have a basis for raising the issue. Dr. Black found that Petitioner's competency had been restored. Dr. Gray observed that Petitioner was found to be malingering, and lead counsel Hagood was of the opinion that he was not incompetent when the trial began. Mr. Hagood further specified that during the course of the trial he "had no new evidence to dispute the findings at

Vernon or suggest [Petitioner] was incompetent." 6 SHCR 2146. Even though Petitioner was suffering from schizophrenia, the case law was clear at the time of trial that the "presence or absence of mental illness or brain disorder is not dispositive" of competency. *See Mata v. Johnson*, 210 F.3d 324, 329 n.2 (5th Cir. 2000). *See also Patterson v. Cockrell*, 69 Fed.Appx. 658, at *4-6 (5th Cir.), *cert. denied*, 540 U.S. 1008 (2003). "A defendant can be both mentally ill and competent to stand trial." *Mays*, 757 F.3d at 216. In light of counsel's opinion that Petitioner was not incompetent and there was no new evidence to support a claim of incompetency, his representation was not deficient for failing to raise the issue. Counsel appropriately explained in his affidavit that "[a]lthough I will work diligently for my clients, I will not lie to the court or file motions, the basis of which I know are not true." 6 SHCR 2146. The case law is abundantly clear that counsel was not required to make frivolous or futile motions or objections. *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002), *cert. denied*, 538 U.S. 926 (2003); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). Petitioner has not shown that counsel's representation was deficient because he failed to raise the competency issue a second time at the beginning of the trial. Moreover, in light of the conclusion in the first ground for relief that Petitioner was competent, Petitioner cannot show that he was prejudiced by counsel's failure to file a motion for a competency hearing. He has not satisfied either *Strickland* prong.

*13 In addition to the foregoing, the claim should be rejected in light of the findings by the state court.

The state habeas court issued the following two conclusions of law in response to Petitioner's claim that his attorney was ineffective for failing to move for a competency hearing:

> 48. The record does not support [Petitioner's] claim that he was incompetent to stand trial or that his attorney was ineffective for failing to raise the competency issue a second time.
>
> 49. [Petitioner] has failed to prove that he was incompetent to stand trial or that his attorney was ineffective for failing to raise the competency issue a second time.

10 SHCR 3572-73. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner argues in his reply that the affidavits of Hagood, Peterson, Eastep and Schade were sufficient for the state court to find that he did not understand the charges against him and was unable to communicate effectively with counsel. He argues that there was more than enough evidence before the state court to establish prejudice for his attorneys' failure to raise the issue of competency. Nonetheless, there was abundant evidence to support the state court's findings. Petitioner has not satisfied his burden of rebutting the presumption of correctness that must be accorded to the state court's findings of fact with clear and convincing evidence, as required by 28 U.S.C. §

2254(e)(1). With respect to the state court's conclusions of law, Petitioner at best has only shown that fairminded jurists could disagree about the correctness of the state court's decision; thus, the decision was not unreasonable. *Coleman*, 716 F.3d at 902. Overall, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Finally, in the context of § 2254(d), the deferential standard that must be accorded to counsel's representation must also be considered in tandem with the deference that must be accorded state court decisions, which has been referred to as "doubly" deferential. *Richter*, 562 U.S. at 105. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* "If the standard is difficult to meet, that is because it was meant to be." *Id.* at 102. *Also see Morales v. Thaler*, 714 F.3d 295, 302 (5th Cir.), *cert. denied*, 134 S. Ct. 393 (2013). Petitioner has not satisfied his burden of overcoming the "doubly" deferential standard that must be accorded to counsel in conjunction with § 2254(d). He has not shown that he is entitled to relief based on ineffective assistance of counsel. The second ground for relief lacks merit.

Claim Number 3: Race dynamics pervaded every aspect of Petitioner's trial in violation of the Sixth and Fourteenth Amendments.

*14 In his third ground for relief, Petitioner asserts that race dynamics pervaded every aspect of his trial in violation of the Sixth and Fourteenth Amendments. He supports the claim by observing that he is an African-American man convicted of murdering his estranged Caucasian wife, their son, and her mixed-race daughter by another man. It should be noted that he was actually convicted only of the capital murder of thirteen month old Leyha Marie Hughes. He complains that he was convicted by an all-white jury. He stressed that four of the jurors stated that they opposed interracial marriages.

In support of the claim, Petitioner discussed the history of racism in Grayson County. He placed special emphasis on the lynching of an African-American man 77 years earlier who had been accused of raping a white woman. In both his state and federal petitions, he relied on little more than studies and statistics, along with anecdotal stories. He argues that the studies "support the common-sense assertion that the fact that [Petitioner] is African-American and the victims were white and mixed-race had an influence on the outcome of the trial." *See* petition, page 49.

In evaluating the claim, the most noteworthy aspect of the ground for relief is that Petitioner relies on an incident that occurred 77 years earlier, along with generalized studies and statistics – none of

which gives rise to an inference that racism played any role in this case. The claim is conclusory, which does not support a petition for a writ of habeas corpus. *See Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000); *Koch*, 907 F.2d at 530; *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) ("We are thus bound to re-emphasize that mere conclusory allegations do not raise a constitutional issue in a habeas proceeding."). He also claims that his rights under the Sixth and Fourteenth Amendments were violated, but he failed to cite any case law in support of this allegation. By comparison, the Director appropriately observed that the type of approach being employed by Petitioner was rejected in *McClesky v. Kemp*, 481 U.S. 279 (1986). In order to establish an equal protection violation, Petitioner "must prove that the decisionmakers in *his* case acted with a discriminatory purpose." *Id.* at 292 (emphasis in original). The Supreme Court held that it would not "infer" a discriminatory purpose on the part of the State; thus, the equal protection claim was rejected. *Id.* at 299. In the present case, Petitioner's conclusory allegations that race dynamics pervaded every aspect of his trial fares no better. He has not shown that the decision makers in his case acted with a discriminatory purpose. He has not shown that he is entitled to relief on this claim.

In addition to the foregoing, the ground for relief should be denied for reasons provided by the state habeas court. The ground for relief was presented as ground number seventeen in the state habeas corpus proceedings. The trial court gave the following reasons for rejecting the claim:

> 50. Under ground 17, [Petitioner] does not actually state an error upon which he could receive relief.
>
> 51. [Petitioner] did not make an objection at trial regarding ground 17 and has waived this issue.

10 SHCR 3573. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

The second reason articulated by the state court concerns the contemporaneous objection rule, which was fully discussed on pages 13-14 of this opinion. Petitioner has made no attempt to overcome the procedural default by demonstrating either cause and prejudice or a fundamental miscarriage of justice; thus, the claim is procedurally defaulted. *See Turner*, 481 F.3d at 301.

*15 The first reason articulated by the state habeas court is essentially the same as this Court's analysis. The state court found that he "does not actually state an error upon which he could receive relief." 10 SHCR 3573. Similarly, this Court has found that he has offered nothing other than conclusory allegations and bald assertions, which are insufficient to support a petition for a writ of habeas corpus. See Miller, 200 F.3d at 282; Koch, 907 F.2d at 530; Ross, 694 F.2d at 1011. Petitioner simply has not shown that he is entitled to relief on this claim. Furthermore, he has not shown, as required by §

2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Overall, Petitioner has not shown that he is entitled to relief on his third ground for relief.

Claim Number 4: Petitioner's jury was selected in a racially discriminatory manner in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Claim Number 5: The Defense's failure to challenge the State's jury shuffle and disparate questioning of the only African American venire member to make it to voir dire constituted ineffective assistance of counsel under the Sixth and Fourteenth Amendments.

In claim number four, Petitioner asserts that the State's request for a jury shuffle in his case was made with the intent to remove African-Americans from the portion of the venire most likely to be presented for individual voir dire. He further asserts that the State's disparate questioning of the only African-American venire member reached during voir dire (as a result of the jury shuffle) similarly violated his constitutional rights. He argues that separately and in combination, these actions by the State violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and equal protection. In claim number five, Petitioner argues that trial counsel's

failure to object to the State's request to shuffle and the disparate questioning was constitutionally ineffective. He added that the failure to object precluded the errors from being raised on direct appeal, which prejudiced him.

The analysis of this claim begins with the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court held that the Equal Protection Clause forbids the State from challenging potential jurors solely on the basis of their race. *Id.* at 89. Under Batson, a defendant must establish a prima facie case that the State exercised its peremptory challenges on the basis of race. *Id.* at 96. Once the defendant has established a prima facie case of discrimination, the burden shifts to the State to provide a race-neutral reason for each strike. *Id.* at 97. The trial court then makes a determination of whether the defendant has established purposeful discrimination. *Id.* at 98. A state court's finding of the absence of discriminatory intent is "a pure issue of fact" that is accorded great deference and will not be overturned unless clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 364-65 (1991).

The Supreme Court analyzed the State's use of jury shuffles in the context of *Batson* in *Miller-El v. Cockrell* ("*Miller-El I*"), 537 U.S. 322 (2003). Texas provides that either party, based solely upon visual inspection of the venire, may request the court to shuffle or randomly reseat the entire panel. *See* Tex. Code Crim. Proc. art. 35.11. Both the State and the defendant have the absolute right to one jury shuffle. *Smith v. State*, 648 S.W.2d 695, 696 (Tex. Crim. App. 1983). In *Miller-El I*, the Supreme Court held that

"the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise[d] a suspicion that the State sought to exclude African-Americans from the jury." 537 U.S. at 346. The Supreme Court noted, however, that the jury shuffle alone "might not be denominated as a Batson claim because it does not involve a peremptory challenge." *Id.* A reviewing court's role is to "determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary." *Id.* at 341. The case was remanded for further development.

*16 *In Miller-El II*, the Supreme Court reiterated its finding in *Miller-El I* that a prosecutor's request to shuffle a jury when a predominant number of African-Americans were seated near the front of the panel "raise[d] a suspicion that the State sought to exclude African-Americans from the jury." 545 U.S. at 253-54. The Court went on to hold that where the State fails to offer any racially neutral reason for shuffling the jury, "nothing stops the suspicion of discriminatory intent from rising to an inference." *Id.* at 254. Overall, the Court found three factors supported a finding that the State violated *Batson*: (1) the prosecution's use of the jury shuffle when members of a protected class are disproportionately seated near the front of the venire, (2) disparate questioning, and (3) evidence of official office policy or

long-standing customs systematically excluding a protected class from juries. *Id.* 253-66.

More recently, the Fifth Circuit discussed the use of jury shuffles in the context of the *Miller-El* line of cases in *Fields v. Thaler*, 588 F.3d 270 (5th Cir. 2009), *cert. denied*, 562 U.S. 901 (2010). In *Fields*, unlike *Miller-El*, all courts rejected the *Batson* claim. The Fifth Circuit distinguished the cases as follows:

> Although Fields, like Miller-El and Reed, was tried in Dallas County, the similarities end there. Fields's trial took place in Dallas County in October 2002, long after the trials of Miller-El and Reed in 1986 and 1983, respectively. *See Miller-El I*, 537 U.S. at 328, 123 S.Ct. 1029; *Reed*, 555 F.3d at 366, 371. There is no evidence that the now infamous Sparling Manual, outlining the reasoning for excluding minorities from jury service, was still in use by Dallas County prosecutors when Fields's case was tried. *See Miller-El II*, 545 U.S. at 264, 125 S.Ct. 2317; *Reed*, 555 F.3d at 382. There were no jury shuffles like the ones found to have been used for discriminatory reasons in Miller-El's case. See *Miller-El II*, 545 U.S. at 254, 125 S.Ct. 2317. There were no "trick" questions by the prosecutor, *id.* at 261, 125 S.Ct. 2317, and the prosecutor did not use different "scripts" for jurors of different races. *Id.* at 255-57, 125 S.Ct. 2317. The transcript of the voir dire examination in Fields's case indicates that the prosecutor asked nearly identical questions of all of the prospective jurors. The trial judge, noticing that the prosecutor had peremptorily

> struck all five of the blacks remaining after agreed strikes, invited defense counsel to make a Batson challenge. When the prosecutor said that he struck Randy Williams because of gold teeth and gold chains, the trial judge pressed the prosecutor for further explanation as to why his reasons for the strike were not racially motivated. Fields's counsel was invited to cross-examine the prosecutor after the prosecutor gave his reasons, but declined, and only challenged the prosecutor's reasons for striking Green, Williams, and Peterson. In sum, the strongest evidence of racial discrimination in this case is the fact that the prosecutor struck all five of the blacks remaining in the venire after challenges for cause and agreed strikes. Although that is indeed convincing statistical evidence, *see Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317, it is not enough to support the granting of habeas relief, where the habeas petitioner fails to rebut the State's race-neutral reason for striking a juror.

Id. at 281. The Fifth Circuit found that the state court's decision that a prospective juror was not peremptorily struck because of her race was not an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Id.*

With the case law in mind, the analysis of claim number four should begin with a comparison of the claim as it was presented in the state habeas proceedings to the way it has been presented in the present proceedings. Claim number four was

presented as claim number eighteen in the state habeas corpus proceedings. Petitioner argued only that the State's jury shuffle violated his rights under the Sixth and Fourteenth Amendments. In the present proceeding, Petitioner's claim goes beyond a complaint about the State's shuffle to include complaints about the State's allegedly disparate questioning of African-American venire members.

*17 Petitioner's embellishment of the claim raises exhaustion issues. State prisoners bringing petitions for a writ of habeas corpus are required to exhaust state remedies before proceeding in federal court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective. 28 U.S.C. § 2254(b)(1). In order to exhaust properly, a state prisoner must "fairly present" all of his claims to the state court. *Picard v. Connor*, 404 U.S. 270, 275 (1981). This means that a petitioner must have informed the state court system of the same facts and legal theories upon which he bases his assertions in his federal habeas petition. *Id.* at 276-77; *Dispensa v. Lynaugh*, 847 F.2d 211, 217-18 (5th Cir. 1988). "The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court." *Morris v. Dretke*, 413 F.3d 484, 491 (5th Cir. 2005) (citation omitted). "It is not enough that all the facts necessary to support the federal claim were before the state courts...or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Rather, the petitioner must have presented the substance of his federal constitutional claim to the

state courts. *Id.*; *Picard*, 404 U.S. at 513. The state court must have been apprised of all of the facts and legal theories upon which the petitioner bases his assertions. *Picard, supra*; *Dispensa*, 847 F.2d at 217; *Rodriguez v. McKaskle*, 724 F.2d 463, 466 (5th Cir.), *cert. denied,* 469 U.S. 1039 (1984). Where a petitioner makes the same legal claim to a federal court which he presented to the state courts, but supports that claim with factual allegations which he did not make to the state courts, he has failed to satisfy the exhaustion requirement. *Rodriguez*, 724 F.3d at 466; *Burns v. Estelle*, 695 F.2d 847, 849 (5th Cir. 1983). In Texas, all claims must be presented to and ruled on by the Texas Court of Criminal Appeals. *Richardson v. Procunier*, 762 F.2d 429, 432 (5th Cir. 1985); *Deters v. Collins*, 985 F.2d 789, 797 (5th Cir. 1993). When a petition includes claims that have been exhausted along with claims that have not been exhausted, it is called a "mixed petition," and historically federal courts in the Fifth Circuit have dismissed the entire petition for failure to exhaust. *Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978) (*en banc*).

As a result of *Coleman*'s procedural default doctrine, federal courts have dismissed unexhausted claims in a mixed petition as procedurally barred. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.), *cert. denied*, 515 U.S. 1153 (1995). *See also Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). Such unexhausted claims would be procedurally barred because if a petitioner attempted to exhaust them in state court they would be barred by Texas abuse-of-the-writ rules. *Fearance*, 56 F.3d at 642. The Fifth

Circuit has held that the procedural bar contained in Tex. Code Crim. Proc. Ann art. 11.071 § 5 is an adequate state ground for finding procedural bars in light of decisions by the Texas Court of Criminal Appeals. *Ibarra v. Thaler*, 691 F.3d 677, 684-85 (5th Cir. 2012); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010), *cert. denied*, 564 U.S. 1006 (2011). The procedural bar may be overcome by demonstrating either cause and prejudice for the default or that a fundamental miscarriage of justice would result from the court's refusal to consider the claim. *Fearance*, 56 F.3d at 642 (citing *Coleman*, 501 U.S. at 750-51).

In the present case, Petitioner extended claim number four to include complaints about the State's allegedly disparate questioning of African-American venire members. The new arguments were not presented to the state courts and are unexhausted. Petitioner made no attempt to overcome the procedural default by demonstrating either cause and prejudice or a fundamental miscarriage of justice; thus, his allegation that the State engaged in disparate questioning of African-American venire members is procedurally defaulted.

The portion of claim number four that is exhausted and is properly before the Court is Petitioner's complaint that the State's jury shuffle violated his rights under the Sixth and Fourteenth Amendments. Petitioner acknowledges, however, that he did not object to the jury shuffle at trial; thus, the issue was not preserved for review on direct appeal. In the state habeas corpus proceedings, the trial court made a finding of fact that Petitioner did not object to the shuffle. 10 SHCR 3536 (¶ 69). The trial court went

on to issue the conclusion of law that he did not object to the jury shuffle and that he waived his rights regarding the issue. 10 SHCR 3574 (¶ 56). The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and its own review. *Ex parte Thomas*, 2009 WL 693606, at *1. The ground for relief was procedurally defaulted in light of the contemporaneous objection rule. Petitioner made no attempt to overcome the procedural default by demonstrating either cause and prejudice or a fundamental miscarriage of justice; thus, the claim must be rejected as procedurally defaulted.

*18 Despite the waiver, the state habeas court, in the alternative, discussed the claim on the merits. The issue was fully developed in the state habeas corpus proceedings. Affidavits from all of the attorneys addressed the issue. While the first affidavits from both defense counsel indicated that they remember some minorities in the first three rows, neither states with any certainty how many. 2 SHCR 496 (¶ 14) (Hagood); 1 Supp. SHCR 10 (¶ 16) (Peterson). Petitioner's reply includes both a pre-shuffle and post-shuffle seating chart. *See* reply, pages 25-26. The pre-shuffle seating chart shows two African-Americans in the first row, while the post-shuffle shows no African-Americans in the first row. In his second affidavit, lead counsel Hagood states that his "recollection of the original panel was that there was many younger people in the front of the panel as well as several people who had the appearance of those who might use drugs. It was not surprising that those would have been unacceptable

jurors to the State. I was certainly not surprised when the State requested a shuffle nor did I think it was racially motivated." 6 SHCR 2146.

Prosecutor Ashmore explained the decision requesting a shuffle in his affidavit as follows:

> The decision to request a shuffle was not based on race. As the jury was seated, my recollection is that there might have been two black veniremen in [the] first three rows, but I am not sure of the exact number. I do know that there were not "numerous" black veniremen seated early in the original call of the jury. As Mr. Hagood noted in his affidavit, there were a number of "scruffy looking" white veniremen in the first several rows. Mr. Brown and I discussed this fact, and no mention was ever made about attempting to shuffle minorities.
>
> Both Mr. Brown and I thought that there were a number of white veniremen that appeared rough looking and because of this, a shuffle was asked for. I think that I commented that some of the white veniremen looked like they had just come from jail. In any event, trying to adjust the venire as to where minorities may have been seated had nothing to do with the request of the State.

6 SHCR 2328. Lead prosecutor Brown's comments were similar to those expressed by Ashmore: "When the jury panel was first seated, we noticed a relatively large number of jurors in the first few rows were of a

rough appearance. I believe that almost all of these rough jurors were white. My memory is that we checked our listings of the criminal histories of the jurors in the front and that a relatively high percentage of jurors in front had criminal histories as opposed to jurors in the back." 7 SHCR 2340 (¶ 10).

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact:

> 65. The State timely requested a jury shuffle.
>
> 66. There were more African-Americans in the first one hundred venire men prior to the shuffle.
>
> 67. The State requested the shuffle based on the appearance of several of the venire men in the first one hundred.
>
> 68. There is no evidence that the request for a shuffle was racially motivated.
>
> 69. [Petitioner] did not object to the shuffle.
>
> 70. As a result of the State's shuffle, only two of the 102 potential jurors questioned during voir dire were African American. Ex. 27 at ¶ 18; R.R. Vo. 23, P. 115.
>
> 71. All members of [Petitioner's] jury were white. Ex. 27 at ¶ 18.

> 72. There was no evidence that the jury's decision was racially motivated.
>
> 73. No objection was ever made by [Petitioner] to the purported racial bias of any juror that was seated.

10 SHCR 3536-37.

The state trial court went on to issue the following conclusions of law:

> 52. [Petitioner] has failed to present by a preponderance of the evidence any proof of purposeful prosecutorial or jury discrimination in his particular case. *County v. State*, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989).
>
> 56. [Petitioner] did not object to the jury shuffle and waived any rights under that issue.
>
> *19 57. In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that a prosecutor violates a defendant's equal protection rights if he uses peremptory strikes to eliminate members of defendant's race from the jury.
>
> 58. Texas Courts have declined to make the broad extension of *Batson* that [Petitioner] seeks. See *Ladd v. State*, 3 S.W.3d 547, 563 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1070 (2000).
>
> 59. [Petitioner] has failed to prove by a preponderance of the evidence any fact which

> would establish purposeful discrimination by the court and has failed to cite any law which would support the extension of *Batson* to jury shuffle requests. As such, [Petitioner] has also failed to prove by a preponderance of the evidence that his attorneys were ineffective for not object[ing] to the State's request for a jury shuffle.
>
> 60. The defense and the state are entitled to a shuffle, if requested.
>
> 61. The failure to shuffle when timely requested is reversible error.
>
> 62. The requested shuffle did not constitute reversible error.
>
> 63. *Batson* does not apply to a jury shuffle.

10 SHCR 3574-75. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Overall, the state habeas court found that the State's request for a shuffle was based on the appearance of several of the venire men in the first one hundred. There was no evidence presented to the court that the shuffle was racially motivated. Petitioner has not overcome the presumption of correctness that must be accorded to these findings by clear and convincing evidence. In conclusion, claim

number four must be rejected because it was procedurally defaulted and because it lacks merit.

In claim number five, Petitioner presents claim number four in the context of an ineffective assistance of counsel claim. In the state habeas corpus proceedings, lead counsel Hagood explained that it was his "recollection of the original panel was that there was many younger people in the front of the panel as well as several people who had the appearance of those who might use drugs. It was not surprising that those would have been unacceptable jurors to the State. I was certainly not surprised when the State requested a shuffle nor did I think it was racially motivated." 6 SHCR 2146.

In the aftermath of the *Miller-El* line of cases, the Fifth Circuit dealt with a claim of ineffective assistance for failing to object to a jury shuffle in *Blanton v. Quarterman*, 543 F.3d 230 (5th Cir. 2008), *cert. denied*, 556 U.S. 1240 (2009). The Fifth Circuit noted that *Miller-El I* stood for the proposition "that a racially-motivated jury shuffle, along with other factors indicating intent to exclude African-Americans, can 'raise a suspicion' of purposeful discrimination and rebut a prosecutor's race-neutral justification for a peremptory strike." *Id.* at 242. The Fifth Circuit further noted, however, that the jury shuffle alone "might not be denominated as a Batson claim because it does not involve a peremptory challenge." *Id.* (quoting *Miller-El I*, 537 U.S. at 346).

*20 *Miller-El I* was decided before the trial began in the present case. As such, the prosecutors and defense counsel were on notice of the decision issued

in *Miller-El I*. Nonetheless, the attorneys on both sides agreed that race had nothing to do with the shuffle. Defense counsel stated that he was not surprised that the State requested a shuffle in light of the appearance of people in the front of the original panel. He did not think the request for a shuffle was racially motivated. In light of his impressions, his representation was not deficient for failing to object to the shuffle. It is again noted that counsel was not required to make frivolous or futile motions or objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527. Furthermore, Petitioner cannot show prejudice in light of the state court finding that the shuffle was not racially motivated. The ineffective assistance of counsel claim lacks merit.

In addition to the foregoing, the claim must be rejected for the reasons provided by the state court. In light of the evidence before the state habeas court, the court issued the following specific conclusions of law regarding whether counsel was ineffective on this issue:

> 55. [Petitioner] has not demonstrated that his counsel's performance fell below a reasonable objective standard, and he has not demonstrated that any alleged error prejudiced his defense.
>
> 59. [Petitioner] has failed to prove by a preponderance of the evidence any fact which would establish purposeful discrimination by the court and has failed to cite any law which would support the extension of *Batson* to jury shuffle requests. As such, [Petitioner] has also

> failed to prove by a preponderance of the evidence that his attorneys were ineffective for not object[ing] to the State's request for a jury shuffle.

10 SHCR 3574-75. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and its own review. *Ex parte Thomas*, 2009 WL 693606, at *1. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. At best, he has only shown that fairminded jurists could disagree about the correctness of the state court's decision; thus, the decision was not unreasonable. Overall, relief should be denied on Petitioner's fourth and fifth grounds for relief.

One last issue should be mentioned regarding the ineffective assistance of counsel claim. In *Miller-El II*, the prosecution's use of the jury shuffle was just one of the factors that led to the conclusion that the State violated *Batson*. A second factor was the State's use of disparate questioning. Petitioner did not raise the disparate questioning aspect of *Miller-El II* in his state application for a writ of habeas corpus, but he added it in the present proceedings. His inclusion of the disparate questioning aspect of *Miller-El II* was not properly exhausted and was procedurally

defaulted. Since the pleadings were filed in this case, the Supreme Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The Supreme Court opened the door slightly for a showing of cause and prejudice to excuse the procedural default in *Martinez* and *Trevino*. The Fifth Circuit summarized the rule announced in *Martinez* and *Trevino* as follows:

> To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim[s] ha[ve] some merit," *Martinez*, 132 S. Ct. at 1318; and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application. See *id.*; *Trevino*, 133 S. Ct. at 1921.

*21 *Preyor v. Stephens*, 537 Fed.Appx. 412, 421 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2821 (2014). The Fifth Circuit subsequently reaffirmed this basic approach in *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014).

In the present case, Petitioner's underlying claims of ineffective assistance of trial counsel with respect to the jury shuffle were not substantial. Similarly, his initial state habeas counsel was not ineffective even though he did not include a disparate questioning argument in presenting state claim number eighteen. Petitioner has not satisfied the requirements to overcome the procedural default as set forth in

Martinez and *Trevino*. Overall, Petitioner is not entitled to relief on either claim number four or claim number five, and the ineffective assistance of counsel claim is not saved by the rule announced in *Martinez/Trevino*.

Claim Number 6: The presence of jurors opposed to interracial relationships deprived Petitioner of a fair trial and violated his right to equal protection under the Sixth and Fourteenth Amendments.

Claim Number 7: Defense counsels' failure to inquire into racial prejudice deprived Petitioner of his constitutional right to effective assistance of counsel.

Claims six and seven involve the interracial dynamics of the case. Prospective jurors were required to fill out lengthy jury questionnaires before voir dire. Petitioner observed that four members of the jury openly admitted in their responses that they "oppose people of different racial backgrounds marrying and/or having children." In claim number six, Petitioner argues that it is highly likely that the self-proclaimed racial biases of these four impaneled jurors "prevent[ed] or substantially impair[ed] the performance of [their] duties...in accordance with [their] instructions and [their] oath." Petition at 83 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). In claim number seven, Petitioner argues that his attorney was ineffective for failing to inquire into racial prejudice.

The jury questionnaire mentioned by Petitioner contained the following question:

> The Defendant in this case, Andre Thomas, and his ex-wife, Lauren Boren Thomas, are of different racial backgrounds. Which of the following best reflects your feelings or opinions about people of different racial backgrounds marrying and/or having children.
>
> (___) I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so.
>
> (___) I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my feelings to myself.
>
> (___) I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children.
>
> (___) I think people should be able to marry or be with anyone they wish.

3 SHCR 922 (question 105). The following three jurors and one alternate juror checked either the first or second option: Barbara Armstrong (3 SHCR 941), Charles William Copeland (3 SHCR 964), Marty Glenn Ulmer (3 SHCR 989), and Norma Sue Hintz (3 SHCR 1015). Marty Glenn Ulmer checked the first option while the remaining three checked the second option. The first three individuals served as jurors. Norma Sue Hintz was chosen as an alternate juror

and was excused at the close of trial. Petitioner argues that the inclusion of these four people on his jury violated his right to a fair trial and equal protection under the Sixth and Fourteenth Amendments.

*22 The Sixth Amendment right to a fair trial includes the right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). The right to an impartial jury consists of nothing more than the quest for "jurors who will conscientiously apply the law and find the facts." *Wainwright*, 469 U.S. at 423; *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due Process means a jury capable and willing to decide the case solely on the evidence before it"); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."). The Supreme Court "firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror." *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). A prospective juror may not be rejected merely because of "the racial stereotypes held by that party." *Id.* Instead, a prospective juror may be excluded if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Morgan*, 504 U.S. at 728 (quoting *Wainwright*, 469 U.S. at 424).

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Id.* at 729 (citations omitted). "Voir dire examination serves the dual purpose of

enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). Under the Due Process Clause of the Fourteenth Amendment, a trial court may not deny an African-American defendant the opportunity to question prospective jurors on the subject of racial bias when the circumstances suggest the need for such questioning. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). Furthermore, a "capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner v. Murray*, 476 U.S. 28, 36-37 (1986). On the other hand, there is no per se rule requiring voir dire on racial bias or prejudice in every case in which the defendant and the victim are of different races. *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976). Instead, whether such *voir dire* is necessary requires "an assessment of whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.' " *Id.* at 596 (quoting Coke on Littleton 155b (19th ed. 1832)).

The facts of this case reveal that the trial court conducted a lengthy voir dire. Each prospective juror was questioned individually. The attorneys were permitted to question them about racial bias. Of the four jurors in question, the first prospective juror to be questioned was Marty Glenn Ulmer. The record reveals that the trial court and the attorneys questioned him extensively in order to determine

whether he should be on the jury. He informed the court that "until I've seen the proof of it, I wouldn't – – I could not form an opinion." 16 RR 11. When questioned by the State, he specified that he had not formed an opinion in this case even though his ex-wife knew Petitioner's mother-in-law. *Id.* at 15-16. He repeatedly specified that he would have to listen to all of the evidence before making up his mind. *Id.* at 17, 19. He stated that he could presume Petitioner to be innocent until proven guilty. *Id.* at 22. He repeatedly stated that he would follow the law. *Id.* at 22, 25, 30.

When questioned by the defense, Ulmer stated that he could say "yes" to imposing the death penalty if the defendant was proven guilty and proven sane. *Id.* at 53. On the other hand, he stated that he would have a hard time sentencing a man to death if there was something wrong with him. *Id.* Defense counsel questioned him about racial bias as follows:

> *23 MS. PETERSON: Well, how would — how do you feel about, if you are sitting on a case where the defendant or a defendant accused of capital murder was a black male, and the victim, his wife, was a white female.
>
> VENIREPERSON: Well, I think — I think it's wrong to have those relationships, my view, but we are all human beings and God made every one of us. And, you know, as far as — I don't care if it is white/white, black/black, that don't matter to me. If you've done it, you are a human being, you have got to own up to your responsibility.

> MS. PETERSON: So, the color of anyone's skin would not have any impact or bearing upon your deliberations?
>
> VENIREPERSON: No, not according to that, no.
>
> MS. PETERSON: Okay.
>
> VENIREPERSON: Not whether they were guilty or innocent.
>
> MS. PETERSON: Would the race of either the defendant or the victim be something that you would take into consideration in determining, or considering, answering these special issues, or considering either the death penalty or life imprisonment?
>
> VENIREPERSON: No, I wouldn't judge a man for murder or something like that according to something like that, no, I would not.

16 RR 64-66. Following this exchange, both the State and the defense specified that they were not challenging Ulmer for cause and were accepting him as a juror. *Id.* at 67-68.

The second of the four jurors to be questioned was Barbara Armstrong. The state trial court thoroughly questioned her in order to determine is she was impartial:

> THE COURT: Okay. What I am asking you is, can you listen to the evidence in this case and make up your mind based on the evidence, or

based on what you've already heard and read, do you think you have already formed an opinion as to his guilt or innocence?

VENIREPERSON: Well, I haven't formed an opinion. But, I mean, all I can go by is just what I've heard. It is just hearsay....

THE COURT: So, what I'm telling you is, whatever you have heard before, whether from friends, or heard about it on the news, or read it in the newspaper, you've got to be able to tell me you can set that aside, not consider that for any purpose, and just make up your mind in this case based on the evidence that you hear in this courtroom if you are chosen as a juror.

VENIREPERSON: I think I can do that.

THE COURT: I can't have you just think.

VENIREPERSON: I can do that.

THE COURT: Okay. I apologize for that. Let me get into it before the lawyers have to. We got to be certain in these things. This is a very serious case, obviously, and so, we need to know for sure that you can do that.

VENIREPERSON: I can.

THE COURT: If you can, that's fine. And if you can't, that's fine, but we just need to know.

VENIREPERSON: I can.

16 RR 127-28.

The attorneys followed-up with an extensive line of questioning to determine whether Armstrong would follow the law and be an impartial juror. After going over the charges against Petitioner, the state prosecutor and Armstrong had the following exchange:

> MR. ASHMORE: Is there anything in the fact that — those allegations, where you do not feel like you could apply the law we've gone over in this case?
>
> VENIREPERSON: I don't think so. I think I can sit and listen to the evidence. 16 RR 177. A similar question was posed by Petitioner's co-counsel:
>
> *24 MS. PETERSON: And I gather, throughout all of this, and it is my impression that you're going to listen to the evidence and render a verdict —
>
> VENIREPERSON: Of course, I am. I mean, I'm not coming in here with my mind made up or, anything. I have no idea. Yes, I would listen to all of the evidence.

16 RR 197. Both sides then chose to forego a challenge to Armstrong, and both sides stipulated that they would accept her as a juror. *Id.* at 198.

Christopher Copeland was the next prospective juror to be questioned who had stated that he opposed

people of different racial backgrounds marrying and/or having children. The trial court asked him the following questions regarding the issue of impartiality:

> THE COURT: Is there anything that you have read or heard about this case previously that would cause you to already have formed an opinion regarding this man's guilt or innocence.
>
> VENIREPERSON: No, sir.
>
> THE COURT: Could you, if chosen as a juror, listen to the evidence from the witness stand and make up your mind based solely upon the evidence that you hear?
>
> VENIREPERSON: Yes.

16 RR 258. The state prosecutor likewise asked him questions to determine if he would be impartial:

> MR. BROWN: Anything you are thinking about — anything you're thinking that you need to tell us about whether you could serve as a juror in this case?
>
> VENIREPERSON: You know, you just — you have to listen to both sides.
>
> MR. BROWN: Okay.
>
> VENIREPERSON: You've got to prove he did it. They prove he didn't, whatever, insanity. You know, that's what a jury does, isn't it?

> They listen to both sides and they make up their mind as to —
>
> MR. BROWN: You haven't made up your mind on anything yet, have you?
>
> VENIREPERSON: No.

16 RR 294. He subsequently told defense counsel that he would not make up his mind until he hears both sides of the story. *Id.* at 299. Neither the State nor the defense challenged him for cause, and both accepted him as a juror. *Id.* at 300-01.

The final juror in question was Norma Hintz, the alternate juror who was ultimately excused from jury deliberations. She told the trial court that she had not already formed an opinion regarding the guilt or innocence of Petitioner based on anything she had read in the newspaper or heard. 26 RR 100. She specified that she thought she could make up her mind based just upon the evidence that she would hear in court. *Id.* at 101. She stated that she could follow the law. *Id.* at 118. Neither the State nor the defense challenged her for cause, and both accepted her as an alternate juror. *Id.* at 146.

The record reveals that Petitioner was fully permitted to question the prospective jurors in the quest to obtain an impartial jury. He was accorded all of his rights under the Sixth and Fourteenth Amendments. It is again noted that Petitioner argued that it is highly likely that the self-proclaimed racial biases of these four jurors prevented or substantially impaired the performance of their

duties in accordance with their instructions and their oath. Petition at 83. However, his assertion is speculative. He has offered nothing other than conclusory allegations and bald assertions, which are insufficient to support a petition for a writ of habeas corpus. *See Miller*, 200 F.3d at 282; *Koch*, 907 F.2d at 530; *Ross*, 694 F.2d at 1011. Moreover, apart from being conclusory, the claim must also be rejected because the Supreme Court "firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror...'we may not accept as a defense to racial discrimination the very stereotype the law condemns.' " *McCollum*, 505 U.S. at 59 (citation omitted). A person may not be removed as a juror based merely on "the racial stereotypes held by that party." *Id.* Petitioner had every opportunity to explore whether a prospective juror should be disqualified as impartial under the law. He was accorded all of his rights under the Sixth and Fourteenth Amendments in order to pick an impartial jury. Claim number six lacks merit.

*25 With respect to Petitioner's related ineffective assistance of counsel claim, the Fifth Circuit has found that an "attorney's actions during voir dire are considered to be a matter of trial strategy." *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995). *See also Seigfried v. Greer*, 372 Fed.Appx. 536, 540 (5th Cir.), *cert. denied*, 562 U.S. 1066 (2010). Competent counsel need not engage in searching investigations of potential jurors during voir dire where no suspicion of juror bias is raised by previous testimony. See *Fuller v. Johnson*, 158 F.3d 903, 907 (5th Cir. 1998), *cert.*

denied, 526 U.S. 1133 (1999). Moreover, where the record indicates that trial counsel questioned prospective jurors in detail, a petitioner is not entitled to relief where there is no reasonable probability that further questions would have produced a different result. *Harris v. Johnson*, 81 F.3d 535, 540 (5th Cir.), *cert. denied*, 517 U.S. 1227 (1996). The issue of whether counsel was obligated to explore the jury's racial attitudes when the victim was white and the defendant was African-American was considered by the Fifth Circuit in *Moore v. Maggio*, 740 F.2d 308 (5th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985). The Fifth Circuit found that counsel's decision not to bring up the subject of racial bias before the jury "might be considered sound trial strategy" when there was no showing that the trial was attended by any racial animosity. *Id.* at 317-18. More recently, the Fifth Circuit rejected an ineffective assistance of counsel claim based on counsel's failure to question potential jurors about racial bias when there was no showing that counsel should have been aware of racial bias or prejudice among the venire. *Preyor*, 537 Fed.Appx. at 423. The finding was made even though the defendant was African-American and the victim was white. *Id.* at 422. The ultimate inquiry is whether trial counsel's failure to ask questions rendered a defendant's trial fundamentally unfair. *Mu'Min*, 500 U.S. at 425-26. A petitioner must also show that "but for his attorneys failure to inquire into racial bias of prospective jurors, his trial would have reached a different result." *Clark v. Collins*, 19 F.3d 959, 965 (5th Cir. 1994), *cert. denied*, 513 U.S. 966 (1994). A state court's resolution of this issue is presumed correct, and a habeas petitioner must rebut

this presumption by clear and convincing evidence. *Varga v. Quarterman*, 321 Fed.Appx. 390, 395 (5th Cir. 2009), *cert. denied*, 558 U.S. 1078 (5th Cir. 2009).

The ineffective assistance of counsel claim was fully developed during the state habeas corpus proceedings. The ineffective assistance of counsel claim was presented as claim number 21 in the state habeas corpus proceedings. Mr. Hagood provided the following response in his affidavit:

> Under [Petitioner's] arguments, no white juror in Grayson County, Texas, would be able to sit in judgment on a black defendant. I do not believe that is the case. I have had many black defendants found not guilty by all-white jurys. I take issue with [Petitioner's] decision to race-bait. It appears that the prosecutors and jurors are being accused of racial prejudice without any basis in the record. [Petitioner] seeks to claim racial discrimination, then speculates and cherry-picks items from the record in order to support the proposition they wish the courts to believe. I believe that this sort of unfounded accusation cheapens the judicial system and threatens the ideology behind all jury trials.
>
> Next, under ground 21, [Petitioner] states that we were ineffective for failing to inquire into the racial bias of each juror. Strategically, I would never ask pointed questions regarding racial bias from a juror without a real basis to do so. Voir dire can be delicate in that you do not want to alienate a juror who may end up on

> the jury. Accusing someone of racism is a good way to do that....For those jurors who expressed some problem with interracial relationships, either Ms. Peterson or I questioned them to the extent necessary for us to request a strike for cause or make a decision to use a strike against them. Often time, there were much worse jurors upon whom we exercised our strikes.

6 SHCR 2147.

Co-counsel Peterson provided the following response in her affidavit:

> 18. Next, under ground 21, [Petitioner] states that defense counsel was ineffective for failing to inquire into the racial bias of each juror. Strategically, I am cautious in asking questions regarding racial bias of each juror so that I do not sound like I am accusing a juror of being racist and angering a potential juror. Nona Dodson had suggested several questions to pose to jurors. Mr. Hagood and I followed some of her advise which, based on many years as a trial attorney, we believed would be useful. We did not take all of her suggestions.
>
> 19. For those jurors who expressed some problem with interracial relationships, either Mr. Hagood or I questioned them to the extent necessary for us to request a strike for cause or make a decision to use a strike against them.

*26 6 SHCR 2163-64. The record makes it clear that the attorneys questioned the prospective jurors extensively to determine whether they should be disqualified. When appropriate, they questioned jurors about racial bias, such as when they questioned Mr. Ulmer. Mr. Hagood observed that there was not any basis in the record of racial prejudice. Petitioner has not shown otherwise. Defense counsels' decision to forego questioning three of the four jurors about racial bias was simply a matter of trial strategy. Counsels' decision not to object to them was likewise trial strategy, particularly when they thought there were worse jurors to strike.

After accumulating all of the evidence necessary to make a decision on these two claims, the state trial court issued the following findings of fact:

> 71. All members of [Petitioner's] jury were white.
>
> 72. There is no evidence that the jury's decision was racially motivated.
>
> 73. No objection was ever made by [Petitioner] to the purported racial bias of any juror that was seated.

10 SHCR 3537. Petitioner has not overcome the presumption of correctness that must be accorded to these findings of fact with clear and convincing evidence.

The state trial court also issued the following conclusions of law:

52. [Petitioner] has failed to present by a preponderance of the evidence any proof of purposeful prosecutorial or jury discrimination in his particular case. *County v. State*, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989).

53. *Strickland* encompasses the prohibition against second guessing counsel's trial strategy on voir dire. Not every attorney will conduct voir dire in the same manner, and, with hindsight, every attorney may have wished that additional questions were asked. However, the fact that another attorney might have pursued other areas of questioning during voir dire will not support a finding of ineffective assistance. *See Delrio v. State*, 840 S.W.2d 443, 445 (Tex. Crim. App. 1992); *Owens v. State*, 916 S.W.2d 713, 716 (Tex. App. – Waco 1996).

54. [Petitioner] has failed to overcome the presumption that trial counsel was effective during voir dire questioning. *See Shilling v. State*, 977 S.W.2d 789, 791 (Tex. App. –Ft. Worth 1998, pet. ref'd) (ineffectiveness claim fails where record is devoid of reasoning counsel employed during voir dire); *Sungia v. State*, 733 S.W.2d 594, 600 (Tex. App. – San Antonio 1987, no pet.) (overruling complaint regarding brief voir dire that failed to include certain questions based on absence of indication that trial counsel's decision was unsupported).

55. [Petitioner] has not demonstrated that his counsel's performance fell below a

> reasonable objective standard, and he has not demonstrated that any alleged error prejudiced the defense.

10 SHCR 3574. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. He made the conclusory claim that the trial court's findings and conclusions on this matter are both unsupported by the evidence and contrary to clearly established law. However, the findings and conclusions are supported by the record and consistent with clearly established law. At best, he has only shown that fairminded jurists could disagree about the correctness of the state court's decision; thus, the decision was not unreasonable. Overall, the Petitioner's sixth and seventh grounds for relief lack merit and should otherwise be rejected because he has not satisfied the requirements of § 2254(d).

Claim Number 8: The State withheld evidence that undermined Petitioner's theory of substance-induced psychosis in violation of *Brady v. Maryland*.

*27 Petitioner next alleges that the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Petitioner asserts that he was high on dextromethorphan ("DXM") at the time of the offense. DXM is the active ingredient in Coricidin. The State retained Dr. Shannon Miller, an expert on DXM. Petitioner claims that Dr. Miller would have provided information favorable to him. He further alleges that the State chose to bury its contacts with Dr. Miller. He alleges that the State violated *Brady* by failing to disclose its information regarding Dr. Miller.

The Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon 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." *Brady*, 373 U.S. at 87. The duty to provide favorable evidence includes impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In order to prevail on a *Brady* claim, the Fifth Circuit requires a petitioner to show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to his guilt or innocence. *Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008) (citations omitted). "Evidence is 'material' only when there exists 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Id.* (citing Bagley, 473 U.S. at 682). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the

outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). "Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *West*, 92 F.3d at 1399 (citation omitted). The State in under no duty "to make a complete and detailed accounting to defense counsel of all investigatory work done." *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir.), *cert. denied*, 513 U.S. 1060 (1994).

Petitioner's *Brady* claim was fully developed during the state habeas corpus proceedings. Kerye Ashmore, one of the prosecutors, responded to the claim as follows:

> Dr. Shannon Miller was contacted by me about the possibility of testifying at trial. This contact occurred several months before any type of retainer was paid to him. As best I remember, at the time Dr. Miller was originally contacted, the State was still awaiting the results of evaluation and testing of [Petitioner] by Drs. Scarano, Axelrad and Oropeza. Initially, Dr. Miller indicated that he did not feel that he could be involved in any testing or evaluation of [Petitioner] or testify in his case without being licensed to practice medicine in the State of Texas. He indicated he would expect the State to bear the cost of any such certification and needed to check further on that. For a period of time there was really no discussion between the prosecutors or Dr. Miller concerning his involvement in the case.

Dr. Miller was in possession of the basic facts of the case, including the State's position of what activities demonstrated that [Petitioner] knew his conduct was wrong.

Finally, after paying the retainer fee, Dr. Miller was contacted by Joe Brown and myself. This was during voir dire in this case and after the submission of reports to us (which we in turn provided to the defense) concerning [Petitioner] and to which these experts testified. In talking with Dr. Miller he indicated that the cases that he had dealt with where he had seen psychosis did involve larger amounts of DXM and he questioned whether the amount of DXM in this case could produce a psychosis. However, Dr. Miller indicated that he would not be able to form an opinion concerning [Petitioner], his mental state, his psychosis, the cause thereof, or his sanity unless and until he could perform a complete evaluation of [Petitioner].

*28 It was decided to not do this because of several factors: (1) attendant cost of having Dr. Miler come to Grayson County to evaluate and subsequently to testify, and (2) the fact that [Petitioner] had already been fully tested and evaluated by three expert witnesses the State had already hired. Joe and I felt that [Petitioner] had probably been seen by at least one, probably more than that, defense experts for purposes of evaluation. We felt like [Petitioner] had been seen enough and we doubted that the defense team would allow us

to bring another expert in during voir dire in this case to do another evaluation. We therefore indicated to the doctor that we would not be needing further involvement from him.

Dr. Miller was not requested to prepare a report.

Defense attorney R. J. Hagood requested that I meet with him to discuss our expert witnesses and who we anticipated would be called at trial. This was one reason that a decision had to be made concerning Dr. Miller. Therefore, as I remember, the following day I met with Mr. Hagood with the State's list of expert witnesses which had previously been provided to the defense. It was a rather lengthy list, and I was attempting to accommodate the defense request to narrow down the list.

At this meeting, I went through the list of the State's potential expert witnesses and advised Mr. Hagood who I anticipated would in reality be called to testify. During this meeting, I advised Mr. Hagood that the State would not be calling Shannon Miller. Of course, Mr. Hagood inquired as to why and he was advised of the above conversation and reasoning for us not using Dr. Miller. In fact, during this conversation, when I advised Mr. Hagood that Dr. Miller was not going to be used and the reasons for that, Mr. Hagood indicated that did not surprise him as he had been doing a lot of reading, particularly on the Internet, about DXM. He further stated that the

> position that the drugs did not cause psychosis was going to be the position of defense experts, including Dr. Harrison, at the trial. I took from that the defense already had expert witnesses who could testify whatever mental problems [Petitioner] may have had prior to and at the time of the murder were not substance induced. Accordingly, it came as no surprise that the defense in fact put this testimony on through expert witnesses.

6 SHCR 2325-37. Mr. Ashmore's statement was consistent with the statements provided by Joe Brown, the lead prosecutor. 7 SHCR 2339-40. Mr. Brown specified that this information was disclosed to the defense team by Mr. Ashmore, although he was not present during the conversation. *Id.* at 2340.

Mr. Hagood, in turn, provided the following statement in his affidavit:

> [P]etitioner claims that the State suppressed *Brady* material. I am unaware of any proof, including that in [Petitioner's] 11.071 writ application and attachments, which establishes that Shannon Miller ever made any finding regarding [Petitioner], much less a finding favorable to [Petitioner]. I recall sitting down with the State prosecutor, Kerye Ashmore, and sorting out which of the State's experts would actually testify, but do not remember the substance of that conversation other than that Miller would not be brought to testify. I have known Mr. Ashmore for a considerable time, and have handled numerous

> cases which he prosecuted. I have never known Mr. Ashmore to be dishonest or unethical. I have no reason to believe differently based on the supporting information in this 11.071 application.

6 SHCR 2145. Co-counsel Bobbie Peterson likewise stated that she was "unaware of any fact regarding a person named Shannon Miller ever having made a finding regarding [Petitioner], much less a finding favorable to [Petitioner]." 6 SHCR 2162. She further stated that she had never known Mr. Ashmore to withhold *Brady* evidence. *Id.*

*29 Pursuant to an order of the trial court, Dr. Miller also provided a statement. He noted that he was contacted by Joe Brown and Kerye Ashmore. 9 SHCR 3226. He was given basic facts about the case. He advised the prosecutors that he would not be able to form an opinion about Petitioner unless he reviewed records pertaining to that period of time, and he never received the records. *Id.* at 3227. He specified that he never made a diagnosis in the case nor came to any final conclusions about Petitioner. *Id.* He was never asked to prepare a report. *Id.* He was subsequently informed that the case was closed and asked to return any unused portion of the retainer. *Id.*

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact:

> 74. Dr. Miller is a psychiatrist who has written extensively about DXM addiction, is a

specialist on the effects of drug addiction, and is certified in addiction medication. *See* Ex. 39.

75. In January 2005, the State formally retained Dr. Miller, signed a modified version of his retainer agreement and sent him a retainer check for ten hours work. *See supra*, Part I-I.

76. The State Prosecutors telephoned Dr. Miller and recounted the basic facts of the case to him, including the State's position. During that conversation, Dr. Miller preliminarily questioned whether DXM could have played a part in the kind of psychotic episode [Petitioner] experienced on March 27, 2004. State's Resp. to App. for Writ of Habeas Corpus at 23.

77. There was no evidence from Dr. Shannon Miller, exculpatory or otherwise.

78. Dr. Shannon Miller states in his affidavit that he did not form an opinion concerning [Petition], his mental state, his psychosis, the cause thereof, or his sanity because he never performed a complete evaluation of [Petitioner] or examined all of the records.

79. Mr. Ashmore's and Mr. Brown's decision was not to use Dr. Miller because of several factors including: (1) the attendant cost of having Dr. Miller come to Grayson County to evaluate and subsequently to testify, and (2)

the fact that [Petitioner] had already been fully tested and evaluated by three expert witnesses the State had already hired.

80. The affidavit of J. Kerye Ashmore is credible.

81. The affidavit of Joseph D. Brown is credible.

82. Mr. Ashmore and Mr. Brown believed that [Petitioner] had been seen by enough experts for the State and doubted that the defense team would allow them to bring another expert in during the voir dire in the case to do another evaluation.

83. Dr. Miller was not requested to prepare a report.

84. Mr. Ashmore and Mr. Hagood met to discuss the State's list of expert witnesses which had previously been provided to the defense prior to or during voir dire. Mr. Ashmore went through the list of the State's potential expert witnesses and advised Mr. Hagood who the State anticipated would be called to testify. During this meeting, Mr. Ashmore advised Mr. Hagood that the State would not be calling Shannon Miller. Mr. Hagood inquired as to why and was advised of the reasoning for the State not using Dr. Miller. During this conversation, Mr. Ashmore advised Mr. Hagood that Dr. Miller could not give an opinion without examining the defendant and

> Dr. Miller indicated the cases he had dealt with generally involved larger doses of DXM.

10 SHCR 3537-38. Petitioner questions the credibility of the State prosecutors, but he failed to overcome the presumption of correctness that must be accorded to the state court findings with clear and convincing evidence. In his reply, he merely characterized Mr. Ashmore's assertions as highly suspect and incredible.

*30 The state trial court went on to discuss the law surrounding *Brady*. After discussing the law, the court issued the following conclusions of law:

> 40. [Petitioner] has failed to satisfy any of the three prongs set out in *Brady*...
>
> 41. There was no evidence from Dr. Shannon Miller, exculpatory or otherwise.
>
> 42. [Petitioner] has failed to prove that there was any evidence suppressed by the State.
>
> 43. [Petitioner] has failed to prove by a preponderance of the evidence that Dr. Miller gave evidence favorable to [Petitioner].
>
> 44. [Petitioner] has failed to prove by a preponderance of the evidence the prong regarding materiality and that but for that material evidence the results of his trial would have been different.

10 SHCR 3571-72. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

The state court's discussion of the law adhered to clearly established law as determined by the Supreme Court. In light of the evidence before it, the state court appropriately found that none of the three *Brady* prongs were satisfied. Petitioner at best has only shown that fairminded jurists could disagree about the correctness of the state court's decision; thus, the decision was not unreasonable. *Coleman,* 716 F.3d at 902. Overall, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Petitioner has not shown that he is entitled to relief on claim number eight.

Claim Number 9: Defense Counsel's failure to hire an expert in neuropharmacology was constitutionally ineffective.

Petitioner took the position at trial that he was not guilty by reason of insanity. The State took the position that Petitioner either knew right from wrong or that any psychosis he was experiencing at the time of the offense was substance induced. With respect to

the latter position, it should be noted that voluntary intoxication under Texas law does not constitute a defense to the commission of a crime. Tex. Penal Code § 8.04(a) & (d). Defense counsels' trial strategy was to prove that Petitioner was insane at the time of the offense, not because of voluntary intoxication, but because of his prior medical and mental history.

In the present claim, Petitioner argues that counsel was ineffective for failing to hire a neuropharmacologist to educate the team prior to trial or to oppose the State's experts at trial. He submitted an affidavit from Dr. Jonathan Lipman, a neuropharmacologist, who specified that he would have been available to the defense team at the time of trial. 2 SHCR 547, ¶¶ 1, 4 ("I am Board Certified in neuropharmacology...I was available to consult with the attorneys representing [Petitioner] following his arrest in 2004 and subsequently, and was, in fact, consulting with attorneys in Texas in this period of time."). He asserted that "there was and is no affirmative forensic toxicological support for the view that [Petitioner] was intoxicated by alcohol, marijuana or Coricidin's ingredients at the time of the offenses." *Id.* at 548, ¶ 10. Petitioner argues that if the defense team had hired a neuropharmacologist, like Dr. Lipman, the jury would have heard that his behavior before, during, and after the murders did not resemble intoxication-induced psychosis, but was consistent with paranoid psychotic mental illness. *Id.* at 550, ¶ 15. He further argues that if the defense team had made this argument, then there would have been no basis for the State's experts to offer testimony on the voluntary intoxication theory.

*31 Petitioner notes that instead of calling a neuropharmacologist, counsel called Dr. Edward B. Gripon, a forensic psychiatrist, who addressed the substance-induced psychosis theory. In an affidavit, Dr. Gripon expressed the opinion that "[d]etailed opinions regarding specific pharmacological issues should have been directed to a pharmacologist, i.e., a pharmacist." 2 SHCR 447, ¶ 14.

In response, the Director noted that the Fifth Circuit has held that where a petitioner claims counsel failed to impeach a witness or cast doubt on the credibility of a witness' testimony, then any arguable weakening of the State's evidence must be viewed in light of the totality of the State's evidence. *Leal v. Dretke*, 428 F.3d 543, 549 (5th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006). The Director proceeded to review the relevant evidence, particularly the evidence submitted by the State's experts.

The record reveals that Petitioner's ineffective assistance of counsel claim was fully developed during the state habeas corpus proceedings. Mr. Hagood's affidavit included the following response to Dr. Lipman's affidavit:

> I have read the affidavit by Jonathan Lipman. I understand his conclusion, I just don't [think it] has anything to do with this case. Neither the State nor any of its experts alleged that substances which triggered [Petitioner's] psychotic episode were still in his system at the time he murdered his wife and her children. It appears that Mr. Lipman's conclusions were based on that assumption. I believe that Mr.

> Lipman was working under the premise that the [word] "intoxicated" had its vernacular meaning rather than the specific meaning assigned to it in [the] Texas Code of Criminal Procedure. Lipman does not address the combination of DXM, alcohol and marijuana nor does he give any opinion about the amount of drugs and alcohol in [Petitioner's] system *at the time of the psychotic break*. Lipman's opinion, as set [out in] his affidavit, would not have been beneficial to [Petitioner] because it fails to address [the] core issues in this case: first, whether [Petitioner] understood that his actions were wrong when he murdered his wife and her children and second, whether the psychosis he was experiencing at the time of the murder had been premeditated by his drug and alcohol abuse prior to the day of the murder.

6 SHCR 2150 (emphasis in original). Mr. Hagood went on to specifically address the claim that he was ineffective for failing to hire a neuropharmacologist:

> Petitioner] argues that I was ineffective for failing to hire a neuropharmacologist and request a neuropsychological examination for [him]. As stated above, [Petitioner] is missing the point of the State's case. The issue was not whether [Petitioner] was psychotic. He was. The issue was not whether he had a large amount of DXM, alcohol and marihuana in his system when he committed the triple murder. He did not, and no one claimed that he did. The issue was whether [Petitioner], in a psychotic

> state, still understood that his conduct was wrong when he murdered his wife and her two children and if not, was the psychotic state caused or aggravated by the use of a substance. I am not aware of a neuropharmacologist who is qualified to diagnose schizophrenia as opposed to substance induced behavior or who could extrapolate the amount of drugs in his system at the exact moment of the psychotic break.

*32 6 SHCR 2152. Citing the affidavit, the Director emphasized Mr. Hagood's conclusion that he was not aware of a neuropharmacologist who could address the core issue of whether Petitioner knew right from wrong at the time of the incident and, if not, was the psychotic state caused or aggravated by the use of a substance.

In addition to Mr. Hagood's affidavit, the three state psychiatrists/psychologists who testified at trial submitted affidavits. Dr. Victor R. Scarano observed that Dr. Lipman did not interview nor evaluate Petitioner. 6 SHCR 2182, ¶ 13. He added that Dr. Lipman misconstrued his central point in his report and testimony, which was Petitioner "at the time of the murders was suffering from a drug induced psychosis." *Id.* Dr. Scarano went on to provide a thorough explanation for his conclusion and the shortcomings in Dr. Lipman's analysis. Dr. David Axelrad likewise discussed the shortcomings in Dr. Lipman's analysis and how his "conclusions were not relevant to [his] diagnosis." 6 SHCR 2278, ¶ 54. Finally, Dr. Peter Oropeza, like the two psychiatrists, observed that Dr. Lipman's use of the term

"intoxication" was not the term as defined in the Texas Penal Code. 6 SHCR 2295, ¶ 54. He asserted that Petitioner's statement that "[h]ad the defense team hired a neuropharmacology expert, the jury would have learned that there was no scientific support for the State's theory that Mr. Thomas was intoxicated by alcohol, marijuana or DXM at the time of the murders," was false, misleading and a misrepresentation of his diagnosis. *Id.* at 2296, ¶ 58.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the findings of fact that included the following:

> 20. The blood samples and a urine test from [Petitioner] on the morning of the crime did not reveal any evidence of intoxication due to [Petitioner's] ingestion of either marijuana or Coricidin on the evening of March 25, 2004. [ ] As stipulated by the State at trial, a less than measurable amount of Dextromethorphan ("DXM") was found in [Petitioner's] blood. [ ]
>
> 35. Mr. Hagood's and Ms. Bobbie Peterson (Cate's) trial strategy was to prove that [Petitioner] was insane at the time of the offense, not because of intoxication, but because of his prior medical and mental history.
>
> 36. The State's position was that [Petitioner] either knew right from wrong or that any psychosis he had was substance induced.

37. For the guilt/innocence phase of the trial, the State primarily relied on Drs. David Axelrad and Victor Scarano and psychologist Dr. Peter Oropeza. [ ]

39. The defense team also retained three core experts for the guilt/innocence phase of the trial: psychiatrist Dr. Edward Gripon and Dr. Jay Crowder and psychologist Richard Rogers. Ex. 72. None had specific credentials as a neuropharmacologist and only Dr. Gripon was called at trial. The defense team did not initially retain any experts for the mitigation phase of the case. [ ]

41. The Defense neither retained nor called a neuropharmacologist or a toxicologist.

44. Texas Law provides that "Voluntary intoxication does not constitute a defense to the commission of crime" and "intoxication" means "disturbance of mental or physical capacity resulting from the introduction of any substance into the body." Texas Penal Code § 8.04(a) & (d).

*33 48. On direct examination, Dr. Victor Scarano set out his opinion that [Petitioner's] use of drugs and alcohol precipitated [Petitioner's] psychotic episode.

52. The court's instruction on voluntary intoxication was supported in that: (1) the evidence showed that [Petitioner] told Dr. Peter Oropeza that he smoked marijuana the

night before the murder [ ]; (2) the medical records of [Petitioner] showed that there was marijuana in his urine. There was insufficient blood to test for marijuana in the blood as what blood was left from the hospital was used to test for DXM; (3) there was DXM still in [Petitioner's] blood at the time his blood was drawn several hours after the murders; (4) there was evidence from nurse Natalie Sims that [Petitioner] had told her that if it hadn't been for the drugs the crime would not have happened. The defense expert, Dr. Harrison, was also questioned about this [ ]; and (5) the defense expert Dr. Gripon, admitted during cross-examination that the combined use of marijuana, alcohol, and DXM would aggravate and exacerbate a pre-existing condition of schizophrenia [ ]. Numerous witnesses testified to [Petitioner's] drug and/or alcohol abuse. [ ] The State's expert psychiatrists also found that [Petitioner's] psychosis was substance-induced. [ ]

57. Dr. Victor Scarano, M.D., testified about [Petitioner's] mental state at the time he murdered the victims. During direct examination, Dr. Scarano testified that a person can be mentally ill and delusional and still be sane according to the legal definition of sanity in Texas. [ ] Dr. Scarano described how mental illness can be substance-induced. [ ] The doctor also explained to the jury that a substance-induced mental illness or psychosis does not disappear when the substance is taken

away from a subject. Instead, the "psychosis can continue once it is precipitated by a substance for a longer period of time, even when the substance is removed." [ ] The doctor testified that [Petitioner] was psychotic when he killed his wife and her two children, but that the psychosis was triggered by his substance abuse in the preceding days and weeks. [ ] The doctor also set out the facts of the case, some of which had been given to him by [Petitioner], and applied those facts to the legal definition of sanity. In Dr. Scarano's medical opinion, [Petitioner] knew that his conduct was wrong and was not legally insane at the time he murdered his wife and her two children. [ ]

60. Dr. Jay Crowder, a psychiatrist hired by the defense but not called at trial, informed the defense that he could not rule out the possibility that the psychotic episode leading up to the murders was induced by his use of a combination of drugs and alcohol.

162. As a medical doctor and a psychiatrist, part of a doctor's education and training would include the pharmacological effect of drugs and alcohol on the brain and relating to psychotic behavior.

169. Neuropharmacologists are not the only individuals who should be allowed to testify in court in regards to the effects of drugs on the central nervous system. These individuals are not physicians, but rather are consultants whose services may be requested by the

> physician responsible for the evaluation and/or treatment of the patient. Many physicians, including family physicians, emergency room physicians, internists, pediatricians, and psychiatrists, have expertise in identifying the effects of drugs or their absence on human behavior.

*34 10 SHCR 3529, 3531-36, 3550-52 (some citations omitted as indicated by brackets).

The state trial court also issued the following conclusions of law:

> 87. Dr. Lipman's conclusions in his affidavit do not prove by a preponderance of the evidence that the opinions and diagnosis of the State's experts are erroneous.
>
> 88. [Petitioner] has failed to prove by a preponderance of the evidence, that counsel's failure to hire a neuropharmacologist or to have a neuropharmacological exam performed on [him] was constitutionally deficient.

10 SHCR 3579. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

The specific issue before the Court in claim number nine is whether defense counsel was ineffective for failing to hire a neuropharmacologist, such as Dr. Lipman. In *Strickland*, the Supreme

Court described defense counsel's duty to investigate as follows:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. *See also Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005). The Supreme Court subsequently observed that these three post-*Strickland* cases, each of which granted relief on ineffective assistance claims, did not establish "strict rules" for counsel's conduct "[b]eyond the general requirement of reasonableness." *Pinholster*, 563 U.S. at 195. *See also Brown v. Thaler*, 684 F.3d 482, 490-91 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1244 (2013). "An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Richter*, 562 U.S. at 108. Petitioner's counsel were "entitled to formulate a strategy that was reasonable at the time

and to balance limited resources in accord with effective trial tactics and strategies." *Id.* at 107. "A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight...and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

In the present case, defense counsel hired three psychiatrists and/or psychologists. The state trial court appropriately observed that neuropharmacologists are not the only individuals who can testify in court regarding the effects of drugs on the central nervous system. Both Dr. Edward Gripon and Dr. Jay Crowder had sufficient training and expertise in identifying the effects of drugs or their absence on human behavior. Dr. Crowder, in turn, advised the defense team that he could not rule out the possibility that the psychotic episode leading up to the murders was induced by his use of a combination of drugs and alcohol. Overall, defense counsel formulated a strategy that was reasonable in recognizing the possible issues regarding Petitioner's mental state and employing three experts. "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up." *Rompilla*, 545 U.S. at 383. Counsel was not deficient by not canvassing the field to find a more favorable defense expert. *Dowthitt*, 230 F.3d at 748.

*35 In an analogous situation, the Fifth Circuit observed that defense counsel perhaps could have investigated more or hired different experts; nonetheless, courts "must be particularly wary of arguments that come down to a matter of degrees.

Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir.) (citations omitted), *cert. denied*, 136 S. Ct. 86 (2015). Defense counsel possibly could have employed another expert. Nonetheless, counsel acted reasonably in this case by recognizing the need for experts and, in fact, hiring several experts. Petitioner has not shown that their representation fell below an objective standard of reasonableness and was otherwise deficient by failing to also hire a neuropharmacologist.

The Director also appropriately noted that the omitted testimony should be viewed in light of the totality of the State's evidence. State differently, the question of prejudice should be considered. To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citation omitted).

As an initial matter, Dr. Lipman's affidavit does not show that the outcome of the case would have been different. Mr. Hagood's assessment of Dr. Lipman's affidavit astutely observed that it does not have "anything to do with this case." 6 SHCR 2150. Dr. Axelrad similarly observed that Dr. Lipman's conclusions were not relevant to his diagnosis. 6

SHCR 2278, ¶ 54. Dr. Lipman's analysis simply did not address the legal issues in this case. Thus the state court appropriately found, as a conclusion of law, that his "conclusions in his affidavit do not prove by a preponderance of the evidence that the opinions and diagnosis of the State's experts are erroneous." 10 SHCR 3579. Overall, the State's evidence that Petitioner's psychosis was substance induced was substantial, and he has not established that the testimony that could have been offered by a neuropharmacologist, like Dr. Lipman, would not have changed the results.

Overall, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). He has not satisfied his burden of showing that counsel was ineffective on this issue. Claim number nine lacks merit.

Claim Number 10: Defense Counsel's failure to obtain a neuropsychological examination and the testimony of a neuropsychologist was constitutionally ineffective.

Claim number ten, like the previous claim, is an allegation that defense counsel was ineffective for

failing to obtain the services of another expert – this time one dealing in neuropsychology. He asserts that counsel should have hired a neuropsychologist to provide evidence of his mental impairment. He stresses that his mental impairment is entirely separate from and in addition to his paranoid schizophrenic mental illness. In support of the claim, Petitioner provided affidavits from Dr. Ruben C. Gur, Ph.D, and Dr. Myla H. Young, Ph.D. He specifically cited the following comments by Dr. Gur:

> *36 Based upon my observation and work and a review of Dr. Young's work, it is my opinion that [Petitioner] suffers from schizophrenia of the paranoid type and, significantly, he has brain impairments in addition to those associated with that mental illness. This "double whammy" is most likely a result of genetic and environmental facts and has substantially impaired his judgment and hold on reality during commission of the crimes at issue in this case.

See PX 14 (Gur); PX 35 (Young). Petitioner argues that the omission rises to the level of ineffective assistance of counsel.

This issue was fully developed during the state habeas corpus proceedings. Competing affidavits were provided by Dr. Victor Scarano, M.D., Dr. David Axelrad, M.D., and Dr. Peter Oropeza. Dr. Scarano reviewed the reports submitted by Doctors Young and Gur. He initially discussed Dr. Young's report. 6 SHCR 2176-78 ¶ 11. He observed that "[m]ost well trained psychologists who perform

neuropsychological testing will suggest that their results must be considered in association with the overall clinical findings of the treating and/or evaluating physician, be he/she a neurologist or psychiatrist." *Id.* Dr. Young, however, failed to do so. He noted that Dr. Young's evaluation took place in May 2007, some three years after the murders. He observed that the report completely avoids comments or opinions as to the emotional or psychological effects of being locked up on death row for two years. He observed that prescribed medications can skew the results of neuropsychological tests, but Dr. Young makes no comment about that. He observed that Dr. Young found Petitioner to be actively psychotic in 2007 even though he had been on antipsychotic medication for three years. He expressed the opinion that Dr. Young was not objective.

Dr. Scarano next evaluated the report provided by Dr. Gur. 6 SHCR 2178-82 ¶ 12. He pointed out that Dr. Gur could not say when the brain impairment manifested itself. He noted that Dr. Gur could not determine that Petitioner's present paranoid schizophrenia was not related to long term drug abuse and a drug induced psychosis in a person with a genetic vulnerability for the development of schizophrenia. He observed that it was evident that Dr. Gur was not a trained forensic psychologist and had little, if any, experience in forensic psychological evaluations. "The examination/evaluation of an individual's state of mind at the time of the criminal act is a discipline in which a trained forensic psychiatrist or forensic psychologist looks into the past and applies his/her skills in providing a learned

opinion." *Id.* He observed that Dr. Gur was unable to do so. He observed that Dr. Gur's opinion that Petitioner had paranoid schizophrenia and brain impairments in June 2007 did not establish the cause of Petitioner's mental illness on March 27, 2004. He criticized Dr. Gur's avoidance of linking any brain injury to Petitioner's long history of substance abuse and its damaging effect on the young, developing brain. He opined that, in reality, Dr. Gur "has no idea what was going on in the brain of [Petitioner] at the time he murdered his ex-wife and her two children. Gur's conclusion is, in fact, speculation, pure and simple." *Id.* at 2182 ¶ 12.

After summarizing all of the evidence provided by Petitioner's experts, Dr. Scarano summarized the evidence as follows:

> Regardless of whether [Petitioner] was in the throes of a drug induced or schizophrenic delusional psychosis at the time he murdered his wife and her two children, [Petitioner] by his actions and statements knew that what he was doing was wrong.

*37 6 SHCR 2185 ¶ 15.

Dr. Axelrad likewise reviewed Dr. Young's report. 6 SHCR 2273-76 ¶¶ 27-39. He observed that Dr. Young prepared the extensive report in her capacity as a clinical psychologist specializing in neuropsychology and neuropsychological assessments. He asserted that although her resume was impressive, her report was flawed. He observed that Petitioner was taking the following three drugs

at the time of her assessment: Navane (antipsychotic), Trazodone (antidepressant) and Cogentin (for antipsychotic side effects). However, she made no attempt to explain how the drugs DXM, marihuana and alcohol he was using prior to the murders can contribute to Petitioner's current symptomology or might explain his current physical and mental characteristics. He observed that many of the sensory and motor impairments, attention and concentration deficits cited by her can just as easily be caused by Petitioner's prescription drugs as schizophrenia.

Dr. Axelrad reiterated that there is no issue that Petitioner was psychotic at the time he committed the murders. He observed that Dr. Young never addressed whether Petitioner, in his psychotic state, understood that his actions in killing his ex-wife and her two small children were wrong. He stressed he testified that there were numerous actions by Petitioner showing he understood that killing his ex-wife and her two children was wrong. He observed that Dr. Young does not dispute his analysis surrounding the murder nor disagree with his assertion that an individual can be psychotic yet still know right from wrong. He asserted that Dr. Young's statement that Petitioner was actively psychotic at the time she examined him did not make any sense since he had been on medication and receiving treatment for over two years. He concluded his assessment of Dr. Young's report by stating that her blatant lack of research, preparation and methodology invalidated her assessment of Petitioner.

Dr. Axelrad went on to review Dr. Gur's report. 6 SHCR 2273-76 ¶¶ 40-52. He noted that Dr. Gur acknowledged that Petitioner's neuropsychological test results could not be explained by the neurology of schizophrenia alone, so he speculated that Petitioner had an overlay of a serious neurological event such as severe head trauma or a brain tumor. He noted that Dr. Gur could not identify anything in Petitioner's medical history that could account for his severe neuropsychological impairments. He observed that Dr. Gur's description of Petitioner as "clearly psychotic" was not based on any mental status examination. He reiterated that Petitioner's medication should have controlled the psychosis. He stressed that Dr. Gur made no mention of either Petitioner's prior drug use or the medications that he was taking at the time of the examination. He observed that neither Dr. Young nor Dr. Gur acknowledged that Petitioner's self-reporting might be inaccurate, exaggerated, incomplete or self-serving. He noted that Dr. Gur speculated about possible causes of Petitioner's brain dysfunction. While there was no evidence to support the speculation, there was ample evidence that Petitioner exhibited psychotic behavior during the time of his excessive drug use in the two month period before the murders. He observed that Dr. Gur never concluded in his report that Petitioner was legally insane when he committed the murders under the definition provided by the Texas Penal Code, nor does Dr. Gur dispute his findings regarding sanity. He finally observed that Dr. Gur's report is irrelevant since it does not, cannot and makes no attempt to address Petitioner's sanity or functioning in 2004.

*38 Dr. Oropeza likewise assessed Dr. Young's report. 6 SHCR 2290-93 ¶¶ 30-41. He provided criticisms similar to those provided by Dr. Scarano and Dr. Axelrad. He stressed that Dr. Young's use of subjective testing to rule out symptoms of malingering was not reliable. He finally characterized her report as lacking objectivity. He went on to critique Dr. Gur's report. 6 SHCR 2393-95 ¶¶ 42-51. As observed by Dr. Scarano and Dr. Axelrad, Dr. Oropeza observed that Dr. Gur made no mention of what effect Petitioner's heavy drug use or the medications he was using. He expressed the opinion that Petitioner's psychotic episode on March 27, 2004 was precipitated by voluntary intoxication as defined by the Texas Penal Code.

As was noted in conjunction with the previous ground for relief, lead counsel Hagood provided the following response to the claim that he was ineffective for failing to request a neuropsychological examination:

> [Petitioner] argues that I was ineffective for failing to hire a neuropharmacologist and request a neuropsychological examination for [him]. As stated above, [Petitioner] is missing the point of the State's case. The issue was not whether [Petitioner] was psychotic. He was. The issue was not whether he had a large amount of DXM, alcohol and marihuana in his system when he committed the triple murder. He did not, and no one claimed that he did. The issue was whether [Petitioner], in a psychotic state, still understood that his conduct was wrong when he murdered his wife and her two

> children and if not, was the psychotic state caused or aggravated by the use of a substance. I am not aware of a neuropharmacologist who is qualified to diagnose schizophrenia as opposed to substance induced behavior or who could extrapolate the amount of drugs in his system at the exact moment of the psychotic break.

6 SHCR 2152.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued findings of fact and conclusions of law regarding the claim that counsel was ineffective for failing to request a neuropsychological examination. Many of the findings listed regarding claim number nine on pages 47 through 48 of this memorandum opinion apply equally to the present claim. Two findings bear repeating:

> 35. Mr. Hagood's and Ms. Bobbie Peterson (Cate's) trial strategy was to prove that [Petitioner] was insane at the time of the offense, not because of intoxication, but because of his prior medical and mental history.
>
> 36. The State's position was that [Petitioner] either knew right or wrong or that any psychosis he had was substance induced.

10 SHCR 3531. The evidence presented by the defense attorneys was consistent with their strategy. The affidavits by Drs. Scarano, Axelrad and Oropeza

explained why the affidavits submitted by Drs. Young and Gur did not undermine nor address the State's position that Petitioner either knew right or wrong or that any psychosis was substance induced. The state trial court accordingly issued the following conclusion of law:

> 91. [Petitioner] has failed to prove by a preponderance of the evidence that [counsel's] alleged deficient performance prejudiced his defense and that based on the opinions of Gur, Young and Lipman there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different.

10 SHCR 3579. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

In the petition, Petitioner goes no further than to say that the evidence provided by Drs. Young and Gur would have amounted to a persuasive case that he was not guilty by reason of insanity, sparing him a death sentence. He erroneously argues that the state court's decision was conclusory, unreasoned and unsupported. The record reveals that there was substantial evidence to support the state court's findings. He did not satisfy his burden of rebutting the presumption of correctness that must be accorded the state court findings by clear and convincing evidence. Overall, Petitioner has not shown, as required by § 2254(d), that the state court findings

resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). He has not satisfied his burden of showing that counsel was ineffective on this issue. Claim number ten lacks merit.

Claim Number 11: Defense counsels' reliance on the State experts to prove key issues was constitutionally ineffective.

*39 In claim number eleven, Petitioner alleges that his attorneys were ineffective for calling Drs. Axelrad and Scarano during the defense's case-in-chief. He argued that calling these two State's experts adversely as defense witnesses shows that his attorneys were not pursuing a strategy but, rather, were grasping at straws. He noted that his attorneys had an expert, Dr. Gripon, to testify that he was not sane at the time of the murder, along with neutral fact witnesses Drs. McGirk and Harrison at their disposal.

This issue was fully developed during the state habeas corpus proceedings. Mr. Hagood provided the following explanation for calling Drs. Axelrad and Scarano:

> [P]etitioner claims that I was ineffective for calling experts hired by the State in the defense

> case. I was aware of both Dr. Scarano's and Dr. Axelrad's diagnoses long before the trial started. I was somewhat taken aback that the court allowed the State to go into sanity issues prior to our witnesses regarding insanity. However, my decision to call two of the State's witnesses during our case was deliberate. My strategic decision to do so was to elicit certain information and to attempt to diffuse some of the more damaging testimony against [Petitioner]. I was able to get Dr. Scarano to admit that psychoses triggered by marihuana or alcohol was rare. Further, I elicited information that alcohol induced psychoses generally occurred in chronic alcoholics and [Petitioner] did not appear to be a chronic alcoholic. I also attempted to get the doctor to give information that would minimize the testimony against [Petitioner]. Dr. Scarano admitted that this was his first case involving DXM. As for Dr. Axelrad, after the State was able to call Scarano first and set out the prosecutions's theory through the expert, I wanted first shot at Dr. Axelrad. This would allow me to frame the questions in a way more beneficial to [Petitioner]. I pressed both doctors, after hearing the State's theory, in order to make them back down from their diagnosis or to at least admit that they could not rule out schizophrenia that was not precipitated by drug and alcohol use.

6 SHCR 2153-54. With respect to his failure to elicit opinions from Drs. McGirk and Harrison, Mr. Hagood

noted that neither had examined Petitioner for the purpose of determining insanity. *Id.* at 2154. Moreover, Dr. Harrison had specified in his affidavit that he could not rule out that Petitioner had experienced a substance induced psychotic episode. *Id.*

Petitioner complains that "[i]nstead of forcing the State to rebut the defense's insanity case, the dynamics were such that the defense found themselves rebutting the State's sanity presentation." Petition at 121. Prosecutor Ashmore, however, discussed his reaction to the defense team's decision calling the doctors as adverse witnesses as follows:

> I thought it was important trial strategy to put Dr. Scarano on as early as possible in the case. I also believed that the defense team felt it would be damaging to their case to present their experts in their case-in-chief only to have me present the State's experts' opinion in rebuttal, perhaps leaving the last thing heard by the jury as being experts who indicated that [Petitioner] was sane at the time of the offense. Therefore, I believe it was trial strategy on the part of the defense to call Scarano and Axelrad in order to have their testimony immediately rebutted by the defense expert witnesses. Based on my years of trial work, particularly these type of cases, I thought that was sound strategy on the part of the defense.

*40 6 SHCR 2332 ¶ 23.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding the claim that counsel was ineffective for calling Drs. Scarano and Axelred during the defense's case-in-chief:

> 198. The decision to call Dr. Axelred as part of the defense case was done to examine him and attempt to frame questions in a way more favorable to [Petitioner] as well as to attempt to discredit his opinion prior to the State examining him. Strategically, Mr. Hagood states he felt this was the best course of action rather than attempting to exclude his testimony.
>
> 199. Mr. Hagood's decision to call two of the state's witnesses during the defense case was deliberate. Mr. Hagood states that his strategy was to illicit certain information and attempt to diffuse some of the more damaging testimony against [Petitioner]. Mr. Hagood was able to get Dr. Scarano to admit that psychoses triggered by marihuana or alcohol was rare. Further, the defense illicited information that alcohol induced psychoses generally occurred in chronic alcoholics and [Petitioner] did not appear to be a chronic alcoholic.
>
> 200. Mr. Hagood also states that he attempted to get the doctor to give information that would minimize the testimony against

> [Petitioner]. Dr. Scarano admitted that this was his first case involving DXM.
>
> 201. Mr. Hagood states in his affidavit that he wanted to be the first to question Dr. Axelrad in order to frame the question in a way more beneficial to [Petitioner].
>
> 202. Mr. Hagood states that he pressed both doctors, after hearing the state's theory, in order to make them back down from their diagnosis or to at least admit that they could not rule out schizophrenia that was not precipitated by drug and alcohol use.

10 SHCR 3556-57. The state trial court went on to issue the following conclusions of law:

> 94. [Petitioner] has failed to prove by the preponderance of the evidence that Mr. Hagood was not employing trial strategy calling two of the State's experts in the defense's case-in-chief.
>
> 95. [Petitioner] has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient and that he was not acting as a reasonably competent attorney, and that his trial strategy was not within the range of competence demanded of attorneys in criminal cases.
>
> 96. [Petitioner] has failed to prove by a preponderance of the evidence that a constitutionally deficient performance

> prejudiced his defense and that there is a reasonable probability that, but for counsel's decision to use Dr. Scarano and Dr. Axelrad in the defense's case-in-chief, the result of the proceeding would have been different.

10 SHCR 3580. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner acknowledges that counsel's decision to call two of the State's experts during the defense's case-in-chief was trial strategy, but he disagrees with the strategy. Nonetheless, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Counsel was aware of the anticipated testimony of these witnesses. He called them in order to lessen the impact of their testimony. The Court would note that the practice of calling the other side's witness in order to get the first shot at that witness is a trial strategy regularly employed by attorneys. Petitioner has not shown that Mr. Hagood's decision to call Drs. Scarano and Axelrad in the defense's case-in-chief was outside the range of objective reasonableness demanded of attorneys in criminal cases. *See Richter*, 562 U.S. at 110. His arguments to the contrary are fallacious.

*41 Overall, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). In particular, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. Claim number eleven lacks merit.

Claim Number 12: Defense counsels' failure to elicit opinions on sanity from Drs. Harrison and McGirk rendered its counsel constitutionally ineffective.

Drs. Harrison and McGirk were the first two psychologists who had contact with Petitioner after the crimes for the purpose of evaluating his mental state. Petitioner argues that the failure to even elicit their opinions regarding his sanity at the time of crimes violated both *Strickland* prongs. In support of the claim, Petitioner offers affidavits from both doctors. Dr. Harrison states that he would have testified that Petitioner was insane on the morning of March 24, 2004, because he was suffering from psychosis and further that he did not understand what he did on that morning. 2 SHCR 508-508. Dr. McGirk similarly states that if he had been asked, he would have testified that Petitioner was insane on that morning and that he did not know what he was

doing was wrong at the time he committed the murders. Petitioner's Exhibit 25 ¶¶ 10-11.

This issue was raised in both the direct appeal and in the state habeas corpus proceedings. The TCCA rejected the claim on direct appeal as follows:

> [Petitioner] complains that "counsel failed to request and obtain evaluations and opinions from Dr. James Harrison and Dr. Robin McGirk on the issue of [Petitioner's] sanity at the time the offense was committed." The trial court appointed Harrison to examine [Petitioner] for the sole purpose of determining his competency to stand trial. Dr. McGirk met with [Petitioner] several times in his capacity as the jail psychologist; he was not hired by either the State or the defense. Both were called to testify by the defense. Dr. Harrison believed that [Petitioner] was schizophrenic, but he testified that he did not have enough information to render an opinion regarding [Petitioner's] sanity at the time of the offense. Dr. McGirk also diagnosed [Petitioner] as schizophrenic, but declined to give an opinion as to [Petitioner's] sanity at the time of the offense.
>
> Petitioner has not shown how counsel's representation was deficient. Article 46.03, Sec. 3(g) permits the same expert to be appointed to evaluate competency and insanity, provided that the expert files separate reports. But counsel was by no means required or expected to solicit the same expert's

> opinion, in this case Dr. Harrison's, regarding both issues. [Petitioner] also overlooks the fact that, in addition to obtaining approval for the appointment of Dr. Edward Gripon, counsel requested and was granted the services of another psychologist, Dr. Richard Rogers, to assist [Petitioner] in preparing his insanity defense. Dr. Rogers evaluated [Petitioner] and prepared a report but was never called to testify, for reasons that the record does not reveal.
>
> [Petitioner] has also failed to prove how counsel's performance prejudiced his defense. There is nothing to indicate that Dr. Harrison or Dr. McGirk would have testified to [Petitioner's] legal insanity at the time of the offense had they been appointed specifically for the purpose of such an evaluation. In fact, Dr. Harrison testified under cross-examination that people with schizophrenia could still be legally sane...
>
> *42 [Petitioner] has failed to meet his burden to demonstrate deficient performance and prejudice. He has failed to show a reasonable probability that the result of the proceeding would have been different if counsel had also requested sanity evaluations from Dr. Harrison and Dr. McGirk.

Thomas v. State, 2008 WL 4531976, at *17-18. The TCCA appropriately noted that the defense called both doctors. They both declined to offer an opinion regarding Petitioner's sanity.

This issue was developed further during the state habeas proceedings. In response to Dr. Harrison's affidavit, prosecutor Ashmore observed that Dr. Harrison's affidavit did not comport with his sworn trial testimony:

> During cross-examination of Dr. Harrison, I specifically asked him whether, after interviewing [Petitioner] on a number of occasions, reviewing all of the expert's reports in this case (which were quite detailed) and looking at the other information that he indicated that he had taken into consideration both during direct examination and on voir dire prior to his cross, whether he felt like he had insufficient information to give an opinion about [Petitioner's] sanity at the time of the offense. Dr. Harrison responded that he did not feel like he had sufficient information to render an opinion (RR Vol. 35, p. 50-51). At no time did Dr. Harrison indicate that he would not render an opinion because he was under some mistaken belief that he would be precluded from rendering such an opinion. The reasoning at trial was that he had insufficient information to provide an opinion.

6 SHCR 2331 ¶ 20. On the other hand, Dr. McGirk's testimony was that he was only hired by the jail to determine if Petitioner needed medication or was a danger to himself, and that he was never hired to determine competency or sanity. 35 RR 184, 188-89. Dr. McGirk specifically testified that he was not going to offer an opinion on Petitioner's sanity and that it was for the jury to decide. 35 RR 171-82.

Mr. Hagood offered the following response to this claim of ineffective assistance of counsel:

> Petitioner] complains...that I was ineffective for not eliciting opinions on sanity from Cactus McGirk and James Harrison. Neither psychologist had examined [Petitioner] with the purpose of determining insanity. Harrison had stated in his report that he could not rule out that a substance had induced [Petitioner's] psychotic episode. He also testified that he could not make a determination regarding sanity when asked by the prosecution. Coupled with the fact that Harrison had never been sent to determine sanity, I did not think it a good idea to query him on that issue. As for Cactus McGirk, he had only been hired by the jail to determine if [Petitioner] needed medication or was a danger to himself. After being examined by prosecutor Kerye Ashmore, McGirk came across as biased against the State and incompetent. I did not believe that McGirk had any credibility with the jury and was not about to hang [Petitioner's] insanity theory on McGirk.

6 SHCR 2154. The Director argues that counsel's decisions with respect to these witnesses are entitled to deference.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding the claim that counsel was ineffective for failing to elicit opinions on sanity from Drs. Harrison and McGirk:

*43 203. Neither Dr. James Harrison or Dr. Cactus McGirk had examined [Petitioner] with the purpose of determining sanity.

204. Harrison stated in his first report that he could not rule out that a substance had induced [Petitioner's] psychotic episode. (State's Response, appendix ex. O)

205. Harrison testified that he did not have enough evidence to make a determination of sanity.

206. Dr. Harrison's affidavit does not comport with his sworn testimony. During cross examination of Dr. Harrison, Mr. Ashmore specifically asked him whether after interviewing [Petitioner] on a number of occasions, reviewing all of the expert reports in this case (which were quite detailed) and looking at the other information that he indicated he had taken into consideration both during direct examination and on voir dire prior to cross, whether he felt like he had sufficient information to give an opinion about [Petitioner's] sanity at the time of the offense. Dr. Harrison responded he did not feel like he had sufficient information to render an opinion (RR vol. 35, pp. 50-51).

207. Cactus McGirk had been hired by the jail to determine if [Petitioner] needed medication or was a danger to himself. McGirk has never been hired to determine competency or sanity. (RR vol. 35, pp. 184, 188-189).

> 208. Mr. Hagood knew that Harrison had stated in his report that he could not rule out that a substance had induced [Petitioner's] psychotic episode.
>
> 209. Harrison also testified that he could not make a determination regarding sanity when asked by the prosecution. (RR vol. 35, p. 51)
>
> 210. After being examined by prosecutor, Kerye Ashmore, Mr. Hagood states that McGirk came across as biased against the state and incompetent.
>
> 211. Mr. Hagood did not believe McGirk had any credibility with the jury and was not going to hang [Petitioner's] insanity on McGirk.

10 SHCR 3557-58. The state trial court then proceeded to issue the following conclusion of law:

> 97. [Petitioner] has failed to prove by the preponderance of the evidence that Mr. Hagood was not employing trial strategy in not requesting sanity opinions from Dr. Harrison or Dr. McGirk.

10 SHCR 3580. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

In the present petition, Petitioner simply asserts that defense counsel should have elicited sanity opinions from Drs. Harrison and McGirk. With respect to the issue of whether counsel's representation was deficient on this issue, the dispositive factor is that defense counsel chose not to elicit opinions from the doctors because of trial strategy. Mr. Hagood knew that Dr. Harrison had stated in his report that he could not rule out that a substance had induced Petitioner's psychotic episode. Mr. Hagood was also of the opinion that Dr. McGirk did not have any credibility with the jury, and he was not going to hang the issue of Petitioner's insanity on Dr. McGirk. Once again, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. With respect to the prejudice prong, the Court finds the claim to be somewhat incredible because both doctors were asked whether they would offer opinions, albeit by the State, and both declined. Petitioner cannot show harm. Overall, Petitioner has not shown that Mr. Hagood's representation on this matter was outside the range of objective reasonableness demanded of attorneys in criminal cases. See *Richter*, 562 U.S. at 110.

*44 In addition to the foregoing, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

presented in the state court proceedings. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. Claim number twelve lacks merit.

Claim Number 13: Defense counsels' failure to present evidence of or seek a jury instruction on diminished capacity constituted ineffective assistance of counsel.

In claim number thirteen, Petitioner argues that counsel should have pursued a diminished capacity defense. He erroneously asserts that Texas recognizes a diminished capacity defense.

Before the pleadings were ever filed in this case, the Fifth Circuit discussed the diminished capacity defense in *Coble v. Quarterman*, 496 F.3d 430 (2007). The Fifth Circuit found that "counsel was not ineffective for failing to present a diminished capacity defense because diminished capacity is not cognizable in Texas. *See, e.g.*, *Jackson v. State*, 115 S.W.3d 326, 328 (Tex. App. – Dallas 2003)." *Id.* at 437-38.

The Jackson case cited by the Fifth Circuit was decided by the state intermediate appellate court in Dallas, Texas. The case was subsequently considered by the TCCA. Discretionary review was granted "to determine whether the doctrine of diminished

capacity exists in the jurisprudence of Texas." *Jackson v. State*, 160 S.W.3d 568, 569 (Tex. Crim. App. 2005). In affirming the Dallas appellate court, the TCCA provided the following analysis:

> [T]he evidence of mental illness in this case does not negate *mens rea*. Rather, the evidence presented an excuse for the crime[.] In fact, this evidence makes it even more apparent that Appellant intended to cause serious bodily injury or death to his brother. The evidence of appellant's paranoia simply provides a motive for an intentional act. The evidence presented was the type of excuse-based evidence that would be raised as an affirmative defense....The court of appeals correctly stated that Texas does not recognize diminished capacity as an affirmative defense i.e., a lesser form of insanity.

Id. at 572-73. Much like the situation in *Jackson*, Petitioner committed murder, and he raised the excuse of insanity. A diminished capacity defense was unavailable. More recently, the Eastern District of Texas rejected diminished capacity arguments in two death penalty cases. *Mays v. Director*, TDCJ-CID, No. 6:11cv135, 2013 WL 6677373, at *25 (E.D. Tex. Dec. 18, 2013), *c.o.a. denied*, 757 F.3d 211 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015); *Roberson v. Director*, TDCJ-CID, No. 2:09cv327, 2014 WL 5343198, at *58 (E.D. Tex. Sept. 30, 2014), *aff'd*, 619 Fed.Appx. 353 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1177 (2016).

Mr. Hagood responded to this ineffective assistance of counsel claim as follows:

> [Petitioner] complains that we did not request a jury instruction on diminished capacity. There is no "diminished capacity" defense in Texas. The case law cited by [Petitioner] refers to the State's proof of specific intent and a "failure of proof" defense. That language was submitted to the jury as one of the elements the State had to prove beyond a reasonable doubt. I would disagree with [Petitioner's] assertion that I should have requested a lesser-included charge to capital murder. Our trial strategy involved straight insanity. Although it is permissible to request conflicting defensive instructions in a jury charge, it is not always prudent. In front of a real jury, in a real death penalty trial, with real dead babies, telling a jury "he did it, but he was insane" then saying in the next breath, "but if he wasn't insane he was just reckless or criminally negligent" might seem deceitful and manipulative to a jury. Even if I believed that the facts of this case warranted a lesser included instruction, I might not have requested one. I certainly would not have labeled in a "diminished capacity" defense as that carries with it a different connotation."

*45 6 SHCR 2158.

The state trial court proceeded to issue the following conclusions of law on this claim:

> 121. Texas does not recognize diminished capacity as an affirmative defense i.e., a lesser form of the defense of insanity,
>
> 122. The diminished-capacity doctrine argued by [Petitioner] in this case is a failure-of-proof defense in which [Petitioner] claims that the State failed to prove that the defendant had the required state of mind at the time of the offense.
>
> 123. [Petitioner] has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient.

10 SHCR 3585. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

In the present petition, Petitioner merely reasserts his claim that counsel should have pursued a diminished capacity defense and that he was ineffective for failing to do so. The claim may be summarily dismissed in light of clearly established Fifth Circuit case law that "counsel was not ineffective for failing to present a diminished capacity defense because diminished capacity is not cognizable in Texas." *Coble*, 496 F.3d at 437-38. The claim lacks any basis in law in Texas. The claim may also be dismissed in light of § 2254(d). Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Counsel was not ineffective for failing to pursue a defense that was unavailable under Texas law. As such, Petitioner failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. Claim number thirteen lacks merit.

Claim Number 14: Defense counsels' performance at the punishment phase of Petitioner's trial was constitutionally ineffective.

Claim number fourteen concerns the mitigating evidence presented by defense counsel during the punishment phase of the trial. An argument is made that the story of Petitioner's tragic life was never told due to ineffective assistance of counsel. He asserts that his life is a case study of mental illness, neglect and abuse. He adds that it is not surprising that the triad of mental illness, neglect and abuse was seen in both his life and that of his siblings, parents, aunts, uncles, grandparents, and great aunts and uncles.[4]

[4] The Court observes that the presentation of the claim in state court differs somewhat from the way it has been presented

He asserts that counsel should have investigated and offered mitigating evidence from additional family members, although he admits that the minimal number of family members who testified for the defense in the punishment phase of the trial did more harm than good.

*46 The Director argues that the defense team conducted a constitutionally sufficient investigation and presented ample mitigating evidence. He notes that counsel's failure to investigate will not rise to the level of ineffective assistance of counsel where the evidence in question is cumulative, unknown, or possibly harmful to the defense. *Anderson v. Collins*, 18 F.3d 1208, 1220-21 (5th Cir. 1994). He opines that Petitioner does not argue that something should have been done better, but that something should have been done differently. *See* Answer, pages 112-13. He notes that the Fifth Circuit has recognized that it "must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Dowthitt*, 230 F.3d at 743 (internal quotation marks and citation omitted). The Director argues that Petitioner has not satisfied either *Strickland* prong on this matter.

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in this Court. Petitioner, through a different attorney, embellishes on the claim from the way it was presented in state court. Review under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits. *Pinholster*, 563 U.S. at 181; *Blue*, 665 F.3d at 656.

The case law is abundantly clear that "defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (quoting *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983)), *cert. denied,* 537 U.S. 1104 (2003). *See also Woods v. Thaler*, 399 Fed.Appx. 884, 891 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 2444 (2011). "Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and the ultimate determination of whether the death penalty is an appropriate punishment." *Riley v. Cockrell*, 339 F.3d 308, 316 (5th Cir. 2003) (citation omitted), *cert. denied*, 543 U.S. 1056 (2005). In assessing whether counsel's performance was deficient, courts look to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional "leads" he had, and what results he might reasonably have expected from those leads. *Neal*, 286 F.3d at 237. The reasonableness of counsel's investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. *See also Blanton*, 543 F.3d at 236. "[C]ounsel should consider presenting...[the defendant's] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins*, 539 U.S. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in

Death Penalty Cases § 11.8.6, at 133 (1989)). The Supreme Court stressed in *Wiggins* that the "investigation into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence." *Id.* (emphasis in original).

The Supreme Court added, however, that the investigation into mitigating evidence has limits:

> [We] emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.* at 690-91, 104 S.Ct. 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691, 104 S.Ct. 2052.

*47 *Id.* at 533. In *Wiggins*, the Supreme Court held that counsel's representation "fell short of... professional standards" for not expanding the investigation beyond the investigation report and one set of records they obtained, particularly "in light of

what counsel actually discovered" in the records. *Id.* at 524-25. More recently, the Court found counsel's representation deficient when he failed "to conduct *some* sort of mitigation investigation" even though his client was fatalistic and uncooperative. *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (emphasis in original). *See also Rompilla*, 545 U.S. at 381-82 (counsel's investigation was unreasonable because counsel failed to review a prior conviction file used by the prosecution, a file that would have alerted counsel that further investigation was necessary). On the other hand, the Supreme Court has found that counsel's performance was not deficient where he gathered a substantial amount of information and then made a reasonable decision not to pursue additional sources. *Bobby v. Van Hook*, 558 U.S. 4, 11-12 (2009). Similarly, in *Strickland*, the Court found that counsel's decision not to seek more character or psychological evidence than was already in hand was reasonable. *Strickland*, 466 U.S. at 699. In order to establish that counsel was ineffective due to a failure to investigate the case, a petitioner must do more than merely allege a failure to investigate; instead, he must state with specificity what the investigation would have revealed, what specific evidence would have been disclosed, and how the evidence would have altered the outcome of the trial. *Anderson*, 18 F.3d at 1221.

A court determines whether a petitioner was prejudiced by counsel's deficient performance by "reweigh[ing] the evidence in aggravation against the totality of the available mitigating evidence" and asking whether the petitioner "has shown that, had

counsel presented all the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence." *Gray v. Epps*, 616 F.3d 436, 442 (5th Cir. 2010) (quoting *Wiggins*, 539 U.S. at 534), *cert. denied*, 563 U.S. 905 (2011).

The transcript in this case reveals that abundant evidence that could have been presented by Petitioner in mitigation during the sentencing phase of the trial had already been presented during the guilt/innocence phase of the trial. Danny Thomas, Petitioner's father, testified extensively about Petitioner's childhood. 28 RR 153-62. He noted that he had been separated from Petitioner's mother, Rochelle Thomas, since between 1985 and 1989. *Id.* at 151. He stated that he provided guidance to Petitioner and described him as very intelligent. *Id.* at 153. He testified that Petitioner made good grades. *Id.* at 153-54. His contact with Petitioner did not "drop off" after Rochelle left him. *Id.* at 157. Mr. Thomas testified that Rochelle took Petitioner to church "every time the door opened." *Id.* at 159. He specified that he was aware that Petitioner smoked marijuana, but he did not know how much marijuana he smoked. *Id.* at 162. He described Petitioner as a moderate drinker. Id. at 165. He agreed that Petitioner had mental problems. *Id.* at 167. He testified that Petitioner's behavior changed for the worse during the two or three months leading up to the murders. *Id.* at 169.

The State also took steps to have Petitioner's mother testify at the trial. She was subpoenaed to

attend the trial, but she failed to appear and was held in contempt. 28 RR 149.

The State called Carmen Hayes, Petitioner's girlfriend at the time of the murders, during the guilt/innocence phase of the trial. She testified that they were smoking marijuana and taking Coricidin Cough and Cold medicine during the days just prior to the murders. 27 RR 185. She described him as a regular drinker. *Id.* at 187. He would talk about religion when they were smoking and taking Coricidin. *Id.* at 195. In particular, he would talk about the book of Revelation. *Id.* She testified that Petitioner "believed that all women were Jezebel." *Id.* She explained that he thought all women were lustful. *Id.* at 196. She described how he stabbed himself in the chest just two days before the murders. *Id.* at 232-34. Petitioner told her just before stabbing himself that he wanted to be forgiven of his sins and fly with the angels. *Id.* at 234-35. She subsequently testified that on other occasions he placed duct tape on his mouth to stop talking. 28 RR 26. He told her that "he felt like he was the devil, and if he stopped talking for 24 hours, then the world would be right." *Id.* at 27. She added, however, that he would remove the duct tape "not to speak, but to smoke dope." *Id.* at 28. Around the time of the murders, Rochelle Thomas occasionally spent the night at Petitioner's house. *Id.* at 71. Ms. Hayes also discussed Petitioner's regular use of the term "deja vu." "He thought he was — God was making him relive days because he was smoking marijuana. Punishment I suppose." *Id.* at 89.

*48 The State also called Isaiah Gibbs, Petitioner's life long friend. 29 RR 106. He testified that

Petitioner thought of him as one of his best friends. *Id.* at 127. He testified about a number of experiences involving Petitioner. Near the beginning of his testimony, he stated that Petitioner came over to his house and confessed to him that he had killed his ex-wife and her two kids. 29 RR 111-12. He noted that Petitioner was in tears at the time. *Id.* at 112. Mr. Gibbs testified that he did not believe him and "told him to quit playing." *Id.* at 112-13. He discussed Petitioner's relationship with Laura and how they first started going together in middle school. *Id.* at 121. He discussed how Petitioner thought that his cousin, Floyd Patterson, was having an affair with Laura. *Id.* at 122-23. On another occasion, Petitioner had told him that he thought Laura had slept with his brother Brian. *Id.* at 126. Petitioner had also accused him of sleeping with Laura. *Id.* at 127.

On cross-examination, Isaiah Gibbs was questioned extensively about Petitioner's relationship with his mother, Rochelle Thomas. 29 RR 154-56. Mr. Gibbs noted that Rochelle Thomas regularly talked about church. *Id.* at 155. If Petitioner brought around a girl that she did not like, she would refer to the girl as Jezebel. *Id.* He noted that Mrs. Thomas treated him just like Petitioner, and she would discipline them both and give them whippings. *Id.* at 156. The State objected to defense counsel discussing Petitioner's upbringing as irrelevant, but the trial court overruled the objection. *Id.* at 157. The trial court gave Petitioner a full opportunity to present evidence about his background.

Numerous other witnesses talked about Petitioner's character. When questioned by the

defense, Ms. Rae Baird, a friend, testified about Petitioner's hyper-religious nature. 29 RR 193-94. She did not see him after January 2004, but before then he told her that God talked to him. *Id.* at 194. He told her that God had told him that he needed to get back with Laura. *Id.*

Clifford Adams testified that he and Petitioner were very good friends for a long time. 29 RR 200. He testified that Petitioner used marijuana. *Id.* As far as quantities were concerned, "if he had it, he would smoke it." *Id.* Mr. Adams testified that Petitioner got back at Floyd Patterson for sleeping with Laura by sleeping with Floyd's girlfriend, Amy Ingle. *Id.* at 202. He believed that Petitioner engaged in actions to get attention, such as refusing to talk. *Id.* at 203. He would act "weepy" and "goofy" around girls to get them to sleep with him. *Id.* at 205.

Bryant Hughes, Laura's boyfriend at the time of the murders, also talked about Petitioner's hyper-religious nature when questioned by the defense. 30 RR 66-67, 68-70. Mr. Hughes added that "[o]nce he came over with a dollar bill showing me the pyramid on the back of it and saying, That is one of their [Illuminati] symbols." *Id.* at 78. When questioned by the defense, he admitted that he told the police that Petitioner was crazy and always talking about weird things. *Id.* at 85.

Don Bowling testified that he knew Petitioner as a co-worker with the City of Sherman. 30 RR 90. He discussed Petitioner's alleged odd behavior. The only thing that Petitioner did to make him question his mental status was dying his hair from one color to

another. *Id.* at 92. His impression was that Petitioner was just seeking attention from people. *Id.* at 92-93.

Paul Boren, Laura's father, also testified. He stated that he encouraged Petitioner to get a job, and he offered to help him. 30 RR 128, 139-40. He likewise testified about Petitioner's obsession with religion. *Id.* at 137-38, 155-56. He witnessed Petitioner tear up money as if it was nothing. *Id.* at 157. He was aware that Petitioner smoked marijuana. *Id.* at 158. He also heard Petitioner talk about his feeling of "deja vu." *Id.* at 160.

Amy Ingle, who was Petitioner's friend and a former girlfriend of Floyd Patterson, likewise talked about his strange behavior and obsession with religion and the Bible. She testified that he talked about God a lot and thought that God had a purpose for him. 33 RR 190. She noted that on one occasion "he took the Bible and, you know, cut out the words in Revelations to reword it." *Id.* She further testified that "he thought certain people had demons and that demons were kind of around us, but he also did believe in angels and that angels were here" and that "they had power — super powers over everybody." *Id.* at 190-91. She characterized him as a "different type of person," who "had his own thoughts on everything and expressed them." *Id.* at 192. She described his mother as "eccentric." *Id.* at 193. She added that Petitioner's mother was "real Godly and just overboard with it, I'd say." *Id.* He became upset when his mother moved to Oklahoma and cried over it. *Id.* He also discussed the dollar bill and the eye symbol over the pyramid with her. *Id.* at 197-98. Like the

other witnesses, she testified that he used the term "deja vu" and felt like everything was "happening over and over again." *Id.* at 198. She also testified that she had seen him with duct tape on his mouth. *Id.* at 200.

*49 The defense called Rose Soto Caballero, a former girlfriend, who testified that she had been friends with Petitioner since kindergarten and that they started dating in fifth grade. 3 RR 18. Like other witnesses, she testified that she saw him smoke marijuana and drink alcohol. *Id.* at 20. She explained that Petitioner had dyed his hair green for an Incredible Hulk themed birthday party for Andre, Jr. *Id.* at 27, 46. She stated that she had spent a good amount of time with Rochelle Thomas and described her as sweet. *Id.* at 29. She noted that Petitioner was upset when his mother moved away. *Id.* She added that "[n]obody will ever understand her, but she has her own quirks and her own ways of doing things." *Id.* at 30. She stated that Petitioner discussed religion with her. *Id.* at 31. She added that "[h]e had told her that he thought that he had spirits, demons in him from the cemetery." *Id.* at 28. Their conversations about demons and being evil and seeking forgiveness occurred about two months before the murders. *Id.* at 34. He also talked "about how everything was deja vu, and about living the same days over and over again." *Id.* On cross-examination, she testified that she loved him greatly and still loved him. *Id.* at 45.

During the sentencing phase of the trial, the State called Eric Ross, Petitioner's older brother, as a witness. He testified that Rochelle Thomas was his mother, and Danny Thomas was his stepfather. 40

RR 53. He stated that he was self-employed. *Id.* He had previously worked at Popeye's for eleven years and had been a manager. *Id.* at 54. He stated that his mother and the elders of the church were the greatest influences on him. *Id.* at 55. He testified in depth about Petitioner's childhood. *Id.* at 55-57. He specified that his mother raised him the same way she raised Petitioner and that he had never been arrested nor neglected. *Id.* at 56.

With the backdrop of all of this evidence concerning Petitioner's character and his background, the defense team finally had the opportunity to present mitigating evidence for the purpose of persuading the jury to spare his life. The jury had heard all of the previous evidence, which was the same type of evidence that could have been presented by defense counsel during the punishment phase of the trial. With this in mind, defense counsel called Steve Atkins, Leander Williford, Danny Ross, Wendy Ross, Scott Hamel, Doris Gonzales, Roger Braziel, Dr. Kate Allen and Larry Fitzgerald during the punishment phase of the trial. Of these, three were family members: brother Danny Ross, sister-in-law Wendy Ross and paternal aunt Doris Gonzales.

Danny Ross testified that he was Rochelle Thomas' second oldest child and Petitioner's older brother. 40 RR 88. He started working at Popeye's when he was sixteen and was still working there. *Id.* He worked with his older brother Eric. *Id.* Danny Ross testified extensively about Petitioner's childhood. He described Petitioner as a good kid. *Id.* at 90. He noted that Petitioner strived for knowledge

in school. *Id.* at 91. He testified that he had never seen a violent side to Petitioner. *Id.* at 97.

Defense counsel next called Wendy Ross, Danny Ross' wife. 40 RR 117. She testified that she had been married to Danny for eight years and that they had three children. *Id.* She described her husband's family as close. *Id.* at 119. Members of the family were protective of each other and did not reveal their family problems to others. *Id.* at 120. She was not really aware of problems that were being experienced by members of the family. *Id.* at 120-21. She stated that she loved Petitioner. *Id.* at 124. He watched her kids for her, and she never had any concerns or fears because he was watching them. *Id.* She observed changes in him in the months just prior to the murders, which she attributed to anxiety. *Id.* at 125. Wendy Ross characterized her mother-in-law, Rochelle Thomas, as loving and caring and good to her. *Id.* at 126. She testified that she had observed Petitioner's relationship with his mother. *Id.* at 131. She loved him, and he loved her. *Id.* She never observed them get into a fight. *Id.*

Doris Gonzalez, Petitioner's paternal aunt, testified that she and Rochelle lived together a few times. Rochelle came to stay with her once for a few weeks in Oklahoma without the kids, who stayed with their dad. 40 RR 159-60. She observed Petitioner interacting with his brothers by "[l]aughter, happiness, joking, kidding." *Id.* at 161. She described Petitioner as very loving, kind and analytical. *Id.* at 163. She testified that she was responsible for taking care of Brian Ross, one of Petitioner's older bothers. *Id.* at 163-64. The trial court initially would not

permit the defense to question her about Brian's mental illness and the issue of family genetics. *Id.* at 164-65. Nonetheless, she was subsequently permitted to testify that Brian Ross was diagnosed with a mental illness, and she signed the papers for him to obtain professional help. *Id.* at 171. She observed Petitioner being "very distraught, crying a lot" in the months just prior to the murders. *Id.* at 165. He would not talk to her about it. *Id.* She went on to talk about Petitioner's loving relationships with other members of the family. She also discussed some concerns she had, including Rochelle's inappropriate attire around her sons and Danny Thomas' drinking. *Id.* at 168-69.

*50 Steve Atkins testified that he had previously been employed at the Crockett House, which is a MHMR outpatient facility. 40 RR 74-75. He knew Petitioner from seeing him at the facility visiting his older brother, Brian. *Id.* at 74. Leander Williford, Jr., testified that he knew Petitioner when they worked together for three years at the cemetery. *Id.* at 83. He stated that Petitioner had a good disposition with no problems. *Id.* at 86. Scott Anthony Hamel testified that Petitioner had been his friend since childhood. *Id.* at 136. He ran around with him until about one and one-half months before the murders. *Id.* at 139. He stopped hanging out with him because of the people Petitioner "was running with....Like Carmen and Zack and Kim." *Id.* He noticed changes in Petitioner's behavior when he started hanging out with them. *Id.* He characterized Petitioner as being depressed. *Id.* at 141. He testified that he had never seen Petitioner be violent. *Id.* at 142. Corporal Roger

Braziel testified about Petitioner's conduct and behavior while confined at the Grayson County Jail. *Id.* at 176-178. The final witness was Dr. Kate Allen, a clinical social worker and family sociologist, who testified extensively about her findings regarding Petitioner. Petitioner complains, however, that counsel did not adequately prepare Dr. Allen to testify at trial.

Despite all of the foregoing testimony, Petitioner now complains that many additional witnesses were not contacted by the defense team who knew him as he was growing up and descending into increasingly severe mental illness, and/or had detailed information about him and the family's multi-generational pattern of health issues. These witnesses include Walter Johnson (Petitioner's great-uncle), Kevin Ross (uncle), Pam Ross Borens (aunt), Alice Harris (aunt), Denise Ross Wade (aunt), Konta Johnson (aunt), Todd Johnson (Konta's husband), Roscoe Johnson (uncle), Christopher Bennett (childhood friend), McCloud Luper (one of Rochelle's boyfriends), Clifton Eaton (minister at Petitioner's church), Wanda Banks (church director), Floyd Patterson (cousin) or Christopher Smith (childhood friend). In support of his claim, he attached affidavits from family and friends.

The Director observed that these affidavits reveal that Petitioner did not have a stable father figure, that his family was poor and often without money to pay the utilities, that they moved around a lot, that his mother did not provide much guidance and was unstable, that his bothers were mean and aggressive towards him, that people suspected that he was

mentally ill even as a young child and teenager, that his brother was a diagnosed schizophrenic, that he behaved oddly (putting duct tape on his mouth), that he was hyper-religious, and that he was affected by the deaths of his grandmother and aunt. The Director appropriately observed that all of this information was in front of the jury in some form, having been testified to either at the guilt/innocence or punishment phases of the trial, or both. The Director persuasively argued that because much of the evidence cited by Petitioner was actually presented in some form to the jury, any additional evidence would have been cumulative of evidence already admitted at trial. *See Emery v. Johnson*, 139 F.3d 191, 197 (5th Cir. 1997) (Petitioner has not shown prejudice in that omitted testimony was duplicative), *cert. denied*, 525 U.S. 969 (1998); *Motley v. Collins*, 18 F.3d 1223, 1228 (5th Cir.) ("[N]on-record Penry evidence merely corroborated the substantial trial testimony."), *cert. denied*, 513 U.S. 960 (1994); *Lincecum v. Collins*, 958 F.2d 1271, 1280 (5th Cir. 1992) ("[T]estimony would merely have been duplicative and could not have had an effect on the jury's decision to assess the death penalty."), *cert. denied*, 506 U.S. 957 (1992). The Director thus argues that the omission of such cumulative evidence was not prejudicial.

The Director also appropriately observed that Petitioner did not demonstrate how much of the evidence he claims should have been presented during punishment would have been helpful to his case. First of all, evidence regarding his mother's upbringing – as deplorable as it was – and her mother's upbringing – as deplorable as it was – has

only marginal relevance to Petitioner or his own childhood. The Supreme Court's Eighth Amendment jurisprudence demands only that the capital sentencing jury not be precluded from considering, as a mitigating factor, the character and the record of the individual offender, as well as the circumstances of the particular offense. E.g., *Penry v. Johnson*, 532 U.S. 782 (2001) (Penry II); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Penry I); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality op.). The Director appropriately argued that the focus of this case was on Petitioner, as opposed to his ancestors or distant relatives. By comparison, the evidence found "powerful" by the Supreme Court in Wiggins was that of abuse and neglect suffered specifically by the petitioner. *Wiggins,* 539 U.S. at 535.

*51 The Director further noted that much of the additional evidence cited by Petitioner of his upbringing was double-edged. The Fifth Circuit has often denied claims for lack of prejudice due to the double-edged nature of the evidence. *See Gray*, 616 F.3d at 449 (Petitioner "cannot show prejudice because much of the new evidence is 'double edged' in that it could also be interpreted as aggravating."); *Miniel v. Cockrell*, 339 F.3d 331, 346-48 (5th Cir. 2002) (upholding the state court's conclusion that petitioner suffered no prejudice from counsel's failure to investigate and present evidence of abuse and neglect during childhood), *cert. denied*, 540 U.S. 1179 (2004); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (failure to present evidence of troubled childhood, mental retardation diagnosis as a child,

low IQ test score, being placed on a psychomotor inhibitor, and good behavior in institutional settings not prejudicial because some of the evidence was double-edged, and the rest had only "minimal" mitigating value); *Vasquez v. Thaler*, 389 Fed.Appx. 419, 429 (5th Cir. 2010) ("[W]e have repeatedly rejected IAC claims where alleged failures to investigate mitigating evidence did not prejudice the defendant because of the double-edged nature of the evidence available."), *cert. denied*, 563 U.S. 991 (2011).

The Court observes that Petitioner claims that the mitigating evidence was not investigated nor developed because the defense team was leaderless, fractured and lethally unprepared. In support of this allegation, he placed special emphasis on the affidavit provided by Shelli Schade, the mitigation specialist, who was experiencing her first capital murder case. Petitioner's Ex. 30 ¶ 2. Ms. Schade claims that Mr. Hagood did not give her any guidance with respect to what he expected of her or what he wanted her to do. *Id.* at ¶¶ 3-4, 8-9. Petitioner also cites other affidavits from members of the defense team and members of his family that purportedly attacks Mr. Hagood's preparation for the punishment phase of the trial.

Lead counsel Hagood responded to the claim that he was not prepared as follows:

> [Petitioner] attacks me as unprepared and inept. [Petitioner] claims that we were not prepared to present our punishment case. This is patently false. Ms. Peterson and I spent many months preparing all aspects of the case.

I had talked to several family members regarding [Petitioner's] background and childhood.

Ms. Peterson and I never divided duties in this case in a manner that was set in stone. By and large, I handled voir dire and most of the experts. This was because I had experience of having done so in the past. Ms. Peterson procured Kate Allen with my consent. I did not know about Ms. Allen until shortly before she testified although I was glad Ms. Peterson had contacted Ms. Allen. Unfortunately, I was disappointed in Ms. Allen's performance. Her demeanor did not translate well to the rural community from which our jurors were selected. Likewise, Ms. Schade was employed based on a recommendation from the Texas Defender Service. I instructed Ms. Schade to do as much background as possible. All materials possessed by Ms. Peterson and myself were available to her. At no time did she request more documents from us or tell us that she needed more information to do her job. I was disappointed in her performance. Having worked with Amanda Maxwell, a mitigation specialist also recommended by the Texas Defender Service, in another case, I can now see what Ms. Schade should have done. Ms. Schade allowed her personal feelings about the death penalty to effect her performance. While I would not hesitate to hire Ms. Maxwell again, I cannot say the same for Ms. Schade.

6 SHCR 2155. In her affidavit, Ms. Peterson added to Mr. Hagood's statement by noting that she "procured Kate Allen with Mr. Hagood's consent." *Id.* at 2166 ¶ 31.

With respect to the claim that counsel did not prepare the witnesses that he did call and the additional claim that he failed to call Petitioner's mother, Mr. Hagood responded as follows:

> *52 [P]etitioner's mother was angry at [him] for killing her grandson. Although I could have gleaned useful background information from her testimony, I did not do so. She left the state and I made no attempt to subpoena her or get her back to Grayson County, Texas for the trial. I was too afraid of what might come out of her mouth and further damage she might [do] to [Petitioner]. I had no intention of putting her on the stand and preferred that the State not have the opportunity either.
>
> I believed [Petitioner's] aunt, Doris Gonzales, would be my primary witness regarding mitigation. When I interviewed her she was articulate and passionate about the trial and obstacles faced by [Petitioner]. Once on the stand, however, she collapsed. She was unable to relate to the jury, despite my best attempts, in as clear and convincing a manner as she had during trial preparation.
>
> I had also prepared two of [Petitioner's] brothers and his father. They, too, had done a much better job in my office than they were

> able to do in court. Once I realized that they were not coming across well, I abandoned my questioning of those three witnesses.

Id. at 2154-55. Ms. Peterson likewise stated that Petitioner's mother was not cooperative. *Id.* at 2166 ¶ 31.

With respect to strategy and investigative findings, Mr. Hagood provided the following response:

> I was also aware of the family background and history of mental problems and alcohol abuse. That information to a jury could cut both ways. I certainly didn't want the jury to think that [Petitioner's] background and propensity for drug use and mental instability would make him more of a future danger. Additionally, I concentrated on relatives and friends with current, close relationships to [Petitioner]. Strategically, I did not want to introduce childhood anecdotes or the history of distant relations. Through my investigation and interviews with friends and family members, I had been told that [Petitioner] had engaged in conduct as a child, long before any onset of mental illness, that involved cruelty to animals and setting fires. I am aware of the MacDonald triad which refers to the three major personality traits in children that are said to be warning signs for the tendency to become a serial killer: the three are bedwetting, firestarting and cruelty to animals. They were first described by J. M. MacDonald in his article "The Threat to Kill" in the American

> Journal of Psychiatry. Not all children who exhibit these signs grow up to develop antisocial personality disorder, but these signs are found in significantly higher proportions than in the general population. Generally, two out of three indicates a very strong tendency towards sociopathy. Although some researchers have called the triad into question, these three traits were included in the Diagnostic and Statistical Manual of Mental Disorders IV-TR under conduct disorder at the time of [Petitioner's] trial. I was afraid that the jury would see this as a sure sign that [Petitioner] would be a future danger. As such, I did not seek out all friends and relatives. Although I would have liked Ms. Schade to come up with more mitigating evidence, I felt that I was presenting the case to the jury most likely to sway them.

Id. at 2155-56. Petitioner's reply to the answer asserts that Mr. Hagood's affidavit is not credible. He refers to the affidavit as "revisionist history," which should be rejected.

After accumulating all of the aforementioned evidence and conducting oral arguments, the state trial court issued lengthy findings of fact regarding the claim that counsel was ineffective during the punishment phase of the trial:

> *53 129. Members of [Petitioner's] family, friends and community leaders were available at the time of [his] trial to inform counsel, experts, and jurors about [his] life.

130. The defense team did not contact all of [Petitioner's] family members. Nor did Ms. Schade draft a social history or mitigation report.

131. Mr. Hagood spent many months preparing all aspects of the case. He states that he talked to several family members regarding [Petitioner's] background and childhood.

132. [Petitioner's] mother was angry at [him] for killing her grandson. Although Mr. Hagood states that he could have gleaned useful background information from the mother's testimony, Mr. Hagood did not do so. She had left the state and Mr. Hagood states he made no attempt to subpoena her or get her back to Grayson County, Texas for trial. Mr. Hagood states that this was because he was too afraid of what might come out of her mouth and the further damage she might do to [Petitioner]. Mr. Hagood states that he had no intention of putting her on the stand and preferred that the state not have that opportunity either.

133. Mr. Hagood believed [Petitioner's] aunt, Doris Gonzalez, would be the primary defense witness regarding mitigation. When Mr. Hagood interviewed her she was articulate and passionate about the trial and obstacles faced by [Petitioner]. Once on the stand, she collapsed. She was unable to relate to the jury

despite Mr. Hagood's best attempts as she had during trial preparation.

134. Mr. Hagood also prepared two of [Petitioner's] brothers and his father. They, too, had done a much better job in Mr. Hagood's office than they were able to do in court. Mr. Hagood states that once he realized that they were not coming across well, he abandoned his questioning of those three witnesses.

135. Ms. Peterson (Cate) procured Kate Allen with Mr. Hagood's consent. Mr. Hagood did not know about Ms. Allen until shortly before she testified, although he was glad Ms. Peterson (Cate) had contacted Ms. Allen. Mr. Hagood was disappointed with Ms. Allen's performance because her demeanor did not translate well to the rural community from which our jurors were selected.

136. Ms. Schade was employed based on a recommendation from the Texas Defender's Service.

137. Mr. Hagood states that he instructed Ms. Schade to do as much background as possible. All materials possessed by the defense were available to her.

138. Mr. Hagood was disappointed in Ms. Schade's performance. Mr. Hagood states that having worked well with Amanda Maxwell, a mitigation specialist also recommended, by the

Texas Defender Service, in another case, he can now see what Ms. Schade should have done.

139. Mr. Hagood also states that Ms. Schade allowed her personal feelings about the death penalty to affect her performance.

140. Ms. Schade was admonished by the court to restrain herself because a juror had complained about her action in the courtroom.

141. Mr. Hagood was aware of the family background and history of mental problems and alcohol abuse.

142. Mr. Hagood felt that such information to a juror could cut both ways.

143. Mr. Hagood did not want the jury to think that [Petitioner's] background and propensity for drug use and mental instability would make him more a future danger.

*54 144. Mr. Hagood concentrated on relatives and friends with current close relationships to [Petitioner]. Strategically, Mr. Hagood states that he did not want to introduce childhood anecdotes or the history of distant relations.

145. Through his investigation and interviews [with] friends and family members, Mr. Hagood had been told that [Petitioner] had engaged in the conduct as a child long before

> any onset of mental illness that involved cruelty to animals and setting fires.
>
> 146. Mr. Hagood was afraid that the jury could see this as a sure sign that [Petitioner] would be a future danger as such, Mr. Hagood did not seek out all friends and relatives.

10 SHCR 3545-47. Petitioner has not rebutted the presumption of correctness that must be accorded to these findings of fact with clear and convincing evidence. *See Miller-EL*, 545 U.S. at 240.

The state trial court proceeded to issue the following conclusions of law on this claim:

> 100. [Petitioner] has failed to prove by a preponderance of the evidence that a constitutionally deficient performance prejudiced his defense or that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different.
>
> 102. [Petitioner] has failed to prove by a preponderance of the evidence that Mr. Hagood was not employing trial strategy in his selection of punishment witnesses.
>
> 103. [Petitioner] has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient and that he was not acting as a reasonably competent attorney in that his trial strategy was not in the range of competence required of

> attorneys in criminal cases in his selection and handling of punishment witnesses.

10 SHCR 3581. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

In the present petition, Petitioner presents a long list of additional witnesses who could have been interviewed and called as witnesses during the punishment phase of the trial. However, "there comes a point at which evidence from more distant relatives can be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby*, 558 U.S. at 11. *See also Simon v. Epps*, 394 Fed.Appx. 138, 144 (5th Cir. 2010), *cert. denied*, 562 U.S. 1290 (2011). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In the present case, defense counsel's strategy was to concentrate on close friends and relatives, who, in fact, testified. The anticipated testimony of the proposed additional witnesses would have been cumulative. Similarly, testimony from additional expert witnesses would have been cumulative. Counsel's representation was not deficient for failing to present cumulative testimony.

To the extent Petitioner argues that counsel should have presented evidence of problems experienced by other family members, *Wiggins* requires counsel to investigate evidence of abuse and

disadvantages experienced by him. *Wiggins*, 539 U.S. at 535. If his mother or grandmother or cousins were on trial, then their history would have been relevant. Nonetheless, evidence was presented about problems experienced by other family members to the extent that Petitioner was affected by their experiences, including evidence of poverty, an unstable home, his father's drinking and Brian's mental problems. Counsel's representation was not deficient for failing to present mitigating evidence regarding other family members that did not directly impact Petitioner.

*55 Furthermore, to the extent that these witnesses would have offered "double-edged" testimony, Mr. Hagood engaged in reasonable trial strategy in deciding to forego calling them as witnesses. He sensibly wanted to avoid presenting testimony providing the jury a sure sign that Petitioner would be a future danger. The decision to forego presenting "double-edged" evidence is a reasonable trial strategy. See *Hopkins v. Cockrell*, 325 F.3d 579, 586 (5th Cir.) (holding "that a tactical decision not to pursue and present potentially mitigating evidence on the ground that it is double-edged in nature is objectively reasonable"), *cert. denied*, 540 U.S. 968 (2003); *Mann v. Scott*, 41 F.3d 968, 984 (5th Cir.) (noting the heavy deference owed trial counsel when deciding as a strategical matter to forego admitting evidence of a 'double-edged nature' which might harm defendant's case), *cert. denied*, 514 U.S. 1117 (1994); *Rodriguez v. Quarterman*, 204 Fed.Appx. 489, 500 (5th Cir. 2006) (The decision to forego presenting double-edged evidence regarding petitioner's permanent brain damage was reasonable

since it could have bolstered the State case regarding future dangerousness.), *cert. denied*, 549 U.S. 1350 (2007). Counsel's tactical decision to forego presenting double-edged testimony was objectively reasonable and does not amount to deficient performance. *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999) (citations omitted), *cert. denied*, 528 U.S. 1013 (1999).

In conclusion with respect to this claim, Petitioner has not shown that counsel's representation was deficient in his selection of punishment witnesses. Moreover, since the evidence the additional witnesses would have presented was cumulative, he cannot show prejudice. Finally, to the extent that their testimony would have been double-edged, their testimony would have had limited mitigating value, if any, which would have been outweighed by the aggravating nature of such evidence. Overall, having reweighed the evidence in aggravation against the totality of available mitigating evidence, the Court finds that Petitioner has not shown that, had counsel presented all of the available mitigating evidence, there is a reasonable probability that a juror would have found that the mitigating evidence outweighed the aggravating evidence. Petitioner has not shown that counsel was ineffective during the punishment phase.

In addition to the foregoing, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a

decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. In particular, he failed to show that the state court's finding that he had not shown prejudice was unreasonable. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to overcome the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. Claim number fourteen lacks merit.

Claim Number 15: The trial court placed unconstitutional limitations on Petitioner's presentation of mitigating evidence.

In claim number fifteen, Petitioner complains that the trial court limited the testimony of his expert, Dr. Kate Allen. More specifically, the trial court granted the State's motion *in limine* and instructed Dr. Allen to "avoid anything that says mitigation or moral culpability." 41 RR 124. The trial court also held that Dr. Allen could not be called a "mitigation specialist" in open court; instead, she was to be referred to as a "social worker." *Id.* at 24. Finally, she was prohibited from testifying as to any conversations she had with Petitioner one day earlier, wherein he expressed remorse for the killing, because such testimony was inadmissible hearsay. *Id.* 26-27.

*56 The Director argued that the trial court properly limited Dr. Allen's testimony under

evidentiary rules. Petitioner did not address the response in his reply.

The state trial court issued the following conclusions of law on this claim:

> 116. The trial court properly limited Dr. Allen from testifying that she believed evidence was "mitigating" or referring to a "mitigation time line" compiled by a "mitigation expert."
>
> 117. The trial court properly prevented Dr. Allen from testifying that [Petitioner] had expressed remorse to her the night before Dr. Allen testified. The Court of Criminal Appeals has decided that the federal constitution does not require admission of a defendant's self-serving, out-of-court declarations of remorse when they are inadmissible under state law even when these declarations meet the test of constitutional "relevancy." *See Lewis v. State*, 815 S.W.2d 560, 568 (Tex. Crim. App. 1991) (defendant's hearsay expressions of remorse not admissible at punishment phase of capital murder trial); *Thomas*, 638 S.W.2d at 484 (defendant's self-serving hearsay declarations in mitigation are ordinarily inadmissible). Although "[r]emorse following commission of a serious crime may well be a circumstance tending in some measure to mitigate the degree of a criminal's fault, but it must be presented in a form acceptable to the law of evidence before he is entitled to insist that it be received over objection." *Renteria v. State*, 206 S.W.3d 689, 697 (Tex. Crim. App. 2006).

10 SHCR 3583-84. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

"The use of mitigation evidence is the product of the requirement of individualized sentencing." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (citations omitted). In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), a plurality of the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original). The Court held that the sentencer must have full access to "highly relevant" information. *Id.* at 603. A majority of the Court adopted the *Lockett* ruling in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). The *Lockett* and *Eddings* decisions were revisited in *Johnson v. Texas*, 509 U.S. 350 (1993). The Court read these cases narrowly:

> *Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.

Id. at 361 (citations omitted). *Lockett* "does not deprive the State of its authority to set reasonable limits on the evidence a defendant can submit, and to control the manner in which it is submitted." *Oregon v. Guzek*, 546 U.S. 517, 526 (2006). "States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty." *Id.* (citations and internal quotation marks omitted).

*57 In the present case, the trial court's ruling did not cut off in an absolute manner the presentation of mitigating evidence; instead, the trial court required the presentation of the evidence in a manner consistent with evidentiary rules. The TCCA has repeatedly held that only the individual juror can decide what mitigating weight, if any, is to be given to particular evidence. See *Curry v. State*, 910 S.W.2d 490, 495 (Tex. Crim App. 1995). "Although technically a 'factual question,' the mitigation issue is in reality a normative determination left to the subjective conscience of each juror." *Howard v. State*, 941 S.W.2d 101, 119 (Tex. Crim. App. 1996). The Director persuasively argued that Dr. Allen was not qualified to give such an opinion and that the trial court's limits were appropriate.

The trial court likewise reasonably prohibited Dr. Allen from telling the jury that Petitioner had expressed remorse to her. As was noted by the trial court, the TCCA has consistently held that the Constitution does not require the admission of a criminal defendant's self-serving, out-of-court declarations of remorse when they are inadmissible under state law. See *Lewis v. State*, 815 S.W.2d at

568 (defendant's hearsay expressions of remorse not admissible at punishment phase of capital murder trial); *Thomas*, 638 S.W.2d at 484 (defendant's self-serving hearsay declarations in mitigation are ordinarily inadmissible); *Renteria*, 206 S.W.3d at 697 (Although "[r]emorse following commission of a serious crime may well be a circumstance tending in some measure to mitigate the degree of a criminal's fault, but it must be presented in a form acceptable to the law of evidence before he is entitled to insist that it be received over objection."). Furthermore, even if Dr. Allen should have been allowed to testify to Petitioner's self-serving declarations of remorse, he cannot show harm since several other witnesses had already testified that he was sorry and worried about forgiveness. Overall, the trial court's rulings were consistent with the Supreme Court's holding that states can structure and shape the consideration of mitigating evidence. States are not required to disregard their evidentiary rules in capital cases. The fifteenth ground for relief lacks merit.

In addition to the foregoing, Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. He has not satisfied the requirements of § 2254(d); thus, all relief on claim number fifteen must be denied.

Claim Number 16: Sentencing Petitioner to death violates the prohibition on cruel and unusual punishment set forth in the Eighth Amendment to the United States because Petitioner is indisputably and severely mentally ill.

Petitioner's sixteenth ground for relief is a claim that he should not be executed because he is mentally ill. He supports his claim by citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 609-10 (1999), and *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). *Olmstead*, however, concerns confining mentally disabled patients in a segregated environment. It has nothing to do with the execution of mentally ill inmates. Petitioner's reliance on Atkins is likewise misplaced. Atkins prohibits the execution of mentally retarded inmates. It does not cover the execution of mentally ill inmates separate and apart from mental retardation. The Director correctly observed that the Fifth Circuit has held that the Supreme Court has not "created a new rule of constitutional law, made retroactive by the Supreme Court, making the execution of mentally ill persons unconstitutional." *In re Neville*, 440 F.3d 220, 221 (5th Cir.), *cert. denied*, 546 U.S. 1161 (2006). *See also In re Woods*, 155 Fed.Appx. 132, 136 (5th Cir. 2005) ("Atkins did not cover mental illness separate and apart from mental retardation, and [petitioner] points to no Supreme Court case creating such a rule."). Since the pleadings were filed in this case, the Fifth Circuit rejected yet another claim by a death row inmate that the Eighth Amendment prohibits the execution of the mentally ill. *Mays*, 757 F.3d at 219. The ground for relief lacks

merit and is foreclosed by Fifth Circuit precedent. The Director also properly observed that relief must be denied because Petitioner is attempting to rely on a new rule of law, which is barred by *Teague v. Lane*, 489 U.S. 288 (1989).

*58 In addition to the foregoing, the claim should be denied for reasons explained by the state court. The trial court issued the following conclusion of law:

> 137. The execution of mentally retarded persons and insane persons violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986). There is no Supreme Court authority or authority from the Texas Court of Criminal Appeals suggesting that mental illness is enough to render one immune from execution under the Eighth Amendment.
>
> 138. The Court of Criminal Appeals has previously rejected an invitation to extend the federal constitutional proscription against execution of the insane to the greater category of mentally ill defendants. *Colburn v. State*, 966 S.W.2d 511 (Tex. Crim. App. 1998).
>
> 139. [Petitioner] has failed to prove by a preponderance of the evidence that the Court of Criminal Appeals should extend the prohibition in Atkins to those who are mentally ill.

10 SHCR 3588-89. The TCCA subsequently denied Petitioner's state application for a writ of habeas

corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. He has not satisfied the requirements of § 2254(d); thus, all relief on claim number sixteen must be denied.

Claim Number 17: As Petitioner is no longer a future danger, his death sentence violates the Eighth and Fourteenth Amendments.

Petitioner argues that he should not be executed because he is no longer a future danger in light of the fact that he plucked out both of his eyes and is completely blind. The claim was presented for the first time in Petitioner's second state application for a writ of habeas corpus. The TCCA dismissed the application as an abuse-of-the-writ pursuant to Texas Code of Criminal Procedure Article 11.071 § 5. The TCCA included the following remarks in dismissing the claim:

> [Petitioner] alleges that due to his blindness there is no longer a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. *See* Art. 37.071, § 2(b)(1). But our law imposes no such requirement. The question was whether

> there was such a probability when he was convicted. The jury found that there was, and this application contains no claim that would make the judgment of the trial court improper. Accordingly, the application is dismissed.

Ex parte Thomas, 2010 WL 1795738, at *1.

The Director argues that the dismissal of the claim as an abuse-of-the-writ by the TCCA operates as a procedural bar. The procedural default doctrine announced in *Coleman* was previously discussed on pages thirteen through fourteen and again on page twenty-four of this memorandum opinion. "A district court must deny federal habeas relief on procedurally defaulted claims dismissed 'pursuant to an independent and adequate state procedural rule,' such as Texas's abuse-of-the-writ doctrine." *Reed* 739 F.3d at 767. Petitioner has not attempted to overcome the procedural bar by showing cause and prejudice or a fundamental miscarriage of justice; thus, the claim is procedurally barred.

*59 The Director also appropriately observed that the Fifth Circuit has rejected a challenge to a finding of future dangerousness premised on a change of circumstances over time as *Teague*-barred. *Hughes v. Johnson*, 191 F.3d 607, 623-24 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000). Petitioner's claim that he is no longer a continuing threat to society because of his self-inflicted blindness would likewise create a new rule of law that is barred by *Teague*'s non-retroactivity doctrine.

Relief on claim number seventeen is thus foreclosed as procedurally barred and by Teague's non-retroactivity doctrine.

Claim Number 18: Defense counsels' copious failure in handling expert witnesses further deprived Petitioner of effective assistance of counsel.

Petitioner argues that the evidence makes it clear that his actions were not those of a sane and rational person. He stresses that he was mentally ill and suffering from schizophrenia at the time of the murders. As a result of his mental illness, he acted under the psychotic delusion that he was doing God's will. He complains that the State obtained a conviction with surprising ease despite this evidence. He blames his counsel for failing to develop and implement any meaningful strategy with regard to expert witnesses or failing to investigate the facts relevant to their opinions.

A. Counsel was ineffective for failing to prepare and present essential testimony from psychiatric expert Dr. Edward Gripon.

Petitioner initially argues that counsel was ineffective with respect to his star expert, Dr. Edward Gripon. He asserts that counsel "failed completely to prepare" and "provide Dr. Gripon with available information" regarding his sanity. Petition at 245. He characterized counsel as incompetent and disorganized.

Lead counsel Hagood provided the following response:

> [Petitioner] attaches an affidavit from Dr. Gripon stating that he did not remember reviewing all of the materials we were given by the State in discovery. My recollection is that we gave him a copy of everything we had received in discovery. The offense reports clearly reference recordings being placed into evidence. Because Dr. Gripon reviewed all of the materials, had he seen that evidence existed, such as recorded interviews, but not provided to him, I would have expected him to inquire as to their location. Dr. Gripon never complained that items were missing from materials sent to him. I discussed the case with Dr. Gripon originally and instructed him to do everything necessary for his evaluation. I was never given a list of questions from Dr. Gripon, but I did spend a considerable time going over the questions I would be asking Dr. Gripon. I even spent a couple of hours with Dr. Gripon in his hotel room the night before he testified going back over questions and issues. I made sure the doctor knew that I would ask him about his qualifications, his interviews and examinations of [Petitioner] and would then elicit his opinion regarding sanity. I do not know which questions Dr. Gripon specifically asked me to use that were not use in some manner. Strategically, there may have been some questions I did not ask. Our position was always that [Petitioner's] psychosis was

> not caused by a substance but was organic. However, I had discussed the case with Dr. Crowder and Dr. Richard Rogers. I attempted to avoid any questions of Dr. Gripon which would highlight that [Petitioner] was willingly taking drugs prior to the murders as well as anything that would make [Petitioner] more blameworthy or less sympathetic in front of the jury. Dr. Crowder had been unable to rule out substance induce psychosis and Dr. Rogers indicated that testing showed [Petitioner] was manipulative and "blew the top off" the questions indicating malingering. I was being careful not to elicit information from our expert which the State's experts could use against [Petitioner].

*60 6 SHCR 2152-53.

At trial, Dr. Gripon was asked by defense counsel what items he had reviewed in reaching his evaluation of Petitioner's sanity. Dr. Gripon provided the following answer:

> I have reviewed offense reports, crime scene photographs, witness statements, videotapes, audiotapes, information from those who interviewed this individual around or about the time of the arrest and subsequent to that. I've reviewed jail records. I reviewed medical records. I've reviewed treatment records of his treatment once he was begun on treatment using psychotic medication. I reviewed reports of other people who have examined him and interviewed him and whatever opinion or

> conclusion they have come to. I've read expert reports in regard to this particular case of people who have testified. I've read anything that was provided to me that would help me have some kind of understanding of this man in these circumstances.

36 RR 73. He added that he had been told that he had been provided everything the defense had. *Id.* It is noted that Dr. Gripon specified in his affidavit that counsel provided him with numerous materials, although he also noted a few items that he did not receive. 2 SHCR 445 ¶¶ 4, 6.

Regardless of any omissions that may have occurred, the transcript from the trial reveals that Dr. Gripon effectively discussed schizophrenia, delusions associated with schizophrenia, and hallucinations. 36 RR 77-83. He opined that Petitioner's treatment in jail was "most consistent with treating a chronic schizophrenic condition." *Id.* at 83. He testified that he had considered drug-induced psychosis, but he ruled it out. *Id.* at 92. Dr. Gripon was of the opinion that Petitioner was still in a state of psychosis at the time he plucked out his eye. *Id.* at 96. After discussing all of the reasons upon which he formed his opinion, Dr. Gripon finally gave his opinion as to Petitioner's mental status at the time of the murders as follows:

> I believe that he was operating under the effect of a psychotic illness at that time, specifically schizophrenia, in which he believed that he was doing what was directed by or that he was at least operating under the direction of God in

> fighting these demons, saving the world; that was all based on psychosis, and that based upon that psychosis, he did not know that conduct at that time was wrong.

Id. at 99-100. On cross-examination, he acknowledged that Drs. Scarano and Axelrad were highly qualified and they were of the opinion that Petitioner's psychosis was substance induced. *Id.* at 102. In his affidavit, Dr. Gripon noted that there were additional questions that could have been asked that would have supported a finding of insanity. 2 SHCR 446 ¶ 11. Overall, a review of the record reveals that Dr. Gripon effectively presented a basis for the jury to find that Petitioner was insane at the time of the offense, but the jury believed the State's witnesses. Counsel's representation with respect to Dr. Gripon was not deficient simply because the jury found against Petitioner on this issue.

*61 After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding the claim that counsel was ineffective with respect to Dr. Gripon:

> 186. Mr. Hagood's recollection is that the defense gave Dr. Gripon a copy of everything they had received in discovery.
>
> 188. Mr. Hagood handled Dr. Gripon's testimony.

190. Mr. Hagood states that Dr. Gripon never complained to him that items were missing from the materials sent to the doctor.

191. Mr. Hagood also states that he was never given a list of questions from Dr. Gripon, but did spend a considerable time going over the questions the defense would be asking Dr. Gripon.

192. Mr. Hagood states that he spent a couple of hours with Dr. Gripon in his hotel room the night before he testified going back over questions and issues.

193. Mr. Hagood states that he made sure the doctor knew that he would be asked about his qualifications, interviews and examinations of [Petitioner] and would then illicit [sic] his opinion regarding sanity.

194. Mr. Hagood states that he does not know which questions Dr. Gripon specifically asked Mr. Hagood to use that were not used in some manner.

195. Dr. Gripon is not specific about which questions Mr. Hagood should have asked.

196. Mr. Hagood states that strategically there may have been some questions the defense did not ask.

197. Mr. Hagood states that during the examination of Dr. Gripon, Hagood was being

> careful not to illicit [sic] information from Gripon which the state's experts could use against [Petitioner].

10 SHCR 3555-56. Petitioner complains that the state court's findings were based solely on Mr. Hagood's recollection; nonetheless, the findings of fact were supported by the evidence even though there was some evidence to the contrary. Petitioner has not overcome the presumption of correctness that must be accorded to the state court findings with clear and convincing evidence.

The state trial court proceeded to issue the following conclusions of law:

> 89. [Petitioner] has failed to prove by a preponderance of the evidence exactly what questions Mr. Hagood did not ask Dr. Gripon.
>
> 90. [Petitioner] has failed to prove by a preponderance of the evidence that the decision not to ask certain questions was not trial strategy.
>
> 92. [Petitioner] has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient and was not acting as a reasonably competent attorney, and his advice was not within the range of competence demanded of attorneys in criminal cases.
>
> 93. [Petitioner] has failed to prove by a preponderance of the evidence that a

> constitutionally deficient performance prejudiced his defense and that there is a reasonabl[e] probability but for counsel's unprofessional err[or]s the results of the proceeding would have been different.

10 SHCR 3579-80. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner disputes these findings, but he has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. His first ineffective assistance of counsel claim under claim number eighteen regarding Dr. Gripon must be rejected because it lacks merit and because he has not satisfied the requirements of § 2254(d).

B. Defense counsel's failure to lodge a *Daubert/Kelly* objection to Dr. Victor Scarano's testimony constituted ineffective assistance of counsel.

C. Defense counsel's failure to lodge a *Daubert/Kelly* objection to Dr. David Axelrad's testimony likewise constituted ineffective assistance of counsel.

*62 Petitioner argues that defense counsel was ineffective for failing to lodge objections to the testimony of Dr. Victor Scarano and Dr. David Axelrad pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and the *Kelly/Frye* standard, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Daubert* and *Frye* did not, however, set a constitutional standard for the admissibility of expert testimony. *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994), *cert. denied*, 513 U.S. 1076 (1995). *Daubert* simply examined the standard of the admissibility of scientific evidence under the Federal Rules of Evidence. A violation of *Daubert* does not equal a constitutional violation. After the petition was filed in this case, the Fifth Circuit, in another capital murder case, rejected a claim based on *Daubert* with the explanation that such claims are "squarely foreclosed by Supreme Court and circuit precedent." *Rivas v. Thaler*, 432 Fed.Appx. 395, 404 (5th Cir.) (citations omitted), *cert. denied*, 132 S. Ct. 850 (2011). More recently, in yet another capital murder case, the Fifth Circuit held that "*Daubert* does not apply" and rejected an ineffective assistance of counsel claim based on counsel's failure to challenge the State's psychiatric and psychological experts

based on *Daubert*. *Williams v. Stephens*, 761 F.3d 561, 571 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). The Fifth Circuit subsequently rejected similar claims based on *Daubert* in *Gonzales v. Stephens*, 606 Fed.Appx. 767, 774-75 (5th Cir. 2015), and*Holiday v. Stephens*, 587 Fed.Appx. 767, 783 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2893 (2015). There is no legal basis to Petitioner's claim that defense counsel was ineffective for failing to lodge objections to the testimony of Dr. Scarano and Dr. Axelrad based on *Daubert*, *Frye* and related cases.

In addition to the foregoing, the claim lacks merit because counsel did not have a basis to object to Drs. Scarano and Axelrad testifying. Mr. Hagood noted in his affidavit that he was provided their credentials and was aware of their qualifications before trial. 6 SHCR 2149. He was present when they examined Petitioner, and he observed their professionalism. *Id.* at 2149-50. They appeared knowledgeable and followed the protocol most doctors use. *Id.* at 2150. He consulted with his expert, Dr. Jay Crowder, and their testimony was consistent with the information provided by his expert. *Id.* Mr. Hagood concluded that requesting a *Daubert/Kelly* hearing would have been frivolous. *Id.* Counsel was not required to make frivolous objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527. "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark*, 19 F.3d at 966.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding the

claim that counsel was ineffective with respect to Dr. Scarano and Dr. Axelrad:

> 119. Trial counsel did not raise a *Daubert* challenge to Dr. Scarano or Dr. Axelrad.
>
> 163. Dr. Scarano's testimony was consistent with what the defense expert, Dr. Crowder, had told Mr. Hagood.
>
> 164. Mr. Hagood felt requesting a *Daubert/Kelly* hearing regarding Scarano and Axelrad would be frivolous.
>
> 165. The majority of Dr. Scarano's work as a full-time forensic psychiatrist is in the examination and evaluation of individuals involved in the criminal justice system, as was the case with [Petitioner].
>
> 166. Dr. Scarano is often appointed as a forensic psychiatrist expert by courts. In addition, his services are employed as a consulting and/or testifying expert by the prosecution and the defense in criminal cases. A large portion of the defendants on whom he performs forensic psychiatric examinations/evaluations have a history of drug abuse. Evaluation of the defendant's abuse of drugs is an integral and important part of the forensic psychiatrist examination/evaluation.
>
> 168. This court finds that Dr. Scarano is a qualified expert in forensic psychiatry.

> 170. Based on the facts of the case and the information provided to the defense, Mr. Hagood did not believe the trial court would have prevented Dr. Axelrad's testimony.

10 SHCR 3554, 3551-52. Petitioner criticizes these findings by saying that the state habeas court's findings were issued without consideration of the salient facts. The findings, however, were based on the facts before the court. Petitioner has not overcome the presumption of correctness that must be accorded to the state court findings with clear and convincing evidence.

*63 The state trial court accordingly issued the following conclusions of law:

> 73. [Petitioner] has failed to prove by a preponderance of the evidence that Dr. Scarano was not qualified to render a diagnosis involving substance-induced psychosis.
>
> 74. [Petitioner] has failed to prove by a preponderance of the evidence that the Court would have excluded Dr. Scarano's testimony.
>
> 75. [Petitioner] has failed to prove by a preponderance of the evidence that defense counsel was ineffective for not requesting a *Daubert/Kelly* hearing regarding Dr. Scarano.
>
> 76. [Petitioner] has failed to prove by a preponderance of the evidence that Dr. Axelrad was not qualified to render a diagnosis involving substance-induced psychosis.

> 77. [Petitioner] has failed to prove by a preponderance of the evidence that the Court would have excluded Dr. Axelrad's testimony.
>
> 78. [Petitioner] has failed to prove by a preponderance of the evidence that defense counsel was ineffective for not requesting [a] *Daubert/Kelly* hearing on Dr. Axelrad.

10 SHCR 3577-78. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner disputes these findings, but he has gone no further than to argue that the state habeas court's conclusions were cursory and unreasonable. Nonetheless, the conclusions were reasonable in light of the evidence before the state court. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Furthermore, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of

showing that counsel was ineffective on this issue. Furthermore, his second and third ineffective assistance of counsel claims under claim number eighteen regarding Dr. Scarano and Dr. Axelrad must be rejected in light of clearly established Fifth Circuit precedent and because he has not satisfied the requirements of § 2254(d).

D. Defense counsel's failure to call expert Larry Fitzgerald during the punishment phase denied [Petitioner] effective assistance of counsel.

Petitioner next complains that defense counsel was ineffective for failing to call Larry Fitzgerald during the punishment phase of the trial. He initially complained that Ms. Peterson hired Larry Fitzgerald at the last minute, and then he complained that defense counsel did not call him as a witness to show that he would not be a danger to society.

Larry Fitzgerald was initially questioned on voir dire outside of the presence of the jury. He testified that he had been the public information officer for the Texas Department of Criminal Justice, but he had retired by time of the trial. 41 RR 139. He stated that he had testified in about twelve capital murder trials. *Id.* at 140. On cross-examination, he testified that he did not develop any of the policies at the prison system. *Id.* at 141. He had not written any media articles; instead, he had testified about articles. *Id.* at 142. He stated that his qualifications to testify were based on spending "a lot of time down there inside the prison in my capacity." *Id.* at 143. His intent was to show a video prepared by the Texas

Defender Service. *Id.* at 144. He described the Texas Defender Service as an advocacy group against the death penalty. *Id.* at 145. The group had sought him out, presumably because of his experience at the prison system. *Id.* at 146. The State specified that it did not object to Mr. Fitzgerald testifying, but defense counsel chose not to call him as a witness. *Id.* at 148.

*64 Mr. Hagood reviewed Mr. Fitzgerald's testimony in his affidavit. He expressed the opinion that "Fitzgerald, under the blistering [ ] examination by the State did not come off as a respected expert. Instead, he looked like a bureaucrat who was being used by a defense oriented organization. I did not want a repeat of Fitzgerald's performance in front of the jury." 6 SHCR 2151. The Director observed that prosecutor Ashmore stated in his affidavit that he was hoping that Mr. Fitzgerald would testify so that he could discredit him in front of the jury. *Id.* at 2331 ("I thought he was one of the worst witnesses I have seen in some time and felt that he would be very damaging if the defense used him."). The Court notes that following the trial in this case the Fifth Circuit upheld a state trial court's decision prohibiting Mr. Fitzgerald from testifying during the punishment phase about the future dangerousness of a capital murder defendant. *Fuller v. Dretke*, 161 Fed.Appx. 413, 416 (5th Cir.), *cert. denied*, 548 U.S. 936 (2006).

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding the claim that counsel was ineffective with respect to Larry Fitzgerald:

> 217. Mr. Fitzgerald had been questioned by the State out of the presence of the jury. The State had him admit that he was retired from the Texas Department of Criminal Justice where he had been employed as a public information officer. (RR vol. 41, p. 142) The State established that Fitzgerald did not aid in the development of TDCJ policies, had never investigated crimes in the penitentiary, and had not gathered any statistics of his own. (RR vol. 41, pp. 141-146) Fitzgerald also testified that the video tape he intended to show was provided by the Texas Defender Service. (RR vol 41, pp. 144-145)
>
> 218. Mr. Hagood believed that Fitzgerald did not come off as a respected expert.
>
> 219. Mr. Hagood's decision not to call Fitzgerald as a witness was trial strategy.

10 SHCR 3559. Petitioner did not attempt to overcome the presumption of correctness that must be accorded to the state court findings with clear and convincing evidence.

The state trial court proceeded to issue the following conclusions of law:

> 98. [Petitioner] has failed to prove by a preponderance of the evidence that Mr. Hagood's decision not to call Larry Fitzgerald was not trial strategy.

> 99. [Petitioner] has failed to prove by a preponderance of the evidence that counsel was not acting as a reasonably competent attorney and his advice was not within the range of competence demanded by attorneys in criminal case[s] by not introducing the testimony of Larry Fitzgerald.

10 SHCR 3580-81. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner disputes Mr. Hagood's assessment of Larry Fitzgerald and argues that he should have been called as a witness. Nonetheless, Mr. Hagood observed the State question him on voir dire. He was of the opinion that Mr. Fitzgerald would not be a good witness. Mr. Hagood engaged in reasonable trial strategy in deciding not to use Larry Fitzgerald as a witness. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S.

at 105. Indeed, there was a reasonable argument that Mr. Hagood did not call Larry Fitzgerald as a witness because he did not think he would be a good defense witness. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. His fourth ineffective assistance of counsel claims under claim number eighteen regarding Larry Fitzgerald should be denied because it lacks merit and because Petitioner has not satisfied the requirements of § 2254(d).

E. Defense counsel's failure to investigate the qualifications of Royce Smithey or object to his inadmissible testimony constituted ineffective assistance of counsel.

*65 Petitioner next complains that counsel did not investigate the qualifications of Royce Smithey or object to his testimony. The State called Mr. Smithey as an expert during the sentencing phase of the trial. Petitioner argues that Mr. Smithey was not qualified under the *Daubert* standard. The focus of the claim is Petitioner's argument that counsel was ineffective for failing to conduct even a basic investigation into Smithey's qualifications. He argues that he was not afforded relief in state court because of the state court's unreasonable application of federal law and unreasonable findings of fact.

As an initial matter, the Court again notes that the Fifth Circuit has rejected *Daubert* claims in the context of capital murder cases with the explanation that such claims are "squarely foreclosed by Supreme Court and circuit precedent." *Rivas*, 432 Fed.Appx. at 404. Moreover, ineffective assistance of counsel

claims based on *Daubert* in the context of capital murder cases have been rejected. *Williams*, 761 F.3d at 571 ("*Daubert* does not apply"); *Gonzales*, 606 Fed.Appx. at 774-75; *Holiday*, 587 Fed.Appx. at 783. There is no basis to Petitioner's claim that defense counsel was ineffective for failing to challenge Mr. Smithey's testimony based on *Daubert*.

In addition to the foregoing, the claim lacks merit because Mr. Smithey was qualified as a witness, and counsel had no reason to object to him as a witness. At the time of the trial, Mr. Smithey was the chief investigator for the Texas Special Prison Prosecution Unit. He had regularly testified in death penalty cases. *See, e.g., Sells v. Stephens*, 536 Fed.Appx. 483, 487 (5th Cir. 2013); *Fuller v. Johnson*, 114 F.3d 491, 497 (5th Cir. 1997); *Jones v. Cockrell*, 74 Fed.Appx. 317, 321 (5th Cir. 2003). *See also Garcia v. Director, TDCJ-CID*, 73 F. Supp.3d 693, 751-762 (E.D. Tex. 2014);*Williams v. Thaler*, No. 1:09cv271, 2013 WL 1249773, at *9-12 (E.D. Tex. Mar. 26, 2013); *Simpson v. Quarterman*, Civil Action No. 1:04cv485, 2007 WL 1008193, at *21-23 (E.D. Tex. Mar. 29, 2007). The TCCA has found that his testimony regarding general prison conditions is both relevant and permissible. *Lucero v. State*, 246 S.W.3d 86, 97 (Tex. Crim. App. 2008). Despite his extensive record of testifying in death penalty and non-death penalty criminal cases, Petitioner now alleges that counsel should have objected to Mr. Smithey testifying. Counsel, however, was not required to make frivolous or futile objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527. In light of the extensive case law finding that Mr. Smithey was an appropriate witness, Petitioner

cannot show he was prejudiced by counsel's alleged failure to investigate Mr. Smithey's background or his failure to object to Mr. Smithey's testimony.

In addition to the foregoing, Mr. Hagood responded to the claim that he was ineffective with respect to Mr. Smithey as follows:

> [T]he State had announced its intention to call Royce Smithey. We did not challenge the witness' credentials because we intended to get much of the information Fitzgerald was to provide in through the State's witness. It would make no sense to seek to exclude a State's witness needed by the defense as well. We were successfully able to get our video tape into evidence and establish that [Petitioner] would be sent to the Connally Unit which was maximum security, the different classifications within the unit, security precautions in the unit, and that [Petitioner] could never reach the best classification of G1. We also were able to have Smithey testify that an inmate serving life in a capital case is not housed in open housing with other inmates, are ineligible for furloughs and trustee status and cannot work out side of the facility. Smithey also testified that there was a psychiatric unit available and the homicide rate at TDCJ.

*66 6 SHCR 2151. Mr. Hagood's response makes it clear that he actually wanted Mr. Smithey to testify. The decision not to challenge Mr. Smithey was reasonable trial strategy.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding the claim that counsel was ineffective with respect to Royce Smithey:

> 220. The defense did not challenge Smithey's credentials because they intended to get much of the information Fitzgerald was to provide in through the State's witness. Through Smithey, the defense was able to get a video tape of the conditions at prison into evidence and establish that [Petitioner] would be sent to the Connally Unit which was maximum security, the different classifications within the unit, security precautions in the unit and that [Petitioner] could never reach the best classification of G1. The defense was able to have Smithey testify that an inmate serving life in a capital case is not housed in open housing with other inmates, are ineligible for furloughs and trustee status and cannot work out side of the facility. Smithey also testified that there was a psychiatric unit available and to the homicide rate at TDCJ.

10 SHCR 3559-60. Petitioner did not overcome the presumption of correctness that must be accorded to the state court findings with clear and convincing evidence.

The state trial court proceeded to issue the following conclusions of law:

> 100. [Petitioner] has failed to prove by a preponderance of the evidence that a constitutionally deficient performance prejudiced his defense or that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would be different.
>
> 102. [Petitioner] has failed to prove by a preponderance of the evidence that Mr. Hagood was not employing trial strategy in his selection of punishment witnesses.

10 SHCR 3581. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner disputes Mr. Hagood's assessment of the situation and the state court's findings and conclusions; nonetheless, the findings and conclusions were supported by the evidence before the state court. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was

not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. His fifth ineffective assistance of counsel claims under claim number eighteen regarding Royce Smithey should be denied because it lacks merit and because Petitioner has not satisfied the requirements of § 2254(d).

F. Defense counsel's failure to challenge the qualifications and testimony of Dr. Peter Oropeza constituted constitutionally ineffective assistance of counsel.

*67 Petitioner also challenges counsel's representation with respect to one last State expert, Dr. Peter Oropeza. He complains that counsel failed to challenge Dr. Oropeza's assessment of his competency and mental state at the time of the offense. During the state habeas proceedings, Dr. Oropeza provided an affidavit fully setting out his credentials, training and expertise. At the time of the trial, he was a clinical psychologist and an expert mitigation specialist. He was well qualified to testify at the time of the trial. In his affidavit, Mr. Hagood stressed that he did not have any reason to challenge Dr. Oropeza's qualifications. 6 SHCR 2151-52. Counsel was not required to make frivolous or futile objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding the

claim that counsel was ineffective with respect to Dr. Peter Oropeza:

> 221. Dr. Peter Oropeza states that he has testified numerous times in different courts both for the State and the defense. Dr. Oropeza has always been found to be an expert. Dr. Oropeza has never had a challenge to his expertise sustained.
>
> 222. Dr. Oropeza was a psychologist licensed in this state who has a Doctoral degree in psychology prior to 2004.
>
> 223. Dr. Oropeza had at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations prior to 2004.
>
> 224. Dr. Oropeza had completed six hours of required continuing education in courses in forensic psychiatry or psychology, as appropriate, in either of the reporting periods in the 24 months preceding the appointment prior to 2004.
>
> 225. The exams before the Texas Board of Examiners of Psychologists consists of a jurisprudence written examination, the national examination (EPPP), and an oral examination. An examinee must pass all three tests to become a licensed psychologist. On the jurisprudence written examination Dr. Oropeza [ ] received a score of 98, and on the national examination a score of 81. The oral

> boards include a review of a case vignette that involves a host of issues regarding a hypothetical case. Dr. Oropeza's practice was in the area of assessment and the board noted weaknesses regarding therapy issues. Dr. Oropeza addressed these issues in the next examination and passed. Applicants do not receive scores from the oral examination, rather, feedback is provided on areas to address and a simple pass or fail is given.
>
> 226. Dr. Oropeza only testified during the punishment phase of [Petitioner's] case.
>
> 227. Mr. Hagood knew that under 46B.022, Dr. Oropeza met the qualifications set out in subsections (a)(1), (a)(2)(B)(I) and (b), he was licensed by the appropriate board, had training consisting of 24 hours of specialized training relating to incompetency or insanity evaluations and he met his continuing education requirements.

10 SHCR 3560-61. Petitioner has not overcome the presumption of correctness that must be accorded to the state court findings with clear and convincing evidence.

The state trial court proceeded to issue the following conclusions of law:

> 82. [Petitioner] has failed to prove by a preponderance of the evidence that Dr. Peter Oropeza was not legally qualified or competent to testify to [his] competency or sanity.

> 83. [Petitioner] has failed to prove by a preponderance of the evidence that by choosing not to attack Dr. Oropeza's qualifications on non-existent grounds, counsel was not acting as a reasonably competent attorney, and his advice was not within the range of competence demanded of attorneys in criminal cases.
>
> 84. [Petitioner] has failed to prove by a preponderance of the evidence that if defense counsel had challenged Dr. Oropeza's qualifications, the challenge would have been sustained and that there is a reasonable probability that the result of the proceeding would have been different.

*68 10 SHCR 3581. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner challenges Mr. Hagood's assessment of the situation and asserts that Dr. Oropeza's testimony was very damaging. Nonetheless, the record reveals that Dr. Oropeza was qualified to testify. Counsel did not have a legitimate basis upon which to challenge his qualifications or testimony. The state trial court reasonably found that Mr. Hagood was not ineffective with respect to Dr. Oropeza. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of

the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. His final ineffective assistance of counsel claims under claim number eighteen regarding Dr. Peter Oropeza should be denied because it lacks merit and because Petitioner has not satisfied the requirements of § 2254(d).

As a final matter with respect to claim number eighteen, Petitioner criticized counsel's representation with respect to each and every witness, expert or otherwise. His nitpicking of counsel's handling of each and every witness lessens the overall effectiveness of the claim. The Supreme Court has observed that "[f]ocusing on a small number of key points may be more persuasive than a shotgun approach." *Yarborough v. Gentry*, 540 U.S. 1, 7 (2003). Petitioner has employed a shotgun approach. None of his arguments in this claim are persuasive. None satisfy the requirements of § 2254(d).

Claim Number 19: Defense counsel's repeated failures to object to inadmissible evidence was constitutionally ineffective.

In claim number nineteen, Petitioner argues that counsel was ineffective for failing to object to inadmissible evidence. In particular, he complains that counsel failed to object to unfounded lay opinion testimony, overtly leading questioning by the State, and hearsay.

A. Lay opinion testimony

With respect to lay opinion testimony, Petitioner focused on testimony provided by Nurse Nancy Sims, Counselor Jennifer Loyless and Texas Ranger William Bennie. Petitioner asserts that the prosecution inappropriately sought to extrapolate lay opinions based on lay witnesses' perceptions of Petitioner before or after the murders. He stressed that none of the lay witnesses actually witnessed or perceived anything at the time of the murders on March 27, 2004.

Nurse Sims was called during the defense's case-in-chief. Petitioner complains that Ms. Peterson elicited narrative, repetitive testimony that he had overcome his mental illness. The record reveals that Nurse Sims testified that Petitioner appeared more stable and less of a threat after his return from Vernon State Hospital. 33 RR 124. Petitioner told her that he no longer heard voices and that he wanted to go home and use Coricidin. *Id.* at 125. Petitioner complains that this line of questioning enabled the State to obtain, without objection, the following lay opinion from Nurse Sims on cross-examination:

*69 Q. On the evening of March 29th of 2004, after the defendant had been placed into the jail, he was in holding cell 3, correct?

A. Correct.

Q. And he asked to speak with you, correct?

A. Yes.

Q. And you walked up to holding cell 3, and the defendant said, I'm sorry.

A. Correct.

Q. Correct? You asked him what he was sorry for, he hadn't done anything to you. And he responded, I cut their hearts out. After I stabbed them, I cut their hearts out. I didn't mean to hurt anybody. Please, Ms. Natalie, as God as my witness, I didn't mean it.

A. Correct.

Q. Okay, Indicating — does that indicate to you in any manner, shape, or form the defendant knew that cutting the hearts out of Laura Thomas, Andre Boren and Leyha Hughes that he had done something wrong?

A. It indicates, yes, sir, that he does know.

Q. And this is on March 29th of 2004, correct?

A. Yes, sir.

> Q. And I think that you indicated, at least on the 30th, as I recall — the 31st he indicated some delusional thinking.
>
> A. Yes.
>
> Q. So, even during the time he was going through some delusional thought process, he still was able to indicate to you that he knew what he had done was wrong.
>
> A. Yes, sir.

33 RR 130-31. *See also id.* at 133 (testimony that Petitioner's statement, "I'm sorry for everything I have done. I have let my family down" was an indication that he knew what he had done was wrong); *id.* at 136 (testimony that after Petitioner had pulled his eye out, he was still concerned about forgiveness – another indication that he knew what he had done was wrong); *id.* at 146 (even though Petitioner continued to exhibit delusional behavior, he continued "to recognize that he — his actions were wrong in killing Laura Thomas and those two kids"). Petitioner complains that Nurse Sims provided lay opinion testimony, through egregiously leading questions, regarding his "mental state at the time of the murders – testimony which she had no basis to give." Petition at 282.

Petitioner also complains about the following testimony provided by defense witness Jennifer Loyless, a professional counselor and triage specialist at MHMR Services of Texoma, on cross-examination:

Q. Are you familiar with Dextromethorphan?

A. No, I'm not.

Q. It is Coricidin. It is contained in Coricidin cold tablets, Cough and Cold.

A. Yes.

Q. And, of course, you are aware that can cause problems in behavior in co — in perception and cognition.

A. I'm not a physician, but any substance could change that, yes. Correct.

Q. So, it would be — have been important to you insofar as knowing why the defendant was exhibiting this behavior or why he was saying what he did, to know whether he had been doing Coricidin, antipsychotic drugs, drinking, and smoking marijuana, prior to coming in and seeing you, right?

A. Yes.

34 RR 24-25.

Lead counsel Hagood responded to the present ground for relief as follows:

*70 [Petitioner] accuses me...of being ineffective for failing to object to lay opinion testimony. The complained of lay opinions were to my recollections actually questions about the witnesses' personal observations

> rather than medical diagnoses. There was no reason to object to her qualifications. In fact, I am personally familiar with Ms. Sims, and I believe the court would have allowed her to testify to [Petitioner's] actions since she has treated more than one mentally disturbed person in jail during her years as jail nurse.

6 SHCR 2156. The Director appropriately observed that Ms. Loyless simply agreed with the statement that substances can effect cognition and perception. The statement was nothing more than basic common knowledge that did not require scientific, technical or specialized knowledge. It is also noted that Drs. Scarano, Axelrad and Oropeza had testified at length that there is basic knowledge in the medical community. Finally, the Director opined that Sgt. Dawsey merely explained that he had walked the route described by Petitioner.

The Fifth Circuit has observed that "the distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.' " *United States v. Ebron*, 683 F.3d 105, 136-37 (5th Cir. 2012) (citations omitted), *cert. denied*, 134 S. Ct. 512 (2013). "A witness who provides only lay testimony may give limited opinions that are based on the witness's perception and that are helpful in understanding the testimony or in determining a fact in issue, but the witness may not opine based on scientific, technical, or other specialized knowledge." *United States v. McMillan*, 600 F.3d 434, 456 (5th

Cir.), *cert. denied*, 562 U.S. 1006 (2010). None of the opinions offered by these three witnesses were of a type based on scientific, technical or specialized knowledge. Defense counsel did not have a basis to object to their testimony. Counsel was not required to make frivolous or futile objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527. Counsel's failure to make meritless objections does not result in the ineffective assistance of counsel. *Clark*, 19 F.3d at 966 ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite.").

In addition to the foregoing, the claim must be rejected because the state habeas court reasonably concluded that Petitioner has not shown that counsel was ineffective on this issue. 10 SHCR 3581 ¶¶ 104-05. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S.

at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective for failing to object to the lay opinion testimony.

B. Leading questions

*71 Petitioner also complains that counsel failed to object to the State's leading questions. For example, counsel did not object when the State suggested the answer to Ranger William Bennie (actually Sergeant Bruce Dawsey) regarding Petitioner's escape route from the murder scene. 27 RR 171. He also complained that the State asked Dr. Scarano to accede to the contention that Petitioner met the legal definition of voluntary intoxication prior to the murders. 31 RR 120. He asserts that the State continued to propound leading questions to other witnesses, such as questions to his father. He cites 28 RR 155 of the trial transcript, but the record shows that Ms. Peterson objected to the State's leading questions, and the trial court admonished the prosecutor not to lead the witness. Petitioner argues that he was prejudiced by counsel allowing the prosecutor to testify on his own.

Mr. Hagood responded to the claim as follows:

> Often, even if you can object, you do not to avoid annoying the jury or delaying the trial. This is particularly true if the information does not harm [Petitioner] or merely restates previous evidence. Often jurors think you are trying to hide something if you object to everything. In this case there were several

instances where I chose not to object even if I had a legal basis to do so.

First, he claims that I allowed the prosecution to lead Ranger William A. Bennie. Having looked at the citation given by [Petitioner] in his application (vol. 27, p. 171) it is clear that I did not. Ranger Bennie's testimony is not contained at that location nor was Ranger Bennie ever asked a question regarding the "quickest route." The question regarding the quickest route was actually asked of Officer Dawsey. The information had been elicited by Ms. Peterson (vol. 27, p. 167) that the officer had walked what he believed to be the quickest route. There was simply no reason to object to a leading question when that evidence was already before the jury.

[Petitioner] also complains about leading questions to Dr. Scarano and my failure to object. Dr. Scarano had already testified about his diagnosis and his conclusions regarding [Petitioner]. There was no doubt that the court would allow the doctor to opine on whether [Petitioner's] illness and his subsequent conduct while in a psychotic state would be admissible. I strategically chose not to object to information that was admissible. I hoped the trial would move more rapidly and would prevent the State from dwelling at greater length on hurtful facts that would have been shown inevitably by questions in proper form.

> Finally, [Petitioner] criticized us for not objecting to leading questions by Kerye Ashmore of [Petitioner's] father, Danny Thomas. First, Ashmore did not examine Mr. Thomas. That was done by Joe Brown. Second, Ms. Peterson and I did object to some leading questions throughout the case. The section cited by [Petitioner] (vol 28, p. 155) contains only one leading question which was objected to by Ms. Peterson. The other questions were of the "yes" or "no" variety and did not suggest the answer. Further, Mr. Thomas was a terrible witness. Leading questions often produce very short answers from a witness. The shorter his answers were, the better I believed it would be for [Petitioner]. For that reason alone Ms. Peterson and I should have allowed leading questions to pass without objection.

6 SHCR 2156-57. Co-counsel Peterson's response mirrored the comments by Mr. Hagood. *Id.* at 2166-67.

The first thing that stands out in evaluating defense counsels' responses is that they noted factual errors in Petitioner's state application, such as Officer Dawsey testifying as opposed to Ranger Bennie and Ms. Peterson's alleged failure to object to leading questions, but Petitioner repeated the same factual mistakes in the present petition. To that extent, Petitioner's claim lacks any basis in fact. Furthermore, the claim lacks merit because the Fifth Circuit has repeatedly held that the "failure to object to leading questions and the like is generally a matter

of trial strategy as to which [the court] will not second guess counsel." *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993); *Villanueva v. Stephens*, 555 Fed.Appx. 300, 308 (5thCir. 2014). Indeed, Mr. Hagood stated that he often had no reason to object to the question or that he chose, as a matter of trial strategy, not to object. Petitioner's failure to object to leading questions claim lacks merit.

*72 In addition to the foregoing, the claim must be rejected because the state habeas court reasonably concluded that Petitioner has not shown that counsel was ineffective on this issue. 10 SHCR 3581 ¶¶ 104-05. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective for failing to object to leading questions.

C. Hearsay

Petitioner finally alleges that counsel was ineffective for failing to object to hearsay. In particular, he complains that counsel did not object to questions that elicited a hearsay response from Bryant Hughes aimed at developing "a rational motive for [Petitioner's] irrational murders: that [Petitioner] allegedly wanted Laura Boren back, and was enraged after she rejected him over the telephone." Petition at 285.

Mr. Hagood provided the following response to this claim:

> The portion of Bryant Hughes testimony referenced by [Petitioner] (vol. 30, p. 39-43) may not have been hearsay. The statements attributed to the murder victim, Laura Hughes, were admitted to show that they were spoken, but not necessarily for the truth of the matter. Additionally, if Laura's phone conversation and subsequent statements were hearsay, they would qualify as an exception to the hearsay rule because it was a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling...). Because I believed the court would let Laura's statements in, I certainly would not have objected because it would appear we were hiding something from the jury and because there would be many other ways that same evidence, regarding discord between [Petitioner] and his estranged wife, Laura,

> would come into evidence. If I had felt an objection was strategically warranted, I would have prompted Ms. Peterson to object.

6 SHCR 2157-58.

To the extent that the statement was admissible, counsel was not required to make frivolous or futile objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527. Counsel's failure to make meritless objections does not result in the ineffective assistance of counsel. *Clark*, 19 F.3d at 966 ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."). Moreover, the claim ultimately lacks merit because counsel engaged in reasonable trial strategy in not objecting to the testimony. The claim must also be rejected because the statement was "neither crucial to the prosecution nor devastating to the defense in the context of the trial as a whole." *Gochicoa v. Johnson*, 238 F.3d 278, 282 (5th Cir. 2000) (citation omitted). Furthermore, Petitioner cannot show prejudice arising from his claim of failure to object to harmless hearsay. *Id.* at 283. His claim is without merit.

In addition to the foregoing, the claim must be rejected because the state habeas court reasonably concluded that Petitioner has not shown that counsel was ineffective on this issue. 10 SHCR 3581 ¶¶ 104-05. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision

that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to show that there was no reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective for failing to object to allegedly hearsay testimony.

*73 Overall, Petitioner has not shown that he is entitled to relief on claim number nineteen. All relief on this claim should be denied.

Claim Number 20: Counsel was constitutionally ineffective for failing to object to the court's erroneous instruction on, and the entire evidence regarding, voluntary intoxication as there was no intoxication, and it should have never been allowed to infect the trial.

In claim number twenty, Petitioner complains about the State's focus on the argument that he was voluntarily intoxicated at the time of the murders. He argues that counsel was ineffective with respect to this issue in the following four respects: (1) the trial court's preliminary instructions regarding the issue of voluntary intoxication, (2) the joint power point presentation made during voir dire, (3) the State's

opening statement, and (4) the State's closing argument.

The record in this case clearly reveals that the defense strategy in this case was to show that Petitioner was not guilty by reason of insanity and that his psychosis was organic. The State countered the defense by presenting a case showing that Petitioner's psychosis was substance induced, arising from his combined use of alcohol, marijuana and DXM in the days, weeks and months leading up to the murders. Despite Petitioner's claims to the contrary, the State presented evidence supporting its counter argument. The issue of voluntary intoxication was properly before the jury.

The jury was charged as follows:

> It is an affirmative defense to the conduct charged that, at the time of conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.
>
> The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior.
>
> The burden of proof is on the defendant to prove such a defense by a preponderance of the evidence. The term "preponderance of the evidence" means the greater weight of credible evidence.

> You are further instructed that voluntary intoxication does not constitute a defense to the commission of a crime.
>
> "Intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

5 CR 1675-76. The instruction comports with state law. *See* Tex. Penal Code § 8.04. State law expressly provides that "[w]hen temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section." Tex. Penal Code § 8.04(c).

Petitioner contends that this was error because the record is "devoid of any proof that [he] was intoxicated at the time of the crime." The Director persuasively argued that the assertion simply is not true. As the State explained in its opening statement, "intoxication" applies not just to the exact time of the offense but also to any mental or physical disturbance resulting from the introduction of any substance into the body. 27 RR 35. The record fully supports the conclusion that Petitioner's psychosis was drug induced: (1) Petitioner told Dr. Oropeza that he smoked marijuana the night before the murders, 36 RR 106; (2) tests showed marijuana metabolites in Petitioner's urine; (3) a blood test revealed the presence of DXM several hours after the murders; (4) Petitioner told Nurse Sims that if he had not been on drugs, the murders would not have happened, 35 RR 42; and (5) Dr. Gripon admitted on cross-examination that the combined use of marijuana, alcohol and DXM

could exacerbate a pre-existing condition of schizophrenia, 36 RR 111. Furthermore, numerous witnesses testified to Petitioner's alcohol and/or drug use. 27 RR 185-87; 29 RR 113, 137-40, 186, 203-04, 221-24, 226, 235; 31 RR 92-94. The State's experts also concluded that Petitioner's psychosis was substance induced. 31 RR 54, 112; 34 RR 78-79. Dr. Scarano testified that Petitioner admitted to consuming marijuana, alcohol and DXM approximately thirty-six hours before the murders. 31 RR 113-15. Based on the record, the jury instruction was entirely proper.

*74 Further, to the extent that Petitioner contends that the voluntary intoxication instruction precluded the jury from finding insanity, his contention is fallacious. The jury could still have found Petitioner insane as long as: (1) they believed that his mental illness was not substance induced; and, (2) they believed that as a result of that mental illness, he did not know that what he was doing on the morning of March 27, 2004, was wrong. The bottom line is that the jury simply did not believe Petitioner's side of the story and rejected his defense that he was not guilty by reason of insanity.

Because voir dire was conducted with this in mind, and because the power point was presented to assist the jury understand the law, and because the State's opening and closing statements did not in any way misstate the law, counsel was not ineffective for failing to object. Counsel was not required to make frivolous or futile objections. *Johnson*, 306 F.3d at 255; *Koch*, 907 F.2d at 527.

The state court's conclusions of law on this issue include the following:

> 18. Although voluntary intoxication is never a defense, an instruction for the jury's guilt/innocence determination on the law applicable to voluntary intoxication may be warranted when the record includes evidence of intoxication sufficient under the Nethery[5] standard. *Taylor v. State*, 885 S.W.2d at 157-58 (*applying Nethery*, 692 S.W.2d at 711-12). A voluntary intoxication instruction given in the guilt/innocence phase is erroneous if the record is devoid of sufficient intoxication evidence. *Taylor*, 885 S.W.2d at 158.
>
> 19. The *Taylor* court held regarding voluntary intoxication in the guilt/innocence phase that "if there is evidence from any source that might lead a jury to conclude that the defendant's intoxication somehow excused his actions, an instruction is appropriate." *Id.* at 159. Numerous other cases have quoted this holding. *See, e.g., Robinson v. State*, 971 S.W.2d 96, 97-98 (Tex. App. Beaumont 1998); *Haynes v. States*, 85 S.W.3d 855, 858 (Tex. App. Waco 2002); *Miller v. State*, No. 01-03-00819-CR, 2005 WL 825762, at *7 (Tex. App. Hous. 2005); *McGrew v. State*, No. 14-04-00321-CR, 2005 WL 3116240, at *3 (Tex. App. Hous. 2005).

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[5] *Nethery v. State*, 692 S.W.2d 686 (Tex. Crim. App. 1985) (en banc), *cert. denied*, 474 U.S. 1110 (1986).

22. A trial court has wide discretion in conducting voir dire, and its rulings are reviewed under an abuse of discretion standard. *See Atkins v. State*, 951 S.W.2d 787, 790 (Tex. Crim. App. 1997); *Camacho v. State*, 864 S.W.2d 524, 531 (Tex. Crim. App. 1993). If the subject could possibly be raised during trial, the attorneys are entitled to voir dire on that issue. Generally speaking, a voir dire topic is proper if it seeks to discover a juror's views on an issue applicable to the case. *See Robinson v. State*, 720 S.W. 808, 810-11 (Tex. Crim. App. 1986); *Campbell v. State*, 685 S.W.2d 23, 25 (Tex. Crim. App. 1985).

23. It was proper for voluntary intoxication to be discussed.

24. The Court's voluntary intoxication instruction was not erroneous, misleading or a misstatement of the law. The definition of "intoxicated" in the statute regarding voluntary intoxication, referred to whether [Petitioner's] mental state at the time of the offense was induced solely or in part because of the introduction of any substance into the body. Tex. Code Crim. Proc. Art. 8.04 (Vernon's 2003).[6] The definition does not require that the substance still be in the body at the time of the criminal act nor does it preclude mental states that still exist a significant amount of time

[6] It is noted that the state court cited Art. 8.04 of the Texas Code of Criminal Procedure when it was actually § 8.04 of the Texas Penal Code.

after the introduction, but still because, of substances to the body.

25. The court explained the law properly, did not preclude a finding of insanity if [Petitioner] was intoxicated and duly protected [Petitioner's] rights.

*75 26. The facts of the case raised the issue of voluntary intoxication.

27. If a preexisting condition of mind of the accused was not such as would have rendered him legally insane in and of itself, recent use of intoxicants causing stimulation or aggravation of such preexisting condition to the point of insanity could not be relied upon as a defense to the commission of a crime. *Evilsizer v. State*, 487 S.W.2d 113, 116 (Tex. Crim. App. 1972).

28. [Petitioner] has failed to prove by a preponderance of the evidence that the trial court's substantive preliminary instructions to the entire voir dire panel, the specific instructions at voir dire regarding voluntary intoxication, the power point display regarding the definition of voluntary intoxication, the use of the definition of voluntary intoxication in the State's opening statement and closing arguments and the instructions regarding voluntary intoxication in the jury charge were improper or misleading.

29. [Petitioner] has failed to prove by a preponderance of the evidence that the

> decisions by [Petitioner's] counsel regarding these grounds were based on anything less than a thorough and complete investigation of the facts and law at the time of trial.
>
> 30. [Petitioner] has failed to prove by a preponderance of the evidence that his trial attorney was ineffective and denied [Petitioner] his right to counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution for failing to object to the trial court's substantive law preliminary instructions to the entire voir dire panel, the specific instructions at voir dire regarding voluntary intoxication, the power point display regarding the definition of voluntary intoxication, the use of the definition of voluntary intoxication in the State's opening statement and closing arguments and the instructions regarding voluntary intoxication in the jury charge.
>
> 31. [Petitioner] has failed to prove by a preponderance of the evidence that, but for his attorneys' failure to object to the voluntary intoxication instruction, the objection would have been granted and the outcome of his trial would have been different.

10 SHCR 3566-69. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner simply disagrees with the state court's findings, but he has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Moreover, he failed to overcome the "doubly" deferential standard that must be accorded counsel in the context of § 2254(d). Indeed, he failed to satisfy the requirement of showing that there was not any reasonable argument that counsel satisfied *Strickland*'s deferential standard. *Richter*, 562 U.S. at 105. Petitioner has not satisfied his burden of showing that counsel was ineffective on this issue. Claim number twenty should be denied because it lacks merit and because Petitioner has not satisfied the requirements of § 2254(d).

Claim Number 21: The cumulative evidence of counsel's failures at both phases of Petitioner's trial unequivocally constitutes constitutionally ineffective assistance of counsel.

*76 Petitioner argues next that he should be granted habeas corpus relief because of cumulative errors committed by defense counsel. The Fifth Circuit has regularly rejected cumulative error claims while noting that federal habeas relief is available only for cumulative errors that are of constitutional dimension. *Coble*, 496 F.3d at 440; *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir.), *cert. denied*, 522 U.S. 880 (1997); *Yohey v. Collins*, 985 F.2d 222,

229 (5th Cir. 1993). The Fifth Circuit has emphasized that "[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) (citing *Derden v. McNeel*, 978 F.2d 1453, 1461 (5th Cir. 1992)), *cert. denied*, 519 U.S. 1094 (1997). Because all of Petitioner's ineffective assistance of trial counsel claims lack merit, he has failed to show that he was denied due process as a result of cumulative errors. *United States v. Moye*, 951 F.2d 59, 63 n.7 (5th Cir. 1992); *Derden*, 978 F.2d at 1454. The claim lacks merit.

Claim Number 22: The State violated Petitioner's due process rights under the Fifth, Sixth and Fourteenth Amendments when the State knowingly presented false and misleading testimony in violation of Napue v. Illinois and its progeny.

Petitioner continues with the same basic theme presented in claim number twenty by arguing that the State presented false and misleading testimony that he was intoxicated at the time of the murders. He correctly observed that a state denies a criminal defendant due process when it knowingly uses false evidence, including false testimony, to obtain a conviction. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997). In support of the claim, he alleges that the "State began its indoctrination of the jurors with the false impression that (1) he was intoxicated on the day of the murders, and (2) such intoxication nullified the availability of the insanity defense." Petition at 301-

02. He further alleges that the State elicited false and misleading testimony from Dr. Axelrad and Dr. Scarano that he was intoxicated on the day of the slayings. He asserts that the State's questions gave the impression that he was taking drugs, particularly Coricidin, everyday leading up to March 27, 2004. Petitioner argues that the State's experts and others falsely testified that his intoxication and delusions flowed principally from the use of Coricidin.

The Supreme Court found that a the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' " *Giglio*, 405 U.S. at 153 (citations omitted). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* (citations omitted). To obtain relief, Petitioner must show that (1) the testimony was actually false; (2) the State knew that it was false; and (3) the testimony was material. *Canales v. Stephens*, 765 F.3d 551, 573 (5th Cir. 2014) (citations omitted). False testimony is material if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. *Creel v. Johnson*, 162 F.3d 385, 391 (5th Cir. 1998), *cert. denied*, 526 U.S. 1148 (1999); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). Perjury is not established by mere contradictory testimony from witnesses, inconsistencies within a witness' testimony and conflicts between reports, written statements and the trial testimony of prosecution witnesses. *Koch*, 907 F.2d at 531. Contradictory trial testimony merely establishes a credibility question for the jury. *Id.*

*77 The Director persuasively argued that the present claim flows from Petitioner's general misunderstanding of the definition of "intoxication." As was noted in conjunction with claim number twenty, the Texas Penal Code defines "intoxication" as a "disturbance of mental or physical capacity resulting from the introduction of any substance into the body." Tex. Penal Code § 8.04(d); see also 5 CR 1675-76 (jury charge). In its conclusions of law, the state habeas court observed that this definition "does not require that the substance be in the body at the time of the criminal act nor does it preclude mental states that still exist a significant amount of time after the introduction, but still because, of substances to the body." 10 SHCR 3568 ¶ 24. The State's theory of the case was that even though Petitioner was psychotic at the time of the murders, he was not insane such that he did not know right from wrong. As part of the case, the State argued and presented evidence proving that Petitioner's psychosis was substance induced – as opposed to organic as Petitioner sought to prove –having been triggered by his use of marijuana, alcohol and Coricidin (DXM) in the days and weeks leading up to the murders.

During opening statements, the State set out the time line of Petitioner's drug and alcohol use prior to the murders. 27 RR 27-28, 30-31. Further, the State emphasized that state law did not require proof of "intoxication" at the exact time of the murders; rather, it required proof of "any disturbance of mental or physical capacity resulting from the introduction of any substance into the body." *Id.* at 35. This is the area where Petitioner misunderstands the law. His

Giglio claim is premised on the erroneous belief that "intoxication" requires that the substances still be in his body at the time of the murders.

Dr. Scarano testified during the State's case-in-chief. He explained to the jury that mental illness can be substance induced, and even when a person stops using the particular substance or substances that sparked the mental illness, the mental illness does not necessarily disappear. 31 RR 83-85. Dr. Scarano opined that Petitioner's psychosis was substance induced, having been triggered by his use of marijuana, alcohol and DXM in the days and weeks leading up to the murder. *Id.* at 92-111, 113-15. Ultimately, Dr. Scarano testified that Petitioner was not legally insane at the time of the murders. *Id.* at 94-101. Dr. Axelrad, although called first by the defense, reached the same conclusion. Their testimony was not false or misleading in light of the definition of "intoxication" under Texas law, and the State did not violate *Napue/Giglio* because their testimony did not comport to his erroneous understanding of the definition of "intoxication."

During closing arguments, the State emphasized that Petitioner knew right from wrong when he savagely murdered Leyha, Andre, Jr., and Laura. The State further argued that because petitioner was voluntarily intoxicated as defined by state law, he was precluded from claiming insanity – because his psychosis at the time of the murders was substance induced. 37 RR 86, 89-92.

Petitioner relies on blood tests taken hours after the murders to establish his *Napue/Giglio* claim, but

those tests are irrelevant. Neither the State nor its experts contended that significant amounts of drugs and/or alcohol were in Petitioner's system at the time of the murders or that he was "intoxicated" as that term is used in the vernacular. Instead, the State and its witnesses properly used the term "intoxicated" as defined by the Texas Penal Code. The *Napue/Giglio* claim lacks merit.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following findings of fact regarding this claim:

> 61. Neither the State nor its experts alleged that [Petitioner's] system still contained significant amounts of drugs or alcohol during the murder.
>
> 62. Mr. Hagood had gone over the discovery and the reports from both of the State's experts, and was aware of the State's theory of the case.
>
> 63. Mr. Hagood was aware of the lab results from [Petitioner's] blood.
>
> 64. Neither the State nor its experts presented "false or misleading" evidence.

*78 10 SHCR 3536. Petitioner has not overcome the presumption of correctness that must be accorded to the state court findings with clear and convincing evidence.

The state trial court proceeded to issue the following conclusion of law:

> 34. [Petitioner] has failed to prove by a preponderance of the evidence that the State knowingly presented false and misleading testimony about whether [Petitioner] was intoxicated at the time he murdered his estranged wife, his son and her baby daughter.

10 SHCR 3570. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner's claim is simply based on his misunderstanding of Texas law regarding intoxication. He has not satisfied any of the elements of a *Napue/Giglio* claim. Moreover, he is not entitled to relief because he has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Petitioner is not entitled to relief on claim number twenty-two.

Claim Number 23: The trial court's refusal to define "reasonable doubt" denied Petitioner his right to due process under the Fourteenth Amendment.

Claim number twenty-three is an oft seen complaint in capital murder cases about trial courts not providing definitions of basic terms, such as "reasonable doubt." The Constitution does not require courts to define reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). The Fifth Circuit has held that "attempts by trial courts to define 'reasonable doubt' have been disfavored by this court." *Thompson v. Lynaugh*, 821 F.2d 1054, 1061 (5th Cir.), *cert. denied*, 483 U.S. 1035 (1987). *See also Lackey v. Scott*, 28 F.3d 486, 491 (5th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995); *Garcia*, 73 F. Supp. 3d at 769. The claim lacks merit in light of clearly established federal law.

In addition to the foregoing, the claim should be rejected because of the reasons provided by the state court. The Texas Court of Criminal Appeals rejected the claim on direct appeal as follows:

> In Paulson v. State, we overruled the portion of *Geesa [v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991)] that required a trial court to instruct the jury on the definition of "beyond a reasonable doubt." [28 S.W.3d 570, 573 (Tex. Crim. App. 2000)]. We quoted the Supreme Court's holding in *Victor v. Nebraska* that " 'the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.' " [*Id.* at 573 (quoting *Victor*, 511 U.S. at 50)]. And we stated that "the better practice is to give no definition of reasonable doubt at all to the jury." [*Id.*]

Thomas, 2008 WL 4531976, at *15. In the state habeas proceedings, the trial court rejected the claim for essentially the same reasons as the TCCA on direct appeal. 10 SHCR 3585-86 ¶ 125. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Relief on claim number twenty-three should be denied.

Claim Number 24: Petitioner was deprived of his Fifth Amendment privilege against self-incrimination because the jury used Petitioner's decision not to testify against him in imposing a sentence of death.

*79 Petitioner correctly observes that the Fifth Amendment to the United States Constitution guarantees a criminal defendant both the right to remain silent during trial and the right not to have the jury draw any adverse inferences from the defendant's exercise of this privilege. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). The scope of this Fifth Amendment privilege applies equally to the guilt/ innocence and punishment phases of a capital trial. *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981).

After the trial, the foreperson stated that he and others on the jury considered the fact that Petitioner did not express true remorse during the penalty phase of the trial. 43 RR 16. He stated that he, and possibly

others on the jury, wanted something to "hang their hat on," such as Petitioner's expression of true remorse, to decide against imposing a sentence of death. *Id.* Petitioner sought a new trial, arguing that this amounted to a violation of his right against self-incrimination. 5 CR 1702-05. The State, anticipating that Petitioner would call jurors to testify, objected pursuant to Texas Rule of Evidence 606(b). The trial court sustained the objection and denied the motion for new trial. On direct appeal, the TCCA found that the application of Rule 606(b) prevented proof of the alleged violation. *Thomas*, 2008 WL 4531976, at *19-21. The TCCA held that the application of Rule 606(b) did not violate Petitioner's constitutional rights, and the judgment of the trial court was affirmed. *Id.* at *21.

The issue was raised again in the state habeas corpus proceedings. The state trial court rejected the claim and issued the following conclusions of law:

> 132. The failure to testify at trial shall not be used against any defendant, nor shall counsel comment on the defendant's right to remain silent and failure to testify. Tex. Code Crim. Proc. Ann. art. 38.08 (Vernon Supp. 2004). A jury's discussion of the defendant's failure to testify – and using that circumstance to find guilt would be impermissible. Under rule 606(b), however, jurors are not competent to testify that they discussed the defendant's failure to testify and used that failure as a basis for convicting him. Hines v. State, 3 S.W.3d 618, 620-21 (Tex. App. – Texarkana 1999, no pet.); *see also* Tex. R. App. P. 21.3.

> 133. [Petitioner] has failed to prove by a preponderance of the evidence that the jury discussed [Petitioner's] failure to testify or used the fact that [Petitioner] did not testify against [him].

10 SHCR 3587-88. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

"The constitutional right of a defendant to choose not to testify is a fundamental tenet of our system of justice." *United States v. Johnston*, 127 F.3d 380, 399 (5th Cir. 1997), *cert. denied*, 522 U.S. 1152 (1998). On the other hand, it has been long held that a post-verdict inquiry of jury members, as live witnesses or by affidavit, is inappropriate. *See Mattox v. United States*, 146 U.S. 140, 149 (1892) ("[T]he evidence of jurors, as to motives and influences which affected their deliberations, is inadmissible either to impeach or support the verdict."); *see also* Tanner v. United States, 483 U.S. 107, 117-21 (1987) (discussing policy behind federal common law rule against admission of jury testimony to impeach verdict); *Cunningham v. United States*, 356 F.2d 454, 455 (5th Cir.) ("well-settled general rule that a juror will not be heard to impeach his own verdict"), *cert. denied*, 384 U.S. 952 (1966). In *Cunningham*, the Fifth Circuit upheld the trial court's refusal to consider an affidavit by one juror who stated that the jurors discussed the defendant's failure to testify in his own behalf.

*80 This basic tenet that courts generally will not inquire into a jury's deliberative process is encapsulated in Rule 606(b) of both the Federal Rules of Civil Procedure and the Texas Rules of Civil Procedure. The Fifth Circuit has accordingly found that the "post-verdict inquiry of jury members, as live witnesses or by affidavit, is inappropriate and precluded by Federal Rules of Evidence 606(b)." *Williams v. Collins*, 16 F.3d 626, 636 (5th Cir.), *cert. denied*, 512 U.S. 1289 (1994). *Williams*, like the present case, involved a Texas death row inmate challenging his conviction in a habeas corpus proceeding. In affirming the denial of habeas corpus relief, the Fifth Circuit found that the "district court did not abuse its discretion in disallowing the requested testimony." *Id.* The Fifth Circuit subsequently held that both Fed. R. Evid. 606(b) and Tex. R. Evid. 606(b) "bar all juror testimony concerning the juror's subjective thought process." *Salazar v. Dretke*, 419 F.3d 384, 402 (5th Cir. 2005), *cert. denied*, 547 U.S. 1006 (2006). The Court ultimately found that it could not say the "state habeas court's application of Texas Rule 606(b) to bar testimony by jurors concerning their internal discussion...was contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court." *Id.* at 403. More recently, the Fifth Circuit refused to grant a certificate of appealability with respect to a district court's rejection of a claim that jurors took into consideration a defendant's failure to testify because courts "will not inquire into the jury's deliberative process absent a showing of external influences on the jurors." *Greer v. Thaler*, 380 Fed.Appx. 373, 382 (5th Cir.) (citing

Tanner, 483 U.S. at 120-21), *cert. denied*, 562 U.S. 986 (2010). In light of *Williams, Salazar* and *Greer*, this Court likewise cannot say that the state court's rejection of Petitioner's claim based on Rule 606(b) was contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court. Moreover, apart from the state court findings, the Court further finds that Petitioner's claim impermissibly seeks to delve into a juror's deliberative process. Federal habeas corpus relief is unavailable on claim number twenty-four.

Claim Number 25: Petitioner's death sentence is unconstitutional under *Roper v. Simmons* because the State used prior convictions based on acts committed by Petitioner when he was a juvenile to establish an aggravating factor.

The Supreme Court has held that the execution of individuals who were under eighteen years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments. *Roper v. Simmons*, 543 U.S. 551 (2005). Petitioner complains that the State introduced a number of prior offenses committed by him as a juvenile, including felony criminal mischief in an amount over $750 (age eleven), two separate criminal trespass offenses (age eleven), three curfew violations (ages thirteen, fourteen and fifteen), and evading arrest/detention (age seventeen). The State introduced such evidence during the sentencing phase of the trial to establish future dangerousness.

Roper, however, only prohibits the imposition of the death penalty for offenders who were under

eighteen when their crimes were committed. *Id.* at 578. The dividing line of eighteen established a "categorical rule." *Ebron*, 683 F.3d at 156. The Fifth Circuit has accordingly observed that *Roper* "established a lower boundary: No one under eighteen may be executed, meaning only that, ..." *Doyle v. Stephens*, 535 Fed.Appx. 391, 395 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1294 (2014). The Fifth Circuit rejected the efforts to "undermine" *Roper*. *Id.* at 396 n.3.

Juvenile admissions and confessions are generally admissible under Texas law during the punishment phase of a trial where the defendant faces the death penalty. *See East v. State*, 702 S.W.2d 606, 615 (Tex. Crim. App. 1985) ("[Texas Code of Criminal Procedure] Article 37.071 provides that during the punishment phase of a capital murder trial, evidence may be presented as to any matter that the trial court deems relevant to sentence."). *Also see Garcia*, 73 F.Supp.3d at 793 (observing that juvenile record may be considered under Texas law in determining future dangerousness).

The Director appropriately cited numerous cases rejecting attempts by appellants to contort *Roper* to prohibit the consideration of juvenile records as an aggravating factor. *Mitchell v. State*, 235 P.3d 640, 659 (Okla. Crim. App. 2010) ("Nothing in the language of *Roper* suggests that the State is prohibited from relying on prior juvenile adjudications to support an aggravating circumstance."), *cert. denied*, 562 U.S. 1293 (2011); *People v. Bramit*, 210 P.3d 1171, 1186 (Cal.) ("[*Roper*] says nothing about the propriety of permitting a

capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile."), *cert. denied*, 558 U.S. 1031 (2009); *State v. Garcell*, 678 S.E.2d 618, 645 (N.C.) ("Here, defendant committed a capital crime after he turned eighteen years old, and that simple fact carries defendant's case over the bright line drawn by *Roper*. Defendant was sixteen when he committed common law robbery and two counts of second-degree kidnapping, but he is not being sentenced to death as an additional punishment for those crimes."), *cert. denied*, 558 U.S. 999 (2009); *Lowe v. State*, 2 So.3d 21, 46 (Fla. 2008) ("Lowe attempts to expand this prohibition to preclude the State from using as an aggravating factor a conviction for a crime committed by a defendant before he turned eighteen. However, *Roper* does not stand for this proposition."); *United States v. Wilks*, 464 F.3d 1240, 1243 (11th Cir.) ("It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. *Roper* does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday."), *cert. denied*, 549 U.S. 1066 (2006).

*81 Since the original petition was filed in this case, the Fifth Circuit provided the following discussion in rejecting the type of argument being presented by Petitioner:

> While the *Roper* decision clearly establishes that the death penalty may not be imposed as punishment for an offense committed as a

> juvenile, it does not clearly establish that such an offense may not be used to elevate murder to capital murder. Here, [petitioner] is not being punished for his earlier crime but is instead being punished for a murder that he committed as an adult.

Taylor v. Thaler, 397 Fed.Appx. 104, 108 (5th Cir. 2010), *cert. denied*, 563 U.S. 939 (2011). *Roper* simply did not prohibit the State from presenting evidence of Petitioner's juvenile record to establish future dangerousness. The claim lacks merit.

The state trial court rejected the claim and issued the following conclusions of law:

> 134. *Roper v. Simmons* prohibits the State from assessing the death penalty against a defendant who was under 18 years of age at the time he committed the offense. *Roper v. Simmons*, 543 U.S. 551 (2005).
>
> 135. In the punishment phase of a capital murder trial, the admission of prior offenses committed when the defendant was a juvenile does not violate the Eighth Amendment if he was assessed the death penalty for a charged offense that occurred when he was at least eighteen years old. *See Corwin v. State*, 870 S.W.2d 23 (Tex. Crim. App. 1993).
>
> 136. Neither the Supreme Court nor the Texas Court of Criminal Appeals has extended the holding in *Roper v. Simmons* to prohibit the use of juvenile offenses in the punishment

> stage of a capital case. See e.g., *Matthews v. State*, 2006 WL 1752169 (Tex. Crim. App. 2006) (not designated for publication).

10 SHCR 3588. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner argues that *Roper* should be extended, but he has not shown that either the Supreme Court or the Fifth Circuit has done so. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Relief on claim number twenty-five should be denied.

Claim Number 26: Petitioner was deprived of his right to a fair trial under the Sixth Amendment because his attorney had a conflict of interest that was not waived.

Petitioner alleges that co-counsel Bobbie Peterson (Cate) had an "actual conflict of interest due to her involvement as an assistant county attorney in a juvenile prosecution of [him]." He asserts that the conflict was not properly waived. In support of the claim, he notes that she was a prosecutor in Grayson County before going into private practice. She

prosecuted him in juvenile delinquency proceedings in Grayson County. He specifically cites a prosecution for vehicle theft, which resulted in a term of probation for eighteen months.

*82 The issue was raised during a suppression hearing as follows:

> ASHMORE: Your Honor, before we get started, there is one thing we discussed in chambers that I wanted of record. The defendant as a juvenile was placed on probation on two different times. The last time being, I believe, in 1997 for the theft of three different automobiles on three different times. In the course of the County Attorney's office of Grayson County prosecuting the juvenile in those various juvenile matters, I had noted that Bobbie Peterson had signed several pleadings of the state in her capacity as Assistant County Attorney at that time. Mrs. Peterson and I had talked about that and my understanding was that is that Mrs. Peterson had made the defendant aware of that situation and that he has no problem with it, but I wanted the Court to discuss that with him and to have that clear on the record.
>
> THE COURT: Okay.
>
> PETERSON: That is correct, Your Honor. I have spoken to Mr. Thomas about the fact that I was a prosecutor and I did sign off on some petitions that he was the juvenile and he has indicated that he was aware of that and he has

> no problems or concerns about my representing him now and the difference in our capacities.
>
> THE COURT: Is that correct, Mr. Thomas?
>
> THOMAS: Yes.
>
> THE COURT: You are satisfied to have Mrs. Peterson continue as your co-counsel?
>
> THOMAS Yes, Sir.
>
> THE COURT: Let's have the witnesses sworn....

7 RR 4-5.

This issue was raised again in the state habeas corpus proceedings. Lead counsel Hagood addressed the issue as follows:

> [Petitioner] also attacks Ms. Peterson's loyalty to [him]. Specifically, [Petitioner] states that because Ms. Peterson signed juvenile petitions regarding [him] many years ago, and those items were used in punishment, [Petitioner] claims Mr. Peterson had a conflict. During the suppression hearing prior to voir dire, the court addressed that matter and personally asked [Petitioner] if he agreed with a statement by Ms. Peterson on the record that she had discussed the issue with him and he had no problem with her continuing to act as defense attorney. The court specifically asked if [Petitioner] was satisfied to have Ms. Peterson continue as co-counsel. [Petitioner] stated,

> "yes, sir." (RR vol. 7, p. 5). I personally never noticed a lack of loyalty to [Petitioner] or [his] case. In fact, Ms. Peterson showed a tremendous dedication towards [Petitioner] and zealousness towards [his] defense.

6 SHCR 2158. Mr. Ashmore also noted in his affidavit that Petitioner specified that he wanted Ms. Peterson to continue as counsel and that he did not observe any lack of loyalty. 6 SHCR 2330 ¶ 19.

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Supreme Court announced the general rule with respect to conflicts of interest between attorneys and clients. In that case, a state defendant had filed a federal writ of habeas corpus alleging his trial attorney was operating under a conflict of interest because he represented Sullivan and his two co-defendants in three separate criminal trials. The Supreme Court held that the mere *possibility* of a conflict of interest is insufficient to overturn a conviction. Rather, in order for a criminal defendant to demonstrate a violation of Sixth Amendment rights that would entitle him to relief, the defendant must establish that his attorney was actively representing conflicting interests and that an actual conflict of interest adversely affected his attorney's performance. Once a criminal defendant demonstrates such a conflict, prejudice is presumed. *Id.* at 349-50. Since *Cuyler* was decided, the Supreme Court has reiterated that a defendant is not entitled to a presumption that the prejudice prong of the *Strickland* standard has been met where there existed a conflict of interest on his attorney's part, unless that conflict affected the attorney's

performance. *Mickens v. Taylor*, 535 U.S. 162, 172-73 (2002).

*83 In *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996), the Fifth Circuit held that *Cuyler* was only applicable in situations where an attorney was representing multiple interests. The Fifth Circuit further held in *Beets* that the *Cuyler* standard for ineffective assistance of counsel did not extend to conflicts between an attorney's personal interest and his client's interest, as those types of situations were best analyzed under the *Strickland* standard for ineffective assistance of counsel. *Beets*, 65 F.3d at 1269-72. The Fifth Circuit has also held that, in order to show there has been an adverse effect, a petitioner must show "some plausible defense strategy or tactic [that] might have been pursued but was not, because of the conflict of interest." *Hernandez v. Johnson*, 108 F.3d 554, 560 (5th Cir. 1997) (citation omitted), *cert. denied*, 522 U.S. 984 (1997).

More recently, the Fifth Circuit dealt with an analogous situation in *United States v. Villarreal*, 324 F.3d 319 (5th Cir. 2003). The Fifth Circuit found that the mere fact that counsel was employed in the district attorney's office at the time of Villarreal's prior conviction did not represent a conflict of interest. *Id.* at 327-28 (citing *Hernandez*, 108 F.3d at 559-60). Moreover, there was no showing that counsel failed to pursue a defense due to the conflict of interest. The Fifth Circuit rejected the claim for the additional reason that counsel made Villarreal aware of the potential conflict of interest before trial, and

Villarreal chose to continue being represented by counsel. *Id.* at 328.

The situation in the present case is the same as in *Villareal*. Petitioner has not shown an actual conflict of interest; instead, he only showed a potential conflict of interest. Moreover, he failed to show that Ms. Peterson failed to pursue some plausible defense strategy or tactic that might have been pursued because of the conflict of interest. Finally, the potential conflict of interest was made known to Petitioner before trial, and he chose to continue being represented by Ms. Peterson. He waived his right to conflict free defense counsel by his voluntary and intelligent waiver. *See United States v. Plewniak*, 947 F.2d 1284, 1287 (5th Cir. 1991), *cert. denied*, 502 U.S. 1120 (1992). Petitioner has not shown that he is entitled to relief based on a conflict of interest.

After accumulating all of the evidence and conducting oral arguments, the state trial court issued the following conclusions of law:

> 110. The Sixth Amendment guarantees the right of individuals to have counsel without conflicts of interest. *Gray v. Estelle*, 616 F.2d 801, 803 (5th Cir. 1980); *see also Ex parte Prejean*, 625 S.W.2d 731, 733 (Tex. Crim. App. 1981) (*en banc*). If an actual conflict exists, "it need not be shown that the divided loyalties actually prejudiced the defendant in the conduct of his trial." *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979).

111. Although a defendant can waive his or her right to conflict-free counsel, a valid waiver "requires an 'intentional relinquishment or abandonment of a known right.' " *Gray*, 616 F.2d at 803 (*quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). A valid waiver "must be both voluntary and 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.' " *Gray*, 616 F.2d at 803 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Texas courts require that "[s]uch a waiver of right to conflict-free counsel should include a showing that the defendant is aware of the conflict of interest, realizes the consequences of continuing with such counsel, and is aware of his right to obtain other counsel." *Prejean*, 625 S.W.2d at 733.

*84 112. [Petitioner] has failed to show his attorney's former role as the prosecutor in his prior convictions raised anything other than a speculative conflict of interest.

113. [Petitioner] failed to prove an actual conflict of interest by a preponderance of the evidence.

114. [Petitioner] has waived his right to complain of any conflict.

10 SHCR 3582-83. The TCCA subsequently denied Petitioner's state application for a writ of habeas corpus on the trial court's findings and conclusions and on its own review. *Ex parte Thomas*, 2009 WL 693606, at *1.

Petitioner does nothing more than make a conclusory claim that there was an actual conflict of interest. He did not, however, show that he is entitled to relief for the exact same reasons discussed by the Fifth Circuit in Villarreal. He also complains about the conclusion that he waived his conflict of interest; nonetheless, the situation was fully discussed in court, and he voluntarily and clearly waived any conflict. 7 RR 5. Petitioner has not shown, as required by § 2254(d), that the state court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Relief on claim number twenty-six should be denied.

Claim Number 27: Petitioner's appellate counsel was constitutionally ineffective.

In his final claim, Petitioner argues that his appellate counsel was ineffective for failing to raise a number of claims on appeal. He presents a laundry list of claims that purportedly should have been raised on direct appeal, including the following:

> 1. Failure to challenge the State's opening statement;
>
> 2. Failure to voir dire jurors adequately, who stated they were opposed to interracial relationships;

3. Failure to object to the giving of substantive law instruction to the venire;

4. Failure to challenge the voluntary intoxication instruction offered by the State and the Court;

5. Failure to object to the giving of an erroneous voluntary instruction to the venire;

6. Failure to object to erroneous instructions on the issues of insanity and voluntary intoxication, or a clarifying instruction explicating the interplay between;

7. Failure to object to the use of a powerpoint display before the venire, when that powerpoint reflected an erroneous statement of the law;

8. Failure to object to the State's reference in opening statement to jury instructions generally, and to the erroneous voluntary intoxication instruction in particular;

9. Failure to object to the voluntary intoxication instruction in the court's charge;

10. Calling the State's expert witnesses in an attempt to prove insanity;

11. Repeated instances of failing to object to leading or otherwise inappropriate questions or to understand the application of the evidentiary rules in the courtroom; and

12. Trial counsel's failure to request a diminished capacity defense.

The two-prong *Strickland* test applies to claims of ineffective assistance of counsel by both trial and appellate counsel. *Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001), *cert. denied*, 534 U.S. 1163 (2002). An indigent defendant does not have a constitutional right to compel appointed counsel to include every nonfrivolous point requested by him; instead, an appellate attorney's duty is to choose among potential issues, using professional judgment as to their merits. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). "Counsel need not raise every nonfrivolous ground of appeal, but should instead present solid, meritorious arguments based on directly controlling precedent." *Ries v. Quarterman*, 522 F.3d 517, 531-32 (5th Cir.) (citation omitted), *cert. denied*, 555 U.S. 990 (2008); *Adams v. Thaler*, 421 Fed.Appx. 322, 332 (5th Cir.), *cert. denied*, 132 S. Ct. 399 (2011). To demonstrate prejudice, a petitioner must "show a reasonable probability that, but for his counsel's unreasonable failure..., he would have prevailed on his appeal." *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001) (citations omitted).

*85 In the present case, Petitioner essentially presents the same meritless claims previously raised in his petition and rejected earlier in this memorandum opinion. He has not shown that, but for appellate counsel's unreasonable failure to raise these claims, he would have prevailed on appeal. The claim lacks merit.

Moreover, Petitioner's laundry list of claims that allegedly should have been raised on direct appeal focus on ineffective assistance of trial counsel claims. Such arguments generally lack merit for reasons explained by the Supreme Court as follows:

> [T]he Texas procedural system – as a matter of its structure, design, and operation – does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal.

Trevino, 133 S. Ct. at 1921. The Supreme Court recognized that most ineffective assistance of trial counsel claims must be raised and developed in habeas corpus proceedings. Petitioner's argument that such ineffective assistance of trial counsel claims should have been raised on direct appeal shows a basic misunderstanding of the "structure, design and operation" of the Texas procedural system. His claim lacks any basis in theory and in practice. Petitioner's final claim lacks merit and should be denied.

Conclusion

Having carefully considered all of Petitioner's claims, the Court is of the opinion, and so finds, that he has not shown that he is entitled to federal habeas corpus relief and his petition should be denied.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a federal habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Petitioner has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may sua sponte rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the

petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

*86 In this case, reasonable jurists could not debate the denial of Petitioner's § 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). The Court thus finds that Petitioner is not entitled to a certificate of appealability as to his claims. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. It is further

ORDERED that a certificate of appealability is **DENIED**. It is finally

ORDERED that all motions not previously ruled on are **DENIED.**

It is SO ORDERED.

SIGNED this 19th day of September, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4988257

APPENDIX D

2009 WL 693606
Only the Westlaw citation is currently available.
UNDER TX R RAP RULE 77.3, UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.
Court of Criminal Appeals of Texas.
Ex Parte Andre Lee THOMAS.
No. WR-69859-01.

March 18, 2009.

On Application for Writ of Habeas Corpus, In Cause No. 051858-15-A, In the 15th Judicial District Court, Grayson County.

ORDER

PER CURIAM.

*1 This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

In March 2005, a jury convicted Applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Thomas v. State*, No. AP-75,218 (Tex. Thomas-2 Crim.App. October 8, 2008).

Applicant presents forty-four allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing. The trial court entered findings of fact and conclusions of law and recommended that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied. Applicant has also filed a motion to remand his case, or in the alternative, to stay the proceedings, to develop further evidence on applicant's mental illness. Applicant's motion is likewise denied.

IT IS SO ORDERED.

COCHRAN, J., filed a statement concurring in the Court's Order.

This is an extraordinarily tragic case. I concur in the denial of relief because applicant has not shown that he is being illegally restrained or that his capital murder conviction or death sentence was obtained in violation of the constitution. Applicant was well represented at trial, on appeal, and, most especially, on this writ application. In his writ application, he raises forty-four potential claims for relief. Those claims have been fully addressed by the trial judge whose lengthy Findings of Fact and Conclusions of Law are supported by the record. After reviewing the application, the trial record, the direct appeal, and other associated materials, I, like the Court, adopt

those findings and conclusions. But two of applicant's groups of claims-claims relating to his insanity defense and incompetency to be tried-deserve greater explanation.

I.

Applicant has a severe mental illness. He suffers from psychotic delusions and perhaps from schizophrenia.[1] He also has a long history of drug and alcohol abuse. Because of his drug abuse, he was frequently truant, quit school in the ninth grade, and had a series of juvenile and adult arrests. Dr. Axelrad, called by both the State and defense, testified that the twenty-one-year-old applicant told him that he had been abusing alcohol since age ten and marijuana since age thirteen, and, in the month before the murders, had been taking large doses of Coricidin, a cold medicine, for recreational purposes.[2]

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[1] There is evidence in this habeas record that applicant's entire family had long suffered from mental illness. For example, his father's affidavit states that applicant's mother, Rochelle, was mentally ill and that all three of their sons had suffered mental illnesses. One of applicant's brothers has also been diagnosed as schizophrenic. According to one of applicant's experts, Rochelle and her family believed that their delusions were "gifts" that made them special. They interpreted "their mental illness as superior powers" because "God talks to them" and gives them "visions."

[2] Applicant told one psychologist that he had been using large quantities of Coricidin in the days and weeks before the murders, and he told another psychologist that he and his girlfriend ingested up to ten pills a day, mixed with alcohol and marijuana, to obtain "a high." He thought that Coricidin "brings perspective to the whole world, reality breakthrough drug."

Applicant's behavior in the months before the killings became increasingly "bizarre": He put duct tape over his mouth and refused to speak; he talked about how the dollar bill contains the meaning of life; he stated that he was experiencing *deja vu* and reliving events time and again; he had a religious fixation and heard the voice of God.[3] In the weeks before the murders, applicant was heard by others talking about his auditory and visual hallucinations of God and demons.

*2 About twenty days before the killings, he took Coricidin and then tried to commit suicide by overdosing on other medications. He was taken to the local MHMR facility, but then walked away before he could be treated.[4] Two days before the killings, he

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[3] According to his friend, Amy Ingle, applicant began acting strangely at least a month before he began using Coricidin:

> [I]n late January, 2004, he started acting more and more strange. He really went haywire. Since Andre lost his job and did not have any money. Andre and I and some of his friends used to play dice in Andre's trailer and bet money on the game. Once, Andre won a $100 bill and immediately placed it in an ashtray and lit it on fire, while yelling, "Money is the root of all evil!" He burnt up the entire $100 bill despite being broke.

[4] Apparently, a neighbor's son took applicant to the mental health center. The MHMR in-take sheet reads:

> [Applicant] presented as a walk-in-reportedly told the front desk he would throw himself in front of a bus if he couldn't talk to someone now. He presented as restless and highly agitated. He made loose associations & often did not answer questions directly. He stated "we've been here before & the same shit happened."He stated "Life is too much for me to handle. I want to die right now ."He stated if he had a gun he would shoot himself-he asked if triage would shoot him.

drank vodka and took about ten Coricidin tablets[5] and then stabbed himself.[6] His mother took him to the local hospital.[7] But again, applicant left the hospital before he could be committed for observation or psychiatric treatment.[8] On two occasions in the days before the killings, applicant was seen by friends to be highly intoxicated; they described him as vomiting, delirious, incapacitated, and lying on the floor.

The MHMR staff told him to go to the emergency room, but he did not do so. An order for involuntary commitment was obtained, but it was never implemented.

[5] According to one of applicant's experts, "Coricidin has known recreational use for the effects produced by its main ingredient dextromethorphan. When taken in high doses this drug produces euphoria and sensory and perceptual changes that typically last about 6-10 hours depending on the tolerance of the user. Effects may be enhanced or become less predictable when used in conjunction with other mind altering sub-stances."

[6] Applicant explained that he was a "fallen angel" who could "open the gates of Heaven" by killing himself by stabbing himself in the heart. Although the wound was not life-threatening, he did not understand why he did not die and therefore concluded that he was "immortal."

[7] The hospital record included the following notations:

* "[Applicant] has expressed suicidal ideation to several staff in the ER."
* "Psychotic features."
* "[Applicant] states he cut on his chest this AM trying to 'cross over into heaven';
[Applicant is] psychotic-thinks something like Holodeck on Star Trek is happening to him; T don't know if I volunteered for this or if I was forced to' referring to his life."

[8] In fact, applicant had twice before been evaluated for psychiatric problems in 2003 when he was in jail charged with stabbing his brother. He was eventually released without prosecution because he had acted in self-defense.

At around 7:00 p.m. on March 26th, just one day after stabbing himself, applicant went to his estranged wife's apartment where she and her boyfriend, Bryant Hughes, were listening to religious audiotapes.[9] According to applicant's statement to po-lice, he had come to believe that God wanted him to kill his wife, Laura, because she was "Jezebel,"[10] to kill his four-year-old son, Andre, Jr., because he was the "Anti-Christ," and to kill his wife's daughter, thirteen-month old Leyha, because she, too, was evil. That evening, applicant saw Bryant twisting an extension cord as they listened to the religious tapes, and he thought that Bryant also wanted to strangle Laura and the children. Applicant wanted to make "the first move," so he walked into Laura's kitchen to find a knife, but then decided that it was not the right time. Bryant drove applicant home around 10:00 p.m.

Applicant reported that the next morning he woke up and heard a voice that he thought was God telling him that he needed to stab and kill his wife and the children using three different knives so as not to "cross contaminate" their blood and "allow the demons inside them to live." He walked over to

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[9] Applicant explained to police that these tapes talked about a "secret God clan" that would kill, enslave, and rule over people. The audiotape reminded applicant that he had had similar dreams in which Laura was Jezebel, his son was the Anti-Christ, and Leyha "was involved with it also."

[10] During one competency interview, applicant said that the reason he and his wife were separated was because she had had sexual relations with his brother and cousin, but then he said that he was uncertain whether this was truly the case. Another expert stated that applicant had periodic "obsessions regarding his estranged wife, Laura, being unfaithful to him by having sexual relationships with members of his family."

Laura's apartment. He saw Bryant drive by and wave, so applicant believed that this was a signal that he was doing "the right thing" by killing his wife and the children.

He burst into the apartment, then stabbed and killed Laura and the two children. He used a different knife on each one of the victims, and then he carved out the children's hearts and stuffed them into his pockets. He mistakenly cut out part of Laura's lung, instead of her heart, and put that into his pocket. He then stabbed himself in the heart which, he thought, would assure the death of the demons that had inhabited his wife and the children. But he did not die, so he walked home, changed his clothes, and put the hearts into a paper bag and threw them in the trash. He walked to his father's house with the intention of calling Laura, whom he had just killed. He called Laura's parents instead and left a message on their answering machine:

> Um, Sherry, this is Andre. I need y'alls help, something bad is happening to me and it keeps happening and I don't know what's going on. I need some help, I think I'm in hell. I need help. Somebody needs to come and help me. I need help bad. I'm desperate. I'm afraid to go to sleep. So when you get this message, come by the house, please. Hello?

*3 Applicant then walked back to his trailer where his girlfriend, Carmen Hayes, and his cousin, Isaiah Gibbs, were waiting for him. He told them that he had just killed his wife and the two children. Ms. Hayes took him to the Sherman Police Department

and he told the police what he had done. After he was hospitalized for his chest wound, he was taken to jail, and he gave a videotaped statement to the police. In that videotaped statement, applicant gives a very calm, complete, and coherent account of his activities and his reasons for them.

Five days after the killings, applicant was in his cell with his Bible. After reading a Bible verse to the effect that, "If the right eye offends thee, pluck it out," applicant gouged out his right eye.[11] Applicant was examined for competency to stand trial by two psychologists and was evaluated by a treating psychologist in jail, all of whom agreed that applicant was not then competent to stand trial.[12] All three provided a diagnosis or opinion of "Schizophreniform Disorder with a Rule out [13] of Substance Induced Psychotic Disorder due to [applicant's] recent history of abusing Coricidin."

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[11] Applicant's counsel recently filed a motion to remand his case, pointing out that, while on death row, applicant also gouged out his left eye and ate it.

[12] The experts generally agreed that applicant was able to understand the charge against him, the facts underlying that charge, and the role of the judge and defense. But applicant's ability to behave appropriately in the courtroom and to communicate with his attorney were sufficiently compromised to make him incompetent to stand trial at that particular time.

[13] "Rule out," in this context, is understood to mean "try to eliminate or exclude something from consideration." http:// www.medterms.com/script/main/art.asp?articlekey=33831; http:// newide-as.net/adhd/diagnosis/what-to-rule-out-first. It does not mean that this possible alternate diagnosis has already been ruled out.

After approximately five weeks of treatment and medication in the Vernon State Hospital, applicant was found to have regained his competency to stand trial. During his stay at Vernon, applicant was placed on Zyprexa, a strong anti-psychotic medication, and did not display "bizarre or unusual behaviors," but he did make "hyper-religious statements throughout his stay." The attending psychiatrist at Vernon updated applicant's diagnosis as being Substance-Induced Psychosis with Delusions and Hallucinations. He also diagnosed applicant as malingering (as did a psychologist).

Applicant was returned to Grayson County to stand trial. Several different psychiatrists and psychologists-both for the State and applicant-interviewed and tested applicant in anticipation for the capital murder trial. By that time, applicant was fully alert, conversant, and attentive. His memory tested well, he spoke at a level consistent with his tested I.Q. of 112, and he behaved appropriately during the interviews. He told one psychiatrist in December 2004 that he had not experienced any hallucinations since September, although he was severely depressed.

At trial, the jury rejected his insanity plea and found applicant guilty of the capital murder of thirteen-month-old Leyha. Based upon the jury's answers to the special punishment issues, the trial judge sentenced him to death.

II.

In his first twelve claims, applicant complains of the trial court's jury instruction on the law of voluntary intoxication. He asserts that this instruction should not have been given and that his trial counsel's failure to object to this instruction showed ineffective assistance of counsel.[14] He argues that the evidence did not support an instruction on voluntary intoxication and that the instruction "erroneously suggest[ed] that intoxication precludes an insanity defense."[15] Applicant's claims that his two trial attorneys were ineffective for failing to object to the voluntary intoxication instruction are without merit.

*4 First, an attorney is not constitutionally ineffective if his conduct was not deficient.[16] Here, applicant's counsel properly did not object to the voluntary intoxication instruction because its submission was, as the trial judge found, supported

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[14] *See Strickland v. Washington*, 466 U.S. 668 (1984).

[15] These claims are procedurally barred because applicant failed to object at trial or raise them on direct appeal. *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex.Crim.App.2001); *Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex.Crim.App.1991); *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex.Crim.App.1989) (op. on reh'g).

[16] *Strickland*, 466 U.S. at 687 (first prong of ineffective assistance claim is that trial counsel's performance was deficient in that his performance fell below an objectively reasonable standard determined by the then-prevailing professional standards); *see Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex.Crim.App.2005) ("[A] reasonably competent counsel need not perform a useless or futile act, such as requesting a jury instruction to which the defendant is not legally entitled or for which the defendant has not offered legally sufficient evidence to establish. Requesting a jury instruction to which one is not legally entitled, merely for the sake of making the request, is not the benchmark for a competent attorney.") (footnote omitted).

by the law and the evidence. Applicant admitted that he consumed a combination of alcohol, marijuana, and Coricidin some thirty-six hours before the murders. A toxicologist testified that he still had a trace of DXM (the active ingredient in Coricidin) in his blood after the murders. Numerous witnesses testified about applicant's drug use.[17] The State's experts thought that applicant's psychosis was substance-induced.[18] According to one psychiatrist, there appears to be "a strong association between [applicant's] drug and alcohol abuse problems and his affective disfunction" and that applicant's use of Coricidin in the days before the murders accentuated his mental problems.[19] He concluded, "All of [applicant's] psychiatric problems, which occurred at the time of the commission of the alleged offenses, are the result of voluntary intoxication with alcohol, cannabis, and Coricidin[.]"

This voluntary-intoxication instruction, as the trial court's findings state, "was not erroneous, misleading or a misstatement of the law." The trial court had included the instruction pursuant to article

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[17] One nurse testified that applicant told her that if it hadn't been for the drugs, the murders wouldn't have occurred.

[18] Even the defense expert testified that the combined use of marijuana, alcohol, and DXM would aggravate and exacerbate a pre-existing condition of schizophrenia.

[19] Dr. Axelrad noted that applicant "has experienced psychotic behavior and psychotic symptoms, which appear to be strongly associated with the use of drugs and alcohol since his early adolescence. He reported to me that he had at least one psychotic episode in 2002, and has reported similar symptoms of psychotic experiences associated with intoxication on a number of occasions throughout the course of his development."

8.04(a) and (d) of the Texas Penal Code.[20] This definition does not require that the intoxicating substance still be in the body at the time of the offense. The State's theory was that applicant's psychosis was caused by, or aggravated by, his voluntary use of alcohol, drugs, and Coricidin. Accordingly, if applicant's pre-existing, "weakened" condition of mind was not such as would have rendered him legally insane at the time of the murders, but his recent use of intoxicants aggravated that "weakened" condition-was the "last straw" so to speak-then insanity at the time of the offense would not be a defense. That position is in accord with prior Texas law,[21] as well as law from other states.[22] This

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[20] Article 8.04(a) reads: "Voluntary intoxication does not constitute a defense to the commission of crime." Section (d) defines "intoxication" to mean "disturbance of mental or physical capacity resulting from the introduction of any substance into the body."

[21] *See Evilsizer v. State*, 487 S.W.2d 113, 116 (Tex.Crim.App.1972) ("if the pre-existing condition of mind of the accused is not such as would render him legally insane in and of itself, then the recent use of intoxicants causing stimulation or aggravation of the pre-existing condition to the point of insanity cannot be relied upon as a defense to the commission of the crime itself").

[22] *See, e.g., State v. Sexton*, 904 A.2d 1092, 1099-1111 (Vt.2006) (rejecting the claim that a "defendant can present an insanity defense based on his claim that the ingestion of illegal drugs activated a latent mental disease or defect resulting in a psychotic reaction that rendered him unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law"; noting, however, that a "defendant remains free to prove that he was not responsible for his conduct as a result of an independently preexisting mental disease or defect that rendered him unable to appreciate the criminality of his acts or conform his conduct to the requirements of the law.");

legal proposition was accepted by the trial court, the State, and the defense.

The defensive theory, however, was that applicant's actions were committed as the result of insane delusions caused solely by his mental disease.[23] This is precisely what Dr. Gripon, the defense expert, stated: Although applicant had previously used drugs and alcohol, his insanity was not substance-induced. The State's experts, Drs. Scarano and Axelrad, testified that applicant was psychotic when he committed the offense, but that his psychosis was triggered by his substance abuse in the preceding days and weeks. It was also their opinion that applicant knew that his conduct was wrong at the time of the offense.

There was ample evidence to reject an insanity defense and support a jury finding that applicant knew that his conduct was wrong at the time he murdered his wife and the children.[24] There was also

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Bieber v. People, 856 P.2d 811, 817 (Colo.1993) (rejecting defense of "settled" insanity and finding "no principled basis to distinguish between the short-term and long-term effects of voluntary intoxication by punishing the first and excusing the second. If anything, the moral blameworthiness would seem to be even greater with respect to the long-term effects of many, repeated instances of voluntary intoxication occurring over an extended period of time.")

[23] In his most recent affidavit, applicant's lead trial attorneys points out that one psychiatrist retained by the defense, but not called at trial, "could not rule out the possibility that the psychotic episode was induced by drugs and alcohol."

[24] That evidence would include:

* Applicant thought about murdering Laura the night before when he thought Bryant might do so before he could, and he

evidence that applicant did not know that his conduct was wrong at the time. This was a quintessential fact issue for the jury to decide, and it did so.[25] Neither on

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went into the kitchen to look for a knife, but then decided that the time was "not right";

* Applicant went to Laura's apartment to commit the crime at a time when he knew that Bryant would not be there;

* He saw Bryant leave before he approached the apartment;

* He admitted that he saw a woman when he was on the way to his wife's apartment, but decided not to say hello because he wanted things to appear "normal" and not call attention to himself;

* He took the three knives that he used to kill the victims with him when he left his trailer and went to Laura's apartment;

* When Laura came running toward him as he barged into the apartment with the knife raised, she cried "No," but the only word applicant said was "Yes" as he began stabbing his wife to death.

* He felt panicked after he committed the murders;

* He left the apartment when the alarm went off;

* He walked home faster when he heard police and fire sirens because he knew that police were on the way and that "they'd be on to me in [a] second but they didn't, they didn't ever catch up to me";

* He left duct tape behind and thought that the police could identify him through fingerprints left on the tape;

* When he returned home, he told his cousin and girlfriend that he had com-mitted the murders and that the police would be coming for him;

* He told his cousin that he would not see him for a long time;

* He turned himself in to the police, said that he "murdered" his wife, and asked, "Will I be forgiven?";

* He told Dr. McGirk that, while he was stabbing Laura, there was a moment when he asked himself, "What the f--- am I doing?"

[25] *See Graham v. State*, 566 S.W.2d 941, 952-53 (Tex.Crim.App.1978) (stating that issue of insanity is not strictly one of a medical fact because it also includes an "inarticulate ethical component" that is properly left to the jury's discretion).

appeal nor in this habeas application does applicant contend that there was such "overwhelming evidence" that applicant did not know that what he was doing was wrong as to make the jury verdict "manifestly unjust."[26]

*5 While there is no dispute that applicant was, in laymen's terms, "crazy" at the time he killed his wife and the children, the legal question is whether he knew that what he was doing was "wrong" or a "crime" at the time he acted.[27] There is no dispute that applicant knew that it was his wife and the children that he was stabbing to death. He may have thought that he was morally justified in doing so because she was a "Jezebel," his son was the "Anti-Christ," and Leyha was somehow evil also. He said, "I thought I was doing the will of God."[28] But religious fervor,

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[26] *See Bigby v. State*, 892 S.W.2d 864, 875 (Tex.Crim.App.1994) (reviewing the sufficiency of the evidence that supported the jury's rejection of the defendant's affirmative defense of insanity in a capital murder trial); *Meraz v. State*, 785 S.W.2d 146, 155 (Tex.Crim.App.1990) (affirming court of appeals' holding that evidence was factually insufficient to support a finding of competency).

[27] *See Ruffin v. State*, 270 S.W.3d 586, 592 (Tex.Crim.App.2008) ("Under Texas law, 'wrong' in this context means 'illegal.' "). Of course, the jury is instructed only on whether the defendant knew that what he was doing was "wrong." *See Brown v. State*, 122 S.W.3d 794, 802 (Tex.Crim.App.2003). Jurors may then use their common sense understanding of the word "wrong" when deliberating upon that issue. *Graham v. State*, 566 S.W.2d 941, 952-53 & n. 1 (Tex.Crim.App.1978).

[28] During the first custodial interview, a detective asked applicant, "For instance, you knew it wasn't right to go out there and do what you did at that apartment, right?"

whether the result of a severe mental disease or inspired by a jihadist fatwâ or KKK rally, does not provide a legal excuse for the knowingly "wrongful" murder of a person.

Applicant's trial counsel submitted an affidavit stating that it was his understanding that the submission of an instruction on voluntary intoxication was legally proper under these circumstances. He is correct. An attorney is not constitutionally deficient when he declines to make a legally merit less objection.[29] Applicant's ineffective assistance claims are without merit.

Nonetheless, this is a particularly tragic case because these horrendous deaths could have been avoided. Those around applicant realized that he was mentally ill, and he was twice taken to hospitals to obtain help. In each instance, he left before he could be involuntarily committed for observation, diagnosis, or treatment. The hospitals cannot be faulted; they cannot detain someone involuntarily without legal

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Applicant responded, "Right, but I felt like it was what God wanted me to do. That's what he told me to do."

In response to whether he knew what he did was "wrong," applicant said, "It wasn't on my mind whether it was right or wrong. I don't like to talk about it because I cared about Laura. That was my friend. She was my friend. I didn't want to hurt her. What's happening?"Then applicant stated that he had stabbed himself and explained, "I wanted to die for my sins."Applicant said, "I just want to say that I'm sorry for what I did."

[29] *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex.Crim.App.2005).

authority, and applicant voluntarily left while they were trying to obtain that mental health warrant. Of course, there is no direct relationship between the failure to detain applicant for involuntary mental health treatment and the deaths of applicant's wife and the two children, while there is a direct relationship between his intentional conduct and their deaths. The jury was given the proper instructions, and it was entitled to reject his insanity defense and find him criminally responsible for that murderous conduct.

III.

Applicant also claims that (1) he was not competent to stand trial [30] and (2) his trial attorneys were constitutionally ineffective for failing to request a second competency exam. Applicant's first claim is procedurally barred, but the need for clarity in the law concerning ineffective assistance warrants discussion of the second claim.[31]

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[30] Applicant failed to object at trial that he had not regained his competency during the time he spent at Vernon Hospital. This claim is procedurally barred. *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex.Crim.App.1974).

[31] In this case, the trial court's findings were issued before the direct appeal was concluded and thus did not address the potential procedural default issue. This ineffective assistance claim is not barred as procedurally defaulted even though applicant raised the issue of ineffective assistance of his counsel for failing to request a post-commitment competency hearing on direct appeal. That claim was rejected on direct appeal, but in this habeas application, applicant provides additional evidence that could arguably support such a position. *See generally Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex.Crim.App.2004)

At the time of applicant's trial in March 2005, Texas law stated, "A person is incompetent to stand trial if the person does not have:

> (1) sufficient present ability to consult with the per-son's lawyer with a reasonable degree of rational understanding; or
>
> (2) a rational as well as factual understanding of the proceedings against the person.[32] Texas law, in accord with decisions by the United States Supreme Court,[33] has intentionally set the threshold for competency very low. A person may be suffering from a severe mental disease or defect or he may be highly medicated, but he will be competent to stand trial if he still has the ability to meaningfully consult with his attorney and he has a rational as well as factual understanding

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(procedural bar not applied when new evidence is brought forward on habeas application to support previously rejected claim of ineffective assistance of counsel).

[32] TEX.CODE CRIM. PROC. art. 46B.003.

[33] *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*) (the test for determining competency to stand trial is ' "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.' "); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (repeating *Dusky* standard and stating that it "has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

of the charged offense and the trial proceedings.[34]

*6 Applicant was initially found incompetent to stand trial and sent to Vernon State Hospital on June 23, 2004. While there, he was placed on Zyprexa, a medication used for the treatment of schizophrenia and related psychotic disorders. After the dosage was increased to 40 mg a day and applicant was enrolled in a psychosocial educational program to improve his trial competence, he was found to meet the six criteria for trial competency.[35] At Vernon, applicant was

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[34] *See, e.g., Townsend v. State*, 949 S.W.2d 24, 27 (Tex.App.-San Antonio 1997, no pet.)(although evidence showed that defendant was depressed and suicidal, a "determination that a person is mentally ill does not constitute a finding that the person is incompetent to stand trial"; evidence supported finding that defendant could consult with his attorney and understood the proceedings against him).

[35] Those criteria are:

(1) Capacity to understand the charges and potential consequences of pending criminal proceedings.

Here, the Vernon psychologist concluded that applicant has "consistently been able to accurately name the charges he faces, and has periodically indicated his awareness that this is a serious matter of felony status."

(2) Capacity to disclose pertinent facts, events, and states of mind to counsel.

The competency report stated that applicant knew his attorney's name, but was not sure if that attorney was trying to help him because applicant hardly ever saw him. Thus, the report continued, "one might conclude that his faith in his attorney might well be increased if and when he has greater contact. Importantly, [applicant] was able to provide a consistent account of facts, events, and states of mind to various authorities within the first several weeks after the instant offense, suggesting that should he chose to do so, he would be able to convey information to his attorney as well."

diagnosed with Substance-Induced Psychosis with Delusions. He was also diagnosed with Malingering because he "has clearly exaggerated symptoms that he might be experiencing, and may have even fabricated some symptoms of psychosis." He was returned to Grayson County for trial.

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(3) Capacity to engage in a reasoned choice of legal strategies and options.

The report noted that applicant was verbally vague on these issues, but that he revealed considerably greater under-standing of such information on a written questionnaire. "[H]is approach of grossly exaggerating the symptoms of memory deficits and [psychosis] that he appears to have adopted during this evaluation can be interpreted as a distinct strategy, one which he has apparently chosen to pursue."

(4) Capacity to understand the adversarial nature of the legal process.

The report concluded that applicant had a reasonable understanding of the roles played by the various courtroom personnel.

(5) Capacity to exhibit appropriate courtroom behavior.

Applicant knew that he was "supposed to sit still, pay attention" in the courtroom. Although he had originally suggested that he would talk directly to the judge "if faced with a situation in which others were lying about him," applicant then agreed that it would be more appropriate to use his attorney as a conduit to the judge.

(6) Capacity to testify.

The psychologist noted that applicant could provide a consistent account of the events and circumstances surrounding the charged offenses, [but] he had a very low tone of voice, a tendency to mumble, and frequently made non-responsive answers.

This sixth area was the only one of concern to the Vernon psychologist. Nonetheless, both applicant's treating psychiatrist and the testing psychologist found that applicant "has demonstrated all areas of trial competency." *See*TEX.CODE CRIM. PROC. art. 46.B.024(1).

For the first time, applicant argues that the 40 mg dosage of Zyprexa during the trial exceeded the normal maximum therapeutic amount, and therefore he could have been overly sedated and unable to consult with his trial counsel.[36] Trial counsel, however, disputes that conclusion. In his post-trial affidavit, lead counsel stated that he did not file a second claim of incompetency after applicant returned from Vernon State Hospital because he believed that applicant was, in fact, competent. Counsel stated that, "[a]lthough [applicant was] heavily medicated and still suffering from a mental illness, I was able to talk to applicant and discuss the case with him." Applicant was able to participate in their conversations, he recalled events, and helped with his defense.

When the judge explicitly asked counsel, during the trial, if he was claiming that applicant was again incompetent, counsel tried to avoid the question, but finally had to admit that he was not going to challenge applicant's present competency "because [he] had no new evidence to dispute the findings at Vernon or suggest the applicant was incompetent. Although I will work diligently for my clients, I will not lie to the court or file motions, the basis of which I know are not true." Applicant's lead counsel would usually be the single most reliable and important source of information about whether he and applicant could discuss the factual and legal aspects of the case and develop an appropriate defense. Although others who worked with counsel in developing evidence and

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[36] The trial court's pertinent factual finding states, "As is widely recognized, antipsychotic drugs can have a 'sedation-like' effect, and in severe cases, may affect thought processes."

testimony for the trial disagreed with counsel's assessment and thought that applicant was not totally responsive to them during the trial, the trial judge credited counsel's affidavit and found that applicant was competent to stand trial.[37]

Applicant has failed to show that his counsel was constitutionally deficient for failing to raise a second claim of incompetency to be tried when both his counsel and the trial court concluded that applicant was competent to stand trial.

Although reasonable people might well differ on the questions of whether this applicant was sane at the time he committed these murders or competent at the time he was tried, those issues were appropriately addressed by the defense, the prosecution, trial judge, and the jury during the trial. The evidentiary basis for those sanity and competency issues [38] could have been addressed on direct appeal, thus they are procedurally barred (as well as without merit). His ineffective assistance claims are, as the trial judge found, without merit. In sum, applicant has failed to prove that he is entitled to relief on his application for a writ of habeas corpus. This is a sad case. Applicant is clearly "crazy," but he is also "sane" under Texas law.

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[37] The trial judge could also rely upon his personal recollection of applicant's appearance, demeanor, and statements during the trial as support for his finding that applicant was competent.

[38] A claim of error that the trial judge's failure to make a specific judicial determination that applicant had regained his competency was raised, but rejected, on appeal.

Tex.Crim.App.,2009.

Ex parte Thomas

Not Reported in S.W.3d, 2009 WL 693606 (Tex.Crim.App.)

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APPENDIX E

NO. 051858-15-A

EX PARTE	**§**	**IN THE 15TH JUDICIAL**
	§	**DISTRICT COURT OF**
ANDRE THOMAS	**§**	**GRAYSON COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING APPLICANT'S POST JUDGMENT APPLICATION FOR WRIT OF HABEAS CORPUS

After reviewing the Application and Response thereto as well as the proposed Findings of Fact and Conclusions of the Law by both sides, as well as the Court's personal recollection, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Applicant Mr. Thomas is confined at the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division, in Livingston, Texas.

2. Mr. Thomas is confined pursuant to a Judgment entered on March 14, 2005, by the 15th Judicial District Court of Grayson, Texas, the Honorable James R. Fry, sitting by assignment in the 15th Judicial District Court. Clerk's Record (C.R.) Volume (Vol.) 5, Page (P.) 1696-1698.

3. A grand jury impaneled in Grayson County, Texas in and for the 336th Judicial District of Texas, indicted Mr. Thomas in Cause No. 51858 on or about June 30, 2004, for the capital murder of Leyha Marie Hughes. C.R. Vol. 1, P. 9. Mr. Thomas pled not guilty by reason of insanity to the charge in Cause No. 51858. C.R. Vol. 1, P.1.

4. Prior to the issuance of the above-described indictment against Mr. Thomas, on March 30, 2004, the 336th Court of Grayson County, Texas appointed R.J. Hagood to represent Mr. Thomas as lead counsel or "1st Chair." Supplementary (Supp.) C.R. Vol. 1, P. 14. The next day, March 31, 2004, the 15th District Court of Grayson County, Texas appointed Ms. Peterson as co-counsel or "2nd Chair." Supp. C.R. Vol. 1, P. 15.

5. On July 22, 2004, the State moved to transfer Cause No. 51858 from the 336th Judicial District to the 15th Judicial District for Grayson County, Texas. C.R. Vol. 1, P. 5.

6. Jury selection for Mr. Thomas's capital murder trial began on January 10, 2005, and ended on February 4, 2005. Reporter's Record ("R.R.") Volume ("Vol.") 11-26. The trial itself commenced on February 15, 2005. R.R. Vol. 27. On March 7, 2005, the jury returned a guilty verdict. C.R. Vol. 1, P. 6; C.R. Vol. 5, P. 1674-81; R.R. Vol. 38, P. 6-7.

7. The penalty phase of Mr. Thomas's trial began on March 7, 2005. R.R. Vol. 38-42. The jury answered two special issues, as required by law, resulting in a sentence of death for Mr. Thomas. C.R. Vol. 1, P. 7;

C.R. Vol. 5, P. 1690-95; R.R. Vol. 42, P. 85-87. The Court immediately sentenced Mr. Thomas based upon the jury's verdict. R.R. Vol. 42, P. 91-92. Thereafter, on March 14, 2005, the court formally entered "Judgment of Conviction by Jury; Sentence by Court to Death." C.R. Vol. 5, P. 1696-1698.

8. On July 5, 2005, the court appointed Garland Cardwell as Mr. Thomas's counsel for his direct appeal. C.R. Vol. 5, P. 1709.

9. Mr. Thomas's case is on automatic direct appeal before the Court of Criminal Appeals for the State of Texas, Case No. AP-75,218 pursuant to Tex. R. App. Proc. 25.2(a)(2)(b) & 71.1.

10. The Court of Criminal Appeals for the State of Texas has yet to issue an Order addressing the issues raised in Mr. Thomas's direct appeal.

11. On the morning of March 27, 2004 Andre Thomas and his wife, Laura Christine (Boren) Thomas were separated and she was living with their four year old son, Andre Lee Boren, and Andre Lee Boren's thirteen and one-half month old half-sister, Leyha.

12. In the days and weeks leading up to the murders of his wife and her two children, Mr. Thomas had been abusing marijuana, alcohol, and a cold medication called Coricidin, containing the drug Dextromethorphan ("DXM").

13. On the morning of March 27, 2004 Andre Thomas was psychotic.

14. On the morning of March 27, 2004 Andre Thomas went to the apartment of his wife, Laura Christine Thomas, his four year old son, Andre Lee Boren, and Andre Lee Boren's thirteen and one-half month old half-sister, Leyha and killed each of them with a different knife.

15. Mr. Thomas attempted to cut each of his victim's hearts out, but was only partially successful. He removed the hearts of the children, but only managed to remove a part of one of Laura's lungs. See generally R.R. Vol. 28, P. 123-149; R.R. Vol. 45 at State's Exs. 51-60.

16. While still at the crime scene, Mr. Thomas turned one of the knives on himself, stabbing himself in the chest, in an attempt to commit suicide. Surprised that he was not dead, Mr. Thomas did not flee, but simply walked home. Just a few hours later, he would need emergency surgery to save his life. R.R. Vol. 36, P. 6-14; Vol. 44, Supp. Hrg. State's Ex. 21 at 21 and State's Ex. 23 at 3-4 and 8.

17. Upon arriving at his home he "went and . . . got a Wal-Mart sack and put the hearts into" it and then "put the hearts in the trash" and then "went and changed clothes." R.R. Vol. 44, at Supp. Hrg. State's Ex. 23 at 4-5. He put the murder weapons – the three knives – in his kitchen sink and left his bloody clothes on the floor of his bedroom. R.R. Vol. 27, P. 141-144; R.R. Vol. 45 at State's Ex. 66.

18. Despite just having killed Laura, Mr. Thomas next went over to his dad's trailer nearby to call her, because he "didn't believe what had happened" and

was "gonna call her." R.R. Vol. 44 at Supp. Hrg. State's Ex. 23 at 5. Unable to locate Laura's phone number in his wallet, however, he used his dad's phone instead to call Laura's parents. He did not reach them, but left them the following message:

> Um, Sherry, this is Andre. I need yall's help. Something bad is happening to me and it keeps happenin' and I don't know what's going on. I need some help. I, I think I'm in hell, and um, I need help. Somebody needs to come and help me. I need help bad. I'm desperate and, um, I'm afraid to go to sleep. So, when you get this message, come by the house, please. Hello?

R.R. Vol. 30, P. 143-148; R.R. Vol. 45 at State's Exs. 85 & 86.

19. Andre Thomas turned himself into the Sherman Police Department later that morning.

20. The blood samples and a urine test from Mr. Thomas on the morning of the crime did not reveal any evidence of intoxication due to Mr. Thomas's ingestion of either marijuana or Coricidin on the evening of March 25, 2004. *See* Ex. 63 at DPS 0160; Ex. 64 at DPS0137; Ex. 159 at DPS0123; Ex. 83 at AT 018949. *See also* Ex. 23 at ¶ 10. As stipulated by the State at trial, a less than measurable amount of Dextromethorphan ("DXM") was found in Mr. Thomas's blood. R.R. Vol. 45, State's Ex. 92. *See also* R.R. Vol. 29, P. 73-74; R.R. Vol. 32, 7-8.

21. On March 27, 2004, Mr. Thomas had emergency open heart surgery to repair damage

caused by his self-inflicted stab wounds to his heart and was re-arrested for the murders of Laura, Andre, Jr., and Leyha. R.R. Vol. 36, P. 6-14; R.R. Vol. 7, P. 111; R.R. Vol. 14 at State's Supp. Hrg. Exs. 18 and 19.

22. After spending two days in the hospital, Mr. Thomas was discharged to the Sherman Police Department for a videotaped interview and statement. R.R. Vol. 7, P. 134. *See generally* R.R. Vol. 7, P. 119-131, R.R. Vol. 10, P. 4-14.

23. Mr. Thomas gave a videotaped statement to the police on March 29, 2004.

24. On March 30, 2004, Mr. Thomas was transferred to the Grayson County Jail and gave an audiotaped statement to Detective Ditto, Texas Ranger Tony Bennie, and Grayson County Jail Nurse Natalie Sims. R.R. Vol. 44, State Ex. 23. *See generally* R.R. Vol. 32, P. 9, 22; R.R. Vol. 44 at Supp. Hrg. State's Ex. 23; R.R. Vol. 45 at State's Exs. 91 and 92.

25. On March 30, 2004, the 336th Court of Grayson County, Texas appointed R.J. Hagood to represent Thomas as lead counsel or "1st Chair." Supp. C.R. Vol. 1, P. 14. The next day, March 31, 2004, the 15th District Court of Grayson County, Texas appointed Bobbie Peterson (Cate) as co-counsel or "2nd Chair." Supp. C.R. Vol. 1, P. 15.

26. Mr. Hagood and Ms. Peterson (Cate) were working on other cases in state and federal court while representing Mr. Thomas. Ex. 15 (Hagood Aff.) at ¶ 6.

27. Prior to and during trial, Mr. Hagood suffered from chronic pancreatitis.

28. Following his return from Wilson N. Jones Hospital, Mr. Thomas was held in Grayson County Jail. *See generally* R.R. Vol. 33, 98, 100-103; R.R. Vol. 46 at Def. Trial Ex. 8.

29. On April 2, 2004, Mr. Thomas was in his cell reading the Bible. After reading a Bible verse to the effect that, "If the right eye offends thee, pluck it out," Mr. Thomas removed his right eye with his fingers, blinding himself in that eye. *See generally* R.R. Vol. 33, 19, 31-32, 111; R.R. Vol. 46 at Def. Exs. 9-13.

30. On or about April 5, 2004, Mr. Hagood brought a motion for a competency examination of Mr. Thomas. Supp. C.R. Vol. 1, P. 21-22. The Court granted the motion the same day and appointed Psychologist Dr. James Harrison to evaluate whether Mr. Thomas was competent to stand trial. Supp. C.R. Vol., P. 23-24. Dr. Harrison concluded that Mr. Thomas was incompetent to stand trial. Ex. 60.

31. On April 26, 2004, the State brought its own motions to have Mr. Thomas examined for trial competency by its expert Dr. Peter Oropeza. Supp. C.R. Vol. 1, P. 25-26.

32. Dr. Oropeza also found Mr. Thomas incompetent to stand trial and recommended that he receive psychiatric treatment. Ex. 65 at 8.

33. The parties waived a trial on competency and at a June 16, 2004 hearing, the Court declared Mr.

Thomas to be incompetent. C.R. Vol. 3, P. 1025-1033. The next day, the Court ordered Mr. Thomas to the North Texas State Hospital – Vernon Maximum Security Unit ("Vernon") in Vernon, Texas, a maximum security psychiatric facility of the Mental Health Mental Retardation ("MHMR") network. Supp. C.R. Vol. I, P. 11-12; C.R. Vol. 3, P. 00981-982.

34. On July 23, 2004 Dr. B. Thomas Gray, a Clinical Psychologist at Vernon concluded that Mr. Thomas was now competent to stand trial. Ex. 70 at AT 002029.

35. Mr. Hagood's and Ms. Bobbie Peterson (Cate's) trial strategy was to prove that the applicant was insane at the time of the offense, not because of intoxication, but because of his prior medical and mental history.

36. The State's position was that the Applicant either knew right from wrong or that any psychosis he had was substance induced.

37. For the guilt/innocence phase of the trial, the State primarily relied on Drs. David Axelrad and Victor Scarano and psychologist Dr. Peter Oropeza. *See generally* C.R. Vol. 1, P. 20-22, 51; R.R. Vol. 2, P. 3.

38. The State called two experts for the punishment phase of the trial that were disclosed on its expert witness list, Brent O'Bannon, a licensed professional counselor who interacted with Mr. Thomas back in 1999, when he was 16, and Royce Smithey, the Chief Investigator for the Special

Prosecution Unit for the State of Texas that helps Texas district attorneys prosecute crimes committed in prisons. *See generally* R.R. Vol. 40, P. 19-53, R.R. Vol. 41, P. 161-216.

39. The defense team also retained three core experts for the guilt/innocence phase of the trial: psychiatrists Dr. Edward Gripon and Dr. Jay Crowder and psychologist Richard Rogers. Ex. 72. None had specific credentials as a neuropharmacologist and only Dr. Gripon was called at trial. The defense team did not initially retain any experts for the mitigation phase of the case. *Id*; Ex. 27 at ¶ 31.

40. On December 6, 2006, the defense team filed a motion entitled, "Motion for Discovery, Production and Rule 702/705 Hearing" in the related case, Cause No. 51483, involving Laura and Andre, Jr. to preserve the right to challenge the State's experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and its progeny. *See* Supp. C.R. Vo. 1, P. 76-86.

41. The Defense neither retained nor called a neuropharmacologist or a toxicologist.

42. Jury selection in Mr. Thomas's capital case began on January 10, 2005. The venire was seated in the East and West courtrooms of the old Grayson County Courthouse. *See generally* R.R. Vol. 11, P. 21-23.

43. Prior to commencement of voir dire, potential jury instructions were read to the entire venire

assembled for Mr. Thomas's trial. The defense made no objection. *See generally* R.R. Vol. 11, P. 67-75, 79-86.

44. Texas Law provides that "Voluntary intoxication does not constitute a defense to the commission of crime" and "intoxication" means "disturbance of mental or physical capacity resulting from the introduction of any substance into the body." Texas Penal Code § 8.04(a) & (d).

45. The defense and the State agreed on a joint Power Point presentation that stated "Insanity caused by the aggravation of a pre-existing mental condition by alcohol or drugs is *not* a defense to a crime." Ex. 41 (emphasis added). *See, e.g.,* R.R. Vol. 21, P. 84-87.

46. Prosecutor Kerye Ashmore made references to the law of voluntary intoxication in his opening statement. The defense did not object. R.R. Vol. 27, P. 35-36.

47. Mr. Hagood was aware that the State's experts had diagnosed the applicant with substance-induced psychosis.

48. On direct examination, Dr. Victor Scarano set out his opinion that the applicant's use of drugs and alcohol precipitated the applicant's psychotic episode. RR vol. 31, p. 94; State's Response Appendix ex. L)

49. The instruction on voluntary intoxication given by the court and referred to during the entire

trial was taken almost verbatim from the Texas Code of Criminal Procedure.

50. The applicant has failed to plead facts that establish the jurors or attorneys had difficulty in understanding the instructions.

51. There was no instruction that if voluntary intoxication was found, the applicant could never be considered insane.

52. The court's instruction on voluntary intoxication was supported in that: (1) the evidence showed that the applicant told Dr. Peter Oropeza that he smoked marijuana the night before the murder (RR Vol. 36, p. 106); (2) the medical records of the applicant showed that there was marijuana in his urine. There was insufficient blood to test for marijuana in the blood as what blood that was left from the hospital was used to test for DXM; (3) there was DXM still in the applicant's blood at the time his blood was drawn several hours after the murders; (4) there was evidence from nurse Natalie Sims that the applicant had told her that if it hadn't been for the drugs the crime would not have happened. The defense expert, Dr. Harrison, was also questioned about this (RR Vol. 35, p. 42); and (5) the defense expert Dr. Gripon, admitted during cross examination that the combined use of marijuana, alcohol, and DXM would aggravate and exacerbate a pre-existing condition of schizophrenia (RR Vol. 36, p. 111). Numerous witnesses testified to the applicant's drug and/or alcohol abuse. (RR vol. 27, pp. 185-187, vol. 29, pp. 113, 137-140, 186, 203-204, 221-224, 226, 234-235; vol. 31, pp. 92-94) The State's expert psychiatrists

also found that the applicant's psychosis was substance-induced. (RR vol 31, pp. 54, 112; vol. 34, p. 78-79)

53. The jury heard evidence that applicant was intoxicated off and on in the days and weeks leading up to the murders.

54. Dr. Victor Scarano testified that the applicant told the doctor that the applicant was a heavy user of marihuana in 2004 and that he had begun mixing the marihuana with alcohol and Coricidin, a cold medicine which contained Dextromethorphan (hereinafter, DXM). (RR vol. 31, pp 92-94) The applicant specifically told the doctor that he had mixed those substances on either March 4 or 5 of 2004, and the 25th into the 26th of March 2004. (RR vol. 31, p. 94) According to the applicant, he had consumed all three substances approximately 36 hours before murdering his wife and her two children. (RR vol. 31, pp. 113-115)

55. After a day and a half, the applicant used enough Coricidin to still have a trace of DXM in his blood. (RR vol. 29, pp. 76-79, 82, 85-86, 88)

56. During opening statements, the State set out a time line setting out the drug use and intoxication by the applicant prior to the murders. (RR vol. 27, pp. 27-28, 30-31) The prosecutor, Kerye Ashmore, specifically set out the definition of voluntary intoxication and emphasized that it did not only apply to the exact time of an offense, but also to *any* disturbance of mental of physical disturbance resulting from the introduction of any substance into

the body. (RR vo. 27, p. 35) Mr. Ashmore set out that he expected the evidence to show that in the days and weeks leading up to the murders, the applicant had been smoking "blunts," containing marihuana, drinking and taking Coricidin, a cold medicine containing DXM on a daily basis (RR vol. 27, p. 36-38) The prosecutor also described the anticipated testimony of Dr. Victor Scarano, M.D., regarding the applicant's psychotic state and the fact that it was substance induced. (RR vol. 27, pp. 38-39) The State stated that the evidence would show that the mental state of the applicant at the time of the murders was not only substance induced, but that even in that mental state, the applicant knew right from wrong. (RR vol. 27, p. 39, 44-45) In fact, Mr. Ashmore stated in no uncertain terms that the facts of the case surrounding the murders would show that the applicant knew his conduct was wrong and still he killed 13 month old Leyha Marie Hughes, her four year old brother and their mother. (RR vol. 27, pp. 47-62)

57. Dr. Victor Scarano, M.D., testified about the applicant's mental state at the time he murdered the victims. During direct examination, Dr. Scarano testified that a person can be mentally ill and delusional and still be sane according to the legal definition of sanity in Texas. (RR vol. 31, pp. 83-84) Dr. Scarano described how mental illnesses can be substance-induced. (RR vol. 31, p. 85) The doctor also explained to the jury that a substance-induced mental illness or psychosis does not disappear when the substance is taken away from a subject. Instead, the "psychosis can continue once it is precipitated by a

substance for a longer period of time, even when that substance is removed." (RR vol. 31, pp. 86-87, 116-120) The doctor testified that the applicant was psychotic when he killed his wife and her two children, but that the psychosis was triggered by his substance abuse in the preceding days and weeks. (RR vol. 31, pp. 92-111, 113-115) The doctor also set out the facts of the case, some of which had been given to him by the defendant, and applied those facts to the legal definition of sanity. In Dr. Scarano's medical opinion, the applicant new that his conduct was wrong and was not legally insane at the time he murdered his wife and her two children. (RR vol. 31, pp. 94-101)

58. Dr. A. David Axelrad's diagnosis was essentially the same as Dr. Scarano.

59. During closing arguments, the State argued that the applicant knew right from wrong. The state also argued that the definition of intoxication precluded the applicant from claiming insanity even if he did not know right from wrong at the time of the murders, because his psychosis was substance induced. (RR vol. 37, pp. 86, 89-92)

60. Dr. Jay Crowder, a psychiatrist hired by the defense but not called at trial, informed the defense that he could not rule out the possibility that the psychotic episode leading up to the murders was induced by his use of a combination of drugs and alcohol.

61. Neither the State nor its experts alleged that the applicant's system still contained significant amounts of drugs or alcohol during the murder.

62. Mr. Hagood had gone over the discovery and the reports from both of the State's experts, and was aware of the State's theory of the case.

63. Mr. Hagood was aware of the lab results from the applicant's blood.

64. Neither the State nor its experts presented "false or misleading" evidence.

65. The State timely requested a jury shuffle.

66. There were more African-Americans in the first one hundred venire men prior to the shuffle.

67. The State requested the shuffle based on the appearance of several of the venire men in the first one hundred.

68. There is no evidence that the request for a shuffle was racially motivated.

69. The Applicant did not object to the shuffle.

70. As a result of the State's shuffle, only two of the 102 potential jurors questioned during voir dire were African American. Ex. 27 at ¶ 18; R.R. Vol 23, P. 115.

71. All members of Mr. Thomas's jury were white. Ex. 27 at ¶ 18.

72. There is no evidence that the jury's decision was racially motivated.

73. No objection was ever made by the Applicant to the purported racial bias of any juror that was seated.

74. Dr. Shannon Miller is a psychiatrist who has written extensively about DXM addiction, is a specialist on the effects of drug addiction, and is certified in addiction medicine. *See* Ex. 39.

75. In January 2005, the State formally retained Dr. Miller, signed a modified version of his retainer agreement and sent him a retainer check for ten hours work. *See supra*, Part I-I.

76. The State Prosecutors telephoned Dr. Miller and recounted the basic facts of the case to him, including the State's position. During that conversation, Dr. Miller preliminary questioned whether DXM could have played a part in the kind of psychotic episode Mr. Thomas experienced on March 27, 2004. State's Resp. To App. for Writ of Habeas Corpus at 23.

77. There was no evidence from Dr. Shannon Miller, exculpatory or otherwise.

78. Dr. Shannon Miller states in his affidavit that he did not form an opinion concerning the applicant, his mental state, his psychosis, the cause thereof, or his sanity because he never performed a complete evaluation of the applicant or examined all of the records.

79. Mr. Ashmore's and Mr. Brown's decision was not to use Dr. Miller because of several factors including: (1) the attendant cost of having Dr. Miller come to Grayson County to evaluate and subsequently to testify; and (2) the fact that the applicant had already been fully tested and evaluated by three expert witnesses the State had already hired.

80. The affidavit of J. Kerye Ashmore is credible.

81. The affidavit of Joseph Dr. Brown is credible.

82. Mr. Ashmore and Mr. Brown believed the applicant had been seen by enough experts for the State and doubted that the defense team would allow them to bring another expert in during the voir dire in this case to do another evaluation.

83. Dr. Miller was not requested to prepare a report.

84. Mr. Ashmore and Mr. Hagood met to discuss the State's list of expert witnesses which had previously been provided to the defense prior to or during voir dire. Mr. Ashmore went through the list of the State's potential expert witnesses and advised Mr. Hagood who the State anticipated would be called to testify. During this meeting, Mr. Ashmore advised Mr. Hagood that the State would not be calling Shannon Miller. Mr. Hagood inquired as to why and was advised of the reasoning for the State not using Dr. Miller. During this conversation, Mr. Ashmore advised Mr. Hagood that Dr. Miller could not give an opinion without examining the defendant and Dr.

Miller indicated the cases he had dealt with generally involved larger doses of DXM.

85. Bobbie Peterson (Cate) represented the State in a juvenile proceeding regarding Applicant when he was a juvenile.

86. Applicant was aware of this representation.

87. Mr. Hagood never noticed a lack of loyalty to the applicant or the applicant's case by Ms. Peterson (Cate). Mr. Hagood states that Ms. Peterson (Cate) showed a tremendous dedication towards the applicant and was zealous in his defense.

88. The applicant indicated that he understood his attorney's previous role as the prosecutor in his prior convictions and after acknowledging on the record that he understood his attorney's previous role, the applicant stated that he had no problem with Ms. Peterson (Cate) continuing her representation.

89. Both Ms. Peterson (Cate) and the applicant acknowledged on the record that the applicant had previously discussed this problem with his attorney.

90. The Court of Criminal Appeals has previously rejected an invitation to extend the federal constitutional proscription against execution of the insane to the greater category of mentally ill defendants. The applicant has failed to state a compelling reason to do so in this case.

91. Dr. Gripon's testimony that the applicant was competent at the time of trial was credible.

90. Initially, the applicant was found incompetent and sent to Vernon State Hospital for treatment. (Appendix ex. K) The applicant was returned to Grayson County to stand trial after doctors at Vernon State Hospital found that he was then competent to stand trial. (11.071 Application, Appendix ex. 71)

91. No second claim of incompetency was raised.

92. The trial court specifically asked Mr. Hagood if the applicant was claiming incompetency. Mr. Hagood told the judge that the applicant was not challenging competency at that time.

93. The trial court on at least one occasion addressed the applicant directly and asked him a question regarding Ms. Peterson (Cate's) representation. Ms. Cate had told the court that she had explained to the applicant that while Ms. Peterson (Cate) was a prosecutor she had worked on a case against the applicant, that he understood and wished Ms. Peterson (Cate) to continue as co-counsel. (RR vol. 7, p. 4-5) This court did not observe the applicant to be incompetent.

94. At no time did Ms. Peterson (Cate) suggest that the applicant was unable to understand her.

95. During trial, Mr. Thomas was treated for his schizophrenia with an antipsychotic drug called Zyprexa. As is widely recognized, antipsychotic drugs can have a "sedation-like" effect, and in severe cases, may affect thought processes. *Riggins v. Nevada*, 504 U.S. 127, 143 (1992); *see also University of Maryland Medical Center online Health Library at*

http://www.umm.edu/altmed/drugs/olanzapine-094026.htm#Overdosage/Toxicology.

96. As Mr. Hagood explains, the defense team should have objected to the competency finding when Mr. Thomas returned from the state hospital. Ex. 15 at ¶ 10. While his attorney recognized that the report should have been objected to, the defense team did not object to the findings.

97. Defendant was competent to stand trial.

98. Prior to the beginning of the trial on the merits, Mr. Hagood was presented with a memorandum on the admissibility of evidence of the defendant's diminished mental capacity to counter State evidence aimed at proving that Mr. Thomas had the requisite *mens rea* to be found guilty of capital murder. *See* Ex. 15 at ¶ 12.

99. Mr. Hagood did not share this information with co-counsel, *see* Ex. 27 at ¶ 12, nor did he further investigate, or attempt to present a diminished capacity option to the jury. Ex. 15 at ¶ 12.

100. The court granted a motion in limine prohibiting witnesses from using titles or terms including the word "mitigation" or any other form of that word and that Dr. Kate Allen not be allowed to testify to hearsay statements from the applicant.

101. The trial court sustained the objections by the State to Dr. Allen, an expert with a degree in family counseling, from making medical conclusions regarding the applicant's treatment.

102. Mr. Hagood states that their trial strategy involved straight insanity. Although it is permissible to request conflicting defense instructions in a jury charge, it is not always prudent. In front of a jury in a death penalty trial telling a jury "he did it, but he was insane", then saying in the next breath, "but if he wasn't insane he was just reckless or criminally negligent" might seem deceitful and manipulative to a jury. Mr. Hagood states that even if he believed that the facts of this case warranted a lesser included instruction, he might not have requested one. Mr. Hagood states that he certainly would not have labeled it a "diminished capacity" defense as that carries with it a different connotation.

103. Applicant has not indicated what admissible evidence indicated that if guilty, the applicant was only guilty of a lesser-included offense of capital murder.

104. Applicant attempted to negate the State's evidence regarding mens rea by introducing evidence of the applicant's history of mental illness through the testimony of Dr. Gripon.

105. The jury was able to hear all of this evidence, determine the weight of the evidence, and choose whether or not Applicant possessed the requisite *mens rea* to commit this offense or whether he was insane and did not know the difference between right and wrong.

106. On March 4, 2005, Mr. Hagood submitted a motion for a Requested Jury Instruction Defining Reasonable Doubt. C.R. Vol. 5, P. 1619-21. Mr.

Hagood requested the Court give the jury the following definition of reasonable doubt.

> "Reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

This definition comes from the Fifth Circuit's Criminal Pattern Jury Charge. *See United States v. Williams,* 20 F.3d 125, 129 n.1 (5th Cir. 1994), *cert denied*, 115 S. Ct. 239 (1994).

107. On the same date, the Court asked the parties if there were any objections to the Court's jury charge. Mr. Hagood raised an objection that mirrored the motion for the requested jury charge, citing the specific instruction requested. The Court denied the request. R.R. Vol. 37, P. 6.

108. This claim is barred because it was raised on direct appeal, which is still pending.

109. The applicant has failed to plead facts which justify raising in his 11.071 application an issue which has been raised on direct appeal.

110. The jury foreperson, Kyle McCoy, stated that he and others on the jury did not feel there was evidence of true remorse. R.R. Vol. 43, P. 16. Mr. McCoy stated that he, and possibly others on the jury,

wanted something to "hang their hat on," such as evidence of true remorse.

111. The applicant has failed to plead facts that the jury violated the applicant's right against self-incrimination.

112. The State used prior convictions based on acts committed by Mr. Thomas when he was a juvenile to establish aggravating circumstances during the penalty phase of his case.

113. Specifically, the State offered prior offense evidence regarding the following:

- felony criminal mischief over $750 that occurred when Mr. Thomas was 11;
- two separate offenses of criminal trespass when Mr. Thomas was 11;
- a curfew violation citation at age 13;
- three felony offenses of vehicle theft at age 14;
- curfew violations at 14 and 15; and,
- arrest and detention for evading arrest while using a vehicle at age 17.

R.R. Vol. 38, P. 24-25; R.R. Vol. 38, P. 104-106; R.R. Vol. 38, P. 28-32, 101-102, 109-112 & R.R. Vol. 39, P. 34-38; R.R. Vol. 39, P. 26-29, P. 34; R.R. Vol. 39, P. 129-131.

114. During the penalty phase, the trial court instructed the jury that it could consider Mr. Thomas's background and evidence that he had committed other acts or participated in other transactions. R.R. Vol. 42, P. 30-31.

115. Applicant did not object to the admission of his juvenile convictions.

116. The defense team also did not seek to conduct neuropsychological testing of Mr. Thomas. *See generally* Ex. 35 & Ex. 14.

117. To conclude the defense's mitigation case, Mr. Hagood called Mr. Fitzgerald. R.R. Vol. 41, P. Mr. Fitzgerald did not testify after the State's voir dire. R.R. Vol. 41, P. 148.

118. The State identified Dr. Victor Scarano as a potential expert witness, and Dr. Scarano was one of the experts that examined Mr. Thomas.

119. Trial counsel did not raise a *Daubert* challenge to Dr. Scarano or Dr. Axelrod.

120. During the State's case in chief, Dr. Scarano testified that his opinion was that a combination of alcohol, marijuana, and Coricidin "pushed Mr. Thomas into a delusional psychosis" on Saturday morning March 27, 2004. R.R. Vol. 31, P. 94.

121. The State identified Dr. David Axelrad as a potential expert witness, and Dr. Axelrad was one of the State's experts who examined Mr. Thomas.

122. Dr. Axelrad was named on the State's pre-trial witness list and prepared a 68-page report concluding that Mr. Thomas's psychosis was drug-induced.

123. The defense chose to call Dr. David Axelrad as its initial expert witness to help the defense to try and prove their case. *See* R.R. Vol. 34, P. 55-166.

124. Mr. Royce Smithey is an employee of the state special prosecution unit, and investigates felonies that are committed within the Texas penal system. R.R. Vol. 41, 149-150. During the penalty phase of Mr. Thomas's trial, Mr. Smithey was called to testify for the State regarding the risk of Mr. Thomas committing future acts of violence. He also testified on the broad subjects of prison classification and prison violence. *Id*. at 152-153.

125. Defense counsel retained Mr. Larry Fitzgerald to testify, on behalf of Mr. Thomas, about the safeguards taken by the TDCJ to ensure that prisoners would not pose a risk of future dangerousness to other incarcerated individuals and prison employees. *See* Ex. 11 at ¶ 5.

126. Defense counsel waived the Rule 705 hearing with respect to Dr. Oropeza.

127. Defense counsel did not object to Dr. Oropeza's testimony that Mr. Thomas had Antisocial Personality Disorder.

128. Defense counsel had intended to present videotape evidence through Mr. Fitzgerald to

undermine the State's case on Mr. Thomas's future dangerousness, but instead presented this evidence through the State's witness, Mr. Smithey. Ex. 27 at ¶ 28.

129. Members of Mr. Thomas's family, friends and community leaders were available at the time of Mr. Thomas's trial to inform counsel, experts, and jurors about Mr. Thomas's life. *Id.*

130. The defense team did not contact all of Mr. Thomas' family members. Nor did Schade draft a social history or mitigation report.

131. Mr. Hagood spent many months preparing all aspects of the case. He states that he had talked to several family members regarding the applicant's background and childhood.

132. The applicant's mother was angry at the applicant for killing her grandson. Although Mr. Hagood states that he could have gleaned useful background information from the mother's testimony, Mr. Hagood did not do so. She had left the state and Mr. Hagood states he made no attempt to subpoena her or get her back to Grayson County, Texas for the trial. Mr. Hagood states that this was because he was too afraid of what might come out of her mouth and the further damage she might do to the applicant. Mr. Hagood states that he had no intention of putting her on the stand and preferred that the state not have that opportunity either.

133. Mr. Hagood believed the applicant's aunt, Doris Gonzalez, would be the primary defense witness

regarding mitigation. When Mr. Hagood interviewed her she was articulate and passionate about the trial and obstacles faced by the applicant. Once on the stand, however, she collapsed. She was unable to relate to the jury despite Mr. Hagood's best attempts as she had during trial preparation.

134. Mr. Hagood also prepared two of the applicant's brothers and his father. They, too, had done a much better job in Mr. Hagood's office than they were able to in court. Mr. Hagood states that once he realized that they were not coming across well, he abandoned his questioning of those three witnesses.

135. Ms. Peterson (Cate) procured Kate Allen with Mr. Hagood's consent. Mr. Hagood did not know about Ms. Allen until shortly before she testified, although he was glad Ms. Peterson (Cate) had contacted Ms. Allen. Mr. Hagood was disappointed with Ms. Allen's performance because her demeanor did not translate well to the rural community from which our jurors were selected.

136. Ms. Schade was employed based on a recommendation from the Texas Defender's Service.

137. Mr. Hagood states that he instructed Ms. Schade to do as much background as possible. All materials possessed by the defense were available to her.

138. Mr. Hagood was disappointed in Ms. Schade's performance. Mr. Hagood states that having worked well with Amanda Maxwell, a mitigation specialist

also recommended by the Texas Defender Service, in another case, he can now see what Ms. Schade should have done.

139. Mr. Hagood also states that Ms. Schade allowed her personal feelings about the death penalty to affect her performance.

140. Ms. Schade was admonished by the court to restrain herself because a juror had complained about her action in the courtroom.

141. Mr. Hagood was aware of the family background and history of mental problems and alcohol abuse.

142. Mr. Hagood felt that such information to a juror could cut both ways.

143. Mr. Hagood did not want the jury to think that the applicant's background and propensity for drug use and mental instability 'would make him more of a future danger.

144. Mr. Hagood concentrated on relatives and friends with current close relationships to the applicant. Strategically, Mr. Hagood states that he did not want to introduce childhood anecdotes or the history of distant relations.

145. Through his investigation and interviews and friends and family members, Mr. Hagood had been told that the applicant had engaged in the conduct as a child long before any onset of mental illness that involved cruelty to animals or setting fires.

146. Mr. Hagood was afraid that the jury could see this as a sure sign that the applicant would be a future danger as such, Mr. Hagood did not seek out all friends and relatives.

147. The court appointed Garland Cardwell as Mr. Thomas's counsel for his direct appeal. C.R. Vol. 5, P. 1709. Mr. Cardwell submitted appellant's brief on September 29, 2006. *See State v. Thomas*, No. 51858 (appellant's brief on appeal from the 15th District Court).

148. This court observed R.J. Hagood during the course of the entire trial and did not discern any issues with Mr. Hagood's performance attributable to an illness.

149. During Ms. Long's initial examination by the state she indicated that she understood that the state had the burden of proving the applicant committed an offense, even if insanity was involved. Ms. Long also indicated that she understood the burden of proof regarding insanity and the law regarding involuntary intoxication. The question by the state regarding outside evidence from personal knowledge she agree that she could not consider the outside evidence. When the applicant examined her, she first agreed in order to find insanity would be by preponderance of the evidence. She then agreed with Mr. Hagood that she would need clear and convincing evidence then backed up and stated that she did not know at that time. After first stating that she did not know how much evidence she would need to find the applicant insane she then agreed with Mr. Hagood that she would hold the defense to a higher burden of proof

than of preponderance of the evidence. The state asked Ms. Long again whether she understood that insanity bad to be proven by believing more evidence was presented by the state than was by the defense, she agreed. She then agreed with Mr. Hagood that she would need proof beyond a reasonable doubt to find that insanity, then stated that she was confused. The state then explained the difference between reasonable doubt and preponderance of the evidence and Ms. Long stated that there was a fine line between the two standards. At this point the juror became clearly confused about the respective definitions of preponderance and reasonable doubt and the court intervened and attempted to explain to her the differences between the two standards. After that explanation Ms. Long indicated that the difference made sense and that she could follow the law. (RR vol. 12, pp. 14-88)

150. Ms. Long vacillated or equivocated on her understanding of the burden of proof regarding insanity.

151. Ms. Long's answers were credible that she would be able to follow the law.

152. During voir dire the defense moved to strike Ms. Long for cause. The court denied the motion and the applicant exercised his first peremptory strike. The applicant asked for two additional strikes regarding Ms. Long in voir dire person Scott Kermit. The court denied the request at that time. The defense renewed their request three times. The trial court denied each request and told the applicant that

the request was premature because the applicant had yet to exhaust all of his original peremptory strikes.

153. The applicant did not exhaust his fifteen statutory peremptory challenges during voir dire.

154. The applicant requested strikes for cause and additional strikes on several occasions but was told the requests for additional strikes were premature. (RR vol. 12, p. 90, 163; vol. 15, p. 242; vol. 17, pp. 227-228; vol. 20, p. 96) In chambers, the court indicated that he was going to grant two more strikes for the defense. (RR vol. 26, pp. 66-67) However, this did not happen solely because the defense did not exhaust its strikes, having one left. (RR vol. 26, p. 67)

155. After twelve jurors were seated, the parties then proceeded to pick two alternate jurors. Each side was given one strike for purposes of picking the two alternates. (RR vol. 26, p. 66) The State and the applicant accepted the next panel member who became the first alternate. (RR vol. 26, p. 146) The next venire person was Mary Stewart, upon whom the applicant exercised his sole strike in the alternate selection phase. There were no grounds to strike Ms. Stewart for cause. (RR vol. 26, p. 196) The next juror, Kelly Walton, was the one the applicant refers to as an "objectionable juror" in his application. The applicant had used his sole strike regarding alternates. There were no grounds to strike Mr. Walton for cause.

156. Mr. Walton was the second alternate juror and never deliberated on the case. (RR vol. 26, pp. 241-242; vol. 37, pp. 112-113).

157. Prior to Dr. Scarano's testimony, the defense had been provided a copy of Dr. Scarano's curriculum vitae and his report containing his findings, diagnosis and the facts relied on to make those decisions.

158. The defense was not surprised by Dr. Scarano's testimony.

159. The defense was surprised that the State called Dr. Scarano during the State's case-chief rather than at rebuttal.

160. Dr. Scarano was a medical doctor who had been licensed since 1961. Dr. Scarano's prior training and practice had included psychiatry and pediatric surgery. Dr. Scarano had been doing forensic psychiatry since 1998 and had graduated from law school.

161. Dr. Jay Crowder, an expert hired by the defense had indicated to Mr. Hagood that he could not rule out that the applicant's psychosis was substance induced.

162. As a medical doctor and a psychiatrist, part of a doctor's education and training would include the pharmacological effect of drugs and alcohol on the brain and relating to psychotic behavior.

163. Dr. Scarano's testimony was consistent with what the defense expert, Dr. Crowder, had told Mr. Hagood.

164. Mr. Hagood felt requesting a *Daubert/Kelly* hearing regarding Scarano and Axelrad would be frivolous.

165. The majority of Dr. Scarano's work as a full-time forensic psychiatrist is in the examination and evaluation of individuals involved in the criminal justice system, as was the case with the applicant.

166. Dr. Scarano is often appointed as a forensic psychiatric expert by courts. In addition, his services are employed as a consulting and/or testifying expert by the prosecution and defense in criminal cases. A large portion of the defendants on whom he performs forensic psychiatric examinations/evaluations have a history of drug abuse. Evaluation of the defendant's abuse of drugs is an integral and important part of the psychiatric examination/evaluation.

167. A significant and important part of a psychiatrist's and forensic psychiatrist's training is learning and understanding the effects of medications, alcohol, and illicit drugs upon the central nervous system. In clinical practice, experienced forensic psychiatrists utilize and apply their knowledge and expertise in evaluating the mental state of criminal defendants.

168. This court finds that Dr. Scarano is a qualified expert in forensic psychiatry.

169. Neuropharmacologists or psychopharmacologists are not the only individuals who should be allowed to testify in court in regards to the effects of drugs on the central nervous system.

These individuals are not physicians, but rather are consultants whose services may be requested by the physician responsible for the evaluation and/or treatment of the patient. Many physicians, including family physicians, emergency room physicians, internists, pediatricians, and psychiatrists, have expertise in identifying the effects of drugs or their absence on human behavior.

170. Based on the facts of the case and the information provided to the defense, Mr. Hagood did not believe the trial court would have prevented Dr. Axelrad's testimony.

171. Neuropharmicological findings were not the sole basis of Dr. Axelrad's diagnosis.

172. Applicant's habeas attorneys retained Dr. Ruben C. Gur to interview and test the applicant.

173. Dr. Gur is a neurophyschologist with a PhD from Michigan State University, a masters from Michigan State University, and has done a post doctoral fellowship from Stanford University.

174. Dr. Gur reviewed Mr. Thomas' medical and social history as well as standard and computerized neuropsychological evaluations, as well as a personal interview of Mr. Thomas. Dr. Gur concludes that Mr. Thomas has schizophrenia of the paranoid type superimposed on a neuro-developmental brain disorder. He further concludes that he was under the delusions that his acts would save himself and the world and his behavior before, during, and after the crime is controlled by this symptom of paranoid

schizophrenia. He states Mr. Thomas's ability to respond to appropriate to his environment or deficits associated with acquired brain injury.

175. Applicant's habeas counsel also retained Dr. Mila H. Young, a board certified clinical psychologist with a specialty in neurophysiology and neuropsychological assessments. She has a doctorate in clinical psychology from Alliant lnternational University in San Francisco, California, a master's degree in experimental psychology from Towson State University in Baltimore, Maryland, and a bachelor of arts with a major in psychology from the University of Guam. Dr. Young did a neuropsychological and psychological evaluation of Andre Thomas in May of 2007, which included neuropsychological testing.

176. Dr. Young concludes that "There is substantiating evidence that Andre experienced psychotic symptoms before the deaths of his wife and children, there is convincing evidence that Andre continues to experience psychotic symptoms." She further concludes that "Andre's performance crossed multiple neuropsychological test of brain functioning are impaired and the impairment is consistent with the brain impairment known to be experienced in schizophrenia."

177. Applicant's habeas counsel retained Janet Vogelsang, who has a master's degree in social work from the University of South Carolina, and bachelors in psychology from Pepperdine University.

178. Jan Vogelsang reviewed "a social history prepared by Andre Thomas's habeas defense team."

She concluded that Andre was completely deprived of the cohesive family environment that would provide a crucial support for someone with his mental illness." She further finds that she has "no doubt that any competent clinical social worker conducting a comprehensive psycho social assessment could have presented a formable picture of Andre's life and his family which have directly and strongly supported the severe genetically deviated mental illness corroborated by current neuropsychological testing."

179. Applicant's habeas corpus counsel retained Dr. Jonathan Lipman, a Neuropharmacologist with a doctoral degree from the University of Wales.

180. Dr. Lipman's opinion was that "the behaviors exhibited by Thomas before, during, and after 27 March 2004 do not resemble the known toxicity of dextromythorathan. Dr. Lipman concludes to a reasonable degree of neuropharamachological certainty that Mr. Thomas appears to suffer from an endogenous schizophreniform psychotic illness.

181. Ruben Gur, Mila Young, Jan Vogelsang, and Jonathan Lipman have been qualified as experts in state and federal courts.

182. Ruben Gur, Mila Young, Jan Vogelsang, and Jonathan Lipman did not testify at trial.

183. Dr. Victor Scarano, Dr. David Axelrad, both psychiatrists and Dr. Peter Orapeza, a psychologist, testified at the trial of Andre Thomas.

184. Larry Pollock, PhD, psychologist specializing in neuropsychology, did not testify at the trial but was hired by the state to review the findings of Dr. Mila Young and Ruben Gur.

185. The State's experts take issue with both the findings and methodology used by the applicant's post trial experts. All of the state's experts have been qualified to testify in state and federal courts as experts. Dr. Scarano, Dr. Axelrad, and Dr. Orapeza interviewed the applicant and evaluated him on at least one occasion prior to trial.

186. Mr. Hagood's recollection is that the defense gave Dr. Gripon a copy of everything they had received in discovery.

187. Ms. Peterson (Cate) states that on her way to Grayson County, Dr. Gripon requested from her several items he told her he had not been provided, although she cannot remember what those items were at this time.

188. Mr. Hagood handled Dr. Gripon's testimony.

189. Ms. Peterson (Cate) says she cannot speak for Mr. Hagood as to why he did or did not ask certain questions.

190. Mr. Hagood states that Dr. Gripon never complained to him that items were missing from the materials sent to the doctor.

191. Mr. Hagood also states that he was never given a list of questions from Dr. Gripon. but did

spend a considerable time going over the questions the defense would be asking Dr. Gripon.

192. Mr. Hagood states that he spent a couple of hours with Dr. Gripon in his hotel room the night before he testified going back over questions and issues.

193. Mr. Hagood states that he made sure the doctor knew that he would be asked about his qualifications, interviews and examinations of the applicant and would then illicit his opinion regarding sanity.

194. Mr. Hagood states that he does not know which questions Dr. Gripon specifically asked Mr. Hagood to use that were not used in some manner.

195. Dr. Gripon is not specific about which questions Mr. Hagood should have asked.

196. Mr. Hagood states that strategically there may have been some questions the defense did not ask.

197. Mr. Hagood states that during the examination of Dr. Gripon, Hagood was being careful not to illicit information from Gripon which the state's experts could use against the applicant.

198. The decision to call Dr. Axelrad as part of the defense case was done to examine him and attempt to frame questions in a way more favorable to the applicant as well as to attempt to discredit his opinion prior to the State examining him. Strategically, Mr.

Hagood states he felt this was the best course of action rather than attempting to exclude his testimony.

199. Mr. Hagood's decision to call two of the state's witnesses during the defenses case was deliberate. Mr. Hagood states that his strategy was to illicit certain information and to attempt to diffuse some of the more damaging testimony against the applicant. Mr. Hagood was able to get Dr. Scarano to admit that psychoses triggered by marihuana or alcohol was rare. Further, the defense illlicited information that alcohol induced psychoses generally occurred in chronic alcoholics and the applicant did not appear to be a chronic alcoholic.

200. Mr. Hagood also states that he attempted to get the doctor to give information that would minimize the testimony against the applicant. Dr. Scarano admitted that this was his first case involving DXM.

201. Mr. Hagood states in his affidavit that he wanted to be the first to question Dr. Axelrad in order to frame the questions in a way more beneficial to the applicant.

202. Mr. Hagood states that he pressed both doctors, after hearing the state's theory, in order to make them back down from their diagnosis or to at least admit that they would not rule out schizophrenia that was not precipitated by drug and alcohol use.

203. Neither Dr. James Harrison or Dr. Cactus McGirk had examined the applicant with the purpose of determining sanity.

204. Harrison stated in his first report that he could not rule out that a substance had induced the applicant's psychotic episode. (States' Response, appendix ex. O)

205. Harrison testified that he did not have enough evidence to make a determination of insanity.

206. Dr. Harrison's affidavit does not comport with his sworn trial testimony. During cross examination of Dr. Harrison, Mr. Ashmore specifically asked him whether after interviewing the applicant on a number of occasions, reviewing all of the experts reports in this case (which were quite detailed) and looking at the other information that he indicated he had taken into consideration both during direct examination and on voir dire prior to cross, whether he felt like he had sufficient information to give an opinion about the applicant's sanity at the time of the offense. Dr. Harrison responded he did not feel like he had sufficient information to render an opinion (RR vol.35, pp. 50-51).

207. Cactus McGirk had been hired by the jail to determine if the applicant needed medication or was a danger to himself. McGirk has never been hired to determine competency or sanity. (RR vol. 35, pp.184, 188-189).

208. Mr. Hagood knew that Harrison had stated in his report that he could not rule out that a substance had induced the applicant's psychotic episode.

209. Harrison also testified that he could not make a determination regarding sanity when asked by the prosecution. (RR vol. 35, p.51)

210. After being examined by prosecutor, Kerye Ashmore, Mr. Hagood states that McGirk came across as biased against the state and incompetent.

211. Mr. Hagood did not believe McGirk had any credibility with the jury and was not going to hang the applicant's insanity on McGirk.

212. Dr. Axelrad is a practicing psychiatrist who specializes in Adult Psychiatry, Neuropsychiatry, Pain Medicine, Psychoanalysis, and Forensic Psychiatry. He is Board-certified by the American Board of Psychiatry and Neurology in General Psychiatry (April 1978, Certificate #17308); Forensic Psychiatry (Certificate #22), and Pain Medicine (Certificate #102).

213. The records provided to Dr. Axelrad indicated that Thomas was a heavy drinker and used marihuana almost daily in the form of a blunt (a hollowed out cigar filled with marihuana).

214. The testimony reflects that both the applicant and his girlfriend Carmen Hayes stated in the records provided to Dr. Axelrad that the applicant had recently started adding DXM to the alcohol and marihuana.

215. Thomas exhibited psychotic behavior after showing up at MHMR on one occasion and the emergency room at a local hospital on a different day. On both occasions, the testimony and the records provided to Dr. Axelrad indicated that Thomas was using a combination of DXM, marihuana and alcohol the previous night. The testimony reflected that there was no indication from the records or from Dr. Axelrad's interviews with Thomas that he exhibited the same acute psychotic symptoms when DXM was not added to the other substances he was using.

216. Dr. Axelrad interviewed Mr. Thomas and took a history from him including his scholastic history, his marriage to Laura Boren and the birth of their son Andre, his work history and his lack of a history of psychiatric issues prior to two months before the murder. The applicant admitted abusing alcohol since age 10, marihuana since age thirteen and the addition of Dextromethorphan, in the form of the cold medicine Coricidin, in the days leading up to the murder.

217. Mr. Fitzgerald bad been questioned by the State out of the presence of the jury. The State had him admit that he was retired from the Texas Department of Criminal Justice where he had been employed as a public information officer. (RR vol. 41, p. 142) The State established that Fitzgerald did not aid in the development of TDCJ policies, had never investigated crimes in the penitentiary, and had not gathered any statistics of his own. (RR vol.41, pp. 141-146) Fitzgerald also testified that the video tape he intended to show was provided by the Texas Defender Service. (RR vol.41, pp. 144-145)

218. Mr. Hagood believed that Fitzgerald did not come off as a respected expert.

219. Mr. Hagood decision not to call Fitzgerald as a witness was trial strategy.

220. The defense did not challenge Smithey's credentials because they intended to get much of the information Fitzgerald was to provide in through the State's witness. Through Smithey, the defense was able to get a video tape of the conditions at prison into evidence and establish that the applicant would be sent to the Connally Unit which was maximum security, the different classifications within the unit, security precautions in the unit, and that the applicant could never reach the best classification of GI. The defense was able to have Smithey testify that an inmate serving life in a capital case is not housed in open housing with other inmates, are ineligible for furloughs and trustee status and cannot work out side of the facility. Smithey also testified that there was a psychiatric unit available and to the homicide rate at TDCJ.

221. Dr. Peter Oropeza states that he has testified numerous times in different courts both for the State and the defense. Dr. Oropeza has always been found to be an expert. Dr. Oropeza has never had a challenge to his expertise sustained.

222. Dr. Oropeza was a psychologist licensed in this state who has a Doctoral degree in psychology prior to 2004.

223. Dr. Oropeza had at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations prior to 2004.

224. Dr. Oropeza had completed six hours of required continuing education in courses in forensic psychiatry or psychology, as appropriate, in either of the reporting periods in the 24 months preceding the appointment prior to 2004.

225. The exams before the Texas Board of Examiners of Psychologists consists of a jurisprudence written examination, the national examination (EPPP), and an oral examination. An examinee must pass all three tests to become a licensed psychologist. On the jurisprudence written examination Dr. Oropeza he received a score of 98, and on the national examination a score of 81. The oral boards include a review of a case vignette that involves a host of issues regarding a hypothetical case. Dr. Oropeza's practice was in the area of assessment and the board noted his weakness regarding therapy issues. Dr. Oropeza addressed these issues in the next examination and passed. Applicants do not receive scores from the oral examination, rather, feedback is provided on areas to address and a simple pass or fail is given.

226. Dr. Oropeza only testified during the punishment phase of the applicant's case.

227. Mr. Hagood knew that under 46B.022, Dr. Oropeza met the qualifications set out in subsections (a)(l), (a)(2)(B)(i) and (b), he was licensed by the appropriate board, had training consisting of24 hours

of specialized training relating to incompetency or insanity evaluations and he met his continuing education requirements.

CONCLUSIONS OF LAW

1. An applicant is entitled to relief for ineffective assistance of counsel if he satisfies the two prongs set forth in *Strickland v. Washington*:

> (1) that trial counsel's performance was deficient, meaning that the performance fell below an objective standard of reasonableness—a standard determined with reference to prevailing professional standards and from counsel's actual point of view during the representation; and
>
> (2) that but for counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different.

466 U.S. 668, 687-91 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999).

2. Under *Strickland's* first prong, the question is "whether counsel's assistance was reasonable [after] considering all the circumstances." *Strickland*, 466 U.S. at 688 (emphasis added).

3. Under *Strickland's* second prong, a "reasonable probability" the result would have been different is merely "probability sufficient to undermine confidence in the outcome" of trial. *Strickland*, 446

U.S. at 695; *Thompson*, 9 S.W.3d at 812; *Mitchell v. State*, 68 S.W.3d at 642 (emphasis added).

4. The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") have been cited by the United States Supreme Court as one acceptable "guide[ ] to determining what is reasonable" for defense counsel (*Wiggins v. Smith*, 539 U.S. 510, 524 (2003)), and have also served as a model for the Texas Guidelines and Standards For Texas Capital Counsel ("Texas Guidelines"), adopted by the Texas State Bar in 2006. The ABA Guidelines state that defense counsel "must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination." ABA Guidelines 1.1, commentary at 5 (Rev. Ed. 2003) (emphasis added); *see also* Texas Guidelines §§ 3.1(A)(2); 4.1(B)(2)(e). The Texas Guidelines further provide that trial counsel "at every stage [has] an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." *Id.* at § 11.l(A). Additionally, "[c]ounsel at every stage of the case, exercising professional judgment in accordance with [the Texas Guidelines], should [inter alia]: (l) Consider all legal claims potentially available; and (2) Thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted... " *Id.* at § 11.2(A).

5. The purpose of the constitutional requirement of effective counsel is to ensure a fair trial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Thus, "the

benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

6. A defendant must show, by a preponderance of the evidence, that counsel's performance was constitutionally deficient. The applicant must prove counsel was not acting as "a reasonably competent attorney," and his advice was not "within the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668, 687(1984); *Ex parte White*, 160 S.W.3d 46, 50-51 (Tex.Crim.App. 2004).

7. The applicant must show that this constitutionally deficient performance prejudiced his defense. He must show that "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 694. Under this two-pronged analytical framework, an applicant must overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). Moreover, a "review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Bone v. State*, 71 S.W.3d 828, 833 (Tex.Crim.App. 2002).

8. The practice of law is an art, not a science, "and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. The existence of an adversary system guarantees there will always be lawyers who disagree on almost any issue. Since law is not an exact science, no level of skill or excellence exists at which all differences of opinion or doubts will be removed from the minds of legal professionals. 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §§ 18.17, at 57 (5th ed.2000). Thus, when a legal proposition or a strategic course of conduct is one on which reasonable lawyers could disagree, "an error that occurs despite the lawyer's informed judgment should not be gauged by hindsight or second-guessed." *Id.* at 59.

9. In evaluating the effectiveness of counsel under the first prong, the totality of the representation and the particular circumstances of each case are reviewed. *Thompson*, 9 S.W.3d at 813. The issue is whether counsel's assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. *Strickland*, 466 U.S. at 688-89.

10. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. An allegation of ineffective assistance must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 814.

11. Scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689.

12. The second prong of *Strickland* requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial, *i.e.*, a trial whose result is reliable. *Id.* at 687. In other words, an applicant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Id.* at 697.

13. Under *Strickland*, the appellate courts must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Delrio v. State*, 840 S.W.2d 443, 447 (Tex.Crim.App. 1992) (quoting *Strickland*, 466 U.S. at 690); *see also Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994) (reaffirming same proposition).

14. The right to "reasonably effective assistance of counsel" does not guarantee errorless counsel, or counsel whose competency is to be judged by hindsight. *Saylor v. State*, 660 S. W.2d 822, 824 (Tex.Crim.App. 1983). Rather, the right to counsel affords an accused an attorney "reasonably likely to

render and rendering reasonably effective assistance." *Cannon v. State*, 668 S.W.2d 401, 402 (Tex.Crim.App. 1984). A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances, and to evaluate the conduct from counsel's perspective at the time. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 688-689. Strategic choices made after a thorough investigation of law and facts relevant to plausible options are thus virtually unchallengeable.

15. Issues raised solely under state law are not cognizable under habeas corpus review unless the conviction is void. *Ex parte Truong*, 770 S.w.2d 810 (Tex.Crim.App. 1989).

16. The "failure of petitioner, as defendant, to object at the trial, and to pursue vindication of a constitutional right of which he was put on notice on appeal, constitutes a waiver of the position he now asserts" on a writ of habeas corpus; *see also Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex.Crim.App. 200l) (citing *Bagley* and noting that "(o]rdinarily, the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal").

17. To prevail upon a post-conviction writ of habeas corpus, applicant bears the burden of proving, by a preponderance of the evidence, the facts that would entitle him to relief. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex.Crim.App.1997); *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex.CrimApp.1995); *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex.Crim.App.l993); *Ex parte Adams*, 168 S.W.2d 281, 287-88 (Tex.Crim.App.1989); *Ex parte Maldonado*, 688 S.W.2d 114, l16 (Tex.Crim.App.1985).

18. Although voluntary intoxication is never a defense, an instruction for the jury's guilt/innocence determination on the law applicable to voluntary intoxication may be warranted when the record includes evidence of intoxication sufficient under the *Nethery* standard. *Taylor v. State*, 885 S.W.2d at 157-58 (applying *Nethery*, 692 S.W.2d at 711-12). A voluntary intoxication instruction given in the guilt/innocence phase is erroneous if the record is devoid of sufficient intoxication evidence. *Taylor*, 885 S.W.2d at 158.

19. The *Taylor* court held regarding voluntary intoxication in the guilt/innocence phase that "if there is evidence from any source that might lead a jury to conclude that the defendant's intoxication somehow excused his actions, an instruction is appropriate." *Id.* at 158. Numerous other cases have quoted this holding. *See, e.g., Robinson v. State*, 971 S.W.2d 96, at *97-98 (Tex. App. Beaumont 1998); *Haynes v. State*, 85 S.W.3d 855, 858 (Tex. App. Waco 2002); *Miller v. State*, No. 0l-03-00819-CR, 2005 WL 825762, at *7 (Tex. App. Hous. 2005); *McGrew v. State*, No. 14-

04-00321-CR, 2005 WL 3116240, at *3 (Tex. App. Hous. 2005).

20. The applicant has waived the complaint that he was denied his constitutional rights to Due Process under the Sixth and Fourteenth Amendments to the United States Constitution due to the trial court's substantive law preliminary instructions to the entire voir dire panel, the specific instructions at voir dire regarding voluntary intoxication, the power point display regarding the definition of voluntary intoxication, the use of the definition of voluntary intoxication in the State's opening statement and closing arguments and the instructions regarding voluntary intoxication in the jury charge.

21. There is no requirement that all legal issues to be discussed at voir dire must be contained in the charging instrument.

22. A trial court has wide discretion in conducting voir dire, and its rulings are reviewed under an abuse of discretion standard. *See Atkins v. State*, 951 S.W.2d 787, 790 (Tex.Crim.App.1997); *Camacho v. State*, 864 S.W.2d 524, 531 (Tex.Crim.App.1993). If the subject could possibly be raised during trial, the attorneys are entitled to voir dire on that issue. Generally speaking, a voir dire topic is proper if it seeks to discover a juror's views on an issue applicable to the case. *See Robison v. State*, 720 S.W.2d 808, 810-11 (Tex.Crim.App.1986); *Campbell v. State*, 685 S.W.2d 23, 25 (Tex.CrimApp.1985).

23. It was proper for voluntary intoxication to be discussed during voir dire and the opening statements.

24. The Court's voluntary intoxication instruction was not erroneous, misleading or a misstatement of the law. The definition of "intoxicated" in the statute regarding voluntary intoxication, referred to whether the applicant's mental state at the time of the offense was induced solely or in part because of the introduction of any substance into the body. Tex. Code Crim. Proc. Art. 8.04 (Vernon's 2003) The definition does not require that the substance still be in the body at the time of the criminal act nor does it preclude mental states that still exist a significant amount of time after the introduction, but still because, of substances to the body.

25. The court explained the law properly, did not preclude a finding of insanity if the applicant was intoxicated and duly protected the applicant's rights.

26. The facts of the case raised the issue of voluntary intoxication.

27. If a preexisting condition of mind of the accused was not such as would have rendered him legally insane in and of itself, recent use of intoxicants causing stimulation or aggravation of such preexisting condition to the point of insanity could not be relied upon as a defense to the commission of a crime. *Evilsizer v. State*, 487 S.W.2d 113, 116 (Tex.Crim.App. 1972).

28. The applicant has failed to prove by a preponderance of the evidence that the trial court's substantive law preliminary instructions to the entire voir dire panel, the specific instructions at voir dire regarding voluntary intoxication, the power point display regarding the definition of voluntary intoxication, the use of the definition of voluntary intoxication in the State's opening statement and closing arguments and the instructions regarding voluntary intoxication in the jury charge were improper or misleading.

29. The applicant has failed to prove by a preponderance of the evidence that the decisions by the applicant's counsel regarding these grounds were based on anything less than a thorough and complete investigation of the facts and law at the time of trial.

30. The applicant has failed to prove by a preponderance of the evidence that his trial attorney was ineffective and denied the applicant his right to counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution for failing to object to the trial court's substantive law preliminary instructions to the entire voir dire panel, the specific instructions at voir dire regarding voluntary intoxication, the power point display regarding the definition of voluntary intoxication, the use of the definition of voluntary intoxication in the State's opening statement and closing arguments and the instructions regarding voluntary intoxication in the jury charge.

31. The applicant has failed to prove by a preponderance of the evidence that, but for his

attorneys' failure to object to the voluntary intoxication instruction, the objection would have been granted and the outcome of his trial would have been different.

32. Section 8.04(d) defines "intoxication" as a "disturbance of mental or physical capacity resulting from the introduction of any substance into the body."

33. The explanation of the law of voluntary intoxication was proper and correct. The lab tests taken hours after the murder were irrelevant in regards to the issue of intoxication under Section 8.04(d).

34. The applicant has failed to prove by a preponderance of the evidence that the State knowingly presented false and misleading testimony about whether the applicant was intoxicated at the time he murdered his estranged wife, his son with her and her baby daughter.

35. There are three components to a *Brady* violation: (1) the state failed to disclose evidence regardless of the prosecutor's good faith or bad faith; (2) the withheld evidence is favorable to the defendant; and (3) the evidence is material to guilt or punishment. *See Youngblood v. West Virginia*, 126 S.Ct. 2188, 2190 (2006); *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432-433 (1995); *United States v. Bagley*, 473 U.S. 667, 683 (1985); *East v. Johnson*, 123 F.3d 235, 237 (5th Cir. 1997); *Flores v. State*, 940 S.W.2d 189, 191 (Tex. App. 1996).

36. The due process clause of the Fourteenth Amendment places upon the prosecution in a criminal case the affirmative duty to disclose evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This is commonly referred to as the *Brady* rule, and exculpatory evidence is referenced as *Brady* material. Favorable evidence includes both that which tends to exculpate the accused, and impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), because such evidence is "favorable to the accused," so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Thomas v. State*, 841 S.W.2d 399, 403 (Tex.Crim.App.1992) (quoting *Bagley*, 473 U.S. at 676).

37. Where, as here, the applicant claims that the prosecution suppressed exculpatory evidence and thereby violated his right to due process applicant must satisfy a three pronged test. *Brady v. Maryland*. 373 U.S. 83, 83 (1963) (prosecution has affirmative duty to disclose material, exculpatory evidence to an accused; prosecution's suppression of co defendant's confession violated Due Process Clause of the Fourteenth Amendment); *Ex parte Kimes*, 872 S.W.2d at 702. Applicant must first show that the State failed to disclose evidence, regardless of the prosecution's good or bad faith. *Id.* He must then show that the withheld evidence is favorable to applicant. *Id.* Finally, the applicant must show that the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *Id.* at 702-03.

38. A habeas applicant demonstrates that he is entitled to relief for a *Brady* violation by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435; *Ex parte Adams*, 768 S.W.2d at 290. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

39. However, a habeas corpus applicant's sworn allegations in his petition are insufficient to sustain his burden of proof, if those allegations are the sole "proof" offered. As in any habeas proceeding, the applicant must prove the constitutional violation and his entitlement to habeas relief by a preponderance of the evidence. *See Ex parte Empey*, 757 S.W.2d 771, 775 (Tex.Crim.App. 1988).

40. The applicant has failed to satisfy any of the three prongs set out in *Brady* and followed in *Kimes*.

41. There was no evidence from Dr. Shannon Miller, exculpatory or otherwise.

42. The applicant has failed to prove that there was any evidence suppressed by the State.

43. The applicant has failed to prove by a preponderance of the evidence that Dr. Miller gave evidence favorable to the applicant.

44. The applicant has failed to prove by a preponderance of the evidence the prong regarding materiality and that but for that material evidence the results of his trial would have been different.

45. In ground 15, the applicant claims that he was denied due process because he was not competent to stand trial. This ground was not objected to at trial and has been waived. In *Ex parte Bagley*, 509 S. W.2d 332, 334 (Tex.Crim.App.1974), the Court of Criminal Appeals held that "the failure of petitioner, as defendant, to object at the trial, and to pursue vindication of a constitutional right of which he was put on notice on appeal, constitutes a waiver of the position he now asserts" on a writ of habeas corpus; *see also Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex.Crim.App.2001) (citing *Bagley* and noting that "[o]rdinarily, the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal").

46. Under Texas law, the applicant was competent to stand trial.

47. A person is legally incompetent to stand trial if he lacks either (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or (2) a rational as well as factual understanding of the proceedings against him. *See* Tex.Code Crim. Proc. Ann. art. 46.02, §§ lA (Vernon Supp.2001); *Moore v. State*, 999 S.W.2d 385, 392 (Tex.Crim.App.1999; *Guzman v. State*, 923 S.W.2d 792, 795 (Tex.App.-Corpus Christi 1996, no pet.). Evidence of mental impairment alone does not require that a competency hearing where no evidence

indicates that a defendant is incapable of consulting with counsel or understanding the proceedings against him. *Townsend v. State*, 949 S.W.2d 24, 26-27 (Tex.App. - San Antonio 1997, no pet.) (evidence that defendant was depressed and suicidal did not warrant an incompetency hearing); *Lingerfelt v. State*, 629 S.W.2d 216 (Tex.App.-Dallas 1982, pet. ref'd) (testimony from psychiatrist that defendant suffered from schizophrenia did not warrant a competency hearing). Generally, to raise the issue of incompetency, there must be evidence of recent severe mental illness or bizarre acts by the defendant or evidence of moderate retardation. *Guzman v. State*, 923 S.W.2d 792, 797-98 (Tex.App.-Corpus Christi 1994, no pet.).

48. The record does not support the applicant's claim that he was incompetent to stand trial or that his attorney was ineffective for failing to raise the competency issue a second time.

49. The applicant has failed to prove that he was incompetent to stand trial or that his attorney was ineffective for failing to raise the competency issue a second time.

50. Under ground 17, the applicant does not actually state an error upon which he could receive relief.

51. The applicant did not make an objection at trial regarding ground 17 and has waived this issue.

52. The applicant has failed to present by a preponderance of the evidence any proof of purposeful

prosecutorial or jury discrimination in his particular case. *County v. State*, 812 S.W.2d 303, 308 (Tex.Crim.App.1989).

53. *Strickland* encompasses the prohibition against second-guessing counsel's trial strategy on voir dire. Not every attorney will conduct voir dire in the same manner, and, with hindsight, every attorney may have wished that additional questions were asked. However, the fact that another attorney might have pursued other areas of questioning during voir dire will not support a finding of ineffective assistance. *See Delrio v. State*, 840 S.W.2d 443, 445 (Tex.Crim.App. 1992); *Owens v. State*, 916 S.W.2d 713, 717 (Tex.App. - Waco 1996).

54. The applicant has failed to overcome the presumption that trial counsel was effective during voir dire questioning. *See Shilling v. State*, 977 S.W.2d 789, 791 (Tex.App.-Fort Worth 1998, pet. ref'd) (ineffectiveness claim fails where record is devoid of reasoning counsel employed during voir dire); *Suniga v. State*, 733 S.W.2d 594, 600 (Tex.App.-San Antonio 1987, no pet.) (overruling complaint regarding brief voir dire that failed to include certain questions based on absence of indication that trial counsel's decision was unsupported).

55. The applicant has not demonstrated that his counsel's performance fell below a reasonable objective standard, and he has not demonstrated that any alleged error prejudiced bis defense.

56. The applicant did not object to the jury shuffle and waived any rights under that issue.

57. In *Batson v. Kentucky*, 416 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that a prosecutor violates a defendant's equal protection rights if he uses peremptory strikes to eliminate members of defendant's race from the jury.

58. Texas Courts have declined to make the broad extension of *Batson* that applicant seeks. *See Ladd v. State*, 3 S.W.3d 547, 563 (Tex.Crim.App. 1999), cert. denied, 529 U.S. 1070 (2000).

59. The applicant has failed to prove by a preponderance of the evidence any fact which would establish purposeful discrimination by the court and has failed to cite any law which would support the extension of *Batson* to jury shuffle requests. As such, the applicant has also failed to prove by a preponderance of the evidence that his attorneys were ineffective for not objection to the State's request for a jury shuffle.

60. The defense and the state are entitled to a shuffle, if requested.

61. The failure to shuffle when timely requested is reversible error.

62. The requested shuffle did not constitute reversible error.

63. *Batson* does not apply to a jury shuffle.

64. The applicant did not object to those jurors on the grounds set out in Ground 20.

65. If a juror vacillates or equivocates on the juror's ability to follow the law, the reviewing court must defer to the trial court's judgment. *Brown v. State*, 913 S.W.2d 577, 580 (Tex.Crim.App.1996); *Riley v. State*, 889 S.W.2d 290, 300 (Tex.Crim.App.1993).

66. Because the trial court was in the best position to judge the credibility of the prospective juror's responses, the reviewing court must give deference to the trial courts decision. *Swearingen*, 101 S.W.3d at 99.

67. Ms. Long vacillated or equivocated on her understanding of the burden of proof regarding insanity, the Court intervened and made the difference between preponderance and reasonable doubt clear to Ms. Long, her vacillation ended, the juror gave an unequivicable response that she would be able to follow the law, therefore the trial court did not err in denying the applicant's motion to strike for cause against Ms. Long.

68. There was no harm to the applicant regarding his use of a strike on Ms. Long. When the trial court erroneously overrules a challenge against a venireperson, the defendant is banned only if he uses a peremptory strike to remove the venireperson and thereafter suffers a detriment from the loss of the strike. *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex.Crim.App.1986), *cert. denied*, 482 U.S. 920 (1987). *See also Jones v. State*, 833 S.W.2d 118, 123

(Tex.Crim.App.1992), *cert. denied*, 507 U.S. 921. Error is preserved for review by this Court only if applicant (1) used all of his peremptory strikes, (2) asked for and was refused additional peremptory strikes, and (3) was then forced to take an identified objectionable juror whom applicant would not otherwise have accepted had the trial court granted his challenge for cause (or granted him additional peremptory strikes so that he might strike the juror). *Id.*

69. Because the applicant did not exhaust his fifteen statutory peremptory challenges during voir dire, and because the applicant has failed to allege an objectionable juror who actually sat on the jury and deliberated as a part of that jury, the applicant has failed to prove by a preponderance of the evidence that he was harmed by the court's decision to overrule the motion to strike for cause on Ms. Long.

70. The applicant failed to prove by a preponderance of the evidence that counsel was not acting as a reasonably competent attorney and his advice was not within the range of competence demanded of attorneys in criminal cases.

71. The applicant has failed to prove that a constitutionally deficient performance prejudiced his defense and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

72. The applicant has failed to satisfy either prong of *Strickland* or prove by a preponderance of the

evidence that his attorney was ineffective regarding ground 23.

73. The applicant has failed to prove by a preponderance of the evidence that Dr. Scarano was not qualified to render a diagnosis involving substance-induced psychosis.

74. The applicant has failed to prove by a preponderance of the evidence that the Court would have excluded Dr. Scarano's testimony.

75. The applicant has failed to prove by a preponderance of the evidence that defense counsel was ineffective for not requesting a *Daubert/Kelly* hearing regarding Dr. Scarano.

76. The applicant has failed to prove by a preponderance of the evidence that Dr. Axelrad was not qualified to render a diagnosis involving substance-induced psychosis.

77. The applicant has failed to prove by a preponderance of the evidence that the Court would have excluded Dr. Axelrad's testimony.

78. The applicant has failed to prove by a preponderance of the evidence that defense counsel was ineffective for not requesting *Daubert/Kelly* hearing on Dr. Axelrad.

80. The applicant has failed to prove both prongs of *Strickland* in regards to ground 26.

81. Defense counsel has set out reasonable trial strategy to justify these decisions.

82. The applicant has failed to prove by a preponderance of the evidence that Dr. Peter Oropeza was not legally qualified or competent to testify to the applicant's competency or sanity.

83. The applicant has failed to prove by a preponderance of the evidence that by choosing not to attack Dr. Oropeza's qualifications on non-existent grounds, counsel was not acting as a reasonably competent attorney, and his advice was not within the range of competence demanded of attorneys in criminal cases.

84. The applicant has failed to prove by a preponderance of the evidence that if defense counsel had challenged Dr. Oropeza's qualifications, the challenge would have been sustained and that there is a reasonable probability that the result of the proceeding would have been different.

85. Dr. Young's conclusions in her affidavit do not prove by a preponderance of the evidence that the opinions and diagnosis of the State's experts are erroneous.

86. Dr. Gur's conclusions in his affidavit do not prove by a preponderance of the evidence that the opinions and diagnosis of the State's experts are erroneous.

87. Dr. Lipman's conclusions in his affidavit do not prove by a preponderance of the evidence that the opinions and diagnosis of the State's experts are erroneous.

88. The applicant has failed to prove by a preponderance of the evidence, that counsel's failure to hire a neuropharmacologist or to have a neuropharmicological exam performed on the applicant was constitutionally deficient.

89. The applicant has failed to prove by a preponderance of the evidence exactly which questions Mr. Hagood did not ask Dr. Gripon.

90. The applicant has failed to prove by a preponderance of the evidence that the decision not to ask certain questions was not trial strategy.

91. The applicant has failed to prove by a preponderance of the evidence that his alleged deficient performance prejudiced his defense and that based on the opinions of Gur, Young, and Littman there is a reasonable probability that, but for counsels unprofessional errs the results of the proceeding would have been different."

92. The applicant has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient and was not acting as a reasonably competent attorney, and his advice was not within the range of competence demanded of attorneys in criminal cases.

93. The applicant has failed to prove by a preponderance of the evidence that a constitutionally deficient performance prejudiced his defense and that there is a reasonably probability but for counsel's unprofessional errs the results of the proceeding would have been different.

94. The applicant has failed to prove by a preponderance of the evidence that Mr. Hagood was not employing trial strategy in calling two of the State's experts in the defense's case-in-chief

95. The applicant has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient and that he was not acting as a reasonably competent attorney, and that his trial strategy was not within the range of competence demanded of attorneys in criminal cases.

96. The applicant has failed to prove by a preponderance of the evidence that a constitutionally deficient performance prejudiced his defense and that there is a reasonable probability that, but for counsel's decision to use Dr. Scarano and Dr. Axelrad in the defense's case-in-chief, the result of the proceeding would have been different.

97. The applicant has failed to prove by a preponderance of the evidence that Mr. Hagood was not employing trial strategy in not requesting sanity opinions from Dr. Harrison or Dr. McGirk.

98. The applicant has failed to prove by a preponderance of the evidence that Mr. Hagood's decision not to call Larry Fitzgerald was not trial strategy.

99. The applicant has failed to prove by a preponderance of the evidence that counsel was not acting as a reasonably competent attorney and his advice was not within the range of competence

demanded by attorneys in criminal case by not introducing the testimony of Larry Fitzgerald.

100. The applicant has failed to prove by a preponderance of the evidence that a constitutionally deficient performance prejudiced his defense or that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would be different.

102. The applicant has failed to prove by a preponderance of the evidence that Mr. Hagood was not employing trial strategy in his selection of punishment witnesses.

103. The applicant has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient and that he was not acting as a reasonably competent attorney in that his trial strategy was not in the range of competence required of attorneys in criminal cases in his selection and handling of punishment witnesses.

104. The applicant has failed to prove by a preponderance of the evidence that his attorney was ineffective for not objecting to every objectionable question asked by the State.

105. The applicant has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient or that appellate counsel was not acting as "a reasonably competent attorney," and his advice was not "within the range of competence demanded of attorneys in criminal cases."

106. The applicant has failed to prove by a preponderance of the evidence that any of Grounds l through 36 were actually error. As such they cannot accumulate into reversible error. See *Chamberlain v. State*, 998 SW 2nd 230, 238 (Tex.Crim App, J 999)

107. The applicant has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient or the appellate counsel was not acting as a reasonably competent attorney and his advice was not within the range of competence demanded of attorneys in criminal cases.

108. The applicant has failed to prove that Cardwell did not preserve an issue for "exhaustion" which was constitutionally deficient and prejudiced his defense.

109. The applicant has failed to prove by a preponderance of the evidence that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

110. The Sixth Amendment guarantees the right of individuals to have counsel without conflicts of interest. *Gray v. Estelle*, 616 F.2d 801, 803 (5th Cir. 1980); *see also Ex Parte Prejean*, 625 S.W.2d 731, 733 (Tex. Crim. App. 1981) (*en banc*). If an actual conflict exists, "it need not be shown that the divided loyalties actually prejudiced the defendant in the conduct of his trial." *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979).

111. Although a defendant can waive his or her right to conflict-free counsel, a valid waiver "requires an 'intentional relinquishment or abandonment of a known right.'" *Gray*, 616 F.2d at 803 (*quoting Johnson v. Zerbst*, 304 U.S. 458,464 (1938)). A valid waiver "must be both voluntary and 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'". *Gray*, 616 F.2d at 803 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)). Texas courts require that "[s]uch a waiver of right to conflict-free counsel should include a showing that the defendant is aware of the conflict of interest, realizes the consequences of continuing with such counsel, and is aware of his right to obtain other counsel." *Prejean*, 625 S.W.2d at 733.

112. The applicant has failed to show how his attorney's former role as the prosecutor in his prior convictions raised anything other than a speculative conflict of interest.

113. The applicant failed to prove an actual conflict of interest by a preponderance of the evidence.

114. The applicant has waived his right to complain of any conflict.

115. Texas Rule of Evidence 702 instructs that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." In order to testify about

scientific, technical, or other specialized matter, a witness must be qualified as an expert. The initial burden of establishing a witness's qualifications lies with the party offering the testimony. *Holloway v. State*, 613 S.W.2d 497,501 (Tex.Crim.App.1981).

116. The trial court properly limited Dr. Allen from testifying that she believed evidence was "mitigating" or referring to a "mitigation time line" compiled by a "mitigation expert."

117. The trial court properly prevented Dr. Allen from testifying that the applicant had expressed remorse to her the night before Dr. Allen testified. The Court of Criminal appeals has decided that the federal constitution does not require admission of a defendant's self-serving, out-of-court declarations of remorse when they are inadmissible under state law even when these declarations meet the test of constitutional "relevancy." *See Lewis v. State*, 815 S.W.2d 560, 568 (Tex.Crim.App.1991) (defendant's hearsay expressions of remorse not admissible at punishment phase of capital murder trial); Thomas, 638 S.W.2d at 484 (defendant's self-serving hearsay declarations offered by defendant in mitigation are ordinarily inadmissible). Although "[r]emorse following commission of a serious crime may well be a circumstance tending in some measure to mitigate the degree of a criminal's fault, but it must be presented in a form acceptable to the law of evidence before he is entitled to insist that it be received over objection." *Renteria v. State*, 206 S.W.3d 689, 697 (Tex.Crim.App. 2006).

118. The court properly sustained the State's objection to a witness testifying in the narrative.

119. A trial court is responsible for exercising reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment. *See* Tex.R.Crim.Evid. 610(a); *Jasper v. State*, 61 S.W.3d 413,421 (Tex.Crim.App.2001).

120. The trial court was correct in sustaining the objections by the State to Dr. Allen, with a degree in social work, from making medical conclusions regarding the applicant's treatment.

121. Texas does not recognize diminished capacity as an affirmative defense i.e., a lesser form of the defense of insanity.

122. The diminished-capacity doctrine argued by the applicant in this case is a failure-of-proof defense in which the applicant claims that the State failed to prove that the defendant had the required state of mind at the time of the offense.

123. The applicant has failed to prove by a preponderance of the evidence that counsel's performance was constitutionally deficient.

124. The applicant has failed to prove by a preponderance of the evidence that counsel was not acting as a reasonably competent attorney when he

did not request an instruction on "diminished capacity" or a lesser-included offense or that this decision was not within the range of competence demanded of attorneys in criminal cases.

125. In *Paulson v. State*, 28 S.W.3d 570 (Tex.Crim.App. 2000), issued years before the trial in this case, The Court of Criminal Appeals overruled that portion of *Geesa* which required a definition of "beyond a reasonable doubt" to be included in the court's charge. In fact, they stated "that the better practice is to give no definition of reasonable doubt at all to the jury." *Id.* at 573. The Court in *Paulson* cited *Victor v. Nebraska*, 511 U.S. 1 (1994), for the proposition that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Id.* at 5, 114 S.Ct. at 1243. Citing *Jackson v. Virginia*, 443 U.S. 317 (1979), the Court concluded, "indeed, so long as_ the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.*

126. Ground 41 is barred. Issues raised and rejected on direct appeal are generally not cognizable on habeas corpus. *Ex parte McFarland*, 163 S.W.3d 743, 748 (Tex.Crim.App.2005). An exception to that rule occurs when there is a change in a legal principle relevant to the applicant's claim, and that legal principle would apply retroactively to cases on habeas corpus. *Id.; Ex parte Drake*, 883 S.W.2d 213, 215 (Tex.Crim.App.1994). But when there has been no change, an applicant should not again urge the exact

same basis that was raised on direct appeal unless the legal basis for the claim "could not have been reasonably formulated" at the time the direct appeal was filed. It serves judicial economy and conforms to common sense: issues that can be litigated on direct appeal, should be litigated there, and not re-litigated on habeas corpus. Texas Code of Criminal Procedure 11.071 § 5 bars claims and issues that *have been* presented in an earlier application, not just claims and issues that *could have been* presented. Art. 11.071, §§ 5(a)(1){"the current claims and issues have not been and could not have been presented previously"}.

127. The applicant, in order to avoid the procedural bar, merely claims that appellate counsel did not brief the issue sufficiently. Because the direct appeal has yet to be ruled on, this issue is not ripe for review. There is no a ruling to address in this case yet and the applicant has failed to plead that there has been a change in a legal principle relevant to the applicant's claim, and that legal principle would apply retroactively to cases on habeas corpus.

128. The applicant has failed to prove by a preponderance of the evidence that the United States Constitution requires a full definition of reasonable doubt be included in the court's jury charge.

129. Consistent with due process; the State is required to prove each element of an offense beyond a reasonable doubt. *See* Tex.Pen.Code Ann. §§ 2.01 (Vernon 2003); The United States Supreme Court held that the federal constitution neither requires nor prohibits the giving of a definition of reasonable

doubt. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). So long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. *Id.*

130. In ground 42, the applicant alleges that the jury used the applicant's failure to testify against him in a manner that deprived the applicant of his right against self incrimination. This issue was raised on direct appeal and is barred. In *Ex Parte Drake*, the Court of Appeals stated that habeas corpus should generally not be used to re-litigate matters which were addressed on appeal, 883 S.W.2d 213, 215 (Tex.Crim.App.1994), *citing Ex Parte Schuessler*, 846 S.W.2d 850 (Tex.Crim.App.1993).

131. The applicant has failed to prove by a preponderance of the evidence facts which justify raising in his 11.071 application an issue which has been raised on direct appeal.

132. The failure to testify at trial shall not be used against any defendant, nor shall counsel comment on the defendant's right to remain silent and failure to testify. Tex.Code Crim. Proc. Ann. art. 38.08 (Vernon Supp.2004). A jury's discussion of the defendant's failure to testify – and using that circumstance to find guilt would be impermissible. Under rule 606(b), however, jurors are not competent to testify that they discussed the defendant's failure to testify and used that failure as a basis for convicting him. *Hines v. State*, 3 S.W.3d 618, 620-621 (Tex.App.-Texarkana 1999, no pet.); *see also* Tex.R.App. P. 21.3.

133. The applicant has failed to prove by a preponderance of the evidence that the jury discussed the applicant's failure to testify or used the fact that the applicant did not testify against the applicant.

134. *Roper v. Simmons* prohibits the State from assessing the death penalty against a defendant who was under 18 years of age at the time he committed the offense. *Roper v. Simmons*, 543 U.S. 551 (2005).

135. In the punishment phase of a capital murder trial, the admission of prior offenses committed when the defendant was a juvenile does not violate the Eighth Amendment if he was assessed the death penalty for a charged offense that occurred when he was at least eighteen years old. *See Corwin v. State*, 870 S.W.2d 23 (Tex.Crim.App.1993).

136. Neither the Supreme Court of the United States nor the Texas Court of Criminal Appeals has extended the holding in *Roper v. Simmons* to prohibit the use of juvenile offenses in the punishment stage of a capital case. *See e.g., Matthews v. State*, 2006 WL 1752169 (Tex.Crim.App. 2006) (not designated for publication).

137. The execution of mentally retarded persons and insane persons violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986). There is no Supreme Court authority or authority from the Texas Court of Criminal appeals suggesting that mental illness is enough to render one immune from execution under the Eighth Amendment.

138. The Court of Criminal Appeals has previously rejected an invitation to extend the federal constitutional proscription against execution of the insane to the greater category of mentally ill defendants. *Colburn v. State*, 966 S.W.2d 511 (Tex.Crim.App.1998).

139. The applicant has failed to prove by a preponderance of the evidence that the Court of Criminal Appeals should extend the prohibition in *Atkins* to those who are mentally ill.

The District Clerk is directed to immediately transmit to the Court of Criminal Appeals a copy of all those documents required under 11.071 Section 9(f).

Signed and entered on this 28th day of March, 2008.

s/ James Fry
JAMES R. FRY, Judge Presiding

FILE FOR RECORD

MAR 28 2008

By District Clerk, Grayson County

APPENDIX F

EXCERPTS OF JUROR QUESTIONNAIRES

CAUSE NO. _____

THE STATE OF TEXAS	**§**	**IN THE 15TH JUDICIAL**
VS.	**§**	**DISTRICT COURT OF**
ANDRE THOMAS	**§**	**GRAYSON COUNTY, TEXAS**

Juror Questionnaire
(Marty Ulmer, Juror #4)

****

103. What is your church or spiritual affiliation's position on interracial marriages?
Don't believe in this

104. Do you (__) Agree or (X) Disagree with this position? Please tell us why you feel this way:
I personally don't agree with this.

105. The Defendant in this case, Andre Thomas, and his ex-wife, Laura Boren Thomas, are of different racial backgrounds. Which of the following best reflects your feelings or opinions

about people of different racial backgrounds marrying and/or having children:

(X) I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so.

(__) I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my feelings to myself.

(__) I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children.

(__) I think people should be able to marry or be with anyone they wish.

PLEASE TELL US WHY YOU FEEL THIS WAY:
I don't believe God intended for this.

CAUSE NO. _____

THE STATE OF TEXAS	**§**	**IN THE 15TH JUDICIAL**
VS.	**§**	**DISTRICT COURT OF**
ANDRE THOMAS	**§**	**GRAYSON COUNTY, TEXAS**

Juror Questionnaire
(Barbara Armstrong, Juror #5)

****

103. What is your church or spiritual affiliation's position on interracial marriages?
There is not one

104. Do you (X) Agree or (__) Disagree with this position? Please tell us why you feel this way:
It is not the churchs place to have a position on matters such as this.

105. The Defendant in this case, Andre Thomas, and his ex-wife, Laura Boren Thomas, are of different racial backgrounds. Which of the following best reflects your feelings or opinions about people of different racial backgrounds marrying and/or having children:

(__) I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so.

(X) I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my feelings to myself.

(__) I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children.

(__) I think people should be able to marry or be with anyone they wish.

PLEASE TELL US WHY YOU FEEL THIS WAY:
I think it is harmful for the children involved because they do not have a specific race to belong to

CAUSE NO. _____

THE STATE OF TEXAS	**§**	**IN THE 15TH JUDICIAL**
VS.	**§**	**DISTRICT COURT OF**
ANDRE THOMAS	**§**	**GRAYSON COUNTY, TEXAS**

Juror Questionnaire
(Charles Copeland, Juror #6)

****

103. What is your church or spiritual affiliation's position on interracial marriages?
Should not Be.

104. Do you (X) Agree or (__) Disagree with this position? Please tell us why you feel this way:
I think we should stay with our Blood Line.

105. The Defendant in this case, Andre Thomas, and his ex-wife, Laura Boren Thomas, are of different racial backgrounds. Which of the following best reflects your feelings or opinions about people of different racial backgrounds marrying and/or having children:

(__) I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so.

(X) I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my feelings to myself.

(__) I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children.

(__) I think people should be able to marry or be with anyone they wish.

PLEASE TELL US WHY YOU FEEL THIS WAY:
See Ans. 104

CAUSE NO. _____

THE STATE OF TEXAS	**§**	**IN THE 15TH JUDICIAL**
VS.	**§**	**DISTRICT COURT OF**
ANDRE THOMAS	**§**	**GRAYSON COUNTY, TEXAS**

Juror Questionnaire
(Norma Hintz, Alternate #1)

****

103. What is your church or spiritual affiliation's position on interracial marriages?
We have no interracial couples but they would not be turned away

104. Do you (X) Agree or (__) Disagree with this position? Please tell us why you feel this way:
I would be disappointed if my child entered into an interracial marriage but I love my children and would try to accept their choice

105. The Defendant in this case, Andre Thomas, and his ex-wife, Laura Boren Thomas, are of different racial backgrounds. Which of the following best reflects your feelings or opinions about people of different racial backgrounds marrying and/or having children:

(__) I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so.

(X) I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my feelings to myself.
(__) I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children.

(__) I think people should be able to marry or be with anyone they wish.

PLEASE TELL US WHY YOU FEEL THIS WAY:
As I stated before I try not to judge what other people do. I oppose gay marriage but a man and woman have the right to choose