No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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JOE MICHAEL LUNA,

*Petitioner*,

v.

BOBBY LUMPKIN, DIRECTOR,

*Respondent*.

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

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Dated: August 12, 2021

## Index to Appendix

# United States Court of Appeals for the Fifth Circuit

No. 19-70002

JOE MICHAEL LUNA,

*Petitioner—Appellant*,

*versus*

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

*Respondent—Appellee*.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:15-CV-451

ON PETITION FOR REHEARING

Before DENNIS, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

# *United States Court of Appeals*

**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**
**CLERK**

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

March 17, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-70002 Luna v. Lumpkin
USDC No. 5:15-CV-451

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Mary Frances Yeager

By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

Ms. Katherine D. Hayes
Mr. Kyle D. Highful
Mr. Stuart Lev
Mr. Peter James Walker

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
October 22, 2020
Lyle W. Cayce
Clerk

No. 19-70002

JOE MICHAEL LUNA,

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 Western District of Texas
USDC No. 5:15-CV-451

Before DENNIS, GRAVES, and COSTA, Circuit Judges.*

GREGG COSTA, Circuit Judge:**

Joe Michael Luna admitted guilt at his capital murder trial. On the remaining question of punishment, Luna told the jury that he posed a continuing danger and wanted the death penalty. The jury followed his wish and sentenced Luna to death.

After Luna unsuccessfully sought relief in state court, he filed a federal habeas petition. The district court denied the petition, and we authorized an

* Judge Dennis concurs in the judgment only.

** 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.

appeal on only one issue: whether his trial counsel was constitutionally deficient in his investigation and presentation of mitigation evidence. Under the demanding standard to obtain federal habeas relief on claims a state court rejected, we affirm.

I.

We detailed the facts of this case at the certificate of appealability stage, *Luna v. Davis*, 793 F. App'x 229 (5th Cir. Oct. 24, 2019), so we provide only a summary here. Luna strangled Michael Andrade, a premed college student, to death while burgling Andrade's apartment. He pleaded guilty before the jury at the beginning of trial. The state trial court then held a one-phase trial after which it instructed the jury to find Luna guilty based on his plea and asked it to answer the special issues relevant to the death penalty.

The state presented evidence showing that Luna would continue to be dangerous. In addition to extensive testimony establishing his violent past, the state showed that Luna continued to plot serious crimes while in jail awaiting trial. He told his cellmate about a plan to escape using the trial judge as a "human shield." This was not just talk; Luna had obtained and hidden a handcuff key in a bar of soap.

At the conclusion of the state's case, Luna testified on his own behalf and against his attorney's advice. Luna told the jury he wanted the death penalty. Although he expressed remorse for his crimes, he testified that previous incarceration had not rehabilitated him and future incarceration would only "make [him] worse." He also said that he did not "blame none of [his] circumstances." On cross examination, Luna stated there was no mitigating evidence "whatsoever" that should keep the jury from sentencing him to death.

Following Luna's testimony, his attorney called two other witnesses. Margaret Drake, a social worker and mitigation specialist, had interviewed

Luna, his mother, his former stepmother, and two aunts. She testified that Luna had an unstable childhood, that he was probably physically abused, and that many of his family members had criminal histories and mental illnesses. The jury also received Drake's five-page report, which detailed Luna's childhood and highlighted that he may have been sexually abused.

A forensic psychiatrist, Brian Skop, assessed Luna's future dangerousness. Skop, who had interviewed Luna, testified that the defendant had a history of substance dependency, an impulsive personality, and antisocial personality disorder. Despite these challenges, Skop concluded that Luna would likely be at a lower risk for violence as time passed.

The defense then rested, and the jury answered the special issues in favor of the death penalty.

After exhausting his direct appeals, Luna sought habeas relief in state court. As relevant to our appeal, Luna argued that his childhood sexual abuse was immediately apparent from Drake's report. Luna's theory was that failing to further investigate the abuse and present it in the form of oral testimony was constitutionally deficient. He also provided an affidavit from Dr. Jack Ferrell, which stated that Luna suffered from mental illnesses Skop did not discuss, including schizophrenia, depression, and substance abuse. The state habeas court held both that Luna's counsel provided adequate assistance and that, if any failure occurred, it did not prejudice Luna.

Luna then sought habeas relief in federal district court on several grounds. The district court denied relief and a certificate of appealability. He next sought a certificate of appealability from us, which we granted only on whether "his trial counsel was constitutionally ineffective for failing to investigate and present additional mitigating evidence," particularly "(1) that his mother knew of and was willing to testify about sexual and physical abuse

he suffered as a child; and (2) that a thorough examination of his psychological state would have revealed that he suffers from a variety of mental health problems, including schizophrenia, depression, and PTSD." *Luna*, 793 F. App'x at 232.

II.

Because the state courts adjudicated Luna's ineffective assistance claim on the merits, 28 U.S.C. § 2254(d) provides the governing standard. Under that provision, federal courts may grant habeas relief only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "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). Luna argues that the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

With the Antiterrorism and Effective Death Penalty Act framing our review, we turn to the question of whether the state court unreasonably rejected Luna's *Strickland* claim. There is a Sixth Amendment violation if counsel's performance was constitutionally deficient and that deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 688, 694, 700. To be "deficient," trial counsel's performance must be objectively unreasonable. *Id.* at 687–88. Deficient performance prejudices the defendant if there is a reasonable probability that the outcome of the defendant's trial would have been different but for the deficient representation. *Id.* at 694. Because a unanimous jury verdict was necessary to sentence Luna to death, the prejudice inquiry reduces to whether there is a reasonable chance that a single juror would not have voted for the death penalty if counsel's performance had met constitutional standards. *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003).

We assume, without deciding, that Luna's counsel fell below the constitutional minimum in failing to investigate and present all mitigating evidence. *See, e.g.*, *Andrus v. Texas*, 140 S. Ct. 1875, 1881–82, 1885–87 (2020) (holding that counsel's failure to present mitigating evidence constituted deficient performance). The remaining question is whether the state court's prejudice determination—that there was no reasonable probability that additional evidence of Luna's sexual abuse and mental illness would have caused a juror to vote differently—was unreasonable.

It may be that a state court judge could have found prejudice in Luna's case. To determine whether a failure to present mitigation evidence prejudiced a defendant, courts "reweigh the evidence in aggravation against the totality of available mitigation evidence." *Wiggins*, 539 U.S. at 534.[1] Courts have found prejudice when counsel failed to present childhood abuse and mental health problems as mitigating evidence. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 41, 43 (2009) ("It is unreasonable to discount to irrelevance the evidence of

[1] Luna argues that the district court's application of this standard was inappropriate because Texas does not require jurors to balance aggravating and mitigating evidence. Texas requires Luna's jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," considering "all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offence that militates for or mitigates against the imposition of the death penalty." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1), (d)(1). If the jury answers that question "yes," as it did, Texas further requires them to determine "[w]hether, taking into consideration all of the evidence, including the circumstances of the offence, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." *Id.* art. 37.071, § 2(e)(1). Both charges instruct juries to consider *all* evidence, mitigating or aggravating. Weighing all evidence is necessary to both questions, so our review—determining whether there is a reasonable probability a juror would have voted against the death penalty but for inadequate counsel—does as well. *See Andrus*, 140 S. Ct. at 1885–87 (recognizing in a Texas case that this prejudice inquiry requires a court to reweigh the mitigation evidence—what was presented at trial as well as what should have been—against the aggravating evidence (citing *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)).

[defendant's] abusive childhood . . . ."); *Rompilla v. Beard*, 545 U.S. 374, 391–92 (2005) (defendant suffered from schizophrenia, "extreme mental disturbance," and childhood physical abuse). And Luna points to significant mitigating evidence that could have been presented, including his mother's potential testimony that Luna was a victim of childhood sexual abuse, and that he suffered from schizophrenia and other mental illness. Luna also has direct evidence that concerns about his mental health were on the jury's mind: during deliberations the jury asked for the "psychiatric report of Dr. Skop," though the judge could not give it to them because that report had not been admitted.

But it is not enough for Luna to show that a judge looking at prejudice on a blank slate could rule in his favor. AEDPA requires Luna to show that a reasonable judge would have had to reach that result. *Harringon v. Richter*, 562 U.S. 86, 102 (2011) (explaining that AEDPA's relitigation bar allows federal courts to grant relief only when "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents"). That he cannot do.

Several factors allow a judge to reasonably distinguish this case from others in which there was prejudice from counsel's failure to present mitigating evidence of mental illness and childhood trauma. The most obvious one is Luna's own testimony. He told the jury he could not rehabilitate, that the death penalty was appropriate, and that no mitigating evidence existed to compel a contrary conclusion. The Supreme Court has found that trial counsel's failure to present mitigating evidence did not prejudice a defendant in analogous circumstances. *See Schriro v. Landrigan*, 550 U.S. 465, 475–80 (2007) (denying habeas relief when the defendant testified no mitigating evidence existed, instructed his attorney to present none, and told the sentencing court to "bring [the death penalty] right on").

That unusual feature of this case alone is likely enough to require us to defer to the state court's "no prejudice" determination. But there is more. Luna's asking the jury to give him the death penalty should not obscure the other strong aggravating evidence that existed. He committed a cold-blooded murder. He had an extensive and violent criminal history, including multiple home invasions. In some of those he pressed a gun against victims' heads. In one, he blindfolded family members and tied their wrists and feet with duct tape. In yet another, he wrapped residents up in bedsheets and left them underneath a Christmas tree. Then there is Luna's postarrest scheme for a jail break in which he would use the judge as a human shield if the escape did not go as planned.

On the mitigation side of the ledger, the evidence Luna argues his counsel should have presented was largely cumulative of what the jury did hear. Drake's testimony established that Luna suffered physical abuse, endured an unstable childhood, and had many family members with criminal histories and substance abuse disorders. Luna now argues that further investigation would have revealed further childhood physical and sexual abuse. But while the jury did not hear oral testimony about sexual abuse, it did have Drake's report, mentioning that Luna's uncle may have molested him as a child. Likewise, Skop testified that Luna had mental health issues, including difficulty moderating impulses, substance abuse, and antisocial personality disorder. To be sure, the evidence of schizophrenia and sociopathy that Luna says should have been presented is more serious than the conditions Skop described. But all of these conditions address whether Luna was fully in control of his actions. The additional evidence of mental health problems is different in degree, but not in kind. That further distinguishes this case from ones in which the Supreme Court has found unpresented mitigation evidence

to be prejudicial under the lens of AEDPA deference. *See, e.g.*, *Porter*, 558 U.S. at 41–43; *Rompilla*, 545 U.S. at 382.

To sum up, a state court may have been able to conclude that the failure to present mitigating evidence of sexual abuse and mental health conditions prejudiced the outcome of Luna's trial. But for the reasons we have explained, at best for Luna, prejudice was debatable under *de novo* state court review. That means the state court did not have to find prejudice. As a result, its "no prejudice" ruling was not unreasonable, and we lack authority to grant federal habeas relief.

III.

Luna also appeals the district court's refusal to hold an evidentiary hearing. He does not need a certificate of appealability on this issue. *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016). But we will consider the issue only if it is "corollary to" the constitutional violation on which we authorized an appeal. *See id.* (quoting *Alix v. Quarterman*, 309 F. App'x 875, 878 (5th Cir. 2009) (per curiam)); *see also Alix*, 309 F. App'x at 878 ("[N]on-constitutional claims are only considered to the extent that they are connected to a claim on which a COA is granted."). Insofar as Luna appeals the district court's denial of a hearing to establish either the inadequate assistance of state habeas counsel, or the inadequacy of his trial counsel for grounds other than those we granted a certificate of appealability on, his appeal is not properly before us. *See id.*

As for his hearing request on the *Strickland* "mitigation evidence" claim on which we did allow an appeal, the district court did not abuse its discretion in denying a hearing. As we have held, the state court's determination that the lack of mitigation evidence did not prejudice Luna was not unreasonable even if we assume that his trial counsel was ineffective. Questioning his

counsel in court would not demonstrate that trial counsel prejudiced Luna. "[A]n evidentiary hearing is not required on issues that can be resolved by reference to the state court record." *Schriro*, 550 U.S. at 474 (quotation omitted).

* * *

The judgment is AFFIRMED.

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 19-70002

United States Court of Appeals
Fif h Circuit
**FILED**
October 24, 2019
Lyle W. Cayce
Clerk

JOE MICHAEL LUNA,

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 Western District of Texas
USDC No. 5:15-CV-451

Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:*

A jury convicted Joe Michael Luna of capital murder and sentenced him to death. Following denials of his direct appeal and habeas petition in the state courts, he raised fifteen claims in a federal habeas petition. The district court denied them all and denied a certificate of appealability (COA). Luna now

* 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.

requests from this court a COA on four of his federal claims. We grant one and deny three.

I.

Luna used a crawl space connected to his girlfriend's apartment to sneak into Michael Andrade's apartment in the middle of the night. Intending a burglary, he thought Andrade's apartment would be empty. It was not. Luna found Andrade sitting up in bed, held him at gunpoint, and tied him up. After collecting items from around the apartment, Luna began to worry that Andrade would speak to the police, connect the intruder to the crawl space, and thus connect Luna to the crime. So Luna strangled Andrade to death. Andrade was in his fourth year as a premed student at St. Mary's in San Antonio.

At the beginning of his trial, Luna pleaded guilty in front of the jury. The court then held a one-phase trial that included evidence relevant to both guilt and punishment, followed by an instruction that the jury find Luna guilty and answer the special issues relevant to the death penalty: whether Luna would be a danger in the future, and, if so, whether mitigating circumstances warranted a sentence of life in prison rather than death. *See* TEX. CODE CRIM. PROC. art. 37.071.

Among other things, the state's evidence included testimony about Luna's substantial criminal history, which included car thefts—one of which involved Luna's trying to run a police officer over with the car; a carjacking that ended with Luna and his companions leaving the victim bound with duct tape in the woods; and multiple home invasions during which Luna tied up families at gunpoint while he robbed them. There was also evidence that Luna had been plotting an escape at some point between his arrest and trial.

When the prosecution rested, and against his counsel's advice, Luna testified on his own behalf. He said that he had pleaded guilty because he had

decided to get right with God. He also expressed remorse for his crimes, particularly the murder. Luna then testified that he wanted the death penalty. He said that a prior stint in prison had not rehabilitated him, and he expected that a lifetime in prison would only "make me worse than I am now."

The defense called two other witnesses. The first was Margaret Drake, a clinical social worker and mitigation specialist, who had prepared a "psychosocial assessment" after talking to Luna and his relatives. Her testimony included potentially mitigating evidence, including that Luna's mother moved around a lot, requiring him to frequently change schools; that his father was largely absent from his young life; that a "number" of Luna's relatives were "involved" in substance abuse, and an "unusual number" of them had criminal histories; that some members of Luna's family suffered from "mental difference[s]" ranging from depression or schizophrenia to Down's Syndrome or seizure disorders; and that Luna has at least one son, as well as a "very good relationship" with his former girlfriend's son. Drake also testified that one of Luna's mother's boyfriends was "quite violent" and that they were "often very much afraid of him."

Dr. Brian Skop, a forensic psychiatrist, also testified. He had interviewed Luna and conducted an intelligence screening test that showed an IQ of 89, "in the low average range." The remainder of Skop's testimony on direct examination had to do with future dangerousness. On cross examination, the prosecutor asked why Skop "didn't do the normal thing that you do where you make diagnoses about—for the different axes."[1] Skop explained that he had been asked to analyze only Luna's future dangerousness.

[1] This presumably referred to the then-prevailing categorization of mental disorders along particular "axes." *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).

The defense then rested. The jury answered the special issues in favor of the death penalty.

II.

We may authorize an appeal from the denial of a habeas petition "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That means reasonable jurists "could disagree" with the district court's analysis or could conclude the issues otherwise "deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In a capital case, any doubt is resolved in favor of granting a COA. *Hughes v. Dretke*, 412 F.3d 582, 588 (5th Cir. 2005).

For any claim adjudicated on the merits in state court, the COA "debatability" standard is considered through the lens of deference given by the Antiterrorism and Effective Death Penalty Act of 1996. *Prystash v. Davis*, 854 F.3d 830, 835 (5th Cir. 2017). AEDPA allows a federal court to grant habeas relief only if the state court's conclusions of law were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA requires deference to the state court's findings of fact, too, unless they were unreasonable. *Id.* § 2254(d)(2).

A.

Luna's first claim is that his trial counsel was constitutionally ineffective for failing to investigate and present additional mitigating evidence. He contends (1) that his mother knew of and was willing to testify about sexual and physical abuse he suffered as a child; and (2) that a thorough examination of his psychological state would have revealed that he suffers from a variety of mental health problems, including schizophrenia, depression, and PTSD.

To prevail on this claim, Luna will ultimately have to show not only that his counsel's investigation into his background and mental health was

objectively unreasonable, but also a reasonable probability that at least one juror would have voted against the death penalty if aware of the mitigating evidence a reasonable investigation would have turned up. *See Wiggins v. Smith*, 539 U.S. 510, 520–21, 537 (2003). Counsel is presumed to have rendered adequate assistance. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). That presumption, plus AEDPA deference, means federal courts are "doubly deferential" when reviewing whether counsel's assistance was constitutionally deficient. *Cullen v. Pinholster*, 563 U.S. 170, 189–90 (2011). Despite the demanding standard of review, and keeping in mind that any doubts at the COA stage in a capital case should be resolved in favor of allowing the appeal, we conclude that reasonable jurists could debate the outcome of this claim. Accordingly, we grant a COA on the ineffective assistance claim.

B.

Luna's second claim raises his due process right to be present at critical proceedings. *See Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). He argues that he should have been in the courtroom when the trial judge excused prospective jurors before voir dire.[2]

At the threshold, the Director argues that Luna procedurally defaulted this claim by failing to raise it on direct appeal, as Texas law requires for claims like this one. *See Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) (en banc). The state habeas court,[3] in addition to making a merits finding, denied this claim under that adequate and independent state procedural rule. *See Aguilar v. Dretke*, 428 F.3d 526, 535 (5th Cir. 2005). Ordinarily, that would

[2] Luna casts this claim both in terms of due process and in terms of his Sixth Amendment confrontation right. But there is no confrontation right when there are no witnesses to confront. *United States v. Thomas*, 724 F.3d 632, 642 (5th Cir. 2013).

[3] Unless otherwise noted, the Texas Court of Criminal Appeals adopted, in an unreasoned opinion, the findings and conclusions of the state district court (which we call the "state habeas court"). *Ex parte Luna*, 2015 WL 1870305 (Tex. Crim. App. Apr. 22, 2015).

preclude federal habeas relief. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). Luna, however, argues that his direct appellate counsel was constitutionally ineffective by failing to raise this claim. Procedural defaults can be excused, and one way to excuse a default is to show it resulted from ineffective assistance. *Id.* at 2064–65.[4] Whether Luna's appellate counsel was deficient is largely bound up with the merits of the underlying claim, so we look to the merits. *See Amador v. Quarterman*, 458 F.3d 397, 410–11 (5th Cir. 2006) (explaining that appellate counsel need only bring "[s]olid, meritorious arguments").

It is not altogether clear what happened as there is no transcript of the pre-voir dire assembly. But it appears that a fraction of the venire panel was "excused" at that time. Typically at a "general assembly" venire members are "qualified on their ability to serve and exemptions and excuses are heard," before they are "sent to the individual courts trying the cases." *See Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001). The general assembly is not part of the trial and there is no constitutional right to be present. *Moore v. State*, 999 S.W.2d 385, 399 (Tex. Crim. App. 1999).

But Luna says the process in his cases was not the typical general assembly because the excused potential jurors had already been assigned to his case. *See Jasper*, 61 S.W.3d at 423 ("assum[ing]" that the right to be present had attached when "the trial judge assigned to preside over appellant's trial appears to have functioned as a general assembly judge over prospective jurors *already assigned to [the] appellant's specific case*" (emphasis in original)). The federal district court rejected that argument.[5]

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[4] Contrary to the Director's position, Luna preserved this excuse by arguing it on state habeas. *See Hatten v. Quarterman*, 570 F.3d 595, 605 (5th Cir. 2009).

[5] We do not discuss the state habeas court's merits finding on this claim because the Texas Court of Criminal Appeals vacated it. *Luna*, 2015 WL 1870305.

We need not delve into whether the excused jurors had been technically assigned to Luna's case. The due process question is whether Luna's presence at the proceeding would have been helpful to his defense. *See United States v. Gagnon*, 470 U.S. 522, 526 (1985) ("[The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934)). And that inquiry turns on the reasons the prospective jurors were dismissed. Defendants have the right to be present at voir dire, for instance, because they can help decide what questions to ask prospective jurors or how to exercise peremptory challenges. *United States v. Curtis*, 635 F.3d 704, 715 (5th Cir. 2011); *United States v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987).

What evidence there is indicates that the prospective jurors dismissed before voir dire were dismissed for reasons having nothing to do with Luna's case. The trial judge's first remark, once the remaining prospective jurors were gathered with Luna and counsel, was that one prospective juror had "been working for like two days straight" but "really didn't want to be excused." The judge then announced the case, introduced the parties, and described in detail how capital trials work in Texas, as well as the questionnaires the jurors would be asked to fill out. If the judge had already excused jurors for case-specific reasons, he would already have provided them that information. By all appearances, the jurors were excused for hardships and possibly statutory exemptions or disqualifications. *See* TEX. CODE CRIM. PROC. art. 35.03.

Unlike the role defendants and their counsel have in exercising peremptory strikes during voir dire, judges determine whether jurors are excused for hardships or exemptions (sometimes these exemptions are granted before venire members show up for jury duty). *Id.* So the defendant's presence, or lack thereof, when the judge considers jurors' requests to be excused would

seem to make no difference. *Cf. Gagnon*, 470 U.S. at 527 (holding that defendants had no right to be present during judge's in-chambers questioning of a juror during which defendants "could have done nothing had they been" present).[6]

So we doubt that Luna has a due process claim because he was absent from the pre-voir dire proceeding. But we need not decide whether that question meets the COA threshold because it is beyond debate that any error was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993) (explaining that on federal habeas review, nonstructural errors in a state trial are harmless unless they "had substantial and injurious effect or influence in determining the jury's verdict"). There is no indication that an excused potential juror was more favorable to Luna than those who ultimately sat. Neither is there any indication that a juror was excused improperly. *See Jasper*, 61 S.W.3d at 424 (describing trial court's "broad discretion to excuse prospective jurors for good reason"). And even if there were reason to think that a favorable potential juror was excused improperly, Luna's presence would not have put that person on the jury. As we have already explained, unlike with voir dire, the defendant has no role to play in excusing prospective jurors for hardships, exemptions, or disqualifications.

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[6] To be clear, the defendant's presence may be helpful, and the defendant may thus have a right to be present, during some pre-voir dire hearings on juror dismissals. But that is only when the potential dismissals are for reasons particular to the defendant, as when prospective jurors are excused because they are "friends or supporters" of the defendant. *See United States v. Bordallo*, 857 F.2d 519, 522–23 (9th Cir. 1988). During those types of proceedings, the defendant can offer insight into the facts potentially warranting dismissal. Not so during proceedings on requests to be excused, which are granted or denied without regard to the case a prospective juror is assigned to. *United States v. Greer*, 285 F.3d 158, 167–68 (2d Cir. 2002); *see also Cohen v. Senkowski*, 290 F.3d 485, 489–90 (2d Cir. 2002) (distinguishing examination of prospective jurors about exposure to the defendant's case, during which the defendant has a right to be present, from examination of prospective jurors about excusals for hardships).

Perhaps recognizing that he cannot show the decision to excuse jurors impacted the outcome of his case, Luna's only response is that the error was structural and thus not subject to the harmless error rule. But there is a wealth of precedent going the other way. *See Rushen v. Spain*, 464 U.S. 114, 117–18, 121 (1983) (holding that defendant's absence during judge's communication with juror was harmless). This court and others have held that absence during voir dire can be harmless. *United States v. Alikpo*, 944 F.2d 206, 209–10 (5th Cir. 1991) (conducting harmless error analysis but holding that defendant's absence was not harmless); *see also United States v. Rivera-Rodriguez*, 617 F.3d 581, 604 (1st Cir. 2010); *United States v. Riddle*, 249 F.3d 529, 535 (6th Cir. 2001). If absence from voir dire can be harmless, then absence from pre-voir dire excusals certainly can. Indeed, the two cases on which Luna most relies for this claim held that the defendant's absence when jurors were dismissed was harmless beyond a reasonable doubt. *Bordallo*, 857 F.2d at 523; *Jasper*, 61 S.W.3d at 423–24.

Any possible error, which again we doubt existed in the first place, was harmless. We thus deny a COA on this claim.

C.

Luna's third claim argues that the trial court erroneously concluded that a juror's views on the death penalty warranted striking the juror for cause. *See Witherspoon v. Illinois*, 391 U.S. 510, 521–22 (1968). As with his previous claim, Texas law required Luna to bring this one on direct appeal. *See Nelson*, 137 S.W.3d at 667; *Aguilar*, 428 F.3d at 535. In addition to denying this claim on the merits, both the state habeas court and the district court ruled that Luna procedurally defaulted on this claim by failing to raise it on direct appeal.

But unlike on the previous claim, Luna makes no attempt on this one to excuse his procedural default or to show that failure to consider this claim would work a fundamental miscarriage of justice. That alone means we should

deny a COA. *Norman v. Stephens*, 817 F.3d 226, 231–32 & n.2 (5th Cir. 2016); *see also Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994).

In any event, even if his default were excused, Luna's *Witherspoon* claim is not reasonably debatable. Prospective jurors in capital cases cannot be dismissed for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon*, 391 U.S. at 522. Exclusion is proper only 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." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quotation omitted).

To be sure, for much of the challenged juror's voir dire testimony, he sounded like an ideal capital juror. He repeatedly stated that whether he could impose the death penalty would depend on "the circumstances" and that there would be "a lot of variables involved." He might, for instance, be "sway[ed]" if the victim was a child, elderly, or disabled, or if the crime was "heinous" or "brutal[]." The juror also said that the motive for the crime might influence him.

But at one point, he said that if the victim was not young, elderly, or disabled, he "really d[idn't] think" he could vote to impose the death penalty. And ultimately, his voir dire ended with the following:

> Q: And you were there, and you have found somebody guilty of capital murder beyond a reasonable doubt. And then you have heard whatever other evidence might be presented. And you knew that the answers to the questions were such that the result would be death, would you be able to do it?
>
> A: I'm sorry I'm so ambivalent, but I don't think I could.
>
> THE COURT: What was your answer? I don't think I could?
>
> A: I don't think I could.

The trial judge then granted the state's motion to strike the juror for cause.

Viewed against the juror's prior statements indicating a willingness to vote for the death penalty in appropriate circumstances, his last statements raise an ambiguity. And because the trial judge takes into account firsthand impressions of the juror's demeanor—impressions not apparent in an appellate record—we defer to the trial judge's resolution of that ambiguity. *Uttecht v. Brown*, 551 U.S. 1, 7, 9–10 (2007). Indeed, our review is "doubly deferential" because AEDPA adds another layer. *White v. Wheeler*, 136 S. Ct. 456, 460 (2015).[7]

That much deference means that reasonable jurists could not debate the merits of this claim. AEDPA requires deference to strikes for cause in cases with substantially less equivocation. *See White*, 136 S. Ct. at 459, 461–62 (holding that trial judge had discretion to strike juror who said he could not be "absolutely certain" that he could consider the death penalty, but later "expressed his belief that he could consider all the penalty options"); *Uttecht*, 551 U.S. at 15–17 (holding that juror's answers "on their face" permitted trial court to strike juror for cause, when juror "stated six times that he could consider the death penalty or follow the law" but interspersed those statements with "more equivocal" ones about how he would have to give it "some thought"). We accordingly deny a COA on this claim.

D.

Luna's last claim is a challenge to the constitutionality of Texas's jury instructions for capital cases. To impose a death sentence, a Texas jury must

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[7] Luna argues that the district court erred in applying section 2254(e)(1) of AEDPA, under which a state court's findings of fact are presumed correct, a presumption that can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). According to Luna, section 2254(d)(2)—which requires deference unless the state court's finding was "unreasonable"—should apply to *Witherspoon* claims. But this court recently deemed it "prudent" to apply both subsections. *Smith v. Davis*, 927 F.3d 313, 324 (5th Cir. 2019). We ultimately need not define the degree of deference with exactitude because its precise articulation does not make a difference in this case.

answer "yes" on a future dangerousness question and "no" on a mitigation question. TEX. CODE CRIM. PROC. art. 37.071. Luna challenges the jury instructions on the mitigation question. Texas courts instruct capital juries that they must answer the mitigation question. A "no" answer must be unanimous, and at least 10 jurors must agree on a "yes" answer. *Id.* § 2(f). If the jury is unable to reach an answer, the defendant receives a life sentence. *Id.* § 2(g). But Texas law forbids the court or counsel from informing the jury "of the effect of a failure of a jury to agree" on the special issues. *Id.* § 2(a)(1). Luna argues that jurors should be told about this possible outcome.

The Texas Court of Criminal Appeals, on direct appeal, rejected Luna's constitutional challenge to these instructions, as it has before. *Luna v. State*, 268 S.W.3d 594, 609 & n.40 (Tex. Crim. App. 2008). This court, too, has already held that three of the Supreme Court cases Luna raises do not clearly establish that the jury must be informed of the effect of its inability to reach an answer. *See Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011) (holding that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), does not implicate Texas's capital jury instructions); *Hughes*, 412 F.3d at 594 (rejecting challenge based on *Mills v. Maryland*, 486 U.S. 367 (1988), and holding that "no clearly established federal law calls into doubt the Texas death penalty statute"); *Webb v. Collins*, 2 F.3d 93, 96 (5th Cir. 1993) (rejecting challenge based on *Andres v. United States*, 333 U.S. 740 (1948), under analogous *Teague* doctrine).

Luna does rely on two Supreme Court cases this court appears not to have addressed in considering this question, but neither debatably establishes clearly established law undermining Texas's capital jury instructions. Luna cites a portion of *Wiggins v. Smith* that refers to the standard for showing prejudice in ineffective-assistance claims arising from capital cases—namely, a reasonable probability that at least one juror would have voted against death. 539 U.S. 510, 537 (2003). That says nothing about what must be

communicated to a capital jury. And *Jenkins v. United States*, 380 U.S. 445 (1965), is "off the table as far as [AEDPA] is concerned" because it was based on the Court's supervisory powers over federal courts, not the Constitution. *Early v. Packer*, 537 U.S. 3, 10 (2002).

We thus deny a COA on Luna's challenge to Texas's capital jury instructions.

* * *

We GRANT a COA on Luna's claim for ineffective assistance of trial counsel during the investigation and presentation of mitigating evidence. We DENY COAs on Luna's other claims.

# *United States Court of Appeals*

**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**
**CLERK**

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

October 24, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-70002 Joe Luna v. Lorie Davis, Director
USDC No. 5:15-CV-451

Enclosed is the opinion entered in the case captioned above.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

Ms. Jeannette Clack
Ms. Katherine D. Hayes
Mr. Stuart Lev
Mr. Peter James Walker

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **JOE MICHAEL LUNA,** | § | |
| | § | |
| **Petitioner,** | § | |
| | § | **CIVIL NO. SA-15-CA-451-XR** |
| **v.** | § | |
| | § | *** DEATH PENALTY CASE *** |
| **LORIE DAVIS, Director,** | § | |
| **Texas Department of Criminal Justice,** | § | |
| **Correctional Institutions Division,** | § | |
| | § | |
| **Respondent.** | § | |

**MEMORANDUM OPINION AND ORDER**

Petitioner Joe Michael Luna initiated this federal habeas corpus action pursuant to 28 U.S.C. § 2254 to challenge the constitutionality of his 2006 Bexar County conviction and sentence of death for the capital murder of Michael Andrade. Currently before the Court is Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 22), as well as Respondent's Answer (ECF No. 30) and Petitioner's Reply (ECF No. 40) thereto. Having carefully considered the record and pleadings submitted by both parties, the Court concludes Petitioner is not entitled to federal habeas corpus relief or a certificate of appealability.

## I. Background

### A. The Offense

In February 2005, Petitioner was staying with his girlfriend, Maria Solis, at The Hollows apartment complex in San Antonio, Texas. While there, Petitioner planned to burglarize several other apartments while the occupants were away by utilizing an attic crawl space that was accessible via Solis's apartment; however, upon further investigation, Petitioner found he could only access the neighboring apartment of Michael Andrade, a pre-med senior at nearby St.

Mary's University. On February 17, 2005, Petitioner entered Andrade's apartment by using the attic crawl space to access Andrade's bedroom closet. Petitioner thought the apartment was empty at the time and was surprised to find Andrade asleep in the bedroom when he entered. Andrade, awakened by the sounds coming from his closet, was immediately confronted by Petitioner, dressed in a stolen black police SWAT uniform and ski mask, pointing a gun at him. Petitioner forced Andrade to lie on the bed, tied him up with a cut-up bed sheet, and told Andrade that he would not hurt him and only wanted to rob him. Petitioner then began collecting items from the apartment and placing them in his truck parked outside.

During the robbery, Petitioner began to worry that Andrade would speak to police and tell them that Petitioner entered from the attic, which would eventually lead them to Solis's apartment. Petitioner decided he had to kill Andrade, so he got behind Andrade, put his arms around Andrade's neck, and strangled him to death. Petitioner then attempted to cover his tracks by vacuuming Andrade's apartment and wiping for prints. He also tried to burn down the apartment by setting small fires near the closet, the front door, and next to Andrade's body. The fire did not destroy the apartment, however, because Petitioner had closed all of the doors and windows in the apartment and the fire eventually went out.

Petitioner became a suspect in Andrade's murder a few days later when the police received an anonymous tip on Crime Stoppers. On February 21, 2005, Petitioner was arrested at Solis's apartment. Police found Andrade's camcorder and car keys inside the apartment. Police also found a stolen police vest, a black ski mask and gloves, a loaded .32 automatic handgun, a shotgun and shells, maps and information about Belize and Mexico, and notes about "going south." In addition, fibers found inside a vacuum cleaner and on Petitioner's clothing were consistent with the insulation found in Andrade's attic and fibers from Andrade's bed sheet.

**B. The Trial**

On January 5, 2006, Petitioner was indicted for the capital murder of Michael Andrade. 2 CR 258-59.[1] At the commencement of his trial six weeks later, Petitioner entered a plea of guilty to the offense of capital murder as charged in the indictment. 13 RR 6. Before accepting the plea, the trial court admonished Petitioner as to the consequences of his plea and then inquired whether defense counsel believed Petitioner had a rational and factual understanding of the proceedings against him. 13 RR 10-13. Counsel responded affirmatively and indicated that, in his opinion, Petitioner was mentally competent to waive his rights and enter a guilty plea. The parties then agreed to a unitary proceeding where both parties would submit evidence concerning Petitioner's punishment, after which the jury would be instructed to find Petitioner guilty and consider only the punishment phase special issues. The jury then heard testimony from fifty-eight witnesses presented by the prosecution followed by three witnesses presented on behalf of the defense, including Petitioner.

1. Evidence Presented by the State

The State began the proceedings by presenting several witnesses who testified regarding the discovery of Andrade's body and subsequent investigation into his murder. 13-14 RR. These witnesses established for the jury the nature and circumstances of the crime. The jury was then presented with evidence concerning Petitioner's escalating pattern of violence from the time he was fourteen years old until his incarceration for Andrade's murder at age twenty-five.

As a juvenile, Petitioner pulled a gun on his middle school principal on the first or second day of the seventh grade in September 1993, was expelled, and was placed on two years of intensive supervised probation with the Bexar County Juvenile Probation Department. 15 RR 3-

[1] Throughout this opinion, "CR" refers to the Clerk's Record of Petitioner's trial while "RR" refers to the Reporter's Record. Both are preceded by volume number and followed by the relevant page numbers.

23. One of Petitioner's probation officers, Tony Martinez, testified that Petitioner displayed behavioral problems, assaultive behavior, and substance abuse issues. *Id*. 24. He was evaluated by Dr. J. O. Sherman in August 1994, who concluded Petitioner suffered from conduct disorder and substance abuse but did not have a thought disorder or major affective disturbance. *Id*. at 33-35. Petitioner was referred to several different treatment facilities for therapy and substance counseling but was discharged from each facility within weeks for either assaultive behavior or absconding. *Id*. at 24-29. As a result, Petitioner was committed to the Texas Youth Commission (TYC), a juvenile detention facility, in July 1995. Petitioner was paroled twice from TYC but was revoked both times for failing to comply with the terms of his parole. *Id*. at 30-32. Petitioner was ultimately released from TYC in October 1997 when he turned eighteen.

The State then presented evidence that, as an adult, Petitioner carried out an almost unabated string of increasingly violent offenses leading up to Andrade's murder:

| | |
|---|---|
| December 1997 | Petitioner stole a 1996 Cadillac and later attempted to pawn golf clubs that had been in the car. The owner of the car spotted it at the pawn shop and called his son, who then confronted Petitioner at the store. A fight broke out, and police were dispatched to investigate and break up the fight. The responding officer, Officer Juan Torres, was injured in the altercation and had to be sent to the hospital in an ambulance. He later had to retire because of an injury he sustained while trying to detain Petitioner. 15 RR 54-72. |
| January 1998 | Petitioner stole a 1998 pink Z-28 Camaro. A few days later, Petitioner stole a 1991 brown Pontiac four door, but was eventually spotted and pulled over by Officers Roy Naylor and Richard Schoenberger. As the officers approached the vehicle, Petitioner tried to run one of them over while he fled the scene. Less than half a mile down the road Petitioner lost control of the car and crashed into a phone pole. He fled on foot, but was later apprehended. Petitioner was arrested for assault of a public servant and unauthorized use of a vehicle. 15 RR 73-95, 110-19. |
| May 1998 | Petitioner was placed on probation for the above offenses and was assigned to sixty days in a Zero Tolerance Boot Camp. Petitioner was also given six months of intensive supervision with the gang unit due to his membership in the "La Raza" street gang. At the Boot Camp, Petitioner |

was disciplined for two separate altercations with other residents, and was eventually terminated from the program for absconding in July 1998. 15 RR 96-101.

July 1998

A week later, Petitioner broke into the apartment of Phillip Settles and his thirteen-year-old daughter. Settles was awakened in the middle of the night by his barking dog and found an individual jumping out of his daughter's bedroom window. Fingerprints taken at the scene were later matched to Petitioner. Petitioner's probation was revoked and he was convicted of burglary of a habitation, assault on a public servant, and three counts of unauthorized use of a vehicle. He received two five-year sentences for the first two counts and a two-year sentence for each of the unauthorized use counts. 15 RR 101-19.

March 2004

Petitioner was released from prison in August 2003. Six months later, Petitioner carjacked Candido Tovar at gunpoint in his work truck around three o'clock in the morning while Tovar was driving to work. Petitioner asked for money, but when he discovered Tovar did not have any, he forced Tovar to drive to a secluded area where Petitioner and his companions bound him with duct tape. The men left Tovar on his knees in the woods, but he was able to roll to the side of the road where someone eventually stopped to help him. 16 RR 9-34.

June 2004

Petitioner and his companions entered the home of Brooke Envick through the garage but left after her dog began to bark. That same night, the group broke into the home of Michael McGloughlin while he, his wife, and two-year-old daughter were asleep. McGloughlin awoke early in the morning to the sound of someone walking around upstairs. After finding someone in his home, McGloughlin ran back to the bedroom and tried to close the door, but the suspect knocked the door completely off its hinges and pointed a sawed-off shotgun at the family. The three suspects bound the adults with torn bedsheets while their daughter watched, then went about the house collecting items to take. The suspects took several items, including a computer, a camcorder, two cars, and the family dog. 16 RR 36-117.

A week later, Petitioner robbed Ruy D'Amico and his family at gunpoint in their home. D'Amico rose early in the morning to go to work and was confronted by Petitioner in the hallway pointing a silver handgun at his head. Petitioner gathered D'Amico and his family, made them lay face-down on the floor, and tied them up with torn bedsheets and duct tape. Similar to the previous robberies, the suspects then gathered various expensive items while the terrified victims prayed for their lives. The suspects then placed the stolen items in the D'Amico's car and left in it. 16 RR 118-186.

August 2004 — Petitioner broke into the home of Jennifer Weise while she was asleep. She was awakened by the sound of creaking stairs but did not move from her bed as she heard someone enter her room. The person looked around and then left, but she stayed still until she heard the sound of her Dodge Durango leaving the garage. 17 RR 14-25.

December 2004 — Just before Christmas Petitioner burglarized the home of Phillip Dreyer, a Lieutenant with the Bexar County Sheriff's Department,. Dreyer returned home from work around midnight to find his home ransacked and numerous work items stolen, including two rifles, two shotguns, ammunition, knives, a laptop, a bulletproof vest, two raid jackets, and a hazardous materials suit. Some of these items were later recovered in Maria Solis's apartment. 17 RR 26-34.

January 2005 — Around a week later, Petitioner and a cohort robbed Vicky Calsada, her roommate, and her roommate's sixteen-year-old son at gunpoint. The two men were wearing all black, including ski masks, and were armed with shotguns. Again, the victims were forced onto the ground and tied up with torn bedsheets. The suspects stole jewelry, $2,900 in cash, and a handgun, as well as Calsada's puppy. The handgun was also recovered the following month in Maria Solis's apartment. 17 RR 35-52.

After hearing evidence concerning Petitioner's violent past, the jury was presented with evidence concerning Petitioner's behavior following his arrest for Andrade's murder in February 2005. Raymond Valero, a former cellmate of Petitioner's at the Bexar County Jail, testified that Petitioner confessed to him the details of Andrade's murder and expressed no remorse for the crime. Petitioner also told him that he had planned to use a shotgun to "shoot his way out" when police came to arrest him for Andrade's murder but that he did not have enough time to get to his gun. Petitioner also told Valero that he planned to marry Solis to prevent her from testifying against him and that he had a plan to use the judge as a "human shield" to escape if his trial did not go well. He also showed Valero a handcuff key he kept hidden in a bar of soap that was later recovered by Bexar County jailers. 17 RR 61-118.

Lastly, the State presented the testimony of Andrade's mother, father, sister, and college friend to demonstrate the devastating impact his murder had upon each of their lives. 17 RR 125-37; 18 RR 16-29. The State closed by presenting the jury with evidence that Petitioner had a

short-term sexual relationship with his fourteen-year-old neighbor in June of 2004 after she had run away from home. Petitioner—24 years old at the time—was aware of the girl's age. 18 RR 30-51.

2. Evidence Presented by the Defense

Against the advice of counsel, Petitioner took the stand to testify on his own behalf. 18 RR 58-117. Petitioner began by saying he was testifying to set the record straight and was not there to plead for his life. Petitioner stated he was responsible for his circumstances and did not blame his childhood or believe there was anything mitigating about his past to warrant a life sentence. According to Petitioner, a death sentence would be appropriate for him, as a life in prison would only make him worse. Petitioner stated he pled guilty to get right with God and to give justice to Andrade's family.

On cross-examination, Petitioner admitted to murdering Andrade and described how the killing took place. Petitioner stated he felt no remorse after the murder and confessed to Maria Solis that he committed the robbery and murder because he was bored. Petitioner also admitted he had been given several chances to turn his life around but failed to take advantage of those opportunities. Petitioner testified he was guilty of all of the offenses enumerated by the State along with numerous other offenses unknown to law enforcement. In all, Petitioner estimated he had committed between 25-30 burglaries and aggravated robberies and also admitted to selling cocaine. According to Petitioner, he was addicted to the adrenalin rush of "going into a house when somebody was there and taking everything they owned." Petitioner finished by stating he knew the punishment for capital murder when he committed the crime and he was not trying to trick the jury into giving him a life sentence by asking for a death sentence.

Following Petitioner's testimony, the defense presented the testimony of Margaret Drake, a licensed clinical social worker and mitigation expert. 19 RR 3-33. In preparing a psycho-social report on Petitioner, she interviewed Petitioner on five occasions, met with his mother three or four times, and met with two of his aunts, his sister, and a former stepmother. She also reviewed Petitioner's TYC records. Ms. Drake testified that Petitioner moved around a lot as a child and had a very difficult upbringing. A number of Petitioner's family members abused drugs and alcohol and were abusive toward the children. There was also a history of mental health issues and criminal behavior in Petitioner's family. Petitioner's father had little involvement in his life, which led to a sense of rejection and alienation. Ms. Drake also testified that Petitioner was intelligent, likeable, and tended to do better during the times he was incarcerated at TYC and the Bexar County Jail. She admitted, however, that Petitioner had been given many chances for counseling and treatment to help him turn his life around but he ignored those opportunities and chose a life of crime instead.

Finally, the defense presented the testimony of Dr. Brian Skop, a clinical and forensic psychiatrist who evaluated Petitioner's potential for future danger just prior to his trial. 19 RR 34-54. As part of his evaluation, Dr. Skop reviewed Petitioner's TYC and TDCJ records as well as Petitioner's trial testimony. Dr. Skop determined Petitioner's I.Q. to be 89 and believed Petitioner suffers from anti-social personality disorder as well as some traits of borderline personality disorder and narcissistic personality disorder. Although he believed Petitioner would constitute a future danger if released back into society, Dr. Skop stated Petitioner would be less a danger if he were confined in prison. This is so partly because Petitioner's substance abuse problem would be lessened in prison due to treatment and decreased availability, and because prison is a controlled environment that could effectively control his impulsive behavior. Dr.

Skop also cited the fact that a person's risk of violence decreases as they age and Petitioner would have access to treatment for his mental disorders while incarcerated.

Following this testimony, on March 8, 2006, the trial court instructed the jury to return a guilty verdict on the issue of Petitioner's guilt or innocence. 20 RR 19-20. The jury was then instructed on the punishment special issues and heard closing argument by counsel. *Id*. at 21-50. After deliberations, the jury returned its verdict, finding unanimously (1) beyond a reasonable doubt there was a probability Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, and (2) taking into consideration all of the evidence, including the circumstances of the offense, the Petitioner's character, background, and personal moral culpability, there were insufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. *Id*. at 53-54.

**C. Post-conviction Proceedings**

Petitioner appealed his conviction and sentence, raising twenty-five points of error in his direct appeal brief. In an opinion issued October 29, 2008, the Texas Court of Criminal Appeals (TCCA) affirmed Petitioner's conviction and sentence. *Luna v. State*, 268 S.W.3d 594 (Tex. Crim. App. 2008), *cert. denied*, 558 U.S. 833 (2009). The United States Supreme Court denied Petitioner's petition for writ of certiorari on October 5, 2009. *Luna v. Texas*, 558 U.S. 833 (2009).

While his direct appeal was still pending, Petitioner was appointed counsel—attorney Michael Gross—to represent him in pursuing state habeas corpus relief. In December 2008, Mr. Gross filed a state habeas application on Petitioner's behalf in the trial court raising a total of five claims for relief. These five claims were later fleshed out in a nearly three-hundred page

amended application filed by Mr. Gross in June 2009. Supp. SHCR at 1-297.[2] The state trial court held an evidentiary hearing on Petitioner's claims in November 2012, hearing testimony from several of Petitioner's family members as well as his two court-appointed trial attorneys, Michael Granados and Mario Trevino. The state trial court then issued its findings of fact and conclusions of law recommending that state habeas corpus relief be denied. I SHCR at 203-59. In an order dated April 22, 2015, the TCCA adopted all but three of the trial court's findings of fact and conclusions of law and denied Petitioner state habeas corpus relief. *Ex parte Luna*, No. 70,511-01, 2015 WL 1870305 (Tex. Crim. App. 2015).

One year following the denial of state habeas relief, Petitioner filed his initial federal habeas corpus petition in this Court (ECF No. 13) and amended the petition six months later on October 21, 2016 (ECF No. 22). Respondent answered the amended petition on June 19, 2017 (ECF No. 30), to which Petitioner has responded (ECF No. 40). This case is thus ripe for adjudication.

## II. Claims for Relief

As raised in Petitioner's Amended Petition (ECF No. 22), the following allegations are now before the Court:

1. Petitioner received ineffective assistance of trial counsel by counsel's failure to investigate, develop, and present compelling mitigation evidence at the punishment phase of trial;

2. Trial counsel were ineffective for failing to investigate Petitioner's experiences while incarcerated in TYC;

3. The State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959) when it failed to disclose the horrific conditions Petitioner endured while incarcerated at TYC facilities and

[2] Throughout this opinion, "SHCR" refers to the State Habeas Clerk's Record while "Supp. SHCR" refers to the Supplemental State Habeas Clerk's Record. Both are preceded by volume number and followed by the relevant page numbers.

presented false evidence that such facilities were rehabilitative and supportive;

4. The trial court violated Petitioner's due process rights by failing to conduct an adequate inquiry into his mental status despite information that raised doubts regarding his competency;

5. Trial counsel were ineffective for failing to investigate and present evidence of Petitioner's incompetency;

6. Petitioner's guilty plea was not knowing, intelligent, and voluntary;

7. Petitioner's absence from the courtroom for a critical proceeding when the trial court excused nearly a quarter of the venire panel off the record violated his Sixth, Eighth, and Fourteenth Amendment rights;

8. The trial court violated Petitioner's right to an impartial jury and due process by excluding two venire members for cause because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction;

9. Petitioner's due process rights were violated when the shackles he was wearing were specifically brought to the jury's attention by the bailiff and by the trial court's decision to continue shackling Petitioner during his own testimony;

10. Trial counsel were ineffective for failing to investigate and impeach prosecution witness Raymond Valero;

11. Trial counsel were ineffective for failing to object to the State's admission and recitation of Dr. J.O. Sherman's 1994 psychological report of Petitioner in violation of Petitioner's Sixth Amendment right to confront witnesses against him;

12. The trial court's ad hoc proceeding—in which the jury simultaneously considered evidence of Petitioner's guilt/innocence of the charged offense and his individual characteristics bearing on punishment—violated the Eighth and Fourteenth Amendments by failing to adequately guide the jury's discretion and ensure that Petitioner's death sentence was not arbitrarily or capriciously imposed;

13. Petitioner was denied his rights to due process and a jury trial when the jury failed to unanimously determine beyond a reasonable doubt the fact that exposed Petitioner to the punishment of death;

14. Petitioner was tried and sentenced to death under a statutory scheme that violates the Sixth, Eighth and Fourteenth Amendments in the following ways:

A. Special Issue Number One [future dangerousness] is unconstitutionally vague and fails to adequately channel the jury's discretion or narrow the class of defendants sentenced to death;

B. Special Issue Number Two [mitigation] is unconstitutional because it (1) instructs the jury that ten or more jurors must agree to a sentence of life, and (2) fails to require that the jury's findings on this issue be made beyond a reasonable doubt;

C. Petitioner's death sentence is inconsistent with the evolving standards of decency that mark the progress of a maturing society; and

15. The cumulative prejudicial effect of the above errors at both the guilt phase and punishment phase denied Petitioner due process of law and the effective assistance of counsel.

## III. Standard of Review

The standard of review a federal court applies depends on the state court's treatment of the federal claims. When claims have not been adjudicated on their merits by the state court, the federal court should apply a *de novo* standard of review to the claims. *Hoffman v. Cain*, 752 F.3d 430, 437 (5th Cir. 2014). If the claims were adjudicated on the merits, however, federal courts should apply the deferential standard of review provided by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(d). Under this heightened standard, a writ of habeas corpus should be granted only if a state court's adjudication of a claim (1) resulted in a decision that is contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court, or (2) resulted in a decision that is based on an unreasonable determination of the facts in light of the record before the state court. *Harrington v. Richter*, 562 U.S. 86, 100-01 (2011). This standard is difficult to meet and "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Richter*, 562 U.S. at 102 (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

With regard to § 2254(d)(1), the Supreme Court has concluded the "contrary to" and "unreasonable application" clauses have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the "contrary to" clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown v. Payton*, 544 U.S. 133, 141 (2005); *(Terry) Williams v. Taylor*, 529 U.S. 362, 413 (2000). An "unreasonable application" occurs if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Brown*, 544 U.S. at 141; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

A federal habeas court's inquiry into unreasonableness should always be objective rather than subjective, with a focus on whether the state court's application of clearly established federal law was "objectively unreasonable" and not whether it was incorrect or erroneous. *McDaniel v. Brown*, 558 U.S. 120 (2010); *Wiggins*, 539 U.S. at 520-21. Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable, regardless of whether the federal habeas court would have reached a different conclusion. *Richter*, 562 U.S. at 102. Instead, a petitioner must show that the decision was objectively unreasonable, which is a "substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). So long as "fairminded jurists could disagree" on the correctness of the state court's decision, a state court's determination that a claim lacks merit precludes federal habeas relief. *Richter*, 562 U.S. at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In other words, to obtain federal habeas relief on a claim previously adjudicated on the merits in state court, Petitioner must show

that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103; *see also Bobby v. Dixon*, 565 U.S. 23, 24 (2011).

Through §§ 2254(d)(2) and (e)(1), the AEDPA also significantly restricts the scope of federal habeas review of state court fact findings. Similar to a state court's determination regarding clearly established federal law, a state court's factual determination is not unreasonable under § 2254(d)(2) "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010); *(Terry) Williams*, 529 U.S. at 410 ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Even if reasonable minds reviewing the record might disagree about the factual finding in question (or the implicit credibility determination underlying the factual finding), on habeas review, this does not suffice to supersede the trial court's factual determination. *Wood*, 558 U.S. at 301; *Rice v. Collins*, 546 U.S. 333, 341-42 (2006). In addition, § 2254(e)(1) supplements the deference afforded to state court factual determinations under § 2254(d)(2) by providing that a state court's determination of a particular factual issue "shall be presumed to be correct," and that a petitioner "shall have the burden of rebutting the presumption by clear and convincing evidence." *Wood*, 558 U.S. at 293; *Rice*, 546 U.S. at 338-39 ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'").[3]

Finally, the Fifth Circuit has held that a federal habeas court's review under AEDPA must focus exclusively on the ultimate decision reached by the state court and not evaluate the

[3] This standard, while "arguably more deferential" to state courts than the "unreasonable determination" standard of § 2254(d)(2), pertains only to a state court's determinations of particular factual issues. *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 341-42 (2003)). On the other hand, § 2254(d)(2) pertains to a state court's decision as a whole. *Id*.

quality, or lack thereof, of the state court's written opinion supporting its decision. *See Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010) (federal habeas review of a state court's adjudication involves review only of a state court's decision, not the written opinion explaining the decision); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding a federal court is authorized by § 2254(d) to review only a state court's decision and "not on whether the state court considered and discussed every angle of the evidence"); *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (holding that it is the state court's "ultimate decision" that is to be tested for unreasonableness, "not every jot of its reasoning"). Indeed, state courts are presumed to know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Even where the state court fails to cite to applicable Supreme Court precedent or is unaware of such precedent, the AEDPA deferential standard of review nevertheless applies "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]." *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (citing *Early v. Packer*, 537 U.S. 3, 8 (2002)).

## IV. Analysis

### A. Several of Petitioner's Claims are Unexhausted and Procedurally Barred.

As listed previously, Petitioner raises a total of fifteen allegations (not including subparts) in his amended federal petition. Respondent contends a majority of these allegations—claims 2, 3, 5, 6, 9, 10, 14(b)(2), 14(c), and 15, in particular—have not been presented to the Texas Court of Criminal Appeals for review either on direct appeal or during Petitioner's state habeas proceedings. Federal habeas relief is therefore precluded on these unexhausted allegations because they are considered procedurally defaulted.

1. The procedural default doctrine

The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition. *See* § 2254(b)(1)(A) (stating that habeas corpus relief may not be granted "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"). The exhaustion requirement is satisfied if the substance of the federal habeas claim was presented to the highest state court in a procedurally proper manner. *Baldwin v. Reese*, 541 U.S. 27, 29-32 (2004); *Moore v. Cain*, 298 F.3d 361, 364 (5th Cir. 2002). In Texas, the highest state court for criminal matters is the TCCA. *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). To properly exhaust a claim the petitioner must "present the state courts with the same claim he urges upon the federal courts." *Picard v. O'Connor*, 404 U.S. 270, 276 (1971).

Petitioner readily admits he did not raise the instant claims in the TCCA, and, as such, those claims are unexhausted. *Martinez v. Johnson*, 255 F.3d 229, 238 (5th Cir. 2001). However, if Petitioner were to return to state court to satisfy the exhaustion requirement and the state court would now find the claims procedurally barred, the unexhausted claims would be considered procedurally barred from federal habeas review. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992) (holding an unexhausted claim is procedurally defaulted for federal habeas purposes if the claim would now be procedurally barred by state court); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (same).

In this case, Petitioner is unable to return to state court to present any unexhausted claims because doing so would be barred by Texas' abuse of the writ doctrine codified in Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure.[4] *Fuller v. Johnson*, 158 F.3d

[4] Article 11.071, Section 5(a) provides that a state court may not consider the merits of, or grant relief on, claims presented in a successive state habeas application unless the legal or factual issues were unavailable at the

903, 906 (5th Cir. 1998). The Fifth Circuit has consistently held that Texas' abuse of the writ doctrine is an independent and adequate state procedural bar foreclosing federal habeas review of unexhausted claims. *See Williams v. Thaler*, 602 F.3d 291, 305-06 (5th Cir. 2010) (holding a petitioner's claims were procedurally defaulted because if the petitioner returned to state court, the court would not consider the merits under Article 11.071, § 5(a)); *Rocha v. Thaler*, 626 F.3d 815, 832 (5th Cir. 2010); *Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir. 2001). As a result, Petitioner's unexhausted claims are deemed procedurally defaulted in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004).

Federal habeas relief on the basis of a procedurally defaulted claim is barred unless the petitioner can demonstrate cause for the default and actual prejudice arising from the default or demonstrate the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Barrientes v. Johnson*, 221 F.3d 741, 758 (5th Cir. 2000). Petitioner makes no attempt to show a "fundamental miscarriage of justice" will result from the Court's dismissal of these claims. Instead, Petitioner repeatedly cites the Supreme Court cases of *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013) to establish that the alleged ineffectiveness of his post-conviction counsel constitutes cause to overcome the default. But as discussed below, Petitioner fails to make this showing.

2. *Martinez* and *Trevino* are inapplicable to the instant proceedings.

Prior to *Martinez*, an attorney's negligence in a postconviction proceeding could not serve as "cause." *Coleman*, 501 U.S. at 755. *Martinez* and *Trevino* carved out a "narrow"

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time the previous application was filed or, but for a violation of the Constitution, no rational juror could have found the applicant guilty or voted in favor of a death sentence. As discussed previously in this Court's denial of Petitioner's request for stay and abatement (ECF No. 41 at 4), Petitioner freely admitted the majority of his unexhausted claims "could and should have been raised in state post-conviction proceedings," and provided no viable argument demonstrating the remainder of his claims were previously unavailable. The unexhausted claims would therefore be barred if Petitioner attempted to present them in a subsequent writ application in state court. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a).

exception to the *Coleman* rule for claims asserting ineffective assistance of trial counsel (IATC). *Trevino*, 569 U.S. at 422. Now, a petitioner may meet the cause element by showing (1) "that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding" and (2) "that his [IATC claim] is substantial—i.e., has some merit." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013). Neither of these is satisfied in this case.

The majority of Petitioner's defaulted claims are not eligible for the equitable exception created by *Martinez*. Although Petitioner argues throughout his amended petition that, under *Martinez*, state habeas counsel's failure to investigate and plead each of the unexhausted claims should constitute cause to excuse any default, *Martinez* is not a catchall excuse for the failure to first raise a claim in state court. Rather, *Martinez* is a "narrow exception" that applies only to IATC claims. *Martinez*, 566 U.S. at 9-18; *see also Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (declining to extend *Martinez* to claims alleging ineffective assistance of appellate counsel). The *Coleman* rule—holding that attorney negligence in post-conviction proceedings does not establish cause—thus still applies to every claim except IATC claims. *Id*. at 15. In other words, *Martinez* has no effect on any of Petitioner's allegations other than his three unexhausted IATC claims (claims 2, 5, and 10).

With regard to these IATC claims, however, Petitioner fails to establish that his habeas counsel—Mr. Gross—was "ineffective in failing to present those claims in his first state habeas proceeding." *Garza*, 738 F.3d at 676. In the habeas context, allegations of ineffective assistance are reviewed under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Petitioner must demonstrate (1) counsel's performance was deficient, and (2) this deficiency prejudiced his defense. 466 U.S. at 687-88, 690. Petitioner contends Mr. Gross's inadequacies stem from his failure to raise each of the unexhausted claims

now presented in the amended federal habeas petition. But to establish deficient performance under *Strickland*, a petitioner must do more than identify issues or claims that habeas counsel did not raise and are now barred. *Id*. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way."); *Smith v. Murray*, 477 U.S. 527, 535 (1986) ("[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."); *see also Hittson v. GDCP Warden*, 759 F.3d 1210, 1265 (11th Cir. 2014) ("generalized allegations are insufficient in habeas cases" to meet the *Martinez* exception). Indeed, a state habeas attorney "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal" because "counsel cannot be deficient for failing to press a frivolous point." *Vasquez v. Stephens*, 597 F. App'x 775, 780 (5th Cir. 2015) (unpublished) (citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000)).

Furthermore, Petitioner has not shown that he was prejudiced by Mr. Gross's allegedly deficient performance—that is, "that there is a reasonable probability that he would have been granted state habeas relief had the claims been presented in the first state habeas application." *Barbee v. Davis*, 660 F. App'x 293, 314 (5th Cir. 2016) (unpublished); *Martinez v. Davis*, 653 F. App'x 308, 318 (5th Cir. 2016) (unpublished). The record in this case demonstrates that counsel raised five multifaceted and well-briefed allegations in his state habeas petition that were supported by affidavits from family, friends, and a psychologist he hired to evaluate Petitioner. Supp SHCR at 1-297, 406-419. With the heavy deference given to Mr. Gross's strategic choices under *Strickland*, Petitioner has not shown a reasonable probability that the state habeas court would have granted relief had counsel advanced his unexhausted claims, much less that the new claims had a better chance of success than the claims raised by state habeas counsel during

Petitioner's state habeas proceedings. Accordingly, Petitioner has not shown that state habeas counsel's representation was either deficient or prejudicial enough to provide cause to overcome the procedural bar of his unexhausted claims.

Finally, regardless of whether Petitioner establishes a valid claim of ineffective state habeas counsel under *Martinez*, he still is not entitled to excuse the procedural bar because the defaulted claims are also plainly meritless. Again, to overcome a default under *Martinez*, a petitioner must also demonstrate that the underlying IATC claim "is a substantial one." *Martinez*, 566 U.S. at 14 (citing *Miller-El*, 537 U.S. at 322). "For a claim to be 'substantial,' a petitioner 'must demonstrate that the claim has some merit.'" *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014) (quoting *Martinez*, 566 U.S. at 14). "Conversely, an 'insubstantial' ineffective assistance claim is one that 'does not have any merit' or that is 'wholly without factual support.'" *Reed*, 739 F.3d at 774 (quoting *Martinez*, 566 U.S. at 15-16).

As discussed in greater depth in Section IV(E) below, Petitioner fails to meet this criteria as well. Consequently, Petitioner fails to establish cause under *Martinez* that would excuse his unexhausted IATC claims from being procedurally defaulted. Petitioner is thus barred from receiving federal habeas relief on these allegations.

**B. *Brady* and *Napue* (Claim 3)**

Petitioner contends the State suppressed evidence that TYC, where Petitioner was incarcerated for approximately three years as a juvenile, was dysfunctional and under investigation for widespread allegations of child sexual abuse. ECF No. 22 at 71-78. Petitioner also maintains the State presented false evidence at his trial that TYC was a supportive and rehabilitative institution and that Petitioner failed to take advantage of these rehabilitative opportunities. *Id.* at 78-81. Neither of these allegations was raised during Petitioner's direct

appeal or state habeas proceedings. Thus, as discussed in the previous section, both claims are procedurally barred from federal habeas relief.

To overcome this procedural bar, Petitioner invokes *Banks v. Dretke*, 540 U.S. 668 (2004) to establish cause for the default. Again, a federal court "may consider the merits of a procedurally defaulted claim if the petitioner shows 'cause for the default and prejudice from a violation of federal law.'" *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (quoting *Martinez*, 566 U.S. at 10). Under *Banks*, a petitioner can show "cause" for the default of a *Brady* allegation if "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence." 540 U.S. at 691. To show prejudice, a petitioner must demonstrate that "the suppressed evidence is 'material' for *Brady* purposes." *See Rocha v. Thaler*, 619 F.3d 387, 394 (5th Cir. 2010). In other words, Petitioner must establish a valid *Brady* claim in order to overcome his procedural default and prevail on the merits. As discussed below, Petitioner fails to make this showing.[5]

1. The *Brady* Allegation

In *Brady v. Maryland*, the Supreme Court announced that due process requires the State to disclose material, exculpatory evidence to the defense. 373 U.S. 83, 87 (1963). In order to establish a *Brady* violation, Petitioner must demonstrate (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to either guilt or punishment. *Banks*, 540 U.S. at 691; *Graves v. Cockrell*, 351 F.3d 143, 153-54 (5th Cir. 2003). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 684 (1985).

[5] Petitioner fails to show that a finding of "cause and prejudice" under *Banks* would excuse the default of his false evidence claim under *Napue*. As those are separate legal issues, Petitioner's *Napue* allegation is procedurally defaulted regardless of the outcome of his *Brady* allegation.

Petitioner contends the State failed to disclose evidence that TYC was dysfunctional, riddled with administrative and accountability issues, and regularly abused the children in its care. Petitioner believes the State misled the jury by painting TYC as a rehabilitation facility when in fact "TYC was a place of chaos, disorder, and violence, which offered little in the way of rehabilitative possibilities to the juveniles it was supposed to serve." ECF No. 22 at 62, 76. But Petitioner also asserts that evidence of TYC's alleged dysfunction was public information that "had been well known as far back as 2003." *Id*. at 62, 64. He even supports this assertion with a declaration from his trial attorney and a report from an expert on juvenile justice in Texas. ECF No. 23-1 at 32 (Declaration from attorney Mario Trevino stating that the problems at TYC "had been publically known" prior to Petitioner's trial); ECF No. 23-2 at 67 (Report of Dr. William Bush acknowledging "the problems and failures of TYC were known to the public in broad strokes" at the time of Petitioner's trial). If such evidence was indeed widely known as Petitioner asserts, it was also available to the defense and thus not suppressed within the meaning of *Brady*. *See Woodford v. Cain*, 609 F.3d 774, 803 (5th Cir. 2010) (stating "there can be no viable *Brady* claim when allegedly suppressed evidence was available to the defendant through his own efforts"); *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997) (same).

Petitioner also contends the prosecution was aware of the massive child sexual abuse scandal at TYC and the subsequent investigation by the Texas Rangers but failed to disclose this potential *Brady* material to the defense. According to Petitioner, Bexar County prosecutors had knowledge of the scandal because the Texas Rangers produced a report on the scandal that was apparently seen by the Texas Attorney General's Office as well as by certain individuals at TYC and in the Ward County District Attorney's Office. ECF No. 40 at 31-33. But again, Petitioner concedes that the scandal and subsequent investigation became public news shortly after the

investigation began in February 2005, a year before Petitioner's trial. Accordingly, evidence of the sexual abuse scandal was available to the defense through the use of reasonable diligence, thus negating the *Brady* allegation. *See Castillo v. Johnson*, 141 F.3d 218, 223 (5th Cir. 1998) ("Under *Brady*, the prosecution has no obligation to produce evidence or information already known to the defendant, or that could be obtained through the defendant's exercise of diligence."); *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir. 1997) (same).

Alternatively, if the sexual abuse scandal was not public knowledge, Petitioner cannot establish a valid *Brady* claim because there is no evidence that Bexar County prosecutors were aware of the scandal and subsequent investigation. Petitioner correctly notes that knowledge of potential *Brady* material is imputed to prosecutors if a member of the prosecution team has knowledge of the *Brady* material. *Avila v. Quarterman*, 560 F.3d 299, 307 (5th Cir. 2009) (citations omitted). Contrary to his assertion, however, a prosecutor's office is not automatically imputed with knowledge of an investigation by state law enforcement officials simply by virtue of being a governmental agency. Instead, that determination is made on a "case-by-case analysis of the extent of interaction and cooperation between the two governments." *Id*. In this case, no evidence has been presented indicating that the Bexar County District Attorney's Office had any interaction or cooperated in any way with the investigation by the Texas Rangers. Nor has Petitioner presented evidence establishing that Bexar County had knowledge of the subsequent report created by the Texas Rangers that was distributed to other governmental agencies.[6] Because Petitioner provides no evidence that the prosecution in his case suppressed evidence within the meaning of *Brady*, his claim fails. *See Murphy v. Johnson*, 205 F.3d 809, 814 (5th

[6] Although the prosecution did present the testimony of Juan DeLeon (15 RR 46-54), a Parole Officer with TYC who supervised Petitioner's parole in 1996, Respondent correctly points out that DeLeon's employment with TYC does not establish that he had any knowledge of the Texas Rangers' investigation or subsequent report. Even if he did have some knowledge, it would not be imputed to the prosecution. *See Hill v. Johnson*, 210 F.3d 481, 488-89 (5th Cir. 2000) (suggesting that merely testifying as an expert witness for the State does not necessarily transform an expert witness into an "arm of the state").

Cir. 2000) (finding petitioner is not entitled to habeas relief based on conclusory and speculative allegations of a *Brady* violation).

Regardless, even assuming Petitioner can establish the above evidence was suppressed, the Court concludes it was not material. Again, suppressed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 685. However, "[i]f the evidence provides only incremental impeachment value, it does not rise to the level of *Brady* materiality." *Miller v. Dretke*, 431 F.3d 241, 251 (5th Cir. 2005). "The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." *Rocha*, 619 F.3d at 396 (quoting *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004)).

Petitioner contends the evidence of TYC's scandal would have had substantial value by "conveying to the jury the troubled, traumatic upbringing [he] had endured, including the time he spent as a ward of the State of Texas." ECF No. 40 at 34. Yet, Petitioner does not allege to have witnessed any such abuse during his time at TYC or contend that he was the victim of such abuse. Thus, evidence of a sexual abuse scandal at TYC in and of itself would seem to have only incremental value, at best, and does not rise to the level of *Brady* materiality. The value of such evidence is further diminished when considering Petitioner took the stand and testified before the jury that he did not blame the circumstances of his childhood or the way he was raised for his actions. 18 RR 59-117. Petitioner agreed that TYC offered him numerous opportunities to turn his life around but he failed to take advantage of them, admitted to committing numerous violent felonies both known and unknown to the prosecution, and asked the jury to give him the death penalty because he knows he is a future danger and that no mitigating evidence warranted a life sentence. *Id.*

In addition, the jury heard evidence concerning the cold nature of Andrade's murder, including Petitioner's own confession to the crime and the effect it has had on Andrade's family and friends. *See* Section I(B), *supra*. The jury also heard from numerous victims and investigators about Petitioner's ever-escalating pattern of violence that culminated in Andrade's murder in addition to hearing about Petitioner's inability to reform his conduct while incarcerated as both a juvenile and adult. Thus, given the overwhelming nature of the evidence presented by the State at punishment, Petitioner fails to establish the result would have been different had the State disclosed the TYC scandal and investigation prior to trial. *Bagley*, 473 U.S. at 685. Relief is therefore denied.

2. The *Napue* allegation

In a related allegation, Petitioner contends the State presented false evidence that he was given multiple chances to turn his life around through counseling and drug treatment at TYC but failed to take advantage of these opportunities. In *Napue v. Illinois*, the Supreme Court held that a criminal defendant is denied due process when the State knowingly uses perjured testimony or allows false testimony to go uncorrected at trial. 360 U.S. 264 (1959); *see also Giglio v. United States*, 405 U.S. 150 (1972). A petitioner seeking to obtain relief on such a claim must show that (1) the testimony is false, (2) the State knew that the testimony was false, and (3) the testimony was material. *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001); *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir. 1998).

Citing the testimony of Tony Martinez, one of Petitioner's juvenile probation officers, Petitioner argues the jury was misled about the rehabilitative opportunities he was offered while incarcerated at TYC. According to Petitioner, the testimony omitted certain facts known by the State—namely, that TYC "was a jail for children focused on punishment rather than

rehabilitation" which was plagued by rampant physical and sexual abuse. ECF No. 22 at 76. But despite asserting the State gave the wrong impression, one that could have been corrected with evidence of TYC's dysfunction and abuse scandals, Petitioner has not shown that any witness's testimony was actually false. Martinez testified generally that the goal of probation for juveniles was rehabilitation, but if they are incarcerated or their probation is revoked, they are sent to TYC, a juvenile detention facility. 15 RR 17-22. He then testified about Petitioner's placement in several residential treatment facilities, and that each time Petitioner was expelled within a few weeks for behavioral issues. *Id*. at 22-33. This evidence is neither misleading nor false and was supported by Petitioner's own testimony and that of his mitigation expert, Margaret Drake. 18 RR 73-74; 19 RR 29-30. Moreover, for the reasons previously discussed, the testimony was largely immaterial given the overwhelming nature of the evidence presented by the State at punishment. Relief is therefore denied on Petitioner's *Napue* claim.

**C. The Guilty Plea (Claim 6)**

Petitioner next contends his guilty plea was not knowing, voluntary, and intelligent because it was the result of mental illness and brain damage. Specifically, Petitioner states his mental health issues—Post-traumatic Stress Disorder (PTSD), depression, and suicidality—and the organic brain damage he developed as a juvenile impeded his ability to make a voluntary and rational decision. Petitioner did not raise this claim during his state court proceedings and is therefore procedurally barred from federal habeas corpus relief. *See* Section IV(A), *supra*. Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice in order to overcome this procedural bar. Regardless, even when reviewed under a *de novo* standard of review, Petitioner's claim lacks merit.

A guilty plea is valid only if entered voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). To be voluntary, a plea must not be the product of "actual or threatened physical harm, or . . . mental coercion overbearing the will of the defendant." *Austin v. Davis*, 876 F.3d 757, 783 (5th Cir. 2017) (citing *Matthew v. Johnson*, 201 F.3d 353, 365 (5th Cir. 2000)). To be knowing and intelligent, a defendant must have "real notice of the true nature of the charge against him." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (internal quotation marks omitted); *see also Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996) (finding that knowing the consequences of a guilty plea means only that the defendant knows "the maximum prison term and fine for the offense charged"). When determining whether a plea is voluntary, knowing, and intelligent, a court should consider all relevant circumstances, including whether the defendant: (1) had notice of the charges against him; (2) understood the constitutional protections he was waiving; and (3) had access to competent counsel. *Austin*, 876 F.3d at 783; *Montoya v. Johnson*, 226 F.3d 399, 404 (5th Cir. 2000).

Petitioner does not allege that his guilty plea was the result of any force, threat, or coercion. Instead, he contends his mental health issues and organic brain damage hindered his ability to make a voluntary and rational decision. Other than the unexhausted reports from experts who evaluated Petitioner ten years after his trial, however, Petitioner provides little persuasive evidence he suffers from either PTSD or brain damage. ECF No. 23-2 (reports of Dr. Pablo Stewart and Dr. Barry Crown). And the assertion that he suffered from depression and suicidality at the time of his trial appears to derive mostly from the fact that Petitioner pled guilty and sought the death penalty during his testimony, ECF No. 22 at 96, an idea that was directly rebutted by Petitioner's own expert on direct examination. *See* 19 RR 42 (stating Petitioner

sought the death penalty because he did not want to be in prison the rest of his life, not because "he's suffering from a major depression or anything, or he's suicidal").

Even assuming Petitioner suffered from brain damage and mental illness, those facts alone would not render him incompetent to plead guilty. *See Austin*, 876 F.3d at 780 ("A history of suicidality and depression . . . does not render a defendant incompetent to plead guilty.") (citations omitted); *United States v. Mitchell*, 709 F.3d 436, 440 (5th Cir. 2013) (finding "the presence or absence of mental illness or brain disorder is not dispositive" as to competency). Nor would it render his guilty plea invalid.

The record in this case indicates Petitioner's plea was a voluntary and intelligent choice. Before accepting his guilty plea, the trial court admonished Petitioner regarding the following consequences of his plea: (1) only two punishments were available—a life or death sentence; (2) all non-jurisdictional defects in his proceeding would be waived; and (3) the jury would be instructed to find him guilty and would then decide which punishment would be assessed. 13 RR 10-13. Petitioner responded "I understand" to each of the admonishments given by the trial court and indicated that his plea was voluntary and not the result of any threats, coercion, or promises. *Id*. The trial court also asked defense counsel whether, in his opinion, Petitioner had "a rational and factual understanding of the proceedings," if he was able "to assist in the preparation of any possible defenses," and if he was "mentally competent" to waive his rights and enter a guilty plea. *Id*. at 11-12. Counsel responded unequivocally "yes" to each of these questions. *Id*.

Petitioner clearly demonstrated an understanding of the charges against him and the possible consequences, as well as an ability to make strategic choices and to communicate clearly with counsel and the trial court. Petitioner's formal declarations in open court during his

plea proceedings carry a strong presumption of verity and constitute a formidable barrier to any subsequent collateral attack. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *United States v. Kayode*, 777 F.3d 719, 729 (5th Cir. 2014). "The subsequent presentation of conclusory allegations which are unsupported by specifics is subject to summary dismissal." *Blackledge*, 431 U.S. at 74. Petitioner has not provided sufficient evidence or argument to overcome this strong presumption, much less establish that his guilty plea was an involuntary and irrational decision. The Court would therefore deny relief *de novo* even if it were not barred by the procedural default doctrine.

**D. Competency (Claim 4)**

Petitioner next asserts he was deprived of due process by the trial court's failure to conduct an adequate inquiry into his competency as required by *Pate v. Robinson*, 383 U.S. 375 (1966). Under *Pate*, a trial court must hold a competency hearing when there is evidence before the court that objectively creates a bona fide question as to whether the defendant is competent to stand trial. 383 U.S. at 385. Petitioner contends that, despite ample evidence that raised questions about his competency, the trial court failed to order a mental health evaluation or competency hearing in violation of his due process rights. This allegation was rejected by the TCCA during Petitioner's direct appeal proceedings. *Luna*, 268 S.W.3d at 598-600. Relief is now denied in federal court because the state court's adjudication was neither contrary to nor an unreasonable application of *Pate*.

1. Background

The trial court inquired into Petitioner's competency on three different occasions during Petitioner's trial. The facts surrounding these inquiries were adequately summarized by the TCCA on direct appeal:

The trial court inquired about [Petitioner]'s competency several times during the proceedings. When [Petitioner] initially pleaded guilty to the charges in the indictment, the trial court admonished him of the consequences of his plea. [Petitioner] stated that he understood the admonishments, that his plea was not the result of threats or promises, and that he was satisfied with the assistance of defense counsel. The trial court asked defense counsel if [Petitioner] had "a rational and factual understanding of the proceedings," if he was "able to assist in the preparation of any possible defenses," and if he was "mentally competent" to waive his rights and enter a guilty plea. Defense counsel replied to all of these questions in the affirmative.

[Petitioner] later testified at trial, against the advice of defense counsel. Outside the presence of the jury, defense counsel questioned [Petitioner] about his decision to testify and his awareness of the consequences of doing so. [Petitioner] repeatedly indicated an understanding of the consequences of his decision to testify. The trial court asked defense counsel if he believed that [Petitioner] had "a rational and factual understanding of the proceedings" and was "mentally competent" to waive his Fifth Amendment rights and to testify in front of the jury. Defense counsel replied in the affirmative. The trial court also questioned [Petitioner], who said that he understood his Fifth Amendment right not to testify and the consequences of waiving that right. He also acknowledged that no one threatened him or coerced him to testify.

The trial court again inquired about [Petitioner]'s competency prior to closing arguments, when [Petitioner] consented to the seating of an alternate juror. Defense counsel stated that he was not in favor of seating the alternate juror because she was, in his opinion, "extremely pro-death sentence." The trial court then questioned defense counsel and [Petitioner] as follows:

> THE COURT: [Defense counsel], are you confident that your client—I've asked this before, but as to this issue—has a rational and factual understanding of the issues we're dealing with this morning?
>
> [DEFENSE COUNSEL]: He does. There's no doubt about that. I think Doctor Skop has testified, also, as to his mental condition.
>
> THE COURT: And in your opinion is he mentally competent at this time to be able to make that type of a decision?
>
> [DEFENSE COUNSEL]: Yes, he is.
>
> * * *
>
> THE COURT: Right. [Petitioner], do you understand everything we've done up here?

> [PETITIONER]: I understand.
>
> THE COURT: Do you have any questions about anything we've gone over?
>
> [PETITIONER]: No.
>
> THE COURT: Were you able to effectively communicate with your attorney this morning regarding not only the issue of the lawyer—or the juror's being ill this morning, but the issues related to the alternate and her feelings on the death penalty?
>
> [PETITIONER]: I did.
>
> THE COURT: Do you have any questions?
>
> [PETITIONER]: No.

*Luna*, 268 S.W.3d at 599-600.

2. Analysis

Petitioner contends that the above inquiries were insufficient to reasonably assess his competency because the trial court made no attempt to determine the motivation behind his decision to plead guilty or the status of his mental health. According to Petitioner, there was ample evidence of his incompetency available to the trial court, including his "surprise" guilty plea, his failure to follow counsel's advice, the contents of his testimony, and his history of depression, suicidality, possible mental illness, substance abuse, and limited functioning. To obtain relief on a *Pate* procedural due process allegation, a petitioner does not have to establish he was incompetent[7] to stand trial; rather, he need only establish that the trial judge should have ordered a hearing to determine his competency. *Roberts v. Dretke*, 381 F.3d 491, 497 (5th Cir. 2004). The inquiry is whether the trial judge received information which, objectively

[7] The Supreme Court has explained that the two-part test for competence is (1) whether a 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." *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (citing *Dusky v. United States*, 362 U.S. 402 (1960)).

considered, "should reasonably have raised a doubt about the defendant's competency and alerted [the court] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Id*. (quoting *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980)).

Although the Supreme Court has not articulated a general standard for the nature or quantum of evidence necessary to trigger a competency hearing, it has focused on three factors that should be considered: (1) the existence of a history of irrational behavior; (2) prior medical opinions; and (3) the defendant's bearing and demeanor at the time of trial. *United States v. Flores-Martinez*, 677 F.3d 699, 706–07 (5th Cir. 2012); *Williams*, 819 F.2d at 607. Petitioner carries the burden of showing, by clear and convincing evidence, that a *Pate* violation occurred. *Wheat v. Thigpen*, 793 F.2d 621, 629 (5th Cir. 1986). Petitioner fails to meet this burden.

a. Irrational Behavior

Petitioner asserts his decision to "unexpectedly" plead guilty constitutes evidence of his incompetency. Petitioner argues the unexpected nature of the plea indicates an irrational and impulsive decision that was contrary to his best interests. The record does not support this assertion. To the contrary, Petitioner's own testimony indicates the decision to plead guilty was not a "spur of the moment thing" and was made "quite a while back." 18 RR 74. Petitioner explained that he had communicated this decision to his family prior to the beginning of trial. *Id*. Trial counsel was aware of the decision for at least two or three days prior to trial and met with Petitioner several times to try to persuade him otherwise. 1 SHCR at 498-99.

Petitioner contends that his failure to follow counsel's advice should also have raised a doubt as to his competency. But the fact that Petitioner chose not to follow counsel's advice or disagreed with his defense team does not necessarily indicate an inability to understand the

proceedings or consult with his attorneys. *See United States v. Simpson*, 645 F.3d 300, 306 (5th Cir. 2011) (finding a defendant is not incompetent "merely because he refuses to cooperate [with counsel]"). Moreover, the fact that counsel disagreed with this decision or that the Petitioner's decisions were "motivated by [his] desire to obtain a death sentence" is largely irrelevant. This Court's focus is not on Petitioner's legal acumen, but whether there was sufficient information before the trial court that, objectively considered, should have raised a doubt about his competency. *Roberts*, 381 F.3d at 497. The Fifth Circuit has expressly "decline[d] to adopt a per se rule that, as a matter of law, a trial court must doubt a capital punishment defendant's competency, or conclude that such defendant does not understand the proceedings against him or appreciate their significance . . . simply because it is obvious to the court that the defendant is causing his trial to be conducted in a manner most likely to result in a conviction and the imposition of the death penalty." *Id*. at 498. Thus, the fact that Petitioner, contrary to counsel's advice, chose to plead guilty and request a death sentence is not evidence that he may be incompetent to stand trial or that the trial court should have held a competency hearing.

b. Prior Medical Opinion

Petitioner next argues the trial court should have been aware of "red flags" that called his competency into question, including his history of possible mental illness, depression, suicidal ideation, substance abuse, and limited intellectual functioning. Yet, the only medical opinion before the trial court was the testimony of Dr. Skop, who testified that Petitioner's I.Q. was 89 and that "it doesn't appear that [Petitioner] is suffering from a major depression or anything, or suicidal." Petitioner fails to demonstrate that he suffered from any mental health issue that would prevent him from understanding the proceedings, much less that such evidence was before the trial court and should have triggered a more substantive inquiry into his mental status.

Even assuming Petitioner suffered from depression and mental health issues at the time, such issues do not necessarily raise an objective doubt as to his competency because "the presence or absence of mental illness or brain disorder is not dispositive" as to competency. *United States v. Mitchell*, 709 F.3d 436, 440 (5th Cir. 2013) (citing *Mata v. Johnson*, 210 F.3d 324, 329 n.2 (5th Cir. 2000)); *see also Walton v. Angelone*, 321 F.3d 442, 460 (4th Cir. 2003) ("Not every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.") (citation omitted). Likewise, Petitioner's substance abuse issues would not require a hearing because evidence of drug addiction does not by itself require a finding of incompetency. *Holmes v. King*, 709 F.2d 965, 968 (5th Cir. 1983).

c. Demeanor at Trial

Finally, Petitioner cites his "bizarre and sometimes rambling" testimony at trial as evidence of his potential incompetency, arguing that the damaging testimony evinced a desire to ensure his own death. Although Petitioner clearly stated his desire was for the jury to sentence him to death, his testimony articulating the reasons for this request was anything but irrational. Petitioner stated that he had found religion in prison and a sentence of death would help him focus on God and prevent him from hurting others. He further explained that his decision to plead guilty was the result of his desire to "turn [his] life over to God" and to give justice to the family of his victim. He also did not want to spend the rest of his life in prison because it would just make him a worse person, whereas a death sentence would enable him to focus his attention "on getting strengthened spiritually" without getting sidetracked. Thus, far from being impulsive or irrational, Petitioner's testimony demonstrated coherent and well-reasoned explanations for choosing to plead guilty, testify on his own behalf, and seek the death penalty as punishment.

Nothing about Petitioner's testimony raised a doubt about his competency or ability to understand the proceedings. *Roberts*, 381 F.3d at 497.

Perhaps more significantly, neither of Petitioner's counsel (Michael Granados and Mario Trevino) raised the issue of competency prior to trial or expressed concern about Petitioner's ability to communicate or understand the proceedings against him. To the contrary, on several occasions counsel expressed the opinion that Petitioner was mentally competent to waive his rights and enter a plea. 13 RR 11; 18 RR 54; 20 RR 7. As trial counsel is often the best source of information about a defendant's competency, this failure to raise any sort of issue concerning Petitioner's competency is persuasive evidence in and of itself that no violation occurred. *Medina v. California*, 505 U.S. 437, 450 (1992); *Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir. 1979). Thus, Petitioner's testimony did not indicate a lack of rationality, understanding, or ability to communicate that should have alerted the trial court to potential competency issues.

In sum, this Court's review of each of the three factors to be considered under *Pate* indicates that no bona fide question as to Petitioner's competency existed that would warrant a competency hearing. Petitioner fails to establish that the state court's rejection of this claim was unreasonable. Relief is therefore denied.

**E. <u>Trial Counsel Claims</u> (Claims 1, 2, 5, 10, and 11).**

Petitioner raises several IATC claims asserting that his trial counsel were ineffective prior to or during Petitioner's sentencing proceeding. Two of these allegations—that counsel failed to investigate and present mitigating evidence (Claim 1) and that counsel failed to object to the report of Dr. J. O. Sherman (Claim 11)—were raised and rejected during Petitioner's state habeas proceedings. As discussed below, Petitioner fails to demonstrate the state court's

rejection of the claims was contrary to, or an unreasonable application of, Supreme Court precedent.[8]

The remainder of Petitioner's IATC claims allege: counsel failed to investigate Petitioner's experiences in TYC (Claim 2); counsel failed to investigate and present evidence of Petitioner's incompetency (Claim 5); and that counsel failed to properly impeach Raymond Valero (Claim 10). Petitioner has not exhausted these claims in state court and they are therefore procedurally barred from federal habeas review. *See* Section IV(A), *supra*. Although he references *Martinez* and *Trevino* to establish cause to excuse the procedural default, as discussed below, Petitioner fails to show the underlying IATC claims are substantial. Even when reviewed under a *de novo* standard, Petitioner's IATC claims lack merit. Relief is therefore denied on each claim.

1. The *Strickland* Standard of Review

IATC claims are reviewed under *Strickland*'s familiar two-prong test requiring a petitioner to demonstrate counsel's performance was deficient and this deficiency prejudiced his defense. 466 U.S. at 687-88, 690. According to the Supreme Court, "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

*Strickland*'s first prong "sets a high bar." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). "To demonstrate deficient performance, the defendant must show that, in light of the circumstances

[8] Petitioner contends this Court should not apply AEDPA's presumption of correctness to the state habeas court's factual findings because the state court's order was largely a verbatim adoption of the State's proposed findings and conclusions. ECF No. 22 at 16-17. In another context, the Supreme Court has criticized the "verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *see also Jefferson v. Upton*, 560 U.S. 284, 294-95 (2010) ("Although we have stated that a court's verbatim adoption of findings of fact prepared by prevailing parties should be treated as findings of the court, we have also criticized that practice.") (quotation omitted). The Fifth Circuit, however, has rejected the argument that habeas findings adopted verbatim from those submitted by the State are not entitled to deference. *See Basso v. Stephens*, 555 F. App'x 335, 342, 343 (5th Cir. 2014) (unpublished); *Green v. Thaler*, 699 F.3d 404, 416 n. 8 (5th Cir. 2012).

as they appeared at the time of the conduct, 'counsel's representation fell below an objective standard of reasonableness' as measured by 'prevailing professional norms.'" *Rhoades v. Davis*, 852 F.3d 422, 431-32 (5th Cir. 2017) (quoting *Strickland*, 466 U.S. at 687-88). This requires the Court to "affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). "A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003). As such, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Burt v. Titlow*, 571 U.S. 12, 17 (2013) (quoting *Strickland*, 466 U.S. at 690).

To satisfy *Strickland*'s second prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In conducting a *Strickland* prejudice analysis, a court must "consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). However, the question "is *not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently." *Richter*, 562 U.S. at 111-12 (emphasis added) (citing *Wong*, 558 U.S. at 27). Rather, the "likelihood of a different result must be substantial, not just conceivable." *Id*.

Finally, where the IATC claims raised by Petitioner were adjudicated on the merits by the state court, this Court must review these claims under the "doubly deferential" standards of both *Strickland* and Section 2254(d). *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citing

*Pinholster*, 563 U.S. at 190); *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009) (same). Such claims are considered mixed questions of law and fact and are analyzed under the "unreasonable application" standard of 28 U.S.C. § 2254(d)(1). *Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). In reviewing these claims, the "pivotal question" is not "whether defense counsel's performance fell below *Strickland*'s standards, but whether "the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S at 101. That is to say, the question to be asked in this case is not whether counsel's actions were reasonable, but whether "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id*. at 105.

2. The Mitigation Investigation (Claims 1, 2)

Petitioner's first two claims for relief allege that trial counsel were ineffective for failing to investigate and present mitigating evidence to the jury. In his first allegation, Petitioner contends counsel failed to discover and present evidence of his dysfunctional, abusive, and chaotic childhood, or evidence of the brain damage, PTSD, and depression that resulted from this upbringing. This allegation was raised and rejected during Petitioner's state habeas corpus proceedings,[9] and Petitioner fails to demonstrate that this adjudication was contrary to, or an unreasonable application of, clearly established federal law.

In Petitioner's second claim for relief, he raises a similar allegation—that counsel's mitigation investigation was deficient because they did not properly investigate his experiences in TYC to refute the notion that TYC was a supportive and rehabilitative institution. Had they

[9] Although Petitioner's allegation was raised during his state habeas proceedings, Petitioner attempts to bolster the claim in federal court with several new exhibits that were not presented to the state court. Because Petitioner "must overcome the limitation of § 2254(d)(1) on the record that was before that state court," this Court will not consider this evidence as it pertains to Petitioner's first claim. *Pinholster*. 563 U.S. at 181-82. Petitioner also attempts to bolster the claim with a new allegation concerning counsel's failure to discover evidence of "organic brain damage" that was not presented to the state court. But claims are not exhausted "if a petitioner presents new legal theories or entirely new factual claims in his petition to the federal court." *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001). Thus, for the reasons discussed in Section IV(A), *supra*, Petitioner's allegation is unexhausted and procedurally defaulted to the extent it raises this new assertion.

done so, Petitioner attests, counsel could have presented evidence that TYC was a place of "chaos, disorder, and violence, which offered little in the way of rehabilitative possibilities" to rebut the State's "false characterization" that Petitioner failed to take advantage of the opportunity for rehabilitation while at TYC. This allegation was not presented to the state court and is therefore procedurally barred from federal habeas relief. Aside from the procedural bar, the claim lacks merit for the reasons discussed below.

In preparing for the penalty phase of a death penalty trial, "counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary." *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). However, lawyers generally need not go "looking for a needle in a haystack," especially when they have "reason to doubt there is any needle there." *Maryland v. Kulbicki*, 136 S. Ct. 2, 4-5 (2015) (per curiam) (citing *Rompilla v. Beard*, 545 U.S. 374, 389 (2005)). Instead, counsel's decision not to investigate a particular matter "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 522. When the alleged omission is failure to investigate something in particular, a court must look at "the known evidence" and whether it "would lead a reasonable attorney to investigate further." *Id*. at 527.

In reviewing such claims, it is important to remember that counsel's performance need not be optimal to be reasonable. *Richter*, 562 U.S. at 104; *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam) (finding a defendant is entitled to "reasonable competence, not perfect advocacy"). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Richter*, 562 U.S. at 110. For

this reason, every effort must be made to eliminate the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Accordingly, there is a strong presumption that an alleged deficiency "falls within the wide range of reasonable professional assistance." *Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012) (quoting *Strickland*, 466 U.S. at 689)).

The record in this case supports the state court's conclusion that Petitioner's trial counsel conducted a very thorough mitigation investigation into Petitioner's background and childhood. I SHCR at 254. To assist in the investigation, counsel obtained two experts: Margaret Drake, a licensed clinical social worker and mitigation expert, and Dr. Brian Skop, a clinical and forensic psychiatrist. During her investigation, Ms. Drake interviewed Petitioner several times, met with his mother three or four times, and met with two of his aunts, his sister, and a former stepmother. Ms. Drake then testified about the results of her investigation, which included most of what Petitioner now faults counsel for failing to uncover. 19 RR 3-33. For instance, Ms. Drake testified about Petitioner's difficult upbringing and exposure to substance abuse, violence, instability, criminal behavior, neglect, rejection by his father, and family members with mental health issues. *See* Section I(B), *supra*. Although no *further* evidence was presented on these issues, any additional testimony regarding Petitioner's chaotic childhood would only have been cumulative of evidence already presented at trial. *Parr v. Quarterman*, 472 F.3d 245, 258 (5th Cir. 2006).

The record also demonstrates that counsel's investigation into TYC was reasonable. Both Ms. Drake and Dr. Skop testified that they had obtained and reviewed Petitioner's TYC records prior to evaluating Petitioner. 19 RR 7, 25, 36. Although Petitioner contends counsel should have investigated further to uncover evidence of TYC's dysfunction in order to refute testimony concerning the rehabilitative opportunities offered by TYC, Petitioner fails to cite

anything in the record that would have alerted counsel or their experts that such evidence existed. Indeed, if TYC was a "place of chaos, disorder, and violence," as he now asserts, Petitioner himself would have been the best source of this information. Under *Strickland*, the reasonableness of counsel's actions is substantially influenced by information supplied by the defendant, and the reasonableness of investigative decisions depends on this information. 466 U.S. at 691. Because Petitioner failed to disclose such information, trial counsel's investigation was not deficient. *See Ransom v. Johnson*, 126 F.3d 716, 723 (5th Cir. 1997) (holding that whether or not counsel's investigation is reasonable may critically depend on the information provided by the defendant).

Finally, this Court rejects Petitioner's implication that trial counsel was obligated to hire additional experts to find evidence of organic brain damage, PTSD, and depressive disorder. *Strickland* does not require counsel to "canvass[] the field to find a more favorable defense expert." *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000). To the contrary, counsel was entitled to rely on the opinions of their own mental health experts in deciding what defensive theories to pursue. *See, e.g., Turner v. Epps*, 412 F. App'x 696, 702 (5th Cir. 2011) (unpublished) ("Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment . . ."") (quoting *Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002), *overruled in part on other grounds*, *Tennard v. Dretke*, 542 U.S. 274 (2004)). Because there was no "objective indication" that Petitioner suffered from brain damage, counsel will not be labeled deficient for failing to pursue this avenue of mitigation. *See Earp v. Cullen*, 623 F.3d 1065, 1076-77 (9th Cir. 2010) (finding that an expert's "failure to diagnose a mental condition does not

constitute ineffective assistance of *counsel*, and [Petitioner] has no constitutional guarantee of effective assistance of experts") (emphasis in original).

Regardless, even assuming counsel was deficient in failing to investigate and present certain evidence, Petitioner fails to demonstrate that the results of the proceeding would have been different had counsel discovered such evidence. *Strickland*, 466 U.S. at 694 (finding that, in order 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"). When the missing evidence is weighed against the aggravating evidence presented at trial, it is clear Petitioner was not prejudiced from any alleged deficiencies in counsel's investigation. *Id*. at 698 (finding no prejudice due to State's overwhelming evidence on aggravating factors supporting the death penalty); *Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989) (finding no ineffective assistance "[g]iven the weakness of such testimony when juxtaposed with the overwhelming evidence of guilt, the horrifying nature of the crime, and the abundant impeachment material available to the State").

As detailed in Section I(B), Petitioner took the stand and testified before the jury that he did not blame the circumstances of his childhood or the way he was raised for his behavior. 18 RR 59-117. Petitioner agreed that TYC offered him numerous opportunities to turn his life around but that he failed to take advantage of them. He also asked the jury to give him the death penalty because he knew he is a future danger and that no mitigating evidence warranted a life sentence. Petitioner then described in detail how he murdered Andrade in cold blood and admitted to at least 25-30 other burglaries or aggravated robberies that he committed because he was addicted to the adrenaline rush. Prior to this testimony, the jury heard extensive evidence concerning Petitioner's criminal history and propensity for violence, as well as evidence

regarding Petitioner's inability to reform his conduct while incarcerated as both a juvenile and adult. Thus, given Petitioner's testimony and the overwhelming evidence establishing his future dangerousness and lack of mitigating circumstances, Petitioner fails to establish the result would have been different had counsel discovered the evidence in question. As Petitioner fails to establish either prong of the *Strickland* inquiry, relief is denied.

3. Competency (Claim 5)

In his fifth claim, Petitioner argues his trial counsel were ineffective for failing to investigate evidence of his incompetency or request an inquiry into his mental state. According to Petitioner, counsel were obligated to inquire into his competency for the same reasons the trial court was—Petitioner's mental health issues, depression, suicidal ideation, history of substance abuse, and his decision not to follow counsel's advice. Petitioner's allegation, which was not raised in the state court and is thus unexhausted and procedurally defaulted, also does not meet either prong of the *Strickland* analysis on *de novo* review.

The record in this case indicates that counsel had several conversations with their client and that they never doubted his competency to waive his rights and plead guilty. 13 RR 11; 18 RR 54; 20 RR 7. In fact, counsel informed the trial court of their belief that Petitioner had a rational understanding of the proceedings against him and had no problem communicating with them about the case. *Id*. As such, Petitioner fails to establish that his trial counsel's performance was deficient for the same reasons that the trial court did not violate *Pate* by failing to hold a competency hearing—Petitioner's behavior was hardly irrational, but rather reflected a sincere desire to repent, give justice to the families of those he has harmed, and strengthen his faith and relationship with God. Based on their conversations with Petitioner, there was nothing before trial counsel to lead them to question Petitioner's competency, nor was any concern raised from

Dr. Skop, the defense team's expert. It is thus clear counsel considered the issue and made the reasonable decision not to pursue the issue. A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness. *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003).

Moreover, this claim of ineffectiveness is undermined by the discussion from Section IV(C). That is, Petitioner's trial counsel could not have been deficient in failing to discover his alleged incompetence where there was nothing before either the trial court or counsel indicating that Petitioner was actually incompetent. "There can be no deficiency in failing to request a competency hearing where there is no evidence of incompetency." *Carter v. Johnson*, 131 F.3d 452, 464 (5th Cir. 1997) (quoting *McCoy v. Lynaugh*, 874 F.2d 954, 964 (5th Cir. 1989)). Petitioner thus fails to demonstrate the first prong of the *Strickland* test.

Regardless, Petitioner cannot establish he was prejudiced by counsel's failure to investigate because Petitioner was found competent by the trial court. 20 RR 19 ("It plainly appearing to the Court that [Petitioner] is mentally competent, and that he makes this plea freely and voluntarily, his plea is by the Court received."). This finding of fact is presumed correct under § 2254(e)(1) and Petitioner has failed to overcome that presumption by clear and convincing evidence. It necessarily follows that Petitioner was not prejudiced by trial counsel's failure to contest his competency, as he cannot establish the results of his proceeding would have been different had counsel inquired into his competency. *See Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014) (finding no prejudice where there is no evidence of incompetency). Petitioner cannot make the showing of prejudice necessary under *Strickland*'s second prong and is therefore denied relief on his IATC allegation.

4. Testimony of Raymond Valero (Claim 10)

Petitioner next alleges trial counsel was ineffective for failing to properly impeach prosecution witness Raymond Valero regarding his alleged membership in the Mexican Mafia street gang. Valero met Petitioner while they were incarcerated at the Bexar County Jail and testified that Petitioner confessed many crimes and criminal plans to him during their incarceration together, including the underlying murder. Petitioner also confessed to Valero his original plan to "shoot his way out" if police had arrested him and his plan to escape during trial by using the judge as a "human shield." Petitioner argues Valero embellished his testimony and asserts trial counsel was ineffective on cross-examination by only insinuating that Valero was lying about his gang membership instead of impeaching him on the issue.

Petitioner's allegation does not meet either prong of the *Strickland* analysis. A petitioner alleging that an investigation is deficient must show what the investigation would have uncovered and how the petitioner's defense would have benefited from this information. *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993); *Lockhart v. McCotter*, 782 F.2d 1275, 1282 (5th Cir. 1986). Petitioner argues counsel should have uncovered evidence of Valero's gang membership. He does not, however, establish that any part of Valero's testimony was embellished or made up, much less explain how affirmative evidence of Valero's gang membership would have assisted counsel in impeaching such testimony. The record shows that counsel thoroughly cross-examined Valero on his alleged gang membership, heroin addiction, and numerous felony convictions, as well as the fact that Valero received a reduced sentence in exchange for his testimony. It is unclear how evidence of Valero's gang membership would have impeached Valero's credibility any more than counsel's cross-examination.

Regardless, even assuming counsel was deficient in failing to discover evidence of Valero's gang membership, Petitioner fails to demonstrate that the results of the proceeding would have been different had counsel discovered such evidence. *Strickland*, 466 U.S. at 694. Petitioner claims he can demonstrate prejudice because the State's case for future dangerousness was predicated "in large part on the lies told by Valero." ECF No. 40 at 53. This is simply not true. As demonstrated in this Court's previous summary of the trial testimony (Section I(B)), the State's case for future dangerousness was predicated almost entirely on Petitioner's numerous violent felonies and inability to reform his conduct while incarcerated. Valero's testimony was a small part of the State's overwhelming evidence of Petitioner's future dangerousness which established Petitioner's extensive criminal history and an escalating pattern of violence. In addition, the jury heard testimony concerning the heinous nature of the capital murder for which Petitioner plead guilty, including from Petitioner himself, who agreed he was indeed a future danger to society. Thus, there is no merit to Petitioner's bald assertion that the results of the punishment phase would have been different had counsel impeached Valero's testimony more thoroughly with evidence of an alleged gang membership.

5. Dr. Sherman's Report (Claim 11)

In Petitioner's final IATC allegation, he asserts trial counsel were ineffective for failing to object to the admission and recitation of Dr. J. O. Sherman's 1994 psychological report of Petitioner. Dr. Sherman's report, admitted and read to the jury during the testimony of Petitioner's juvenile probation officer, Jose Martinez, included Dr. Sherman's impressions of Petitioner's mental and emotional health at the time. Petitioner contends this evidence is testimonial and should have been barred from trial under the Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

Petitioner raised this allegation on state habeas, and an evidentiary hearing was held on this (and other) issues. During the hearing trial counsel testified that he did not object to Petitioner's voluminous juvenile records being admitted, which included Dr. Sherman's report, because there was favorable evidence in them that showed Petitioner "truly tried to do the right thing." The state habeas court later rejected Petitioner's claim, finding trial counsel's decision not to object to the records and Dr. Sherman's report was a reasonable trial strategy. I SHCR at 253-54. Petitioner fails to overcome the presumption that counsel's decision was the product of "reasonable professional judgment." *Titlow*, 571 U.S. at 17.

Petitioner does not establish that counsel's decision to allow the records was "so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton*, 343 F.3d at 752-53. As the state court found, counsel's choice comported with their strategy to be completely open and honest about Petitioner's past transgressions. I SHCR at 253-54. On federal habeas review, this Court is mindful that "*Strickland* does not allow second guessing of trial strategy and must be applied with keen awareness that this is an after-the-fact inquiry." *Granados v. Quarterman*, 455 F.3d 529, 534 (5th Cir. 2006). In other words, simply because counsel's strategy was not successful does not mean counsel's performance was deficient. *Avila v. Quarterman*, 560 F.3d 299, 314 (5th Cir. 2009). Because there is a "reasonable argument that counsel satisfied *Strickland*'s deferential standard," Petitioner's allegation fails. *Richter*, 562 U.S at 105.

Even if Petitioner could establish that counsel's failure to object constituted deficient performance, he still fails to demonstrate that the results of the proceeding would have been different had an objection been successful. *Strickland*, 466 U.S. at 694. Contrary to Petitioner's assertion, Dr. Sherman's report was only a small part of the State's overwhelming evidence of Petitioner's future dangerousness. There is virtually no chance the results of Petitioner's

punishment phase would have been different had the report been effectively excluded. Accordingly, relief is denied.

**F. General Assembly and Voir Dire (Claims 7, 8)**

In Petitioner's seventh claim for relief he argues the trial court excused, off the record, nearly a quarter of the voir dire panel while Petitioner was absent from the courtroom, in violation of his constitutional right to be present during "critical proceedings." In his eighth claim, Petitioner challenges the exclusion of two prospective jurors for cause because they voiced general objections to the death penalty. Petitioner raised the majority of these allegations[10] in the state court during his state habeas proceedings which were considered and ultimately rejected by the TCCA. He fails to demonstrate that the state court's adjudication of these claims was either contrary to or involved an unreasonable application of clearly established federal law.

1. Both claims are *Gardner*-barred

In rejecting both of the above allegations the state habeas court found both claims procedurally barred and alternatively meritless. Citing *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004), the state court found Petitioner's claims to be procedurally defaulted because Petitioner could have raised the claims on direct appeal. I SHCR at 207, 211. The TCCA later adopted the state habeas court's findings and denied Petitioner's application. *Ex parte Luna*, 2015 WL 1870305. Based on this procedural history, both of Petitioner's claims are now procedurally barred.

[10] As he does in Claim 7 of his amended federal petition, Petitioner argued during his state habeas proceedings that his absence from the courtroom during a "critical proceeding" violated his due process and confrontation rights. *See* Supp. SHCR at 16-22. Petitioner did not, however, argue that his absence violated his right to a complete defense under *United States v. Cronic*, 466 U.S. 648 (1984), or that the trial court's failure to make a record of the proceeding violated his Eighth and Fourteenth Amendment rights as he does now. Again, claims are not exhausted "if a petitioner presents new legal theories or entirely new factual claims in his petition to the federal court." *Wilder*, 274 F.3d at 259. Thus, these allegations are unexhausted and procedurally defaulted for the reasons discussed in Section IV(A), *supra*.

Under the doctrine of procedural default, this Court is precluded from reviewing "claims that the state court denied based on an adequate and independent state procedural rule." *Davila*, 137 S. Ct. at 2064. The state habeas court's finding of procedural default constitutes such a denial. The state court determined Petitioner's allegations to be procedurally defaulted under *Nelson*, 137 S.W.3d at 667, a case which in turn relies on *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998). This rule from *Gardner*—which bars consideration of claims that could have been but were not raised on direct appeal—is "an adequate state ground capable of barring federal habeas review." *Aguilar v. Dretke*, 428 F.3d 526, 535 (5th Cir. 2005) (citing *Busby v. Dretke*, 359 F.3d 708, 719 (5th Cir. 2004)).

2. Petitioner's absence during general assembly (Claim 7)

The Supreme Court has held that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the proceeding." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The Court has also recognized that voir dire "is a critical stage of the criminal proceedings, during which the defendant has a constitutional right to be present." *Gomez v. United States*, 490 U.S. 858, 873 (1989). In this case, Petitioner contends his right to be present at a critical voir dire proceeding was violated when the trial court excused 33 of 140 members[11] of the venire panel for unknown reasons in a proceeding that was off the record and outside the presence of the defense. Petitioner's claim fails, however, because the trial court's ruling did not occur at a critical proceeding or during voir dire, but rather during the general assembly where prospective jurors are initially summoned.

[11] As the sole support for this allegation, Petitioner refers to defense counsel's notes regarding the jury panel which were apparently attached to his state habeas petition as Exhibit D. As it is the policy of the TCCA not to copy jury information into the record, however, this Court is without a copy of the referenced jury list. In the interests of justice and expediency, the Court will assume the list is as Petitioner states.

In *Jasper v. State*, the TCCA explained what happens when prospective jurors are first summoned:

> Generally, when prospective jurors are initially summoned, they are assembled in a general jury pool or general assembly. [citation omitted]. Members of the general assembly are qualified on their ability to serve and exemptions and excuses are heard and ruled on by the judge presiding over the general assembly. Prospective jurors who are not disqualified, exempt, or excused are divided into trial panels and sent to the individual courts trying the cases. At that point, attorney voir dire will result in the jury that will ultimately hear the case.

61 S.W.3d 413, 422-23 (Tex. Crim. App. 2001).

Contrary to Petitioner's assertion, the general assembly portion of jury selection is not part of Petitioner's trial under Texas law; therefore, he was not entitled to be present. *Id*. at 423 (citing *Chambers v. State*, 903 S.W.2d 21, 31 (Tex. Crim. App. 1995)). This is so because "prospective jurors who are summoned to a general assembly have not been assigned to any particular case [and][t]he judge presiding over the general assembly is assigned for that purpose only at that time and has no given case in mind." *Chambers*, 903 S.W.2d at 31. Although Petitioner asserts he was entitled to be present because "the entire general assembly was assigned to [his] case," ECF No. 40 at 44, nothing from the record supports this assertion. In fact, the record indicates the opposite. *See* 2 RR 4-15 (first day of voir dire where trial judge introduces the parties and relevant legal principles involved to the jury for the first time).

As noted by Respondent, Petitioner cites no Supreme Court precedent holding that a defendant has a constitutional right to be present during the general assembly. Nor has Petitioner shown that the complained-of proceeding was a part of voir dire during which he has a constitutional right to be present. *United States v. Thomas*, 724 F.3d 632, 642 (5th Cir. 2013) (finding the right to be present at a jury empanelment is protected by the Due Process Clause); *Chambers*, 903 S.W.2d at 31 (explaining that "voir dire examination" in Texas refers to the

examination of prospective jurors *after* they have been assigned to a particular court and case from the general assembly"). Consequently, Petitioner fails to demonstrate that the state court's rejection of this claim was unreasonable.

Furthermore, Petitioner has not shown that his presence during the summary dismissal of the potential jurors would have been helpful. The core concern of the right to courtroom presence is that a defendant's "absence might frustrate the fairness of the proceedings . . . ." *Faretta v. California*, 422 U.S. 806, 820 n.15 (1975). But due process does not require the defendant's presence when it would be "useless or only slightly beneficial." *Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1934). Petitioner has not established that he "could have done [anything] had [he] been at the [hearing] nor would [he] have gained anything by attending." *Stincer*, 482 U.S. at 747 (alterations in original). Petitioner's absence therefore did not violate his due process rights because his "presence would be useless, or the benefit but a shadow. . ." *Id*. at 745 (citing *Snyder*, 291 U.S. at 106-07).

Finally, in order to grant federal habeas relief, the trial error must have a substantial and injurious effect or influence in determining the jury's verdict. *Hopkins v. Cockrell*, 325 F.3d 579, 583 (2003) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). As a general rule, a trial court's erroneous venire rulings do not constitute reversible constitutional error "so long as the jury that sits is impartial." *Jones v. Dretke*, 375 F.3d 352, 355 (5th Cir. 2004) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 313 (2000)). Petitioner makes no argument that an unqualified or biased juror sat on his jury. As result, even if Petitioner could demonstrate that the trial court erred in dismissing prospective jurors outside of his presence at general assembly, relief would still be denied because the error was harmless. *Brecht*, 507 U.S. at 637-38.

3. Removal of Prospective Jurors (Claim 8)

Claim 8 pertains to the removal of prospective jurors Harold Franklin and Barbara Ann Torres during voir dire. According to Petitioner, the prospective jurors were excluded from the jury simply because they voiced general objections to the death penalty in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985). Under the *Witherspoon-Witt* rule, "a veniremember may not be excluded from sitting on a capital jury simply because she voices general objection to the death penalty or expresses conscientious or religious scruples against its infliction." *Ortiz v. Quarterman*, 504 F.3d 492, 500 (5th Cir. 2007) (citation omitted). Rather, a potential juror may be removed for cause if the individual's views "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424 (citing *Adams v. Texas*, 448 U.S. 38, 45 (1980)). A venire member must be willing not only to accept that the death penalty is, in certain circumstances, an acceptable punishment, but also to answer the statutory questions "without conscious distortion or bias." *Mann v. Scott*, 41 F.3d 968, 981 (5th Cir. 1994) (citing *Adams*, 448 U.S. at 50).

Excusing a juror for cause in violation of the *Witherspoon-Witt* standard is reversible error and not subject to harmless error review. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). This standard does not require that a juror's bias be proved with "unmistakable clarity," particularly because such determinations "cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 426. Whether a juror is excludable for bias under the *Witherspoon-Witt* standard is a question of fact subject to deferential review under AEDPA. 28 U.S.C. § 2254(e)(1); *Ortiz*, 504 F.3d at 501. For this reason, a reviewing court, "especially federal courts considering habeas petitions, owe deference

to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." *Uttecht v. Brown*, 551 U.S. 1, 22 (2007); *Witt*, 469 U.S. at 424-26.

Harold Franklin

Petitioner first contends that prospective juror Franklin was removed "because he initially might have expressed a general abstract objection against the death penalty." ECF No. 22 at 100. Despite Franklin repeatedly expressing doubts about whether he could honestly answer the special issues knowing it could result in a death sentence, Petitioner argues Franklin "could not have been clearer" in expressing that he could follow the law after carefully considering the particular facts of the case. *Id*. The record does not evince any clarity on Franklin's part concerning his ability to follow the law. *See* 3 RR 4-23. To the contrary, it reflects that Franklin's reservations toward the death penalty would substantially impair his ability to make an impartial decision.

In response to the only question before him—whether he would be able to honestly answer the special issues knowing that it could result in a death sentence—Franklin vacillated and repeatedly doubted his ability to impose the death penalty because of his personal moral beliefs. *Id*. at 12 (". . . but not knowing the circumstances, it would be very difficult for me to actually say that I could do that") ("I really don't think I could"), 13-14 (stating he could not participate in the process because it would do violence to his personal moral beliefs). After being partially rehabilitated by trial counsel and asserting he would be "as fair as I could be," Franklin again doubted his ability to impose a death sentence:

> A: Like I said, it's—it's a lot of variables involved. I don't think that right now I could, to answer your question. I could not right now at this point in time. No.
>
> * * *

Q: And you were there, and you have found somebody guilty of capital murder beyond a reasonable doubt. And then you have heard whatever other evidence might be presented. And you knew that the answers to the questions were such that the result would be death, would you be able to do it?

A: I'm sorry I'm so ambivalent, but I don't think I could.

THE COURT: What was your answer? I don't think I could?

A: I don't think I could.

*Id*. at 21-22.

Even if, as Petitioner asserts, Franklin indicated that he would follow the law, such an expressed willingness to follow the law does not necessarily overcome other indications of bias. *See Morgan v. Illinois*, 504 U.S. 719, 735 (1992) (explaining that a prospective juror may believe she can follow the law and yet will actually be so biased in one direction or another that her inclusion would infect a trial with fundamental unfairness). Here, Franklin's reluctant assurance that he might be able to consider imposing the death penalty depending on the circumstances did not overcome the reasonable contrary inference that he was in fact substantially impaired in his ability to answer the statutory questions "without conscious distortion or bias." *Mann*, 41 F.3d at 981. Moreover, the trial court was in the best position to observe Franklin's demeanor and tone of voice in order to make a credibility determination, and Petitioner fails to demonstrate why that determination should not be entitled to the presumption of correctness it is afforded. *Uttecht*, 551 U.S. at 9 (finding that deference to the trial court is appropriate because the trial court is in the best position to evaluate the demeanor of the jury venire, which is "of critical importance in assessing the attitude and qualifications of potential jurors").

Petitioner has not presented clear and convincing evidence to rebut the trial court's finding that this prospective juror could not fulfill his obligations as a juror in a capital case. *See Ortiz*, 504 F.3d at 501 (finding a state court's resolution of a *Witherspoon-Witt* claim is entitled

to a presumption of correctness rebuttable only by clear and convincing evidence). As a result, he fails to show that the state court's rejection of this claim was contrary to, or involved an unreasonable application of, the *Witherspoon-Witt* standard.

Barbara Ann Torres

Petitioner next contends that prospective juror Torres was removed because of her general objections to the death penalty based on her religious beliefs. On her jury questionnaire, Torres stated that she held religious beliefs that would prevent her from sitting in judgment of another human being. 3 RR 102. Torres reaffirmed this position during voir dire, stating that, as a Catholic, she still felt like she could not judge or decide whether someone lived or died. *Id*. at 102-05. During the state habeas proceedings, the TCCA adopted the trial court's findings that Torres was struck as a result of her religious belief that she could not sit in judgment of another person. *Ex parte Luna*, 2015 WL 1870305 at *1; I SHCR at 211-14.

This Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Fuller v. Johnson*, 114 F.3d 491, 500-01 (5th Cir. 1997) (holding that a trial court's finding of juror bias is entitled to a presumption of correctness). Again, factual determinations are presumed correct, and Petitioner has the burden of rebutting these determinations by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). He has not done so in this case. Although Petitioner contends Torres eventually indicated "an intent and willingness to apply Texas's special issues when given the opportunity," ECF No. 22 at 104, nothing in the record supports this assertion. Throughout the questioning, Torres repeatedly expressed her belief that she could not judge whether someone lived or died. 3 RR 102, 104-05. Her examination ended with the following exchange:

Q: So I'm going to ask you again. Could you be a part of this process that could result in his execution?

A: No.

* * *

Q: . . . Okay. Is that based on your own personal, moral, and religious beliefs?

A: Yes.

Q: Just like you wrote in your questionnaire?

A: Yes.

Q: And that's your final answer?

A: Yes.

*Id*. at 105.

The record clearly indicates that, regardless of the evidence, Torres's personal beliefs would prevent her from ever answering the special issues in a way that would result in a death sentence for Petitioner.[12] Thus, Torres was properly excluded in accordance with the *Witherspoon-Witt* standard. Petitioner has not met AEDPA's high standard with regard to the trial court's factual determination that Torres was biased, nor has he shown that it was unreasonable for the TCCA to uphold her dismissal for cause. *See United States v. Jackson*, 549 F.3d 963, 973 (5th Cir. 2008) (affirming dismissal of potential juror who indicated on her questionnaire that she did not feel she had the right to judge whether a person lives or dies but then wavered during questioning); *United States v. Bernard*, 299 F.3d 467, 474-75 (5th Cir. 2002) (same). Federal habeas relief is therefore denied.

[12] Similarly, the record does not support Petitioner's argument that Torres was only asked insufficient "general inquiries" and "follow the law" questions in violation of *Morgan v. Illinois*, 504 U.S. at 734-35. Unlike *Morgan*, both parties were allowed to question Torres extensively about her views on the death penalty to determine whether she would ever be able to impose a death sentence. Thus, this is not a case where Petitioner was denied inquiry "into whether the views of prospective jurors on the death penalty would disqualify them from sitting." *Id*. at 731.

**G. Petitioner's Shackling During Trial (Claim 9)**

In his ninth claim for relief, Petitioner asserts his rights under the Fifth and Fourteenth Amendments were violated because his shackles were brought to the jury's attention. According to Petitioner, his due process rights were violated twice in this case—once *prior* to his testimony when a bailiff informed the jury that Petitioner was restrained with leg locks under his clothes, and once *during* his testimony when the trial court subjected him to additional shackling around his ankles and left hand. Petitioner did not present this claim to the state courts either on direct appeal or during his state habeas proceedings. As a result, the claim is procedurally barred from federal habeas relief. *See* Section IV(A), *supra*. Even if the claim was reviewed under a *de novo* standard, however, relief would be denied.

"Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process," can interfere with a defendant's ability to communicate with counsel, and "affronts the dignity and decorum of judicial proceedings." *Deck v. Missouri*, 544 U.S. 622, 630-31 (2005). For these reasons, the Constitution forbids the use of "physical restraints visible to the jury" absent a determination by the trial court that the restraints "are justified by a state interest specific to a particular trial." *Id*. at 629. A trial court is justified in ordering physical restraint where there is "a danger of escape or injury to the jury, counsel, or other trial participants." *Bagwell v. Dretke*, 372 F.3d 748, 754 (5th Cir. 2004); *United States v. Joseph*, 333 F.3d 587, 591 (5th Cir. 2003).

Petitioner first contends that he had been restrained with leg locks under his clothes during his trial, but that the jury was unaware of this until a bailiff told them so (apparently to alleviate concern) sometime after Raymond Valero testified. Petitioner bases this assertion solely on the unexhausted declaration of Antonio Perez, a juror who stated that the bailiff's

disclosure occurred sometime after Valero's testimony but before Petitioner testified. There is no evidence in the record to corroborate Petitioner's assertion that he was restrained prior to his testimony. But even if he was, this restraint would avoid the Due Process concerns of *Deck* because, as Perez's declaration affirms, the restraints were not "visible to the jury."

Assuming Perez's declaration to be credible, it is more likely that the bailiff in question was referring to the restraints placed on Petitioner after Valero testified to Petitioner's plans to escape and *after* Petitioner disclosed his desire to testify on his own behalf. Just prior to Petitioner taking the stand, outside the presence of the jury, the trial court explained his decision to have Petitioner shackled as a result of his decision to testify:

> Let me just—let the record reflect, I think the record is abundantly clear of the additional security precautions we've had to take because of this.
>
> In light of the evidence that has been found in your jail cell and on your person, and other evidence that has been developed, and in light of the fact that you've entered a guilty plea, it has been my decision, along with those of my bailiffs, to shackle you at the ankles, and handcuff your left hand to the belt.
>
> * * *
>
> That way when [the jury] come[s] in they will not be aware of any of the restraints that have been placed on you. Although the law is abundantly clear that I'm entitled to do that, and the jury would be entitled to know that, we're not going to bring that to their attention.

18 RR 55-56. The record thus supports the fact that Petitioner was only restrained after his decision to testify—otherwise, the trial court's decision to take "*additional* security precautions" by shackling Petitioner would be redundant.

Moreover, the trial court's decision to shackle Petitioner was fully justified. *See Joseph*, 333 F.3d at 591 (finding physical restraint may be justified where there is "a danger of escape or injury to the jury, counsel, or other trial participants"). As Valero's testimony demonstrated, Petitioner clearly posed a danger of escape. That Petitioner had not previously misbehaved in

court does not eliminate the import of Petitioner's violent past or plans to use a handcuff key or use the judge as a "human shield" to escape. A trial court need not wait until an obviously dangerous defendant actually injures trial participants or tries to escape from the courtroom before restraining him. *See United States v. Fields*, 483 F.3d 313, 357 (5th Cir. 2007) (finding district court did not err in deciding that defendant should wear a stun belt under his clothes due to his violent history and past escape attempts).

Even if Petitioner were erroneously shackled, the error was harmless. On habeas review, a federal court can grant relief only when the use of restraints "had a substantial and injurious effect or influence in determining the jury's verdict." *Hatten v. Quarterman*, 570 F.3d 595, 604 (5th Cir. 2009) (citing *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007)). In this case, the trial court appropriately took steps to minimize any risk of prejudice by advising Petitioner that, if he felt uncomfortable, the judge would stop the proceedings and excuse the jury. 18 RR 56. The bailiffs also arranged to bring the jury in on a different side of Petitioner. *Id*. These steps helped to ensure that the jury would neither see the restraints nor surmise that Petitioner was being treated any differently.

Regardless, the overwhelming evidence presented by the State was sufficient to render harmless any error in the trial court's shackling of Petitioner. *Hatten*, 570 F.3d at 604. As discussed previously, Petitioner took the stand and asked the jury to give him the death penalty because he is a future danger and no mitigating evidence warranted a life sentence. *See* Section I(B), *supra*. Petitioner also admitted on cross-examination to having the handcuff key and stated he would have taken advantage of it to escape had the opportunity presented itself. 18 RR 72. The jury also heard overwhelming evidence concerning Petitioner's extensive criminal history and violence, in addition to hearing about Petitioner's inability to reform his conduct while

incarcerated as both a juvenile and adult. Thus, given the overwhelming nature of the evidence presented by the State at punishment, Petitioner fails to establish that his restraints had a "substantial and injurious effect or influence" on the jury's ultimate decision. *Fry*, 551 U.S. at 121-22. Relief is denied.

**H. Unitary Proceeding (Claim 12)**

Following Petitioner's plea of guilty, the trial court and the parties agreed to hold a unitary proceeding where each party would submit evidence concerning Petitioner's punishment, after which the jury would be instructed to find Petitioner guilty and consider only the punishment phase special issues. 13 RR 3-15. After evidence was presented by both parties, the trial court instructed the jury to find Petitioner guilty of capital murder. 20 RR 19. The jurors deliberated on guilt/innocence and returned a verdict finding Petitioner guilty of capital murder as charged in the indictment. *Id*. at 20. The trial court then read the punishment charge to the jury before the parties made their closing arguments. *Id*. at 21-27. Following closing arguments, the jury deliberated on the punishment issues before sentencing Petitioner to death based on their answers to the special issues. *Id*. at 53-54.

In his twelfth claim for relief, Petitioner contends the trial court conducted an unauthorized "ad hoc" proceeding by having the jury simultaneously consider evidence of his guilt/innocence and evidence concerning punishment presented in a single, unitary proceeding as opposed to having separate, bifurcated proceedings. According to Petitioner, the Constitution requires juries to consider a capital defendant's guilt/innocence separately from the sentencing determination "so that evidence relevant to the determination of one will not influence the determination of the other." This claim was raised and rejected during Petitioner's direct appeal proceedings. *Luna*, 268 S.W.3d at 597-98. Petitioner fails to demonstrate the state court's

rejection of the claim was contrary to, or an unreasonable application of, Supreme Court precedent.[13]

Petitioner's allegation fails for a simple reason—no Supreme Court precedent mandates that a defendant receive a bifurcated proceeding in a capital murder case following the entry of a guilty plea. Citing *Gregg v. Georgia*, Petitioner contends the jury in his case was left without the "adequate guidance" a bifurcated trial would have afforded them by focusing their attentions to the "constitutionally distinct duties of adjudicating guilt and then determining an appropriate individualized punishment." 428 U.S. 153, 189 (1976). But when a defendant pleads guilty in a capital case, there is no longer a danger of confusing these "distinct duties" because the need for a guilt/innocence phase is eliminated. *See Kercheval v. United States*, 274 U.S. 220, 223 (1927) (finding a guilty plea "is itself a conviction" which requires nothing more than a judgment and sentence). In other words, once a defendant enters a guilty plea in a capital case, the only evidence the jury will hear will be regarding the punishment phase of trial.

In declining to hold that bifurcated proceedings are constitutionally mandated, the TCCA explained:

> [T]he plea of guilty before a jury essentially becomes a trial on punishment since entry of a plea of guilty before a jury establishes a defendant's guilt except where evidence demonstrates his innocence. (Citations omitted). The introduction of evidence is not to determine guilt but is to enable the jury to intelligently exercise discretion in determining the appropriate punishment.

*Luna*, 268 S.W.3d at 598 (citations omitted). The court then found that once a defendant pleads guilty to a jury, "[t]he case simply proceeds with a unitary punishment hearing." *Id*. (citing *Fuller v. State*, 253 S.W.3d 220, 227 (Tex. Crim. App. 2008)). Petitioner fails to show that this

[13] Petitioner also alleges he was denied his right to a jury trial when the trial court directed the jury to return a verdict of guilty in violation of his Fifth, Sixth, and Fourteenth Amendment rights. ECF No. 22 at 137-41. Because Petitioner never raised this allegation in state court, however, it is unexhausted and procedurally barred from federal habeas review. *See* Section IV(A), *supra*. In any event, the claim is frivolous because the cases cited by Petitioner do not concern a directed verdict after a guilty plea, but rather stand only for the uncontroversial position that a trial court may not direct a jury considering evidence to find a defendant guilty.

determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Moreover, as pointed out by Respondent, the relief requested by Petitioner is barred by the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, federal courts are generally barred from applying "new" constitutional rules of criminal procedure retroactively on collateral review. *Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994). A new rule for *Teague* purposes is one which was not "dictated by precedent existing at the time the defendant's conviction became final." *Felder v. Johnson*, 180 F.3d 206, 210 (5th Cir. 1999) (citing *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)). The only two exceptions to the *Teague* non-retroactivity doctrine are reserved for (1) rules that would place certain primary conduct beyond the government's power to proscribe, and (2) bedrock rules of criminal procedure that are necessary to ensure a fundamentally fair trial. *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997).

In this case, Petitioner's conviction and sentence became final for *Teague* purposes on October 5, 2009, when the Supreme Court denied his petition for certiorari after his conviction was affirmed on direct review in state court. Petitioner has pointed to no precedent since that time mandating a bifurcated proceeding in a capital murder case following a guilty plea. Nor does the new rule proposed by Petitioner fall within either of the two noted exceptions to the *Teague* doctrine. Consequently, *Teague* bars relief on Petitioner's allegation and precludes this Court from recognizing the new legal theory underlying Petitioner's claim.

**I. <u>Unanimous Jury Verdict</u> (Claim 13)**

In his thirteenth ground for relief, Petitioner challenges the jury's failure to unanimously determine which aggravated felony rendered him guilty of capital murder. Petitioner was

charged with intentionally causing Michael Andrade's death while in the course of committing or attempting to commit burglary, robbery, or arson. 13 RR 5-6. Because it is unclear as to which of these theories of capital murder the jury actually found him guilty, Petitioner argues his rights to due process, a jury trial, and reliable sentencing under the Sixth, Eighth and Fourteenth Amendments were violated. This claim was raised during Petitioner's direct appeal proceedings and was rejected by the TCCA. *See Luna*, 268 S.W.3d at 601. This disposition on the merits therefore receives the deference required by the AEDPA. *Dowthitt v. Johnson*, 230 F.3d 733, 756-57 (5th Cir. 2000).

The TCCA's determination of this issue does not conflict with United States Supreme Court precedent on this point. *See Schad v. Arizona*, 501 U.S. 624, 644 (1991) (plurality op.). In *Schad*, as occurred in Petitioner's case, the prosecution indicted on a single count of capital murder and alleged several different factual theories by which the defendant could have committed that single offense. *Id*. A majority of the Supreme Court recognized the general rule that a single count may include allegations the defendant committed the offense by one or more specified means and held there is no constitutional requirement the jury reach unanimity on the preliminary factual issues which underlie the verdict. *Id*. at 631-32. In reaching this decision, the Court stated that it "never suggested that in returning a general verdict [in cases where alternative methods of committing a single offense were pled] the jurors should be required to agree upon a single means of commission, any more than indictments were required to specify one alone." *Id*.

Because there is no constitutional requirement that a jury must unanimously determine which theory of capital murder was committed, the jury's general guilty verdict in this case was not erroneous and Petitioner's allegation lacks merit. *See Reed v. Quarterman*, 504 F.3d 465,

480-82 (5th Cir. 2007) (denying similar claim that allowing the jury to convict a defendant of capital murder "under two alternative theories without requiring unanimity as to one" violated due process). As such, the TCCA's rejection of this claim was neither contrary to, nor an unreasonable application of, relevant Supreme Court precedent. *Id.*; *see also Maxwell v. Thaler*, 350 F. App'x 854, 859 (5th Cir. 2009) (unpublished) (observing that "neither *Schad* nor our subsequent precedent interpreting it has been overruled implicitly or explicitly. Accordingly, we are bound by *Schad* and *Reed*"). Furthermore, because the Supreme Court's opinion in *Schad* implicitly, if not explicitly, rejected the legal premise underlying Petitioner's claim, adoption of the new rule advocated by Petitioner herein is foreclosed by the non-retroactivity principle of *Teague v. Lane, supra*. Relief is therefore denied.

**J. The Special Issues (Claim 14)**

Petitioner next raises several challenges to Texas's death penalty system, arguing that he was sentenced to death under a statutory scheme that violated his Sixth, Eighth, and Fourteenth Amendment rights. As discussed below, each of these allegations is either procedurally barred, time barred, or foreclosed by Supreme Court and Fifth Circuit precedent.

1. Special Issue Number One (Claim 14(A))

Under Texas's capital sentencing statute, the jury must answer two "special issues" before a sentence of death may be assessed. *See* TEX. CODE. CRIM. PROC. art. 37.071 § 2(b). Under the first special issue, the jury must decide "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* Petitioner contends this first special issue—the future-dangerousness special issue—is unconstitutionally vague because it does not define the terms "probability," "criminal acts of violence," and "continuing threat to society." As a result, Petitioner argues, neither the

statute nor the jury charge adequately channel the jury's discretion or narrow the class of defendants sentenced to death.

Petitioner raised this allegation both on direct appeal and during his state habeas proceedings which the TCCA denied based on previous TCCA precedent rejecting this allegation. *Luna*, 268 S.W.3d at 609; I SHCR at 257-258. Indeed, this claim is "far from novel." *Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). The Fifth Circuit has consistently upheld the future-dangerousness special issue against challenges to the phrases "probability," "criminal acts of violence," and "continuing threat to society." *See Sprouse v. Stephens*, 748 F.3d 609, 622 (5th Cir. 2014); *Turner v. Quarterman*, 481 F.3d 292, 299-300 (5th Cir. 2007); *Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005); *Hughes v. Johnson*, 191 F.3d 607, 615 (5th Cir. 1999). The terms "have a plain meaning of sufficient content that the discretion left to the jury is no more than that inherent in the jury system itself." *Paredes v. Quarterman*, 574 F.3d 281, 294 (5th Cir. 2009). Accordingly, relief is denied because the state court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1). Relief on this claim is also foreclosed by the non-retroactivity principle of *Teague v. Lane*, *supra*. *See Rowell v. Dretke*, 398 F.3d 370, 379 (5th Cir. 2005) (finding a violation of *Teague* would occur if the court were to accept petitioner's argument that the future-dangerousness special issue is unconstitutionally vague for failing to define the term "probability").

2. Special Issue Number Two (Claim 14(B))

Under Texas's second special issue—the mitigation special issue—Petitioner's jury was required to determine "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral

culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment . . . rather than a death sentence be imposed." TEX. CODE. CRIM. PROC. art. 37.071 § 2(e). Petitioner challenges the constitutionality of this special issue for two reasons: (1) the accompanying rule that instructs the jury that ten or more jurors must agree to assess a life sentence is confusing and creates an unnecessary risk of jury coercion, and (2) the statute fails to require the jury to make its findings beyond a reasonable doubt.

a. The 12–10 Rule

Concerning the mitigation special issue, Texas law requires the jury to be instructed that: (1) the jury shall return an answer of "yes" or "no"; and (2) the jury may not answer the issue "no" unless it unanimously agrees and may not answer the issue "yes" unless ten or more jurors agree. TEX. CODE. CRIM. PROC. art. 37.071 § 2(f). Citing *Mills v. Maryland*, 486 U.S. 367 (1988), Petitioner contends that this "12–10 rule" confuses jurors as to the effect of a single negative vote on the special issues, particularly when § 2(g) of the statute prohibits the jury from being instructed that a life sentence is automatically imposed if the jury is unable to respond unanimously to the special issues. According to Petitioner, the rule creates a danger that confused jurors may think their lone dissenting vote would have no effect on the ultimate sentence imposed which would diminish "each juror's individual sense of responsibility in the sentencing process." ECF 22 at 156.

The TCCA rejected this allegation during Petitioner's direct appeal proceedings. *Luna*, 268 S.W.3d at 609. This decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). In fact, this issue has been foreclosed for some time by the Supreme Court's decision in *Jones v. United States*, 527 U.S. 373, 381-82 (1999). In *Jones*, the Court explicitly

rejected the idea that the trial court, by neglecting to inform a jury regarding the consequences of its failure to reach a verdict, "affirmatively mislead[s] [the jury] regarding its role in the sentencing process." *Id.* The Court reasoned that an instruction informing the jury that a life sentence would be imposed if it could not reach a unanimous verdict had no bearing on the jury's role in the sentencing process. *Id.* Rather, such an instruction "speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." *Id.*

The Fifth Circuit has also rejected this claim. "*Mills* is not applicable to the capital sentencing scheme in Texas. We have concluded that '[u]nder the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance.'" *Miller v. Johnson*, 200 F.3d 274, 288–89 (5th Cir. 2000) (quoting *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir. 1994)). On that basis, the Fifth Circuit has repeatedly denied claims based on the 12–10 rule. *See Allen v. Stephens*, 805 F.3d 617, 632 (5th Cir. 2015); *Reed*, 739 F.3d at 779; *Druery v. Thaler*, 647 F.3d 535, 542-43 (5th Cir. 2011). The Fifth Circuit also has held that any extension of *Mills* to Texas's penalty-phase instructions would violate *Teague*'s prohibition on habeas courts creating new constitutional law. *Blue v. Thaler*, 665 F.3d 647, 670 (5th Cir. 2011); *Druery*, 647 F.3d at 542-43. Petitioner is not, therefore, entitled to federal habeas relief.

b. The Burden of Proof

Petitioner next challenges the mitigation special issue because it does not require the jury to make its finding beyond a reasonable doubt. Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Hurst v. Florida*, 136 S. Ct. 616 (2016), Petitioner contends that a finding on the mitigation special issue is a finding of fact that could potentially increase a defendant's sentence

"from a penalty of life to a penalty of death." For this reason, Petitioner asserts the current statutory scheme is unconstitutional for not imposing a burden of proof on the State to prove to the jury beyond a reasonable doubt that a negative answer to the mitigation special issue is warranted. Because Petitioner failed to exhaust this claim during either his direct appeal or state habeas proceedings, he is procedurally barred from federal habeas relief. *See* Section IV(A), *supra*. This allegation also fails for two additional reasons.

The allegation is barred under the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1)(A). As noted by Respondent, Petitioner filed his initial federal habeas petition (ECF No. 13) on April 21, 2016, with only one day remaining on the § 2244(d) limitations period. However, Petitioner did not raise the instant allegation in this initial petition. Instead, the issue was first raised on October 21, 2016, when Petitioner filed his amended federal habeas petition (ECF No. 22) with the Court. Petitioner disputes this assertion, arguing the claim should "relate back" to the original timely petition under Federal Rule of Civil Procedure 15(c)[14] because it is not a new claim, but rather an argument in support of Claim 15 from his initial petition. But Claim 15 from the initial petition challenged the jury's failure to determine which aggravated felony rendered Petitioner guilty of capital murder—a claim virtually identical to Claim 13 from Petitioner's amended petition—instead of challenging the lack of a burden of proof on the mitigation special issue. Thus, Petitioner's new claim does not relate back to this initial petition and is therefore barred by the statute of limitations.[15] *See Mayle v. Felix*, 545 U.S.

[14] Rule 15(c)(2) instructs that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

[15] Although the limitations period may be equitably tolled in certain "rare and exceptional" circumstances, *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002), Petitioner does not make such an argument. Even if he had, these circumstances do not exist in this case. *See McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013) (finding that a federal habeas corpus petitioner may avail himself of the doctrine of equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented

644, 650 (2005) (finding a claim does not relate back when it asserts a new ground for relief supported by facts that differ in both "time and type" from those in the original pleading).

Regardless of the time bar, "[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof." *Rowell*, 398 F.3d at 378. As with his other challenges to the Texas special issues, Petitioner's contention that the Constitution requires that the State be assigned the burden of proof on the mitigation special issue has been repeatedly rejected by the Fifth Circuit. *Druery*, 647 F.3d at 546-47; *Blue*, 665 F.3d at 668-69; *Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009); *Paredes*, 574 F.3d at 292; *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007). Consequently, federal habeas relief is unwarranted.

3. Evolving Standards of Decency (Claim 14(C))

Petitioner's final allegation regarding the Texas capital sentencing scheme asserts that the death penalty in general is arbitrary, inconsistent with evolving standards of decency, and serves no valid penological purpose. As support for his argument, Petitioner contends: (1) there is a "national trend" toward abolishing the death penalty; (2) the death penalty is excessive and ineffective at promoting any penological purpose; (3) there is an international consensus against the death penalty; and (4) capital punishment in this country has not been applied equally and consistently. This allegation fails for several reasons.

As with numerous other allegations raised in his amended petition, Petitioner did not raise this allegation either on direct appeal or during his state habeas corpus proceedings. The claim is therefore unexhausted and procedurally defaulted for reasons already discussed. *See* Section IV(A), *supra*. Petitioner's claim is also time-barred for the reasons discussed in the previous section because the claim was not raised in Petitioner's initial federal petition (ECF No.

timely filing"); *Holland v. Florida*, 560 U.S. 631, 649 (2010).

13) and does not "relate back" to any timely claim alleged in that petition. Even if the Court were to review the merits of Petitioner's allegation, Supreme Court precedent clearly forecloses any argument that capital punishment violates the Constitution in all circumstances as Petitioner now contends. *See Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (recognizing that "it is settled that capital punishment is constitutional"); *Baze v. Rees*, 553 U.S. 35, 41-44 (2008) (examining the various forms of capital punishment upheld since the nineteenth century); *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (reaffirming that the death penalty "does not invariably violate the Constitution"). As the Supreme Court noted in *Baze*: "[r]easonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable . . . [But][t]his Court has ruled that capital punishment is not prohibited under our Constitution[.]" 553 U.S. at 62.

Because the Supreme Court has repeatedly upheld capital punishment as constitutional, the views of the international community, as well as any alleged "national trend" away from its use, are largely irrelevant. Even if they weren't, federal habeas relief would be barred by the non-retroactivity doctrine of *Teague v. Lane* because it would require the creation of a new constitutional rule of law. As such, relief is denied.

**K. Cumulative Error (Claim 15)**

In his final allegation, Petitioner argues that even if none of the above allegations independently entitle him to relief, their cumulative prejudicial effect denied him his right to due process and to the effective assistance of counsel. Petitioner is not entitled to relief on this claim because many of the claims Petitioner wishes to cumulate are procedurally barred from federal habeas corpus relief. *See Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992) (*en banc*)

(establishing, as a condition for showing cumulative error, that "the error complained of must not have been procedurally barred from habeas corpus review"). Moreover, the cumulative-error claim itself is unexhausted and procedurally barred and Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice in order to overcome the procedural bar. *See* Section IV(A), *supra*.

Aside from procedural defects, Petitioner has not demonstrated that any constitutional error occurred. The Fifth Circuit has made it clear that cumulative error analysis is only appropriate where there is constitutional error to cumulate. *United States v. Delgado*, 672 F.3d 320, 344 (5th Cir. 2012) (*en banc*); *Derden*, 938 F.2d at 609. Allegations that alone are insufficient to demonstrate constitutional error cannot be combined to create reversible error. *United States v. Moye*, 951 F.2d 59, 63 n. 7 (5th Cir. 1992) ("Because we find no merit to any of Moye's arguments of error, his claim of cumulative error must also fail."). "Meritless 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*, 978 F.2d at 1461).

As discussed throughout this opinion, Petitioner has not shown a violation of his constitutional rights. None of Petitioner's complaints about the performance of his trial counsel satisfy either prong of the *Strickland* analysis. Therefore, there is no error for this Court to cumulate. *United States v. Thomas*, 724 F.3d 632, 648 (5th Cir. 2013) ("[T]here is no precedent supporting the idea that a series of 'errors' that fail to meet the standard of objectively unreasonable can somehow cumulate to meet the high burden set forth in *Strickland*."); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) ("Twenty times zero equals zero."). Even assuming Petitioner had established some sort of trial court error, federal habeas relief would not be warranted because the cumulative error doctrine provides habeas relief only where the

constitutional errors committed in the state court so fatally infected the trial that they violate the trial's fundamental fairness. *Derden*, 938 F.2d at 609. Again, Petitioner has not made this showing. As such, his cumulative-error claim is denied.

## V. Request for Evidentiary Hearing

In his amended petition and again in his reply, Petitioner requests an evidentiary hearing to resolve "several disputes of material fact" concerning the effectiveness of both his trial and state habeas counsel, as well as the treatment he received as a juvenile while in TYC custody. Under the AEDPA, the proper place for development of the facts supporting a claim is the state court. *See Hernandez v. Johnson*, 108 F.3d 554, 558 n.4 (5th Cir. 1997) (holding the AEDPA clearly places the burden on a petitioner to raise and litigate as fully as possible his federal claims in state court). Thus, to the extent Petitioner wishes to develop new evidence to attack the resolution of claims adjudicated in state court, his request is denied because such factual development is effectively precluded in federal court under *Pinholster*. 563 U.S. at 181-82 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."); *Woodfox v. Cain*, 772 F.3d 358, 368 (5th Cir. 2014) (same).

Petitioner's request for factual development of his unexhausted claims is similarly unpersuasive. Whenever an applicant fails "to develop the factual basis of a claim" in state court, § 2254(e)(2) limits the introduction of new evidence at an evidentiary hearing. *Pinholster*, 563 U.S. at 185-86. Contrary to Petitioner's assertion (ECF No. 22 at 23), he clearly failed to develop the factual basis of his unexhausted claims in state court. Consequently, an evidentiary hearing is permissible only where (1) there is a new, retroactive rule of constitutional law, or (2) the facts could not have been discovered with due diligence and such facts demonstrate actual

innocence of the crime by clear and convincing evidence. 28 U.S.C. § 2254(e)(2)(A)–(B). Petitioner fails to make either of these showings. Instead, he contends a hearing is necessary to help him establish cause and prejudice under *Martinez* and *Trevino* to overcome the procedural default of his unexhausted claims. Neither case entitles him to a hearing. *See Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) ("[W]e decline to hold that *Martinez* mandates an opportunity for additional fact-finding in support of cause and prejudice.").[16]

Regardless, even if Petitioner were not barred from obtaining an evidentiary hearing by § 2254(e)(2), the decision to grant such a hearing "rests in the discretion of the district court." *Richards v. Quarterman*, 566 F.3d 553, 562 (5th Cir. 2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007)). In making this determination, courts must consider whether an evidentiary hearing could "enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Richards*, 566 F.3d at 563 (*quoting Schriro*, 550 U.S. at 474); *Blue*, 665 F.3d at 655. A district court may also deny a hearing if the record is sufficiently developed to make an informed decision. *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998).

Further factual development in this case is unwarranted because all of Petitioner's claims lack merit on their face. *See Register v. Thaler*, 681 F.3d 623, 627-30 (5th Cir. 2012) (recognizing the discretion inherent in district courts to allow factual development, especially when confronted with claims foreclosed by applicable legal authority). As demonstrated herein, each of Petitioner's claims can be resolved on the merits by reference to the state court record, the submissions of the parties, and relevant legal authority. There is therefore no basis upon

[16] Indeed, "reading *Martinez* to create an affirmative right to an evidentiary hearing would effectively guarantee a hearing for every petitioner who raises an unexhausted IATC claim and argues that *Martinez* applies." *Id*.

which to hold an evidentiary hearing. *See Schriro*, 550 U.S. at 474 (recognizing that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record") (citation omitted).

## VI. Certificate of Appealability

The Court must now determine whether to issue a certificate of appealability (COA). *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; *Miller–El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). A district court may deny a COA *sua sponte* without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). But a COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires Petitioner to show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing *Miller-El*, 537 U.S. at 327).

The Supreme Court has explained that the showing required under § 2253(c)(2) is straightforward when a district court has 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The issue becomes somewhat more complicated when the district court denies relief on procedural grounds. *Id.* In that case, the petitioner seeking COA must show both "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." *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack*, 529 U.S. at 484). Whatever the basis for the denial, however, the court must bear in mind

that "[w]here the petitioner faces the death penalty, 'any doubts as to whether a COA should issue must be resolved' in the petitioner's favor.'" *Allen v. Stephens*, 805 F.3d 617, 625 (5th Cir. 2015) (quoting *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

In this case, Petitioner has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nor could reasonable jurists debate the denial of federal habeas corpus relief on either substantive or procedural grounds, or find that the issues presented are adequate to deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). Accordingly, Petitioner is not entitled to a COA.

## VII. Conclusion and Order

The Court has thoroughly reviewed the extensive record and pleadings submitted by both parties in this case, as well as the 1,000-plus pages of exhibits submitted on Petitioner's behalf (ECF Nos. 14, 23). After careful consideration, the Court concludes that the majority of Petitioner's allegations (claims 2, 3, 5, 6, 9, 10, 14(b)(2), 14(c), and 15) are unexhausted and thus procedurally barred from federal habeas relief.[17] Alternatively, even when evaluated under a *de novo* standard of review, these claims do not warrant relief because they also lack merit.

For the remainder of Petitioner's claims that were properly exhausted during Petitioner's state court proceedings (claims 1, 4, 7, 8, 11-13, 14(a), and 14(b)(1)), Petitioner has failed to establish that the state court's rejection of the claims on the merits was either (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the petitioner's state trial, appellate, and habeas corpus

[17] As discussed herein, certain portions of claims 1, 7, 8, and 12 are also unexhausted, making those portions procedurally barred from federal habeas relief as well.

proceedings. Claims 14(b)(2) and 14(c) also do not warrant relief because they are barred by the limitations period set forth in 28 U.S.C. § 2244(d)(1).

In short, Petitioner's amended federal habeas corpus petition does not warrant federal habeas corpus relief. Accordingly, based on the foregoing reasons, **IT IS HEREBY ORDERED** that:

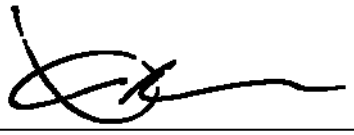
1. Federal habeas corpus relief is **DENIED** and Petitioner Joe Michael Luna's Amended Petition for Writ of Habeas Corpus (ECF No. 22) is **DISMISSED WITH PREJUDICE**;

2. No Certificate of Appealability shall issue in this case; and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this 24th day of September, 2018.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

2015 WL 1870305
Only the Westlaw citation is currently available.

UNDER TX R RAP RULE 77.3, UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

DO NOT PUBLISH
Court of Criminal Appeals of Texas.

Ex Parte Joe Luna

NO. WR–70,511–01 | APRIL 22, 2015

ON APPLICATION FOR A WRIT OF HABEAS CORPUS, CAUSE NO. 2006–CR–0033–W1, IN THE 379th DISTRICT COURT, BEXAR COUNTY

**Attorneys and Law Firms**

Michael C. Gross, for Joe Luna.

***ORDER***

Per curiam.

***1** This is a post conviction application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

Applicant was convicted in March 2006 of a capital murder committed in February 2005. TEX. PENAL CODE ANN. § 19.03(a). Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure article 37.071, sections 2(b) and 2(e), the trial court sentenced him to death. TEX. CODE CRIM. PROC. art. 37.071, § 2(g). This Court affirmed applicant's conviction and sentence on direct appeal. *Luna v. State*, 268 S.W.3d 594 (Tex.Crim.App.2008).

Applicant presented five allegations in his application in which he challenges the validity of his conviction and sentence. The trial court held a live evidentiary hearing. As to all of these allegations, the trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions, except for findings and conclusions II(5), V(D)(2), and V(D)(3), which we reject. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 22nd DAY OF APRIL, 2015.

RICHARDSON and YEARY, JJ., not participating.

**All Citations**

Not Reported in S.W.3d, 2015 WL 1870305

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NO. 2006-CR-0033-W1

| | | |
|---|---|---|
| **EX PARTE** | § | **IN THE DISTRICT COURT** |
| | § | **379TH JUDICIAL DISTRICT** |
| **JOE LUNA** | § | **BEXAR COUNTY, TEXAS** |



## FINDINGS OF FACT & CONCLUSIONS OF LAW

The Applicant, Joe Luna, through his court-appointed attorney Michael C. Gross, has filed an application for post-conviction writ of habeas corpus under the provisions of art. 11.071 of the Texas Code of Criminal Procedure collaterally attacking his death sentence in Cause Number 2006-CR-0033.

### I. History of the Case

Joe Luna, was indicted for the capital murder of Michael Paul Andrade, in cause number 2004-CR-3602 (Cl. R. at 4).[1] Luna pleaded guilty to the charge before the jury in the 379th Judicial District Court of Bexar County, Texas, with the Honorable Bert Richardson presiding (Ct. R. vol. 13 of 24, at 6). Given the unique circumstances surrounding the defendant's guilty plea to the jury, a one phase trial was held on the issue of guilt- innocence and punishment. The jury was instructed to find the defendant guilty and consider the capital murder special issues. (Ct. R.

[1] The clerk's record will be cited as Cl. R. and the reporter's record from the original trial will be cited as Ct. R. and the reporter's record from the hearing on the writ will be cited as Ct. R. Writ.

vol. 13 of 24, at 16-17). On March 8, 2006, after hearing all of the evidence, the jury answered the special issues, and based on the answers, punishment was assessed as death (Cl. R. vol. 2 of 2, at 414-15).

Pursuant to art. 37.071 § 2(h) of the Texas Code of Criminal Procedure, the appeal was directly to the Court of Criminal Appeals. On appeal, Luna raised twenty-five points of error. After considering the alleged errors, the Court of Criminal Appeals affirmed the conviction and sentence. *Luna v. State*, 268 S.W.3d 594 (Tex. Crim. App. 2009). Luna's petition for a writ of certiorari was denied.

On June 12, 2009, Applicant filed the instant application pursuant to art. 11.071 of the Texas Code of Criminal Procedure.

On November 16, 2012, the trial court conducted an evidentiary hearing on the claims raised in Luna's writ, the undersigned, the Honorable Bert Richardson, presiding.

A review of Applicant's decision to plead guilty and his testimony before the jury is essential to resolving several of the issues before this Court, even in light of his claims of ineffective assistance of counsel. While each claim of relief is thoroughly reviewed, it is important that these claims be considered in the context of the Applicant's decision to plead guilty, his decision to testify, and his decision to ask the jury to assess the death penalty against him, which was contrary to the express wishes of his attorneys and the admonishments by the trial court. In

fact, the record reflects the State prosecutor repeatedly questioned applicant about his insistence and motives for testifying. She accused him of using this as a ploy to gain sympathy from the jury, so they would not give him the death penalty. Applicant was insistent he was not testifying for those reasons, and that he did, in fact, want the death penalty.

Based on the Court's extensive experience in capital litigation over the years, it is this Court's opinion that the applicant was competent and that he fully understood the consequences and ramifications of not only pleading guilty to the charge, but testifying in painstaking details to the manner and means of the victim's death and the fact that he had committed all of the extraneous offenses the State had provided notice of (and even more than those listed in the notice). It is hard to for this court to imagine how the results in this case would have been any different given the applicant's insistence to testify, regardless of his lawyers' performance. He was even admonished by his lawyers that the testimony of the mitigation expert would be marginalized by his own testimony.

This court is also mindful of the unopposed motion to supplement this writ, wherein Applicant alleges that his trial counsel made misrepresentations to this court during this writ hearing. Specifically, Applicant asserts that in a prior writ hearing on another capital murder (Ricky Kerr) case, Applicant's counsel was found to be ineffective, and that counsel testified in *this* writ hearing that in the

prior writ hearing he (counsel) was not afforded the opportunity to testify and was not subpoenaed. However, the documents provided to this court reflect that counsel was subpoenaed and did testify in the Ricky Kerr writ hearing. Applicant is attempting to discredit his trial counsel's performance in this case by highlighting such misstatement. However, this court finds that that is a collateral matter and has no bearing on this court's findings, particularly in light of the specific facts here.

It should be noted that Applicant's competency at trial was never questioned. Applicant appeared to have a clear understanding of the proceedings around him during jury selection, at the time of his guilty plea, during the testimony, and at the time he testified against his own interest and against his attorneys' advice.[2] The Exhibits attached hereto contain pages from the trial transcript, and are incorporated herein by reference.

## II. Findings of Fact and Conclusions of Law on Applicant's First Claim for Relief

1. In his first claim for relief, Luna asserts that he was absent from the court room at a critical juncture of the trial and that this violated his due process and confrontation rights. Applicant's Pleading, at page 9. Specifically, he

[2] Please refer to **Exhibit "1"** to these Findings, which is page 6 of the R.R. Vol. 13 of 24, wherein Applicant is read the indictment and pleads "guilty;" and **Exhibit "2"**, which includes pages 10-15 of R.R. Vol. 13 of 24, wherein the court admonishes Applicant regarding his guilty plea; and **Exhibit "3,"** which includes pages 51-117 of R.R. Vol. 18 of 24, wherein Applicant is advised by his counsel to not testify, and against such advice Applicant testifies.

claims that he was not present when the trial judge excused venire members assigned to his panel outside his presence and that of his attorneys and at the beginning of the second day of voir dire when the court was informed that the prosecution and defense agreed to excuse certain veniremen. *Id.* at 9-10.

2. In presenting this claim, Luna relies on the record from his trial proceedings. Applicant's Pleading, at 8-10. As a result, this claim could have been raised on direct appeal. The claim, however, was not raised on direct appeal. Therefore, the claim is not an appropriate ground for relief in the instant matter. *See Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004); *Ex parte Townsend*, 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2004). Therefore, the court recommends that this claim for relief be denied.

3. Voir dire is a critical stage of the trial and an accused has a due process right to be present. *See Gomez v. United States*, 490 U.S. 858, 873 (1989) (citations omitted). Additionally, an accused has a Sixth Amendment right to be present in the court room to confront his accusers. U.S. Const. Amend. VI. "To some degree the right of confrontation and the right to be present may overlap, but the latter extends beyond the former in certain respects. The examination of jurors on voir dire does not involve a confrontation between accused and accusers." *Wildermuth v. State*, 310 Md. 496, 528 (Md. 1987). Thus, despite Luna's claims to the contrary, this Court

concludes that there is no Sixth Amendment right to be present during voir dire.

4. And while there is a due process right to be present during voir dire, in situations where the presence of the defendant does not bear "a reasonably substantial relationship to the opportunity to defend" no harm is shown by his absence under art. 33.03 of the Texas Code of Criminal Procedure. *Cooper v. State*, 631 S.W.2d 508, 512 (Tex. Crim. App. 1982); *Mares v. State*, 571 S.W.2d 303, 307 (Tex. Crim. App. 1978). This "reasonably substantial relationship" derives from the standard recognized as satisfying due process by the United States Supreme Court:

> We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge.
>
> * * *
>
> So far as the Fourteenth Amendment is concerned, the presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence and to that extent only.

*Snyder v. Massachusetts*, 291 U.S. 97, 105-108 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964). And this same test has also been applied by federal courts to hold that the absence of the defendant from certain proceedings does not violate the Sixth Amendment. *Adanandus v. State*, 866 S.W.2d 210 (Tex. Crim. App. 1993).

5. In this case, Luna complains of the excusal of certain venire members prior to the commencement of voir dire.[3] The excusals made prior to the commencement of voir dire were done pursuant to art. 35.03 of the Texas Code of Criminal Procedure. Excusals made under this provision of the Code are done without consultation or involvement of the parties. *See* Tex. Crim. Proc. Code Ann. art. 35.03 ("the court shall then hear and determine excuses... and if the court considers the excuse sufficient, the court shall discharge the prospective juror... .") As a result, the defendant's presence would not bear "a reasonably substantial relationship to the opportunity to defend." As a result, this Court finds that Luna's presence was not required by the either the due process clause or art. 33.03 of the Texas Code of Criminal Procedure, and his absence resulted in absolutely no harm.

[3] Voir dire begins in a capital case when the trial court propounds questions "'concerning principles of reasonable doubt, burden of proof, return of indictment, presumption of innocence and opinion.'" *See Davis v. State*, 782 S.W.2d 211, 215 (Tex. Crim. App. 1989) (quoting Tex. Code Crim. Proc. Ann. art. 35.17).

6. Luna identifies a second instance in which he argues his constitutional and statutory rights to be present were violated. At the beginning of the second day of voir dire, the trial court was notified by the prosecutor that both parties had agreed on excusing five jurors (Ct. R. vol. 4, 3-4). There is no discussion or argument regarding the excusal. Rather, the parties are doing nothing more than informing the court that an agreement had been reached concerning the identified venirepersons.

7. An applicant in a post-conviction habeas proceeding has the burden of producing evidence to support his allegations. *See Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995) ("The burden of proof in a writ of habeas corpus is on the applicant to prove by a preponderance of the evidence his factual allegations"). Here, Luna has produced no evidence that he was not present when the actual discussions between the parties concerning the excusal of the venirepersons occurred. Rather, the record supports a finding that Luna was an active participant in all decisions concerning the venire members. Mike Granados, one of Luna's defense attorneys at trial, testified that Luna was involved in the jury selection process and would tell the attorneys which venire members he did or did not want on the jury (Ct. R. Writ at 149). This Court finds this testimony credible. In the absence of any evidence that Applicant was not involved in the decision to excuse the above referenced venirepersons, this Court

concludes that Applicant was present when the decision to enter into the agreement to excuse the venire members was made. Moreover, Applicant's presence in court when the trial court was notified of the agreement did not bear on his opportunity to defend and no harm is shown by his absence at this juncture. Therefore, this Court recommends that this claim for relief be denied.

## IV. Findings of Fact and Conclusions of Law on Luna's Second Claim for Relief

1. In his second claim for relief, Luna argues that the trial court violated his due process rights when it excused certain venire members for cause. Applicant's Pleading, at 17.

2. This claim was not raised on direct appeal, but it could have been. Claims that can be raised on direct appeal are not appropriate grounds for relief in a post-conviction habeas proceeding. *See Ex parte* Nelson, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004); *Ex parte Townsend*, 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2004). Therefore, the court recommends that this claim for relief be denied.

3. Even if the claim had been raised, the record does not show that the court's rulings were erroneous. Considerable deference is given to a trial court in determining challenges for cause because the trial judge is in the best

position to evaluate a venire member's demeanor and responses. *Colburn v. State*, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998)). When, as in this case, a venire member's answers are vacillating, unclear, or contradictory, particular deference is to be given to the trial court's decision. *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010). Additionally, because there is no right to have any particular person on the jury; trial courts should follow a policy of liberally granting challenges for cause. *Jones v. State*, 982 S.W.2d 386, 393 (Tex. Crim. App 1998).

4. All of the venire members identified by Applicant expressed either opposition to the death penalty or personal feelings that would substantially impair his or her ability to be fair and to follow the court's instructions.[4] As

[4] Venireperson Franklin stated that he did not think he could impose the death penalty if the victim was not a child, disabled, or elderly (Ct. R. vol. 3 of 24, at 12). He agreed that participating in the case would do violence to his personally held moral beliefs. *Id.* Franklin also stated, after being asked if knowing his answers to the special issues would result in death would he be able to do it: "I'm sorry that I'm so ambivalent, but I don't think I could." *Id.* 21-22.

Venireperson Torres stated in her jury questionnaire that as a result of her religious beliefs she could not sit in judgment of another person (Ct. R. vol. 3 of 24, at 102). When asked if she still held that belief, she said yes. *Id.* When asked directly if she could part of a process that resulted in Luna's execution, Torres answered "No" and said that this was based on her religious beliefs. *Id.* at 105.

Venireperson Cordova stated in her questionnaire that the death penalty is the most hideous practice of our time and should never be imposed if life without the possibility of parole for 40 years was available (Ct. R. vol. 3 of 24, at 112). During voir dire she still agreed with that position and went further and told the parties and court that she did not "want to be responsible for somebody else's life." *Id.* at 113. She answered that at her age (18) she was not capable of making a decision that would result in a death sentence. *Id.* at 114. Twice Cordova stated that if the decision was life in prison or a death sentence, that she would always choose life in prison. *Id.* at 127. She also was adamant that she could not convict based on circumstantial evidence. *Id.* at 119, 121.

such, they were properly excluded by this court. *See Segundo v. State*, 270 S.W.3d 79, 94 (Tex. Crim. App. 2008); *Granados v. State*, 85 S.W.3d 217 (Tex. Crim. App. 2002). In addition, of the nine venirepersons identified by Applicant, the defense did not object to the challenge of two and agreed to the excusal of one.

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Venireperson Holden's answers on the jury questionnaire indicated that she had strong opinions and was very opposed to the death penalty (Ct. R. vol. 4 of 24, at 66-68). She also wrote that she was opposed to capital punishment under any circumstances. *Id.* She stated that these were her positions. *Id*

Similarly venireperson Happney stated that she is unequivocally opposed to the death penalty and would not vote for the death penalty regardless of the facts and circumstances of the case (Ct. R. vol. 5 of 24, at 83). She also agreed that she would not be able to take the oath or give both sides a fair shot. *Id.* at 83, 85.

Venireperson Holtkamp stated that she has been very stressed out, not sleeping and having stomach problems, because the case involved a death sentence (Ct. R. vol. 6 of 24, at 145). She spent her time seriously thinking about the death penalty and she did not want to have that on her conscience. *Id.* at 145. Given this, she did not think she could be a part of the process. *Id.* at 146. According to Holtkamp: "I just don't want to be a part of something that – part of my decision might result in somebody's death." *Id.* at 147. The defense had no objection to her excusal. *Id.* at 147.

Venireperson Carrell also indicated in her questionnaire that she had strong religious beliefs that prevented her from sitting in judgment of another (Ct. R. vol. 8 of 24, at 69). She also stated that it would be hard from her to answer the special issue questions in a way that result in Luna's execution. *Id.* at 70. Based on her moral, religious, and personal beliefs, she said she could not participate in a process that would result in an execution. *Id.* at 71.

Venireperson Hennington stated that she would be distracted by work related issues if she were on the jury (Ct. R. vol. 8 of 24, at 80-81). She also had religious views that made it difficult for her to sit in judgment. *Id.* at 81. According to Hennington, "It really upsets me to think that I would have to make that choice if this young man would have to live or die." *Id.* at 82-83. She is also, for the most part, opposed to capital punishment. *Id.* at 85. After consulting with Luna, the defense agreed to the excusal. *Id.* at 86.

Venireperson Gamez was opposed to the death penalty (ct. R. vol. 8 of 24, at 89). She specifically answered that she would not answer the special issues so as to assess death regardless of the evidence presented. *Id.* at 92. The defense did not object to the State's challenge. *Id.* at 94.

5. Finally, even if there was error in the granting of a challenge for cause, Applicant has failed to show any harm that would warrant a new trial. The erroneous granting of a challenge for cause does not "result in harm to the defendant so long as the jury actually selected was composed of qualified persons." *Ford v. State*, 73 S.W.3d 923 (Tex. Crim. App. 2002). There is a presumption that jurors are qualified absent some indication in the record to the contrary. *Id.* Applicant has presented no evidence that those who actually served on his jury were unfit for duty. In the absence of such evidence, Applicant is not entitled to a new trial even if this Court had erroneously granted on the prosecutions challenges for cause. Therefore, this Court recommends that this claim for relief be denied.

## V. Findings of Fact and Conclusions of Law on Applicant's Third Claim for Relief

### A. Law Applicable to Grounds Three, Four, & Five

1. It is the Applicant's obligation to provide a sufficient record that supports his factual allegations with proof by a preponderance of the evidence. *See Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995) ("The burden of proof in a writ of habeas corpus is on the applicant to prove by a preponderance of the evidence his factual allegations").

2. It is well settled that the right to assistance of counsel includes the right to effective assistance of counsel. *Cantu v. State*, 993 S.W.2d 712, 718 (Tex.

App.—San Antonio 1999, pet. ref'd) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex Parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). When reviewing a claim of ineffective assistance of counsel, the appellate court applies a two-part test set forth by the United States Supreme Court in *Strickland v. Washington*. The test is whether: (1) counsel's performance was deficient; and if so, (2) whether there is a reasonable probability that the results would have been different but for counsel's deficient performance. *Id.* (citations omitted). If the defendant is unable to make the required showing of either deficient performance or sufficient prejudice, the ineffective assistance claim will be defeated. *Cantu v. State*, 993 S.W.2d at 718 (citing *Strickland v. Washington*, 466 U.S. at 700).

3. Ineffective assistance claims raised under the Texas Constitution are reviewed using this same standard. *See Derrick v. State*, 773 S.W.2d 271, 272-73 (Tex. Crim. App. 1989) (citing *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986).

4. The *Strickland* standard applies to claims of ineffective assistance at both the guilt/innocence and punishment stages of a trial. *Hernandez v. State*, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999).

5. While a defendant may have a right to effective assistance of counsel, a defendant is not entitled to errorless counsel. *See Miranda v. State*, 993

S.W.2d 323, 328 (Tex. App.—Austin 1999, no pet.) (citing *James v. State*, 763 S.W.2d 776, 778 (Tex. Crim. App. 1989). The adequacy of counsel's representation is based upon the totality of the representation and not by isolated acts or omissions. *Id.* (citing *Ex Parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990)).

6. In order to show ineffective assistance, the "appellant must overcome the presumption that his trial counsel's conduct might be considered to be sound trial strategy." *Vasquez v. State*, 2 S.W.3d 355, 359 (Tex. App.—San Antonio 1999, pet. ref'd); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). A review of the effectiveness of counsel's representation is "highly deferential to the attorney's professional judgment." *Id.* (citing *Strickland v. Washington*, 466 U.S. at 689).

7. The reviewing court should indulge in a strong presumption that counsel's conduct falls within a wide range of reasonable representation and examine the totality of the representation to determine the lawyer's effectiveness. *Cantu v. State*, 993 S.W.2d at 717 (citing *Strickland v. Washington*, 466 U.S. at 689; *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992)). To overcome this presumption, the defendant must identify the acts or omissions of counsel that are alleged to constitute ineffective assistance and affirmatively demonstrate "that they fall outside the scope of reasonable

conduct or professional standards for criminal attorneys." *Cantu v. State*, 993 S.W.2d at 717 (citing *Strickland v. Washington*, 466 U.S. at 690).

B. Relevant Testimony from Luna's Trial[5]

1. Luna entered a plea of guilty to the offense of capital murder as charged in the indictment before the jury. (Ct. R. vol. 13 of 24, at 6).

2. The victim in this case, Michael Paul Andrade, was a twenty-one and a half year old who was living in San Antonio and attending St. Mary's University. *Id.* at 27. Andrade was originally from McAllen, Texas, and he had moved to San Antonio at the same time as his girlfriend, Lilly Macias, to attend college. *Id.* at 27. At the time of the murder, Andrade was living in an apartment (number 1014) in "The Hollows" apartment complex on Potranco. *Id.* at 28.

3. On the morning of February 17, 2005, Andrade failed to meet up with Macias before class and she became concerned. *Id.* at 39-40. After class she made several attempts to contact him by phone but got no answer. *Id.* at 39. She contacted the apartment complex and was allowed to speak with a female detective who made arrangements to meet her on campus. *Id.* at 42-43. The officers who met with her explained that there had been a fire in

[5] Because a review of a claim of ineffective assistance will involve an assessment of harm, this Court believes it is necessary to summarize certain testimony from Luna's trial.

Andrade's apartment and that Michael was found dead. *Id.* at 44-45. She identified State's Exhibit No. 14 as Michael Paul Andrade. *Id.* at 54.

4. Macias also identified several electronics that belonged to Andrade, including photographs that had come from his camcorder (Ct. R. vol. 13 of 24, at 46-48); *see also* State's Exhibits Nos. 5-13). She was with Andrade when he took the pictures. *Id.*

5. Kenneth Page, the lead maintenance man at the apartment complex, testified that Andrade lived in Apartment 1014 (Ct. R. vol. 13 of 24, at 60). On February 17, 2005, the apartment manager summoned him because she smelled smoke. *Id.* at 63. The two went to building 10 and went to apartment 1014 and knocked on the door. *Id.* at 64-65. They entered and found a body laying face down on the bed. *Id.* at 65-67. Page tried to call to him, but got no response. *Id.* at 67. Page told the manager to call the police and both the police and fire department were called. *Id.*

6. Although Page did not know Andrade's name, he testified that Andrade kept his apartment neat and was always very respectful. *Id.* at 68-69. He also knew that a female lived in Apartment 1002 and he had seen Luna in that apartment approximately two or three months earlier. *Id.* at 69-70.

7. According to Page, it was possible to enter one apartment from another through an attic access. *Id.* at 61-62. Apartment 1002 had an attic access

panel in the closet. *Id.* at 74. He discovered a second access in apartment 1014 that was not supposed to be there. *Id.* at 74.

8. Anthony Guerrero, an arson investigator with the San Antonio Fire Department, testified that the fire in Andrade's apartment was non-accidental (Ct. R. vol. 13 of 24, at 79). According to Guerrero, there was evidence that three separate fires had been started, including one in the bed were Andrade was located. *Id.* at 80-81. Because the windows had been closed, the fire lacked oxygen and could not sustain itself. *Id.* at 82. Otherwise, the fire would have destroyed the entire building. *Id.* at 83.

9. Dr. Vincent DiMaio testified about Andrade's autopsy (Ct. R. vol. 14 of 24, at 97-98). He concluded that the cause of Andrade's death was strangulation. *Id.* at 102.

10. Steve Skipper, former principal at of Pat Neff Middle School, testified that on September 16, 1993, he received a report that Applicant was carrying a gun (Ct. R. vol. 15 of 24, at 4-6). Applicant had been a seventh grade student, and it was his first or second day of school at the time. *Id.* at 5. Mr. Skipper confronted Applicant in the library about the gun and Applicant pulled the gun from his waistband and said "Back off motherfuckers." *Id.* at 8-9. Fortunately, Applicant was quickly disarmed. *Id.* at 9. He was expelled and never returned to the school. *Id.* at 11.

11. Jose Martinez, compliance manager with Bexar County Juvenile Probation, testified that Applicant was on probation in May of 1994 (Ct. R. vol. 15of 24, at 21). He was referred for the offenses of reckless conduct and possession of a weapon. *Id.* at 23. Applicant had behavioral problems and demonstrated assaultive behavior and substance abuse issues. *Id.* at 24. Because his parent could not properly supervise him at home, Applicant was placed at various facilities. *Id.* at 24-29. Applicant was discharged from the facilities, however, due to assaultive behavior and absconding from the facilities. *Id.* Applicant was eventually committed to the Texas Youth Commission in July of 1995. *Id.* at 30. He was paroled in February of 1996, but his parole was revoked three months later. *Id.* at 30-31.

12. In August of 1994, the Bexar County Probation Department's Staff Psychologist evaluated Applicant. *Id.* at 33. The psychologist concluded that Applicant did not have a thought disorder or a major affective disturbance, but that he was prone to displaying behavior that disregarded social demands or expectations. *Id.* at 34-35.

13. Juan De Leon, a parole officer with the Texas Youth Commission, testified that he briefly supervised Applicant in 1996 (Ct. R. vol. 15 of 24, at 47). According to De Leon, Applicant was a member of the "La Raza Brown" gang. *Id.* at 51.

14. Johnny Rodriguez, Jr., testified that his father's Cadillac was stolen in December of 1997 (Ct. R. vol. 15 of 24, at 55). He received a call from his father telling him that the person that stole the car was at a pawn shop in the area trying to pawn golf clubs that had been in the car. *Id.* at 57. Rodriguez went to the shop and tried to place Applicant in handcuffs, but Applicant fought with him. *Id.* at 61-62. A police officer, Juan Torres, arrived and tried to get control of the situation, and Applicant struck Officer Torres before finally being subdued. *Id.* at 62.

15. Juan Torres, a retired police officer with twenty five years' experience, also testified about this incident and described the fight with Applicant, noting that he was struck numerous times before Applicant was finally apprehended (Ct. R. vol. 15 of 24, at 67-68). The whole incident lasted approximately twenty minutes. *Id.* at 70. Officer Torres received back and knee injuries that eventually led to his retirement and from which he still suffers. *Id.* at 71.

16. San Antonio Police Officer Patrick Naylor testified that in January of 1998, he was investigating a theft of a 1991 brown Pontiac four door (Ct. R. vol. 15 of 24, at 75). He came upon a vehicle that matched the description with broken windows. *Id.* at 76. They initiated a traffic stop and Applicant, who

was driving the car, tried to run the officer over in attempt to flee. *Id.* at 79 & 82.

17. Officer Richard Schoenberger confirmed the details of the incident. *Id.* at 87-88. After trying to the run over the officer, Applicant lost control of the car and crashed into a telephone pole. *Id.* at 89. Applicant fled on foot and was eventually located and arrested in a wooded area. *Id.* at 91.

18. Sandra Lujano testified that in January of 1998 her Pink Z-28 Camero was broken into in an area close to Lackland Air Force Base (Ct. R. vol. 15 of 24, at 93-94). Fingerprints taken from the car were matched to Applicant. *Id.* at 114.

19. Alexandra Hernandez, a probation officer with the Bexar County Community Supervision and Correction Department, testified that she was assigned to supervise Applicant's probation for assault on a public servant and unauthorized use of vehicle in 1998. *Id.* at 96-98. According to Hernandez, Applicant was a member of the "La Raza" gang at the time. *Id.* at 99. Applicant was assigned to 60 days in the Zero Tolerance Boot Camp facility as a condition of his probation, but he absconded. *Id.* at 99-100. While at the facility, Applicant was disciplined for challenging another inmate to fight and for a verbal altercation with another resident. Applicant was eventually terminated from the program. *Id.* at 100-01.

20. Phillip Settles testified that he was living at Apartment 113, 5534 Fredericksburg Road, with his girlfriend and thirteen year old daughter in July of 1998 (Ct. R. vol. 15 of 24, at 102). He was awakened on the night of the 31st by his dog and went into his daughter's room to discover someone jumping out of her window. *Id.* at 13. The police dusted the window for fingerprints, and the prints were later matched to Applicant. *Id.* at 108-10.

21. Vernon Ginn, a fingerprint examiner with the San Antonio Police Department, testified about Applicant's prior convictions (Ct. R. vol. 15 of 24, at 111). He testified that Applicant has been convicted twice of unauthorized use of a vehicle, once for burglary of a habitation, and an assault on a public servant. *Id.* at 117-18.

22. Candido Tovar testified that in March of 2004 that he was going to his night-time job when he was carjacked by Applicant[6] (Ct. R. vol. 16 of 24, at 14). According to Tovar, he saw Applicant get out the passenger side of a small car and approach his truck. *Id.* at 14. Applicant pointed a gun at him and told him to unlock the door. *Id.* at 14-15. Applicant asked for the money bags and when he discovered that Tovar did not have any, he made him drive to a secluded area. *Id.* at 19-21. When they reached the location, Applicant bound Tovar with duct tape as his companions held guns on Tovar

[6] Tovar also testified about the photographic lineup from which he made the identification. *Id.* at 31-33.

and abandoned him there. *Id.* Tovar was able to roll onto the side of the road where someone finally stopped to help him. *Id.* at 26-28.

23. Brooke Envick testified that on June 9, 2004, she awoke at 3:30 a.m. to the sound of her dog barking (Ct. R. vol. 16 of 24, at 38). She then heard the garage door slam closed. *Id.* at 38. She saw a silver truck in front of the house that later returned and stopped in front of her home. *Id.* at 39. She discovered certain items were moved from their usual places in the garage and there was a cigarette butt. *Id.* at 40. The police were called to the scene. *Id.* at 40. Michael Cuevas, a Detective with Leon Valley Police Department, corroborated Envick's testimony. Id. at 44-49. DNA from the cigarette butt was later matched to Applicant (Ct. R. vol. 17 of 24, at 3).

24. Michael McGloughlin testified that on the same night, June 9, 2004, his home was broken into while he, his wife and daughter were at home (Ct. R. vol. 16 of 24, at 50-52, 56-58). Early in the morning he awoke because he heard someone walking around in his home. *Id.* at 56. He found someone in his house and he ran back to the bedroom and yelled at his wife to call the police. *Id.* at 57-58. He tried to close his bedroom door but the suspect kicked the door in. *Id.* at 60. The person was holding a gun at him and ordered him to turn on the lights. *Id.* at 60. They were tied up and the intruders then gathered items from the home to take. *Id.* at 67-69. The

intruders left taking several items, including their two cars, a camcorder, computer, flashlight and the family dog. *Id.* at 74 & 88. DNA from the items at the McGloughlin home was matched to Applicant (Ct. .R. vol. 17 of 24, at 3).

25. Ruy D'Amico testified concerning a burglary of his home on June 16, 2004 (Ct. R. vol. 16 of 20, at 119-20). Like Applicant's other victims, during the early morning hours he discovered an armed individual in his home. *Id.* at 119-20. The individual had D'Amico, his wife, and son gather in the child's room and they were tied up while their possessions were taken. *Id.* at 121-25. In addition to items from the home, their vehicles—a black Chevy Blazer and a Toyota Camry—were taken. *Id.* at 125. Applicant's DNA was matched to some found at the scene. *Id.* at 140-143, 154, & 162-173.

26. The Blazer was eventually found at a house at 2401 South Presa after a tip-off. Other items found in that house-included jewelry, four televisions, computer equipment, a stereo system, cassette and DVD players. Applicant's fingerprints were found on some of the items. *Id.* at 143-150, 150-152, & 152-153.

27. Detective Jim Wells of the Leon Valley Police Department investigated the incidents and took a statement from Applicant (Ct. R. vol. 16 of 24, at 107). Applicant admitted committing the above offenses. *Id.* at 109-112.

28. Jennifer Weise testified that on the night of August 5, 2004, she awoke to the sound of her creaking stairs (Ct. R. vol. 17 of 24, at 15-16). She did not move as the person entered her bedroom. *Id.* at 16-17. He looked around and then left her home taking her Dodge Durango from the garage. *Id.* at 18. Applicant was arrested a few days later in the Dodge Durango. *Id.* at 23-25.

29. Lieutenant Phillip Dreyer of the Bexar County Sheriff's Office testified about a burglary of his home on December 23, 2004 (Ct. R. vol. 17 of 24, at 26-27). He returned home that night to discover that his home had been ransacked. *Id.* at 27. Property that was taken that night included guns, ammunition, knives, electronic equipment, a police raid jacket, a bulletproof vest, and a pair of binoculars. *Id.* at 28-29. Some of these items were later discovered at Maria Solis's apartment. *Id.* at 26-34.

30. Vicky Calsada testified that her home was broken into on January 2, 2005 (Ct. R. vol. 17 of 24, at 36). She was returning home in the early morning hours and noticed the light on in her bedroom. *Id.* at 37. The intruders had apparently arrived fifteen minutes earlier and had been terrorizing her roommate's teenage son. *Id.* at 42. She discovered two men with shotguns in her home who ordered her and her roommate onto their knees and had them lay face down on the floor. *Id.* at 39-30. The women were robbed of

their jewelry, $2,900 in cash, a gun, and Calsada's Chihuahua. *Id.* at 39-42. Calsada's gun was found in Solis's apartment.

31. Sofia Mendiola testified that she lived with her mother four or five blocks away from Applicant in June of 2004 (Ct. R. vol. 18 of 24, at 31). In June of 2004, she ran away from home and stayed at Applicant's apartment where the two had sex. *Id.* at 32. She was fourteen at the time. *Id.* at 33.

32. Her mother, Diane Mendiola, contacted the police when her daughter did not return home in June of 2004. *Id.* at 34. She went to the apartment where she believed her daughter was and spoke to Applicant, and he denied that he had seen her daughter. *Id.* at 35. He also spoke with the police and told them that he would not have a relationship with an underage girl. *Id.* at 36.

33. Raymond Valero, a former cellmate of Applicant's at the Bexar County Jail testified that Applicant confessed, in detail, to how he murdered Andrade (Ct. R. vol. 17 of 24, at 62-69). According to Valero, Applicant did not express remorse for the murder. *Id.* at 70. Applicant also told Valero how he planned to escape. *Id.* at 71. Applicant planned on using the Judge as a human shield in the process. *Id.* at 72. Applicant showed him a handcuff key he kept hidden in a bar of soap. *Id.* at 78-79.

34. Applicant also planned on marrying Solis to prevent her from testifying against him. *Id.* at 71.

35. In addition to Andrade's murder, Applicant also told Valero about other crimes he had committed including stealing a power washer truck and two burglaries. *Id.* at 72-73. One of the burglaries was of a policeman's home, and Applicant told Valero that he had waited for the officer to return home and had planned on killing him but the officer never returned. *Id.* at 73-74.

36. Valero had talked with Applicant about buying the stolen bulletproof vests and Applicant set up the sale from his jail cell. *Id.* at 74-75. The deal, however, fell through when Applicant's sister, his accomplice in the plan, changed the price. *Id.* at 76-77.

37. Andrew Briones, Applicant's cousin, testified that he received phone calls from Applicant while in the jail telling him not to talk to Detective Titus (Ct. R. vol. 17 vol. 24, at 101).

38. Bexar County Sheriff Sergeant Mark Gibson testified that when authorities learned about the key, Applicant was relocated to the highest security area within the jail and his person and items were searched (Ct. R. vol. 17 of 24, at 108-09). When initially questioned, Applicant denied he had a key. *Id.* at 109.

39. John Anthony Gonzalez, a classification officer with the Bexar County Jail, testified that he spoke with Applicant about the handcuff key and explained that the jail authorities and the District Attorney's Office knew about the

key. *Id.* at 112-13. Applicant reached into his sandal and gave him the key. *Id.* at 113.

40. Deputy Jeffrey Okon testified that after going to investigate the smell of burning metal in a holding cell, he discovered Applicant with a transformer (Ct. R. vol. 17 of 24, at 120-21). The transformer could be used to start a fire. *Id.* at 123. In the event of a fire, Deputies would have had to quickly evacuate all of the prisoners. *Id.* at 124-25.

41. Applicant testified on his own behalf (Ct. R. vol. 18 of 24, at 58-117)[7]. He began his testimony by saying that he wanted to set the record straight and was not there to plead for his life. *Id.* at 58-59. Applicant did not blame any of his circumstances on his childhood or the way he was raised on his current situation. *Id.* at 59. According to Applicant, he did not want anyone to think that there were any mitigating circumstances in his case from his childhood to lessen the sentence. *Id.* at 64. Ultimately, he made the final choices. *Id.* at 59. He also testified that he believed the death sentence was appropriate for him. *Id.* a 68. According to Applicant, a person goes into prison and animal and comes out a beast. *Id.* at 67. He testified that there was not mitigating evidence and that he was, beyond a reasonable doubt, a future danger. *Id.* at 73.

[7] See Exhibit 3 for a copy of the transcript of Applicant's testimony.

42. During Applicant's testimony, he admitted murdering Andrade and described how the killing occurred. *Id.* at 62-63, 86-90. He had Andrade take several deep breaths before putting his arm around him and applying pressure. *Id.* at 88. Andrade did not struggle. *Id.* When Applicant believed Andrade was dead, he let him go. *Id.* at 88. Applicant described how he felt after the murder:

> Right after that I didn't –I felt empty. I didn't feel – I always imagined if you killed somebody I would feel some type of feeling, you know what I'm saying; it would affect you. That day it didn't affect me. I felt inhuman.

*Id.* at 89.

43. He claimed he killed Andrade because he believed that CPS would take away his girlfriend's child when they discovered he entered Andrade's through her apartment. *Id.* at 63. He also admitted to all of the offenses offered by the State along with other offenses that were not known about by law enforcement. *Id.* at 75-84.

44. Applicant admitted that he had several opportunities to turn his life around and failed to do so. *Id.* at. 73-74. Applicant testified that he had been addicted to the adrenalin rush he got from committing crimes. *Id.* at 62. According to Applicant, "I got a rush out of going into a house when somebody was there and taking everything they owned." *Id.* at 77. He

began his burglaries with his father's next door neighbor. *Id.* at 75. Applicant testified that he snuck into her home while she was sleeping and took money from her purse. *Id.* at 75-76. He did a series of burglaries where he would sneak into homes while the residents were sleeping. *Id.* at 76. He began to escalate the crimes by bringing a weapon when he was confronted by a home owner while he was disconnecting electronics. *Id.* at 76. In all, he committed between twenty-five and thirty burglaries. *Id.* 76. He also admitted to selling cocaine. *Id.* at 78.

45. Applicant further testified that after he was arrested for the murder he was scheming with his sister and others to avoid conviction. He encouraged Maria, whose apartment he had been staying in and who was pregnant with his child, to avoid subpoena so she would not testify against him. *Id.* at 103-05. He also sent his sister Brandy over to his cousin Andrew's house so she could get him to provide an alibi for Applicant. *Id.* at 109. As a result, Brandy was indicted for witness tampering. *Id.* at 109-10. He also had Brandy sell stolen body armor so he could get money. *Id.* at 110.

46. During the original trial, the defense presented the testimony of Margaret Drake (Ct. R. vol. 19 of 24, at 3). Drake is a social worker employed by the Texas Department of State Health. *Id.* at 3. She is a licensed clinical social worker, has a Master's degree in social work, and has 25 years' experience

in forensic social work. *Id.* at 4-5. In addition , Drake has attended special continuing education courses in the field of capital penalty mitigation. *Id.* at 4. She has testified in capital cases since 2001. *Id.* at 6.

47. In making her assessment, she conducts interviews and reviews records. *Id.*. at 6. She did this in this case. *Id.* at 6. She interviewed Applicant on five occasions and met with his mother, Josie Luna, three or four times. *Id.* at 7. She also interviewed two of Applicant's aunts, his sister, and his former stepmother. *Id.* at 7, 11. She reviewed Applicant's TYC records and correspondence provided by Mary Tristan. *Id.* at 7.

48. After conducting her investigation, she prepared a psychosocial assessment. *Id.* at 7. Applicant moved around a lot as a child. *Id.* at 8. They moved frequently, sometimes more than once a year. *Id.* at 21. They lived in the family home for a few years when Applicant was very young, but were evicted because Applicant's mother would often leave the children in care of other relatives. *Id.* at 11. His parents never married and Applicant's mother lived with various other men. *Id.* at 15. Applicant was in and out of the home. *Id.* at 15.

49. One of Josie Luna's boyfriends, and the father of Applicant's half-brother Eric, was violent. *Id.* at 15. Both Applicant and his sister were afraid of him and would hide from him. *Id.* at 15.

50. Applicant's father had very little involvement in his life. *Id.* at 12. His father had other children and spent time with them. *Id.* at 20. He set up engagements with Applicant and would not follow through. *Id.* at 20. It was very difficult for Applicant to experience this rejection. *Id.* at 20. This leads to a sense of alienation and not being wanted. *Id.* at 20.

51. A number of Applicant's relatives were involved in substance abuse. *Id.* at 13. The substances included alcohol, inhalants, and cocaine. *Id.* at 13. There is an unusually high number of criminal convictions on both sides of Applicant's family. *Id.* at 14. Applicant's mother was convicted of welfare fraud. *Id.* at 13. Applicant had many adult models of behavior that included criminal activity, drug abuse, and mental illness. *Id.* at 19; Defense Ex. 3.

52. Although a pediatrician had recommended that Applicant be given Ritalin, his mother never followed up on it. *Id.* at 8. Applicant had been placed in multiple treatment centers. *Id.* at 10. Applicant quit attending school in the 7th grade. *Id.* at 15.

53. Applicant has a son (and is rumored to be the father of another child). *Id.* at 22.

54. Margaret Drake testified that she found Applicant to be intelligent and likeable. *Id.* at 21. Applicant had an extremely difficult life, but during his

commitment in TYC and at the Bexar County Detention Center, he had found focus and had been able to channel his energy and be more productive. *Id.* at 23. While at TYC, he made good grades and was able to obtain GED as well as complete some substance abuse treatment. *Id.* at 24.

55. Drake's entire report was admitted into evidence. *Id.* at 25; Defendant's Ex. No. 2. The report provided additional mitigation evidence for the jury's consideration. The report notes that Applicant suffered episodes of depression and there were at least four suicide alerts noted in his TYC records. *Id.* Even though the records indicate that therapy is recommended, there is no indication that Applicant ever received any psychotherapy. *Id.*

56. Again, although one of Applicant's pediatricians recommended Ritalin, the medication was never given. *Id.*

57. Each of Applicant's parents came from large families. Applicant's mother initially lived with her mother, Vicenta, and she kept Applicant and his sister from birth to elementary school age. *Id.* Vicenta had children from three different men and had a *laissez faire* attitude "toward the boys of the family, indifferent to rules or hours, [and would] coddle and spoil the boys." In contrast, she was harder on the girls in the family. *Id.* She eventually made Josie Luna leave the home due to Josie's irresponsibility and lack of supervision of her children. *Id.*

58. Vicenta routinely bailed her son Ralph out of jail, showed no disapproval of his lifestyle, and protected him from the accusations of the girls. *Id.* There were multiple incidents of sexual molestation by Ralph, and Josie would have to secure her and her sister's bedroom door at night. *Id.* One of Vicenta's husbands even had a peephole in the door to watch the daughters. *Id.* There was also an allegation that Ralph had molested Applicant when he was under age of three. *Id.* This incident may have been part of the reason Josie and the kids were "evicted" by Vicenta. *Id.*

59. From that point on, Josie and the kids moved more than once a year. *Id.* While she worked, the children were responsible for themselves. *Id.* They would let themselves into the house and prepare their own dinners and get ready for bed. *Id.* When Josie would go out, they were left with various people. *Id.* On more than one occasion, they were left with a man described as a "biker" who would try and molest Applicant's sister Brandy. *Id.* When Josie was home, the children were exposed to alcohol, drugs, and sexual activity. *Id.* Brandy and Applicant attempted to run away once in seventh grade and Applicant made several solo attempts to run away, leaving without word for days at a time. *Id.*

60. Of the many boyfriends Josie had and that Applicant and his sister were exposed to, James Eric Elizondo was particularly violent. The children were

afraid of him and would run and hide in a closet to avoid him. *Id.* Elizondo "vented his harsh anger" towards Applicant and his sister, telling them that they should have never been born. Elizondo's violence towards Josie increased after she became pregnant with his child. *Id.* Police were called out to the home on several occasions. *Id.*

61. Applicant's father, George Tristan, was raised by a harsh, cruel, and strict father who fathered other children outside of his marriage. *Id.* George and his brothers left home as teenagers. *Id.* While George was witty and smart, he was an adulterer who ignored his children and used drugs throughout his adult life. *Id.* George also sold drugs. *Id.* George would promise to spend time with Applicant but never followed through. *Id.* His discipline of Applicant was described as "overboard." *Id.*

62. Because Applicant moved so often as a child, he changed schools frequently. *Id.* So many schools, in fact, that Applicant himself cannot recall the names of his elementary and middle schools. *Id.* Applicant spent a year at the Brownwood State School, a stable placement with a highly structured environment. *Id.* Drake believed Applicant's history indicated a mild learning disability that thwarted testing performance. *Id.*

63. In her report, Drake identified several significant factors in Applicant's life. These factors include "the lack of stability and consistency in his

environment and caregivers; existence of persuasive fear of violence toward his mother, himself and sister; and the presence of almost exclusively negative examples of lawbreakers and substance abusers." *Id.* According to Drake, these factors exacerbated Applicant's learning disability and engendered his depression and anxiety. *Id.* Applicant's relationships formed through criminal behavior "encouraged a faulty set of values with underlying increased wariness of detection fear, blame, [and] hypervigilant mistrust." *Id.* Applicant lacked any "positive emotional experiences such as affectionate valuing, reinforcement of positive social mores, and deeper bonds built by physical parental presence" that could have answered the negative factors. *Id.*

64. Since his incarceration, Applicant has been subjected to the highly structured environment of the prison. *Id.* In this environment, he is able to focus his attention on study, including the law for his case and religious study, and he is improving his ability to concentrate and reflect rather than simply react. *Id.* His behavior since incarceration indicates a desire for insight. *Id.*

65. The defense also called a psychiatrist, Dr. Brian Skop, to testify at trial (ct. R. vol. 19, at 34). He practices both clinical and forensic psychology. *Id.* at 34. He conducted an evaluation of Applicant. *Id.* at 36. As part of the evaluation, he reviewed Applicant's records from the Texas Youth Commission (TYC) and Texas Department of Criminal Justice. *Id.* at 36.

He also interviewed Applicant and reviewed Applicant's trial testimony. *Id.* at 36 & 37. Applicant's IQ test results from TYC were 81, a borderline intellectual function range. *Id.* at 37.

66. Dr. Skop testified that Applicant would be less of a risk to society if he were in prison. *Id.* at 38. Applicant's substance dependency problem, which is a large risk factor for the commission of violent acts, would be reduced in prison. *Id.* at 38. Applicant's impulsive difficulties would also be controlled in a prison setting. *Id.* at 38. Additionally, Applicant's lower socio-economic status, also associated with violence, would not exist in prison. *Id.* at 38. He would have access to shelter, food, and medical care. *Id.* at 38. He could receive treatment for his mental disorders. *Id.* at 41. The prison system is also capable of restricting Applicant's interaction with other inmates. *Id.* at 38. And finally, risk of violence decreases as people age so as Applicant aged the risk would go down. *Id.* at 39.

67. Dr. Skop also testified that the risk of capital murder inmates committing an incidence of violence sentenced to life in prison is substantially low, 1.6 per 100 inmates per year, when compared to regular inmates that have a rate of 19.3 per 100 per year. *Id.* at 40.

C. Relevant Testimony from the Hearing on Applicant's Writ[8]

[8] A transcript of the writ hearing is attached hereto as **Exhibit 4.**

1. Josie Luna, Applicant's mother, was called to testify at the hearing on his writ. (Ct. R. Writ at 14). She provided an affidavit for the defense. *Id.* at 15. With the exception of where she currently resides, everything in her affidavit is correct. *Id.* at 16. She loves her son very much and feels responsible for the situation he is currently in. *Id.* at 32-33. When Applicant was young, she lived with her mother and brothers, Ralph and Jessie. Exhibit H. Her brothers were involved in drugs and were in trouble with the law. *Id.* They sold marijuana out of the house. *Id.* She fought with them in front of her children. *Id.* Ralph died of an overdose in 2007. *Id.*

2. She claims that when Applicant was three, she went into the garage and found Ralph with Applicant. Applicant had his pants down and Ralph was touching him and making Applicant touch him back. *Id.* She only witnessed this one instance of alleged sexual abuse, and she never reported the abuse to anyone (Ct. R. Writ at 27). She claimed she did not report the abuse because she would have to move out of her mother's house. *Id.* at 27. When she did finally move out, she still failed to report the alleged abuse. *Id.* at 28. Nor did she report the abuse after the alleged abuser died. *Id.* at 28. She's never spoken about the alleged abuse with her son and she does not believe that he even has any recollection that it occurred since he was so young at the time. *Id.* at 28.

3. When Applicant was young, he had an illness that caused a high fever. She sought medical treatment and they were able to bring his fever down and there was no further medical follow up (Ct. R. Writ at 29-30). She also recalled that when Applicant was a child he fell and hit his head. This occurred when Applicant was a year-and-a-half to two-years old (Ct. R. Writ at 29). Applicant never lost consciousness, did not vomit, and Josie did not seek any medical treatment *Id.* She just kept him awake and alert and everything was fine. *Id.* at 29.

4. Her boyfriend, Eric Elizondo, was very abusive to her, and Applicant was afraid of him. Eric would discipline Applicant with a belt. *Id.* Applicant's father, George, never had time for Applicant. *Id.* There were long stretches where he would not see Applicant. *Id.* Sometimes he would call and say he was coming to get him, and then never show up. *Id.*

5. Applicant did not do well in school and Josie did not recall any teacher taking an interest in him. A pediatrician recommended putting Applicant on Ritalin as a child but Josie had heard negative things about the drug and did not think it was a good idea. *Id.*

6. When Applicant began engaging in his criminal activities, she had little contact with him. *Id.* at 29. He was removed from her home and placed in various juvenile facilities where he received treatment. *Id.* at 31.

7. She recalled meeting with Margaret Drake, the defense's mitigation expert at trial, at least two times. *Id.* at 18, 19. Once they met in Josie's home and the other time at a coffee shop. *Id.* at 19.

8. Applicant's sister, Brandy Moyer, testified at the writ hearing. *Id.* at 34. She never spoke to Margeret Drake or the defense attorneys. *Id.* at 38. She does not believe that Applicant deserved the sentence he received. *Id.* at 45.

9. Brandy never witnessed any sexual abuse of her brother and they never discussed any abuse. *Id.* at 43. Being only one year older than Applicant, she experienced the same household environment that he did. *Id.* at 43. As Applicant became a teenager, she spent less time with her brother and did not know what he was doing. *Id.* at 45. They separated from that point on. *Id.* at 46.

10. Applicant's aunt, Rose Ramirez, testified that she does not believe Applicant deserved his death sentence. *Id.* at 79.

11. Dr. Jack Gordon Ferrell, Jr., a clinical and forensic psychologist, testified at the writ hearing that he reviewed records and interviewed Applicant. *Id.* at 50, 53. He testified that there were oppositional criminal activities in and around Applicant's family members and household, including drug abuse. *Id.* at 56-57. Applicant's father was in and out of the home and was abusive. *Id.* at 57.

12. Applicant has a low average IQ, average in the 80s. *Id.* at 58. He was in special education, but did not always receive special education classes. *Id.* at 58. He did not do well in school and was out in the streets by the time he was high school age. *Id.* at 58.

13. Applicant spent time in TYC and did well in some of the placements but when he was returned to his environment he deteriorated. *Id.* at 58-59. And while he did well in some placements, there were other treatment facilities where he did not do well. *Id.* at 83. He absconded from facilities. *Id.* at 83. And he engaged in assaultive behavior while in some facilities. *Id.* at 83.

14. Under the DOJ's risk factors, Applicant had all of them. *Id.* at 60. Dr. Ferrell described Applicant as a disturbed youth. *Id.* at 63. The risk factors predispose a juvenile to delinquent behavior and cause subsequent problems as adults with criminality. *Id.* at 81. This can result in impulse control issues, lack of empathy, lack of remorse, and violent criminal behavior. *Id.* at 81-82. The reason these factors have been identified is so that a juvenile can receive intervention. *Id.* at 82. According to Dr. Ferrell, Luna did not receive sufficient intervention. *Id.* at 82.

15. Dr. Ferrell acknowledged that juveniles with the risk factors present do not go on to become capital murderers. *Id.* at 100-01. In explaining why Applicant's sister, who was exposed to the same environment as Applicant, did not turn out the same way as her brother, Dr. Ferrell explained: "There

are a lot of things that account for how we choose to live out our lives. Some of it is experience, some of it is various types of genetic material. I think he had some things that were a little different than his sister... ." *Id.* at 101.

16. Applicant was tested and showed some depression. *Id.* at 62. He also had some sociopathy, a significant anxiety disorder, and Schizophrenia. *Id.* at 59. He also tested "as being schizoid, another term for a type of ongoing behavior that is confused, withdrawn, not being part of the standard community." *Id.* at 63.

17. Dr. Ferrell agreed with Applicant's conduct disorder diagnosis Dr. Sherman made. *Id.* at 88. Applicant's behavior fit the criteria for a diagnosis of an antisocial personality disorder. *Id.* at 93.

18. Michael Granados testified that he and Mario Trevino were Applicant's defense attorneys at his trial. *Id.* at 104. He has been practicing since 1979, and his practice is almost exclusively criminal. *Id.* at 104. He was a prosecutor for ten years. *Id.* at 147. He tried four capital murder cases as a prosecutor and was chief of the capital crimes section of the Bexar County District Attorney's Office. *Id.* at 147. Since going into private practice, he has handled approximately 140 felony trials. *Id.* at 147. He has handled fifteen capital murder trials as a defense counsel, in eight or nine the State sought death. *Id.* at 148.

19. The main defense strategy at the guilt/innocence stage centered on the fact that there were no eyewitnesses to the murder. *Id.* at 112. As for the punishment phase, his plan depended on what happened at guilt/innocence. *Id.* at 112. There were some things that he would want to use, but it would depend on what the prosecution presented. *Id.* at 113.

20. Granados met with Margaret Drake three or four times prior to trial. *Id.* at 106. She was brought in close in time to when he and Trevino were appointed to the case. *Id.* at 106.

21. They attempted to dissuade Applicant from pleading guilty. *Id.* at 114.

22. Mr. Granados and Mr. Trevino generally agreed on what types of jurors they were looking for and relied heavily on the questionnaires, which are quite extensive. *Id.* at 108, 111. In his experience, the majority of venire members follow what they put on their questionnaires. *Id.* at 111. For some, there are answers that seem strong that the lawyers like or dislike. *Id.* at 111. But for most, the answers are somewhere in the middle, and it is important to see the potential jurors in person. *Id.* at 111. Applicant was involved in the jury selection process and he would tell the attorneys which venirepersons he did or did not want on the jury. *Id.* at 149.

23. Mr. Granados explained the voir dire process:

> Once again, you have to actually see somebody and experience them and – and listen to their answers. You may think going in you're going to go one way or the other, but people can reverse on

you. It's – it's a process. The other thing is that you want a chance for your client to experience each individual juror to some extent because they're the one going to make the – that is going to make the decision. And you want them to have both a chance to see the person and also to get a gut reaction to the person.

A lot of what goes on in voir dire never makes it to the record because it's visual. If – if a prospective juror walks in and makes eye contact with the defendant or refuses to make eye contact with the defendant, all those things go in to the mind of – of the defendant and he gets a feel and then we get a feel and then we discuss it, but it's never going to make the record because only what is – is verbalized makes the record. So there's a lot more than – than what is – is in the paper that goes into jury selection.

*Id.* at 119-20.

24. Mr. Granados was asked about specific members of the venire panel. He explained that Franklin was a nurse, and in his experience he does not like nurses on a jury. *Id.* at 118. Nurses work in emergency rooms and come into contact with victims of violent crimes and they also tend to be cynical and fact-oriented rather than emotion-oriented. *Id.* at 118-19. Ultimately, however, he did not specifically recall Franklin. *Id.* at 121.

25. With venire member Torres, who was against the death penalty, Mr. Granados said as he questioned her she dug in her heels and said she could not make decision. *Id.* at 122. He remembered her crying and she looked him in the eye and he got the feeling she was not going to change. *Id.* at 123.

26. Although he could not remember specific reasons with the identified venirepersons, he said that they had reasons for not trying to rehabilitate potential jurors. *Id.* at 125. It could have been that Applicant whispered into his or Mr. Trevino's ear and told them that he did not want the person on the jury, which happened many times during the trial. *Id.* at 125.

27. Generally, Mr. Granados would have spent more time trying to rehabilitate a venireperson he wanted on the jury and, conversely, would not spend the time on a venireperson he was lukewarm on or that Applicant did not want on his panel. *Id.* at 150.

28. Mr. Granados was also questioned about venirepersons who made it onto the jury. *Id.* at 129. He was comfortable with the individuals who ultimately ended up on the jury. *Id.* at 151. He believed that they would be fair and listen to the evidence. *Id.* at 151.

29. Applicant's other trial counsel, Mario Trevino, also testified at the writ hearing. *Id.* at 157. Mr. Trevino was the first chair in the case. *Id.* at 157. He has been practicing law for thirty-two years and his practice is basically state and federal criminal defense. *Id.* at 157-58. He has handled ten death penalty trials. *Id.* at 158.

30. In preparing for his testimony Mr. Trevino read Applicant's writ pleading but did not review the entire trial record. *Id.* at 169. The portion of the record he did read did not refresh his memory. *Id.* at 169. And although he

agreed with Applicant's writ counsel that his performance was deficient, the answer was incomplete and inaccurate because he does not have an independent recollection of what occurred at trial. *Id.* at 170. In every case, there are things in hindsight that Mr. Trevino would have done differently. *Id.* at 170.

31. He was not surprised by Applicant's decision to enter a plea of guilty. *Id.* at 158. He and Applicant had spoken a lot. *Id.* at 159.

32. Mr. Trevino did not give an opening statement because he was unsure what Applicant was going to say and he did not want the possibility of Applicant saying something different or not testify at all. *Id.* at 159.

33. He did not object to the introduction of the juvenile records because they were voluminous and they contained good information (showing Applicant's efforts to do the right thing), along with the bad. *Id.* at 165.

34. Mr. Trevino thought the jurors selected could be fair. *Id.* at 168. As he reviewed the writ and the excerpts in it from the voir dire, Mr. Trevino could not remember the faces of the venirepersons or their demeanor. *Id.* at 175.

35. In regards to the mitigation evidence, he provided Dr. Skop with Applicant's file and instructed him to find mitigating evidence. *Id.* at 161. Dr. Skop was knowledgeable about the special issues, and Mr. Trevino felt he had the right expert. *Id.* at 161. Dr. Skop also tested Applicant. *Id.* at 161. Even though there were some negatives, after discussing the risks, they decided they

would present Dr. Skop's testimony in order to get the good information before the jury. *Id.* at 162.

36. Mr. Trevino met with both of his experts and discussed mitigation evidence. *Id.* at 171. They discussed what they did in their investigations. *Id.* at 171. Although Mr. Trevino would have preferred more mitigation evidence, they could not find it. *Id.* at 172. In his opinion, Drake worked very hard on the case. *Id.* at 172.

37. Applicant wanted the death penalty, and that put Mr. Trevino in a difficult position in regards to mitigation evidence. *Id.* at 173. According to Mr. Trevino, he and Mr. Granados had to a walk a fine line to do what he felt they needed to do and to not get cross-wise with Applicant. *Id.* at 173. According to Mr. Trevino, nothing would be worse than losing communication with the client. *Id.* at 173.

D. Application of Law to Applicant's Ineffective Assistance of Counsel Claim

1. In his third ground for relief, Applicant identifies several instances in which he claims that his trial attorneys were ineffective. Applicant's Pleading, at 89-271. To avoid confusion, this court will address each of the alleged deficiencies in the order in which Applicant raises them.

2. In his first claim of ineffective assistance, Applicant argues his attorneys were deficient for permitting certain venirepersons to be excused outside of his presence. Applicant's Pleading, at 89. As this Court explained in its

findings and conclusions regarding Applicant's first claim for relief, while there is a due process and statutory right to be present during voir dire, where the presence of the defendant does not bear a reasonably substantial relationship to the opportunity to defend there is no harm either under the due process clause or art. 33.03 of the Texas Code of Criminal Procedure. *See Snyder v. Massachusetts*, 291 U.S. at 105-108; *Cooper v. State*, 631 S.W.2d at 512.

3. The first complained of instance involves the excusal of certain venire members prior to the commencement of voir dire pursuant to art. 35.03 of the Texas Code of Criminal Procedure. Because the excusals made under this provision of the Code are done without consultation or involvement of the parties,[9] the defendant's presence would not bear "a reasonably substantial relationship to the opportunity to defend." As a result, this Court finds that Applicant's presence was not required by the either the due process clause or Art. 33.03 of the Texas Code of Criminal Procedure, and thus trial counsel were not deficient in this regard. Furthermore, even if the representation was deficient, this Court concludes that Applicant suffered absolutely no prejudice as the result of his absence. Despite such actions on the part of trial counsel, this court finds that the result of the outcome of the

[9] *See* Tex. Crim. Proc. Code Ann. art. 35.03.

proceedings would not have changed. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

4. As for the second instance Applicant identifies in which he argues counsel was deficient for failing to secure his attendance--the notification by the prosecutor that both parties had agreed on excusing five jurors— Applicant has presented no evidence that he was not involved in the substantive discussion that resulted in the agreement. In fact, this court finds that the evidence in the record establishes that Applicant was involved in all decisions to excuse venirepersons. The only thing that occurred outside Applicant's presence was the court being informed of the agreement that had been made. Since the record reveals that Applicant was present when the decision to enter into the agreement to excuse the venire members was made, Applicant has not shown that counsels' performance was deficient. Furthermore, since his presence in court when the trial court was notified of the agreement did not bear on his opportunity to defend, Applicant suffered no prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Therefore, this Court recommends that relief be denied on Applicant's first claim of ineffective assistance of counsel.

5. In his second claim, Applicant asserts that his attorneys were deficient for failing to rehabilitate vernirepersons Franklin, Torres, Cordova, Leyva, Daughtery, Holden, Happney, Hol,tkamo, Carrell, Hennington, and Gamez,

who were opposed to the death penalty. Applicant's Pleading, at 93. In support of this allegation, however, Applicant did not call any of the excused venirepersons to testify at the writ hearing or otherwise offer any evidence as to what the venirepersons would have testified to had trial counsel attempted further rehabilitation. Applicant has both the burden of production and persuasion in this habeas application. *See Ex parte Thompson*, 153 S.W.3d 416, 427 (Tex. Crim. App. 2005). As a result, he must produce an adequate record to support his claim for relief; otherwise this court must recommend denial of relief on his claim. By failing to produce evidence that the venirepersons could have been sufficiently rehabilitated, Applicant has failed to meet his burden of establishing his ineffective assistance claim. That is, without a showing that the identified venirepersons could have been rehabilitated, there can be no finding of prejudice. Similarly, because the record does not in any way show that that any of the individuals who actually served on the jury were biased, there can be no prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Therefore, this Court recommends that relief should be denied.

6. In his third ineffective assistance claim, Applicant argues that trial counsel was deficient for agreeing to the excusal of two venirepersons opposed to the death penalty. Applicant's Brief, at 165. Again, Applicant has failed to meet his burden. Not only did Applicant fail to call the venirepersons to

testify at the writ hearing, he made no inquiry of defense counsel as to their reasons for agreeing to the excusals. As a result, Applicant cannot overcome the strong presumption that counsel's reasons for agreeing to the dismissal were proper. Therefore, this court recommends that relief be denied.

7. In his fourth claim for relief, Applicant contends that his trial attorneys were deficient for failing to submit death penalty questions to venirepersons De La Plata, Lucio, Jumenez, Rector, Retzloff, Stanush, Trevino, Moore, Cordova, Perez, Garcia, Boyle. Applicant's Pleading, at 167. In order to obtain relief on this claim, Applicant must produce evidence that had the questions been submitted to the venire members in question, the result of the voir dire would have been different. Since the particular veniremen were not called to testify at Applicant's writ hearing, Applicant he has not met his burden. Therefore, this Court recommends relief be denied.

8. Finally, with respect to all of Applicant's ineffective assistance claims concerning voir dire, this Court would note that Applicant has produced no evidence that those who actually served on his jury were unfit for duty. *See Ford v. State*, 73 S.W.3d 923 (Tex. Crim. App. 2002). In fact, Mario Trevino, the lead defense attorney at trial, testified that he believed the jurors who were selected were acceptable to the defense and fit to sit on the jury. As a result, Applicant cannot establish that any alleged deficiencies on the part of his trial counsel resulted in actual harm. Therefore, this Court

recommends that Applicant's claim of ineffective assistance of counsel be denied on all claims involving the handling of voir dire.

9. In his fifth ineffective of assistance claim, Applicant argues counsel was deficient for failing to make an opening statement. Applicant's Pleading, at 263. Mario Trevino, the lead defense attorney at trial, testified that he did not make an opening statement because he was unsure what Applicant's trial testimony would be or if he would even testify and did not want any possibility that what he said to be contradictory. Given Applicant's decision to plead guilty and testify at trial, this court concludes that Mr. Trevino's decision to not make an opening statement was reasonable and part of his trial strategy. Therefore, his performance was not deficient and this Court recommends that relief be denied.

10. In his sixth and seventh claims for relief, Applicant argues his trial counsel was ineffective for failing to object to his juvenile probation officer's file and juvenile parole officer's file. Applicant's Pleading, at 263 & 265. Mr. Trevino testified that he did not object to the records because they contained information that was favorable to the defense and showed Applicant's efforts to "do the right thing." This Court finds this decision to be reasonable trial strategy, particularly in light of Applicant's decision to plead guilty. It was clear that the strategy was to be completely honest with the jury regarding Applicant's prior criminal history, which included admission

of offenses the prosecution was unaware of. Therefore, counsel was not deficient in this regard, and this court recommends that this claim for relief be denied.

11. In his final ineffective assistance claim, Applicant argues that his trial counsel failed to present all mitigating evidence. Applicant's Pleading, at 271. To be entitled to relief, Applicant must show that his trial counsels' performance was deficient and, as a result of that deficiency, his defense was prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Gonzales*, 204 S.W.3d 391, 393 (Tex. Crim. App. 2006). In order to satisfy the second *Strickland* prong, the "applicant must show there was a reasonable probability that, absent the errors, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." *Ex parte Gonzales,* 204 S.W.3d at 393-94. This requires a showing that there is a reasonable probability that, absent the errors, the jury would have answered the mitigation special issue differently. *Id.* at 394. In this context, a "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citing *Strickland*, 466 U.S. at 694).

12. This court finds that the record reveals that Applicant's trial lawyers conducted a very thorough mitigation investigation. They retained the assistance of two experts, Margeret Drake and Dr. Skop. This court finds

that there is no evidence presented indicating that the performance of Applicant's trial lawyers was deficient in this regard.

13. Most importantly, as to all of Applicant's claims of ineffective assistance of counsel, this court finds that even if Applicant's trial attorneys performed deficiently as to certain aspects of Applicant's trial, in light of Applicant's testimony acknowledging guilt and asking to be sentenced to death, (see Exhibit "3"), Applicant has not satisfied the second prong of *Strickland.* Applicant has not shown that there is a reasonable probability that the results of the trial would have been different but for counsel's deficient performance. *Id.* Therefore, this court recommends that all of Applicant's claims of ineffective assistance of trial counsel be denied.

## VI. Findings of Fact and Conclusions of Law on Applicant's Fourth Claim

1. In his fourth claim for relief, Applicant complains that his appellate counsel failed to provide effective assistance of counsel. Applicant's Pleading, at 282. In order to obtain relief in the form of a new direct appeal on a claim of ineffective assistance of appellate counsel, Applicant must show that "(1) counsel's decision not to raise a particular point of error was objectively unreasonable, and (2) there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal." *Ex parte Miller*, 330 S.W.3d 610, 623 (Tex. Crim. App. 2009) (internal

quotation marks omitted); *Ex parte Santana*, 227 S.W.3d 700, 704-05 (Tex. Crim. App. 2007); *see also Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). An appellate attorney "need not advance every argument, regardless of merit, urged by the appellant". *Evitts v. Lucey*, 469 U.S. 387, 394 (1985); *see also Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir. 2003) ("Counsel need not raise every nonfrivolous ground of appeal, but should instead present solid, meritorious arguments based on directly controlling precedent.") (internal quotation marks and alterations omitted). It is only when "appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it." *Ex parte Miller*, 330 S.W.3d at 624; *see also Ex parte Flores*, 387 S.W.3d 626 (Tex. Crim. App. 2012).

2. Applicant argues that his appellate counsel should have raised the issue of his absence when certain potential jurors were excused. As this court has already determined, no harm has been shown by Applicant's absence. Thus the alleged error does not have indisputable merit that would result in a reversal and this court recommends that this claim for relief be denied.

## VII. Findings of Fact and Conclusions of Law on Applicant's Fifth Claim

1. In his final claim for relief, Applicant argues that the aggravating factors employed in the Texas Capital sentencing scheme are vague and do not properly channel the jury's discretion in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Applicant's Pleading, at 287.

2. This claim could have been raised on direct appeal but was not. It is therefore not an appropriate ground for relief in the instant matter. *SeeEx parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004); *Ex parte Townsend*, 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2004). A writ of habeas corpus should not be used to litigate matters that should have been raised on direct appeal. *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1996). The Court therefore concludes that review of this claim is barred. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

3. Further, the Texas Criminal Court of Appeals has considered similar complaints to art. 37.071 and rejected them. *See Blue v. State,* 125 S.W.3d 491, 505 (Tex. Crim. App. 2003) (citing *Wright v. State*, 28 S.W.3d 526, 537 (Tex. Crim. App. 2000); *Ladd v. State*, 3 S.W.3d 547, 572-73 (Tex. Crim. App. 1999); *Raby v. State*, 970 S.W.2d 1, 8 (Tex. Crim. App. 1998);

*Cockrell v. State*, 933 S.W.2d 73, 93 (Tex. Crim. App. 1996)). Therefore, the court recommends that this claim for relief be denied.

## VII. Orders of the Court

1. The court concludes that Applicant has not met his burden of establishing his claim by a preponderance of the evidence and recommends that relief be **DENIED.**

2. The District Clerk of Bexar County, Texas is hereby ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or other practical means:

a. The Court of Criminal Appeals
Austin, Texas 78711

b. Susan D. Reed
Criminal District Attorney
Bexar County, Texas
Cadena-Reeves Justice Center
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

c. The Office of Greg Abbott
Attorney General of Texas
Enforcement Division
Capital Station
Austin, Texas 78711

d. Joe Luna
Polunsky Unit
3872 FM 350 South
Livingston, Texas 77351

e. Michael C. Gross
106 South St. Mary's Street, Suite 260
San Antonio, Texas 78205

SIGNED, ORDERED, and DECREED on 9/25/2014

Judge Bert Richardson

JUDGE BERT RICHARDSON
Judge Presiding
By Assignment

was in the course of committing and attempting to commit the offense of arson upon Michael Paul Andrade.

Against the peace and dignity of the State.

Signed by the foreman of the grand jury.

THE COURT: Mr. Luna, how do you plead to the charges in Count I?

THE DEFENDANT: Guilty.

THE COURT: Okay. All right.

Ladies and gentlemen, the defendant has entered a plea of guilty to the charges. I'm going to ask you to go back to the jury room for a few minutes. We need to take care of a few matters and then we'll bring you back in.

(Jury Not Present)

THE COURT: Let's take about five minutes and make sure I have these admonishments by the book.



( Recess )

(Defendant Not Present)

THE COURT: I've done a little research very quickly. The first thing we have to do is admonish him clearly. And then -- it's been done a couple of different ways. First way is I would prepare a jury charge

(Defendant Present)

THE COURT: Mr. Luna, the indictment has just been read. It's a one-count indictment with three paragraphs. You've entered a plea of guilty to that. Before accepting your plea, I'm legally required to admonish you on certain issues. I'm going to ask you some questions to make sure you understand them. If you don't understand, if you need to consult with your lawyers, let me know. If you have any questions you want to ask me at any time, just stop me and let me know.

You've entered a guilty plea to committing the offense of capital murder. There are only two forms available for that, that's either a life or death sentence. Do you understand that?

THE DEFENDANT: I understand.

THE COURT: And the State is seeking the death penalty in this case. In order for the death penalty to be imposed, that would have to be a decision the jury reaches. Do you understand that?

THE DEFENDANT: I understand.

THE COURT: Before I go any further, let me ask you if you are an American citizen.

THE DEFENDANT: I am.

THE COURT: If you are not an American

Attachment II

25 citizen, I need to advise you, regardless of the verdict



1 that the jury renders in this case, that by pleading on
2 this it would have an adverse effect upon your immigration
3 status and get you deported if you were not an American
4 citizen.
5 Additionally, I want you to understand that
6 by pleading on this offense, you are waiving all
7 non-jurisdictional defects, which basically includes the
8 pretrial motions that we raised last week addressing the
9 motion to suppress, the evidence that was seized,
10 statements that you might have made. Do you understand
11 that?
12 THE DEFENDANT: I understand.
13 THE COURT: Do you have any questions so
14 far?
15 THE DEFENDANT: No.
16 THE COURT: Mr. Trevino, let me ask you the
17 following questions:
18 Does your client have a rational and
19 factual understanding of the proceedings?
20 MR. TREVINO: Yes, he does.
21 THE COURT: Has he been able to assist in

the preparation of any possible defenses?

MR. TREVINO: Yes, he has.

THE COURT: In your opinion is he mentally competent to waive these rights and enter this plea?



MR. TREVINO: Yes, he is.

THE COURT: Mr. Luna, have you been threatened or coerced in any form or fashion in order to enter this plea?

THE DEFENDANT: No.

THE COURT: And you do understand that by pleading guilty, that I will submit this to the jury, there will be a charge that instructs them to find you guilty, and then they will make the decision on whether or not a life or death sentence would be appropriate by answering the special issues that I submit to them.

THE DEFENDANT: Yes.

THE COURT: Anything else?

MS. REED: May I ask you to ask him if anyone has made any promises to him?

THE COURT: In return for this plea, has anybody made you any promises that I am not aware of or anybody else is not aware of?

THE DEFENDANT: No.

MR. THORNBERRY: The jury will be instructed to find him guilty of capital murder.

THE COURT: Yeah. Let me make it clear. I told you that the jury would be instructed to find you guilty. They would be instructed to find you guilty of the offense of capital murder.



THE DEFENDANT: I understand.

THE COURT: And upon doing that, then the only form of punishment legally that can be imposed would either be a life or death sentence. Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: Anything else from either side?

Okay. Then what I plan to do is bring the jury back in, instruct them that you have entered a plea of guilty to the offense of capital murder. I will then move into the punishment phase of the trial. I guess it's a combination of punishment slash guilt-innocence. There will not be a jury charge until we conclude this phase. Upon the conclusion of all the evidence, I will give them a charge that instructs them to find you guilty. And that

16 charge will also include the special issues that they will
17 be required to answer. So this phase of the trial will
18 include evidence from both the indicted case and any
19 extraneous matters.
20 Anything else?
21 MS. REED: Your Honor, may the record
22 reflect that we have conferred with counsel outside --
23 well, with the Court as to the procedure in reference to
24 the submission of the charge, of the direction of the
25 verdict of guilty, as well as the questions to be asked,



1 to be done in a unified fashion in one verdict form, and
2 one charging instrument, and that is agreeable to the
3 parties?
4 THE COURT: Okay.
5 MR. TREVINO: It is agreeable, Judge.
6 THE COURT: All right. Anything else before
7 we get started?
8 I propose we bring the jury in and I'll
9 instruct them that he has entered a plea of guilty and
10 we'll move right into the evidence.
11 Does either side wish to give an opening
12 statement? I'm sure the State does.

Mr. Trevino?

MR. TREVINO: I was not going to make an opening. That's the problem with the way he's chosen to do this.

THE COURT: Do you need a few minutes?

MR. TREVINO: Yeah. I was -- well, the point is that -- now the opening is more related to punishment.

THE COURT: Right.

MR. TREVINO: And I would prefer to withhold making my opening until the evidence we present on punishment.

THE COURT: Okay. All right.



MS. REED: One other thing. Do you think it would be wise to ask if he is satisfied with the assistance of his counsel and representation?

THE COURT: Yeah. We can do that.

Come on up, Mr. Luna.

Let me ask you so we're clear on the record. Are you satisfied with the assistance of the counsel that you have been provided?

THE DEFENDANT: I'm satisfied.

afternoon.

(Jury Not Present)

THE COURT: You can be seated.

We're going to take 15-minute break. I need to clear the courtroom for a few minutes. We're not conducting any kind of hearing. Mr. Trevino just wants to talk to his client for a few minutes. And it will be easier to do that if I could have everybody step out for a few minutes.

( Recess )

THE COURT: Raise your right hand and state your name.

THE WITNESS: Joe Michael Luna.

(Witness Sworn)

MR. TREVINO: May I proceed?

THE COURT: Yes, sir.



JOE MICHAEL LUNA,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. TREVINO:

Q. Joe, I've advised you not to testify. Correct?

A. You did.

Q. If you choose to testify, you will waive all issues that can be presented on appeal. You know that?

A. I understand that.

Q. In my opinion you will seriously damage your case. Do you understand that?

A. I understand that.

Q. Your testimony will be used against you by the jury to answer the two issues they have at punishment, in my opinion. Do you understand that?

A. I understand that.

Q. And you also understand which those -- which two issues those are, the future dangerousness issue and the mitigation issue. Right?

A. I understand.

Q. The prosecutors will be able to cross examine you on any offense or other issue, not just the ones that have been developed or discussed so far, but anything that your testimony may bring up.

A. Okay.



Q. They will be able to call other witnesses, if they choose, regarding anything that may be developed by your testimony.

A. I understand that.

Q. Your taped jail phone calls will be used during cross examination.

A. I understand.

Q. Your letters from jail will be used during cross examination.

A. I understand that.

Q. You understand that?

A. I understand that.

Q. Your write-ups during the time you've been in jail will be used during cross examination.

A. I understand that.

Q. Including the handcuff key and that gadget that you had at your waist during voir dire. Do you understand that?

A. I understand that.

Q. Okay. You will be cross examined regarding any matter that's relevant to this case.

A. I understand that.

Q. You know you have the right to remain silent and you do not have to testify if you don't want to.

A. I do.

Q. Nobody can make you testify.

A. Correct.

Q. It's my opinion that your testimony will have a negative effect upon the testimony of Margaret Drake and Doctor Skop. Do you understand that?

A. I understand that.

Q. Do you still wish to testify?

A. I do.

THE COURT: Mr. Trevino, let me ask you some questions. I cleared the courtroom and gave you the opportunity to talk to your client about whether or not he should testify. Have you had ample opportunity to?

MR. TREVINO: Yes, I have.

THE COURT: And nobody but the bailiffs was present, for security purposes. Is that correct?

MR. TREVINO: That's correct.

THE COURT: In your opinion, does your client have a rational and factual understanding of the proceedings at this point?

MR. TREVINO: Yes, he does.

THE COURT: In your opinion, is he mentally competent to waive whatever rights he's going to as he testifies and testify in front of the jury?

MR. TREVINO: Yes, he does.

THE COURT: Okay.

And Mr. Luna, do you understand -- were you able to understand all the questions he just asked you?

THE DEFENDANT: I did.

THE COURT: Do you understand that you have a Fifth Amendment right not to testify in this proceeding?

THE DEFENDANT: I do.

THE COURT: Has anybody threatened or coerced you into testifying in this proceeding?

THE DEFENDANT: No, they have not.

THE COURT: And you do understand that you can be cross examined about anything that has been raised in the course of the trial and questioned about that?

THE DEFENDANT: I do.

THE COURT: Do you have any questions you want to ask at this time before we proceed?

THE DEFENDANT: No, I do not.

MR. TREVINO: Just a little further. I also talked to Joe about his left hand being shackled.

THE COURT: Right.

MR. TREVINO: And that his right should be used only.

THE COURT: Let me just -- let the record reflect, I think the record is abundantly clear of the additional security precautions we've had to take because

25 of this.



In light of the evidence that has been found in your jail cell and on your person, and other evidence that has been developed, and in light of the fact that you've entered a guilty plea, it has been my decision, along with those of my bailiffs, to shackle you at the ankles, and handcuff your left hand to the belt.

Is that correct, Mr. Bailiff?

DEPUTY GUTIERREZ: Yes.

THE COURT: Your right hand is free. Okay? So if you need to use any Kleenex, you can do that. If at some point you are uncomfortable and you feel like there's some need to raise your left hand, just let me know and we'll stop the proceedings and excuse the jury.

THE DEFENDANT: Okay.

THE COURT: That way when they come in they will not be aware of any of the restraints that have been placed on you. Although the law is abundantly clear that I'm entitled to do that, and the jury would be entitled to know that, we're not going to bring that to their attention.

MR. TREVINO: One last thing. We've

22 arranged with the bailiffs to bring the jury to the left

23 side so there's no opportunity for them to view Mr. Luna's

24 handcuff.

25 THE COURT: I think my bailiffs have spoken



1 to you time and time again about any outbursts. All your

2 family is here along with any other witnesses. So I don't

3 think there's any need to have any problems.

4 Anything else?

5 DEPUTY GUTIERREZ: I'll be here.

6 THE COURT: The bailiff will be back over

7 to your right.

8 Anything else? Any other requests?

9 MS. HEWITT: No.

10 MR. TREVINO: No.

11 THE COURT: Any other admonishments that

12 you want offered?

13 MS. HEWITT: No, Your Honor.

14 THE COURT: All right. Let's bring the jury

15 in.

16 (Jury Present)

17 THE COURT: You can be seated.

18 MR. TREVINO: May I proceed, Judge?

19 THE COURT: Ladies and gentlemen, the State
20 has rested their case. The defense has an opportunity to
21 put on evidence they want. They have elected to waive an
22 opening statement at this time.
23 Is that correct?
24 MR. TREVINO: That's correct.
25 THE COURT: Your first witness is obviously



1 Mr. Luna?
2 MR. TREVINO: Yes, Judge.
3 THE COURT: Let me swear him in front of
4 the jury. Raise your right hand and state your name.
5 THE WITNESS: Joe Michael Luna.
6 (Witness Sworn)
7 THE COURT: Okay.
8 MR. TREVINO: May I proceed?
9 THE COURT: Yes.
10 JOE MICHAEL LUNA,
11 having been first duly sworn, testified as follows:
12 DIRECT EXAMINATION
13 QUESTIONS BY MR. TREVINO:
14 Q. Would you please state your name, please?
15 A. Joe Michael Luna.

Q. Mr. Luna, you have decided that you wish to address the Court regarding many matters in this case, if not all matters. Is that correct?

A. I do.

Q. And you have also decided to do this in a narrative fashion. Is that correct?

A. I do.

Q. All right. Thank you.

A. Takes a lot of courage for me to get up here and testify. But I want to set the record straight. I want to



set it straight for the family. I'm not up here to try and plead for my life.

THE COURT: Hold on one second.

A. I don't want nobody to get the impression that -- I'm not up here to plead for my life. I'm not. I'm actually going to do the opposite. I don't blame none of my circumstances for the -- my childhood for the way I was raised and who I am. I feel certain things in my life -- but in the end, I made the final choices that I made. I am who I am for the decisions I made in life.

I'm going to speak a little bit about religion because I'm starting to turn my life over to God.

It's the only hope I got left. I did five years in prison. The last two years I did in prison I got into religion, not a particular religion, but I was holding the beliefs of someone by the name of Alistair Crowley who taught there is a little bit of truth before you come to an understanding.

Q. Joe, I hate to interrupt you, but I think the Court Reporter is having a little trouble understanding you. If you can slow down a little bit.

A. Slow down?

Q. Yes.

A. I don't believe none of that no more. But when I used to hold those beliefs, I didn't agree with the Holy



Bible. I thought the Old Testament, in particular -- I used to feel that the God of the Old Testament was an evil God who tried to enslave us by keeping us ignorant to the knowledge of good and evil. There's other passages in the old testament I didn't agree with. For instance, Sodom and Gomorrah. And the Passover. If nobody's familiar with Sodom and Gomorrah. It's Genesis 17 and 18. God destroys a whole city because of the sins of the parents. They were bearing their lust men with men, and women with women. In

this city there was children too, innocent kids. You know what I'm saying, that were, I guess, innocent to sin, ignorant to right and wrong. I didn't agree how God would destroy someone as innocent as child for the sins of the parents. And same thing with The Passover.

Anyhow, when I was in the prison and reading the Bible I was reading it for face value. I didn't actually get into it the way I should have. And when I got out of prison I forgot all about God. It was all about me, you know what I'm saying. I did five years. I wanted to catch up on -- on the life I missed. I lived -- I lived a pretty rough life. I lived a life of crime. You've seen that. Most of the stuff they brought, the DA and the prosecutor have brought up, is not even half of everything that I've done in my life.

But I believe that everything happens for a



purpose. And there's a reason for everything. Whether it be good or whether it be evil. And what I mean is this: The whole -- my whole lifestyle that I lived, there was instances -- instances in my life that God was actually trying to get my attention. And I was ignoring him. There's been times where I was face-to-face with death.

There's two incidents where I had a gun put to my head. One time I was drunk, and encouraged them to do it. You know what I'm saying, he didn't do it. But at them times, I wasn't -- I wasn't realizing it was God trying to speak to me. I was ignoring it. I believe God works in mysterious ways.

And anyhow since I've been in jail for the year and couple of months that I've been in here, I've gotten back to focus on God. And the wisdom I've learned from Him, He's revealed to me the wisdom of Sodom and Gomorrah which is this: If God would not have destroyed that city when he did, chances are those kids would have gone up and followed the traditions of their family. Children are automatically justified by God's wis -- God's mercy, if they're ignorant to sin and don't know right from wrong. If he would allow them to grow up, chances are they were going to follow right after their parents and be condemned as their parents were condemned. I didn't see the wisdom in that. It might have hurt God to actually



destroy them children, them kids, but in the long run he was helping them. That's made me focus on this -- on the -- what I'm on the stand for.

When I was in jail it was hard for me to forgive myself for what I did. And I questioned God a lot, you know what I'm saying, why He would allow me to do something as evil as I -- as what I did.

One thing that I believe what God did is -- see, I had an addiction. I believe everybody has their own little personal addiction, whether they're addicted to drugs, money, working, sleeping, eating. I had a little addiction. My addiction was I was addicted to the adrenalin rush that I got from the doing the crimes I did. I can't explain it. But it was just a little sickness that I had that I needed help with. I think God finally gave me over to my desires since I desired to fulfill that addiction so much. Because the day that this offense took place there was something about me that just -- that wasn't me. I'm not going to try and say that I was insane or nothing, because I knew what I did was wrong. But something -- that day just -- something was missing within me. The way I was thinking wasn't my normal way of thinking.

When I went into his house, and he saw me come in through his room, I tied him up. And I kept pacing

his apartment. The only thing I kept thinking about was I didn't want to hurt Ryan. Ryan is Maria's son. Maria is the lady I was staying with at the apartment. And I fell in love with Ryan. Considered him my own -- I consider him a child of mine. And the only thing I kept thinking that day was I didn't want to hurt Ryan. I didn't want this guy to tell the cops somebody came in through the attic and burglarized his house. And when they find out there's only two openings in the attic, and the other one belongs to Maria, and finds out Maria was harboring a fugitive there, lock her up and put her child in CPS. I know the way I think. And if I would have been myself that day, I would have thought of another option. I would have thought, you know what, maybe I could just go back, kick in Maria's door, make it look like I burglarized her apartment and went up through the attic. But something within me kept me, you know what I'm saying, you got to do it; you got to do it; it's the only way.

This is how I believe God has worked in my life. The whole time I was out there I wasn't paying attention to God. And I feel that he finally gave me over to my desires, let Satan fully control me just so He can get my attention. Knowing the only way to get my attention is to allow me to be in the situation that I'm in. Now that I'm in here, the only hope I got is God.

When I was in jail, the whole year and month that I was in jail, I was following a false -- I was chasing a false sense of hope which was the law. I felt this was a circumstantial evidence case and I could beat it. They couldn't place me at the scene of the crime other than Maria's testimony. Every day I'm going to the law library studying the law. Putting the Bible aside. I would read it occasionally. But finally when I made that plea of guilty, I let all my family know that I knew it was the right thing to do. If I want to get right with God I have to start making the right choices. So that was my first step in making the right choice pleading guilty.

I want to give justice to the family, the victims, for what I did. And I don't want nobody to think that I have a mitigating circumstance in my case from my childhood to lessen this sentence. I've thought about this case. And I know if something would have happened to my brother, and somebody like me would have did what I did to Michael Paul Andrade, if they would have did it to my brother, I would want that person to be punished to the full extent of the law, you know what I'm saying, then I deserve to get punished to the full extent of the law.

I've only been in this world 26 years of my life, but it's enough for me to honestly and truthfully

25 say that I don't want to be part of this world no more.



1 There's nothing here for me. All my life I lived in sin.
2 I've hurt people. I've destroyed their lives. And the
3 only hope I got now is God.
4 My family is just as much a victim -- a
5 victim of my as this family. I kept my -- my lifestyle a
6 secret to them. They didn't know about the stuff I was
7 doing. My mom, every time I got in trouble she turned me
8 in. When I did the five years, it's because she turned me
9 into the cops. She always tried to better me. I was just
10 hard-headed. I had to learn through experience. I couldn't
11 learn by somebody telling me what to do.
12 The whole time I've been in jail it was
13 hard for me to forgive myself for what I did. And even
14 though I would hear, you know what I'm saying, that God
15 forgives anybody for their sins, I still inside felt
16 condemned.
17 I used to listen to this radio station
18 that's 1100 K-something. What gave me assurance that
19 someone who has lived like me, that has lived the life I
20 did can still be saved, there was this lady on the talk
21 show and she committed some sin, I guess her child, the

preacher didn't say what she did, but she kept going from church to church to church asking for forgiveness.

And even though every preacher was telling her you're forgiven for your sins, she still felt



condemned inside until finally she got to that one preacher, who was the one talking to her on the radio station, and he told her, How dare you put your sin above the price Christ paid for the sins of the world; your sin is no greater than what He endured. He said it in a better way, but that gave me assurance that someone like me does have assurance. There is hope for someone like me.

The DA is probably going to get up here and question me about all the crimes I've did. I don't want to get into it all, but everything they've brought up, I am guilty of plus -- plus some.

MR. TREVINO: Judge, I was wondering if we might take a few minutes. I think Mr. Luna has covered a lot of ground. I think he could use few minutes.

THE COURT: Sure. Could you step back in the jury room for a few minutes?

(Jury Not Present)

THE COURT: Do you need to talk to him for

19 a second?

20 MR. TREVINO: Yes.

21 THE COURT: Why don't you approach.

22 I'll take him down, but if you want to sit

23 -- he's got the shackles on. If you want to talk to him up

24 there, just turn around -- there's microphones up there.

25 Toby will stand up there and -- whichever way you want to



1 do it.

2 MR. TREVINO: I thought he needed a little

3 break.

4 THE COURT: That's fine.

5 (Pause In Proceedings)

6 (Jury Present)

7 THE COURT: You can be seated.

8 All right. You can proceed.

9 Q. (BY MR. TREVINO) Mr. Luna, please continue,

10 sir.

11 A. One reason why I think the death sentence would

12 be good for someone like me is because when I went and I

13 did the five years in prison, I remember a saying somebody

14 told me which was, Go to prison an animal, come out a

15 beast. And I believe that to the fullest. I don't believe

there's no rehabilitation about prison whatsoever. To get a life sentence and to go to prison for 40-something years I don't think it would make me any better than I am now. I think it would make me worse than I am now. In prison you got nothing but negative-minded individuals who conspire in ways to combat the prison. Put two negatives together, you don't get a positive.

Whereas, if I was on death row I would be able to strengthen myself spiritually with God, focus all my attention on Him. And I won't be able to get distracted



by somebody talking to me about drugs or making money or something like that. I'm not afraid of death. As a matter of fact, I kind of want it. Has to do with everything I've been through. I'm kind of tired of this life. Tired of hurting people because of this addiction that I had.

They caught me with a handcuff key. They caught me with another little metal object. When I first came in here, I did have in my mind that if the opportunity ever presented itself I was going to -- I was going to take that chance, however it may be. Whatever I got to do, I was going to do it. Because at that time I -- I wasn't ready to go yet. I wasn't fully strengthened by

God. God wasn't in my life completely at that time. From the beginning on the times that I was in jail I was conspiring of ways to beat this case and how to get away, and stuff like that.

But all that time I was realizing that I was following a false sense of hope. Bible says if you lose your life for God, you will save it, but if you save your life for the world, you will lose it. I believe that.

It's going to hurt my family to, you know what I'm saying, to have me on death row. It hurts them already, you know what I'm saying. I've embarrassed them. I've put them through shame. Put them through a lot.

I want to give the victim's family some



sort of a -- I want to give them justice for what I did. I believe in life for a life, eye for an eye, tooth for a tooth. Michael Paul Andrade seemed like a great man. I don't know nothing about him, only from what I heard on the testimony. And seems like somebody anybody would want for a son, for a brother, a husband, a father.

I believe within myself, I truly believe, that Michael Paul Andrade's name is written in the book of life. And if he wasn't saved before that day, he was saved

that day. How do I know is because I heard him praying. And I know when somebody's in a situation where they're going to face death they're in fear and they pray, they're going to pray heartfully and truthfully.

The devil intended evil. He intended me to destroy the family of the Andrades. He wants the family to hate me, which is -- which he knows will cause them to sin. He wants the family to curse God, accuse him, why would you let something terrible happen to my son, my brother, something evil like this. But there's something spiritual in it. Even though in this world and with the eyes we see it from, it was evil, what I did, but the spiritual thing about it is two souls have been accredited to God now, Michael Paul Andrade and me, who He's been trying to reach. All the days of my life, He's been trying to reach me.



And not only that, but there's potential for everybody in here to turn their life to God. God might be speaking to somebody individually in here. And I think He works in mysterious ways. There's nothing I can do to give a life back or to -- I can say I'm sorry a million times and that ain't going to do nothing.

I know I'm forgiven by God for what I did. I can only ask that the victim's family will forgive someone like me for it. It's in their individual minds to forgive someone like me for it. I know it would be very hard for me to forgive somebody who was in my situation and did something like that to my brother, for me to forgive them. I don't think I would be able to do it. It will take a greater man than me to do that.

I'm pretty sure justice will be served to its fullest. And I want my family to be strong. I want to apologize to everybody for all the hurt and all the pain that I've caused. That goes to everybody, every victim that I've ever burglarized, assaulted. Before I go, I want to say I'm sorry to everybody; all the homes that I've destroyed.

That's about it. That's all I got to say.

THE COURT: All right. Can you all go back to the jury room for a minute please?

(Jury Not Present)



THE COURT: Anything else on direct?

MR. TREVINO: No.

THE COURT: Do you need a minute for cross,

Ms. Green?

MS. GREEN: Do I what?

THE COURT: Do you need a minute to get ready for cross?

MR. TREVINO: I think Mr. Luna might need a little break.

THE COURT: Do you need to step down?

MR. TREVINO: Do you want to? It's up to you.

( Recess )

(Jury Present)

THE COURT: Okay. You can be seated. The witness has been passed for cross examination.

Ms. Green?

CROSS EXAMINATION

QUESTIONS BY MS. GREEN:

Q. Mr. Luna, you're representing to this jury that this is the real Joe Luna, right here, right now. Correct?

A. I am.

Q. This is the real Joe Luna.

A. I am.

Q. Okay. Not the Joe Luna of two weeks ago that was

plotting his escape.

A. Two weeks ago I wasn't plotting no escape.

Q. Well, a month ago?

A. A month ago I wasn't plotting an escape neither.

Q. Well, let's see. When was that handcuff key found? January -- around January 17th, I believe?

A. I had the handcuff key for about eight months. I never attempted to do nothing.

Q. You had it --

A. I had it.

Q. -- and you had it for a reason.

A. I had got it for a reason.

Q. And that reason was to try to escape.

A. It was if the opportunity ever presented itself I was going to take it. Yes.

Q. But that's the old Joe Luna.

A. That is the old Joe Luna.

Q. This is the new Joe Luna?

A. This is the new Joe Luna.

Q. This is the new Joe Luna that is basically asking this jury to give him the death penalty. Is that right?

A. That's correct.

Q. Did I understand you correctly?

A. You understood me correctly.

Q. Because you are a future danger?
A. Because I am a future danger, yes.
Q. Beyond a reasonable doubt you're a future danger?
A. Beyond a reasonable doubt.
Q. And there's no mitigating evidence --
A. No.
Q. -- by which this jury should spare your life?
A. No.
Q. None whatsoever?
A. None whatsoever.
Q. Because you're intelligent, aren't you?
A. I don't consider myself to be illiterate or stupid, or nothing like that. I got enough sense.
Q. You're intelligent. Correct?
A. I have sense.
Q. In fact, when you left the Texas Youth Commission they offered to pay your first semester of college, didn't they?
A. They did.
Q. You had all the opportunities in the world to turn your life around back when you were a very young man. Correct?
A. Correct.

25 Q. That wasn't the only opportunity you got. You



1 got probation. You got a special type of probation for
2 five separate cases back when you were a very young man.
3 Correct?
4 A. Correct.
5 Q. And you lasted about a month. Correct?
6 A. Correct.
7 Q. Before you escaped from the Zero Tolerance
8 Facility.
9 A. Correct.
10 Q. So you had an opportunity there and you didn't
11 take advantage of it, did you?
12 A. No, I didn't.
13 Q. Because that's the old Joe Luna.
14 A. That is the old Joe Luna.
15 Q. Is that right?
16 So you just recently decided that you were
17 going to play this this particular way. When did you make
18 that decision?
19 A. I've made it quite a while back. There's letters
20 I've wrote indicating to my family what I was going to do.
21 This isn't a spur of the moment thing that I'm doing.

22 Q. Didn't just come to mind recently when you

23 figured out that we had a pretty darn good case against

24 you?

25 A. I've been -- there's letters way before that



1 letter, if you're speaking of that one in particular with

2 my sister. There's letters before that that I told my

3 family, friends what I was planning to do.

4 Q. Planning to what?

5 A. To do what was right.

6 Q. Which is accept responsibility for the crimes

7 that you've done?

8 A. Accept responsibility for the crimes I did.

9 Q. You mentioned that you were guilty of every

10 crime that we proved up in the past week. Is that right?

11 A. I'm guilty of every crime you all brought up

12 plus --

13 Q. And you also indicated that there was some

14 crimes that we hadn't brought up?

15 A. Many crimes.

16 Q. Well let's talk about those, shall we? What did

17 we miss, Mr. Luna?

18 A. Most of the crimes that you all have -- are

19 aware of, that you all have charged me for, are crimes
20 that I did with accomplice witnesses. All the ones I did
21 my first -- at first, it started off with cat burglaries.
22 As I said, I have this addiction. And the first cat
23 burglary that I can remember, where this whole thing
24 started from, was my father's next-door neighbor. I snuck
25 into her house while she was asleep through her bathroom



1 window, stole some money out of her purse. That's where
2 the whole thing started from.
3 From there I started doing a bunch of cat
4 burglaries where I would sneak into people's home while
5 they were asleep. I would take basically everything they
6 had quietly and I would leave. I would escalate it from
7 being a cat burglary into me taking a weapon, was there
8 was one house in particular where I was behind the
9 entertainment center. I was disconnecting all the wires.
10 Thought I was quiet. Didn't hear them come behind me, but
11 somebody came behind me and hit we with a broom stick or
12 something in my back. I ran, you know what I'm saying, we
13 got into a little struggle. I ended up taking off. I
14 split. And ever since then, that's when I told myself, I'm
15 not just going to be going into these houses empty-handed;

16 I'm going to take a weapon just in case somebody comes out
17 of a room and they have a gun, I can have one too. There's
18 many crimes that I committed that you all are not aware
19 of.
20 Q. Can you give us a rough estimate of how many?
21 A. Cat burglaries and aggravated robbery, I say
22 between 25 and 30.
23 Q. Can you give me some locations so I can let the
24 SAPD know so they can close those cases? How about some
25 locations of aggravated robberies that we don't know



1 about?
2 A. Most of the aggravated robberies all took place
3 up north. I never did no aggravated robberies in the south
4 or west side, or east side. Tezel and 1604 out there,
5 Blanco. Those were all the areas I went to. I don't know
6 the subdivisions -- the name of the subdivisions. I would
7 just go most of the time, you know what I'm saying, I was
8 high or I was drinking when I went. But I can't give you
9 the exact location of everyone that I committed.
10 Q. You're talking about home invasions?
11 A. Home invasions. Yes.
12 Q. Tezel and 1604, Blanco?

A. Those are all the areas I went when I would go.

Q. But you can't give us any specific addresses?

A. No, I can't.

Q. Or -- of course, you didn't know the names of your victims.

A. No, I didn't.

Q. Okay. What else?

A. As far as crimewise, it was that, auto thefts. I never did -- I wasn't into store robberies. I never went into stores and robbed stores or stuff like that. My thing was aggravated home invasions. I got a rush out of going into a house when somebody was there and taking everything they owned. That was about the only crimes I've committed.



Selling drugs.

Q. What kind of drugs did you sell?

A. I was selling cocaine for a little while.

Q. And what kind of quantities are we talking about?

A. Quarter ounces.

Q. And what did you do with the money you made from selling drugs?

A. At that time that's when I had the apartment on

1400 Clamp when you all heard that thing with that -- that girl Sofia. I had an apartment there. I had some stuff rented from Rent-A-Center. That's around the time when I would -- I was selling to pay for the -- the rent and for the stuff that I was renting from Rent-A-Center, and groceries and stuff like that. I didn't -- I wasn't selling for a while. It was just a couple of months; a few months, maybe three or four months.

Q. When is the last time you held a job?

A. At UPS. I can't remember the day that I was working there. But I was working for UPS for a little while. I quit. The reason I quit -- the real reason I quit was because the home invasions, you know what I'm saying. I worked graveyard shift. I would work from 11 to four in the morning. That was around the time -- that's when I would actually go and do something.



But I justified quitting by them making a mistake on my direct deposit. I put in for direct deposit and they forgot to add a number. And a couple of checks that I didn't get, so I couldn't pay Rent-A-Center, you know what I'm saying, their weekly payments. So that's what I used to quit working at UPS. Ever since then, I

7 quit working.

8 Q. How long did you last at a legitimate job at

9 UPS?

10 A. Maybe a month and a half, two months. I don't

11 think it was no longer than that.

12 Q. And that was a good job, wasn't it?

13 A. It was a real good job.

14 Q. How much did you make an hour when you worked

15 for six weeks?

16 A. Nine dollars an hour.

17 Q. That's a good job, isn't it?

18 A. It was a good job. It had good benefits.

19 Q. That's a legitimate job with benefits and you

20 were certainly capable of doing that job.

21 A. I was.

22 Q. But home invasions were more fun, weren't they?

23 A. They were.

24 Q. Beats the heck out of punching in and out,

25 doesn't it?



1 A. It was the adrenaline rush that I was addicted

2 to.

3 Q. The adrenaline rush that you were addicted to.

Terrorizing people gave you a rush?

A. Not really terrorizing them, just the fact that I was in a home while they were there gave may me a rush.

Q. You terrorized the McGloughlins. Correct?

A. Correct.

Q. You terrorized the D'Amicos. Correct?

A. Correct.

Q. You terrorized Vicky Calsada. Correct?

A. Correct.

Q. And that gave you a rush.

A. It did.

Q. And let's not forget Candido Tovar. You terrorized him, too, didn't you?

A. Correct.

Q. And that gave you a rush?

A. It did.

Q. Let's clear up some other things. Who were your accomplices on Candido Tovar?

A. As far as the real, real names, I can't give you their real names, you know what I'm saying. Everybody I knew had what you would call nicknames, tag names.

Q. Well let's start there. Who were your

accomplices on Candido Tovar?

A. You want the nicknames?

Q. Give me everything you know.

A. It was me, Dro and L Dog.

Q. Dro being Gabriel Sanchez?

A. Uh huh.

Q. I'm sorry.

A. Yeah. That's correct.

Q. And who is the other one?

A. He goes by L Dog.

Q. L Dog. Did L Dog live on Clamp Street?

A. No, he didn't.

Q. Where did L Dog live?

A. He stayed on the south side. I don't remember -- he would come to the apartment occasionally to buy -- buy stuff, but I don't know exactly where he stayed at.

Q. Who were your accomplices on the McGloughlin home invasion?

A. The same ones from when -- the statement I wrote. It was me, Dro -- most of the ones I did that you all were apprised of are the ones I did with Dro. From my understanding, he's the one that implicated me in this whole thing. When my name started coming up, was when I started doing it with him. And the same one, Albert.

Q. Albert Sanchez and Gabriel Sanchez? I mean

Albert Flores and Gabriel Sanchez?

A. I did a couple with Albert Flores. I can't remember if -- if he was there that day when I did the one with the McGloughlin family.

Q. Okay. It was Gabriel Sanchez and you don't remember who the third person was?

A. I want to say it was Albert. I don't remember though.

Q. And that was in Gabriel Sanchez's truck?

A. Yes.

Q. And the D'Amicos? Gabriel Sanchez?

A. No. That was with Albert Flores.

Q. Just you and Albert Flores?

A. Just me and Albert Flores. Yeah.

Q. And Vicky Calsada?

A. That's the lady with the handgun. Right?

Q. Yep.

A. That was me and L Dog as well.

Q. You and who?

A. L Dog as well.

Q. L Dog, the mystery man?

A. Yeah.

Q. And you can't give us anything more specific about these other crimes that you committed?

25 A. As far as locations, no. They basically



1 consisted of the same thing; how I did these other ones
2 where I would tie them up with the sheets. Any ones where
3 there was an aggravated robbery and it consisted of sheets
4 and tying them up, that was me.
5 Q. Okay. That was your modus operandi. Correct?
6 A. Correct.
7 Q. You've testified that your family didn't know
8 that you were involved in all of this. That's not true, is
9 it?
10 A. It is true.
11 Q. Are you testifying that your family did not know
12 that you were wanted?
13 A. My mom, she knew I was wanted, but she didn't
14 know where I was staying at. No.
15 Q. Your sister knew you were wanted. Correct?
16 A. Uh huh. But at that time --
17 Q. And she hid you out, didn't she?
18 A. No. There was times I went to the apartment -- I
19 mean, to her house. And I stayed there maybe a few hours
20 and I would split. She didn't know. At that time she
21 didn't know Maria's exact apartment number. She knew I

22 stayed at that -- I was staying at that apartment with a
23 female, but she didn't know the exact apartment number
24 that I was staying in. I would usually call her and she
25 had the number and that was it.



1 Q. And you've sort of glossed over the capital
2 murder of Michael Andrade.
3 A. Not really.
4 Q. I want to talk about that a little bit more in
5 depth.
6 A. I didn't --
7 Q. What did you have on --
8 A. What was I wearing?
9 Q. -- when you crawled into Michael Andrade's
10 apartment?
11 A. When I had -- when I got that police officer, he
12 had a bunch of SERT uniforms. And that's what I was
13 wearing that day. I was wearing a long black SERT uniform.
14 I wasn't wearing the ski mask. I was just all in that SERT
15 uniform. I had some gloves. I was wearing the gloves that
16 day.
17 Q. And you decided to break into Michael Andrade's
18 apartment because you were bored that day, weren't you?

A. Actually, I had been -- I wasn't plotting on that particular apartment. What it was, was there was a police officer who stayed right below Maria. I had been plotting to get him. Right next door there was a lady who stayed with -- I guess she had two kids. But I knew everybody's schedule in that whole apartment complex. I knew what time the officer left, what time he got back. I



knew what time they left and got back. And I knew what time the lady who stayed in the bottom corner left and got back. So I was going to go to the lady's next door through the attic, take all her stuff, load it into the one of the cars I had around the apartment, go back, lock her door, go through the attic, and kick it in to make it look like I had did a kick door. And I was going to go to the officer and do that.

But there was only two attics. The lady next door didn't have an attic. The -- the only one was Michael Paul. So I went into that one and he was there.

Q. So you dropped down out of the attic and was he asleep?

A. He heard me when I -- when I fell down.

Q. It woke him up?

16 A. Yeah.

17 Q. And it probably scared the hell out of him,

18 didn't it?

19 A. Yeah.

20 Q. And you could tell he was scared.

21 A. If you want me to explain it, I'll explain it.

22 The only reason I didn't -- I tried to avoid explaining it

23 because I wanted to save the family from the specific

24 details of doing it. I pleaded guilty. I felt that's all,

25 you know what I'm saying, that really needs to be done.



1 But if you want me to get into the actual crime, if they

2 want that, if they want to hear it, I'll say it. But I

3 don't want to really put them through how it actually

4 happened.

5 Q. Mr. Luna, you've already put them through

6 everything they could go through.

7 A. I know.

8 Q. You understand that, don't you?

9 A. I do understand it. I don't want to pressure

10 them any more with it.

11 Q. You don't want to get into the gory details,

12 Mr. Luna?

A. I said if you want me to, I will.

Q. Hang on a minute.

(Pause In Proceedings)

Q. (BY MS. GREEN) Okay.

A. What happened that day was, I came down from the attic. Before I came down from the attic, I took off the -- took off the floorboard of the attic. And I was listening. I couldn't hear nothing. It sounded empty. So I lowered myself into the apartment. There was a wood -- I don't know how to explain it, but like, when I was holding the wood, there was a little piece of board that was going. And I knew once I let go, that was going to make a noise. I felt nobody was in the apartment so I let go. And



I made a noise.

I stayed in the closet for a few seconds, maybe 30 seconds just listening. I didn't hear nothing. Finally I pushed the door open and he was sitting up in his bed staring at the closet. And surprised when he saw me come out. I had that little handgun that you all got. I had it with me. I told him to turn around; not to look at me; and face the bed.

I did it. I grabbed the sheet, tied him up.

And he was telling me, Take whatever you want; take whatever you want; I'm not going to call the cops; Just don't hurt me. I said, I ain't going hurt you, man.

Q. Speak up, please.

A. He was telling me not to hurt him; if I was going to hurt him. I said, I'm not going to hurt you, man; I just want your stuff. That's it.

After I tied him up, I -- the stuff that I was intending to take, I threw it into one of his -- two of his backpacks. I had like three vehicles parked around them apartments. I went to one of the vehicles. I got the vehicle, came back. I had already put his stuff inside of the vehicle. Went back up in his apartment.

The only thing I kept thinking was, this dude's going to call the cops. When he calls the cops, he's going to tell them I came from the attic. Eventually



they're going to find out, you know what I'm saying, I came from Maria's apartment and lock up Maria and Ryan.

Something just kept telling me, you know what I'm saying, you got to do it; you got to do it. I didn't want to do it in a way to where I -- I know this is an evil crime the way it sounds, strangulation, you know

what I'm saying. That sounds ugly. But when I did it, I didn't want to really hurt him doing it.

I remembered a game we used to play in TYC where you take 10 deep breaths and you hold your breath on the 10th breath and somebody will squeeze your neck, then three or five seconds you pass out. I started telling him to take 10 deep breaths. I just told him to breathe heavy, you know what I'm saying, breathe heavy; take deep breaths. He didn't understand why I was telling him to do that. I said, Just do it, man; just start breathing real hard.

We got to like the 7th or 8th breath, that's when I put my arm around him, started applying pressure. He didn't struggle. I just felt his body go weak. And I just kept holding it and kept holding it. Finally when I felt that he was -- he was dead, I let him go.

Right after that I didn't -- I felt empty. I didn't feel -- I always imagined if you killed somebody



you would feel some type of feeling, you know what I'm saying; it would affect you. That day it didn't affect me. I felt inhuman. I felt like something was wrong with me.

I felt pacing his cell -- I mean, pacing his apartment, pacing his apartment, just thinking of all the mistakes I made. He had a bunch of clothes on the floor. When I had jumped from the attic, a bunch of the insulin (sic) was on the boots that I was wearing. There was a bunch of insulin (sic). So I got his clothes and started shaking them out. I got his vacuum and I vacuumed his apartment. After I vacuumed his apartment, I -- I put the floorboard back up. The part that I had knocked down, I hid it back in place. I wiped all the -- my fingerprints, if I left any. Started looking around to see if maybe I left any hairs on him. I was trying to be real cautious with every mistake I made.

And finally just said, only way -- best way to make sure I get rid of all the evidence is if I set the house on fire. So I did that. His side window was open. I closed it. Because I didn't want the smoke to get out and someone to call the ambulance without the whole house burning up.

After that, I set house on fire. Started in his -- in his closet, did the bed, and then I threw something over his chair, a sheet, and a lit that on fire.

I left.

When I left, I ended up coming back because it was 20 -- 25 minutes done passed and I didn't hear no ambulance. So I thought maybe it turned off. And then I couldn't realize -- I couldn't remember if -- if I took off my gloves before I opened the door. Because I didn't want nobody out there to see me come out of his apartment with gloves on. I couldn't remember if I opened his door and shut it and then took the gloves off.

So I went back to wipe my fingerprints off the door on the inside in case I did leave any in there. I opened the door. A bunch of black smoke was coming out. I reached inside, wiped off the doorknob, then I left.

Q. How did the strands get in Maria's vacuum?

A. I went back to Maria's. When I was climbing up in there, some insulin (sic) had fell. I got her vacuum. I cleaned up her apartment real good. Made sure I got all the insulin (sic) around the cracks of the closet, put the vacuum back, put the ceiling back. That was it.

Q. What did you do with Michael's computer?

A. At first I didn't know what to do with it. I don't know if I should wipe all my fingerprints off of it and go throw it in the trash. I finally took it to a friend of mine's and basically I just gave it to him.

Q. Who was that?

A. His name is David.
Q. David who?
A. I don't know his last name.
Q. Where does he live?
A. He stays on the south side.
Q. Where?
A. I don't know the exact apartment.
Q. Tell us the location.
A. You got -- you got Hutchins, and I want to say you got Drury. You got Aaron. And then you got another street. I know it's like the third or fourth street, or the third street on the south side of Commercial and Military. Around the area where I was staying at 1400 Clamp. It's a drug house. It's a crack house really. People go there and buy weed and coke. People who smoke crack, you know what I'm saying, they make it there and smoke it there.

That guy David, I had been owing him for a while for he had gave me a shotgun. He gave it to me a long time -- actually, I jacked him for it. I never paid him the money. He was always sweating me for a while about it. People that he knew that I associated with, he would tell them, Where's Joe; tell him for that money he owes me for that shotgun. Finally, I took all that stuff to him

25 and told him, Here, man, do what you want with it; here's



1 for what I owe you; just be very careful with it; you know
2 what I'm saying; make sure you erase everything on it.
3 The reason I kept his -- his camcorder was
4 because I wanted to know the person that I -- whose life I
5 took. I just -- I wanted to -- there was a tape inside of
6 there. And there wasn't a battery pack to it so I couldn't
7 recharge it. And it was dead. The camera was dead. But I
8 held on to it because I had to just -- I had to see this
9 -- I had to see this person. I wanted to see what he was,
10 like, the type of person that he was.
11 His keys, the reason his keys were in there
12 because really a mistake I made. I never intended to keep
13 them. I threw them in that bag. I had like 15 sets of keys
14 in there. I actually forgot about them. But his camera, I
15 intended to keep because I wanted to see who he was.
16 Q. You wanted to see who he was.
17 A. Uh huh.
18 Q. Now isn't it true, Mr. Luna, that you could have
19 run out of the front door? The minute you saw that
20 Michael was in that apartment, you could have run out the
21 front door and been done with it?

22 A. That's why I said that that day there was

23 something about me that wasn't me. I'm not saying I was

24 insane. I was fully aware of what I was doing. I knew it

25 was wrong. But there was something that day that just



1 wasn't -- that wasn't me. I know how I think. And if I

2 would have been myself that day, I would have thought, you

3 know what, I don't got to do that; I'm just going to go to

4 Maria's apartment -- I got the key to her apartment -- go

5 inside there; trash her apartment; make it look like I

6 burglarized it; make it look like I went through the

7 attic; lock her door; kick it in; that's it. Ryan won't

8 get in trouble, you know what I'm saying. Maria won't get

9 in trouble. Ryan won't go to CPS.

10 But as I said, I've been getting into the

11 Bible lately and there's parts in the Bible that if

12 somebody desires something so much, God will actually give

13 you over to your desires. And I felt God released me;

14 gave me over to my desire. I desired to fulfill that

15 addiction I had. And He finally said, you know what,

16 that's what you want, you got it. Knowing that if He did

17 that, this was going to happen. By the same token if He

18 did it, it was going to be the only way He could reach

someone like me.

Q. So God sanctioned -- in your head, God sanctioned this murder?

A. I believe God knows past, present and future. I don't think he tempts us, but if you read Job --

Q. I don't want a Bible lesson.

A. Okay. Well.



Q. I'm asking you a question. In your head --

A. God allows certain --

Q. -- do you think God sanctioned this murder?

A. No. I think He allows things to happen for a reason. That's what I say -- what I think.

Q. Does that make you feel better to think that way?

A. God works in mysterious ways.

Q. Answer my question.

A. Yes.

Q. Does that make you feel better to think that way?

A. Yep.

Q. Are you feeling okay?

A. I feel -- I feel at peace with myself.

Q. Okay. Let's hear a little of the old Joe Luna.

Okay?

A. Okay.

Q. When you were locked up for the past almost full year -- a little bit over a full year, you managed to get in quite a few little scrapes with the guards, didn't you?

A. I did.

Q. And your attitude towards the guards was hostile and aggressive. Correct?

A. It was.



(Pause In Proceedings)

THE COURT: The tapes or CDs will not be transcribed.

(Played Audio Tape)

MS. GREEN: I'm sorry, Judge. This is very difficult.

(Played Audio Tape)

Q. (BY MS. GREEN) That's at the start of every phone call, isn't it?

A. Yeah, it is.

(Played Audio Tape)

Q. (BY MS. GREEN) That's you talking to Maria.

Correct?

A. Correct.

Q. And that's the way the real Joe Luna talks, isn't it?

A. That's the way -- see, I can't just change automatically. It takes progression. I've always had a problem with cursing. Mainly because of being in prison. When you're in prison, you know what I'm saying, that's all they do. Everything that comes out of their mouth is a curse word. When I got out, I had that same problem. My sister, my mom, some of my friends, would always, you know what I'm saying, question me on that. But that's not the same Joe Luna that I am now.



Q. Well, let's hear a little bit more of the old Joe Luna.

(Played Audio Tape)

Q. (BY MS. GREEN) The real Joe Luna?

A. The old Joe Luna.

Q. The old Joe Luna. Let's hear a little more.

(Played Audio Tape)

MS. GREEN: I'm sorry. Let me back up.

(Played Audio Tape)

Q. (BY MS. GREEN) You know what a ligature is now, don't you?

A. Uh huh.

(Played Audio Tape)

Q. (BY MS. GREEN) The real Joe Luna?

A. The old Joe Luna.

Q. The old Joe Luna.

Are you sure you didn't give Michael Andrade's property to your friend, Ray Villegas?

A. He got something of it, but I didn't give it to him, no.

Q. How did he get it?

A. I think David gave -- sold it to him. See, a lot of stuff -- Ray knows a lot of people who buy certain stuff around that neighborhood. He's been living there for a while. So he knows almost everybody in every block. I'm



pretty sure David might have took it to him and asked him to sell it for him, you know what I'm saying, because David is basically a crack head. He doesn't really know nobody. If he does sell it, everybody's going to get over on him. But I wouldn't be surprised if he took it to him.

Q. So Ray Villegas knew all about what you'd done?

7 Yes or no?

8 A. No.

9 Q. You sure wanted to talk to him, didn't you?

10 A. Yes.

11 Q. Let's hear about that.

12 (Played Audio Tape)

13 MS. GREEN: Sorry.

14 (Played Audio Tape)

15 Q. (BY MS. GREEN) Whose phone is that?

16 A. I think I was calling --

17 Q. That was Ray's number, wasn't it?

18 A. That's Ray's phone number. Yeah.

19 (Played Audio Tape)

20 Q. (BY MS. GREEN) That's Ray Villegas that you were

21 very anxious to talk to?

22 A. Uh huh.

23 Q. So it's your testimony that you gave Michael's

24 property to the crack head Dave?

25 A. David.



1 Q. David. And that he might have given it to Ray?

2 A. He might have went to him to ask him to sell it

3 for him. I don't know for a fact. I don't know.

Q. Well you're aware, of course, that the Crime Stoppers tip was very detailed, aren't you?

A. Uh huh.

Q. And the Crime Stoppers tip said that the computer screen saver on Michael's computer had a picture of a cat named Nash. Right? Do you know it was that detailed?

A. I remember hearing that.

Q. So which one of your friends do you think called Crime Stoppers?

A. Honestly, I think Maria is the one who called Crime Stoppers.

Q. You think Maria did it?

A. Uh huh.

Q. You were kind of trying to figure that out, weren't you, over the past year?

A. Well, I was trying to figure out --

Q. What were you going to do when you figured it out?

A. Nothing.

Q. Nothing.

(Played Audio Tape)

Q. (BY MS. GREEN) So you weren't worried about it?

A. At the beginning, as you know, from -- I'm pretty sure you have more letters, more conversations, I was fighting the case. It was a circumstantial evidence case. I felt I could beat it. The only thing that could put me at the scene of the crime was Maria's testimony. I felt I had it within me, you know what I'm saying, the capability of beating the case. That's why I kept going to the law library, studying the law, getting cases about circumstantial evidence and whatnot.

But as I mentioned earlier, you know what I'm saying, I realized that I was chasing a false sense of hope. I was trying to save myself with the law when I knew I was guilty. I stopped going to the law library a few months back.

Q. But for the past year you've been scheming?

A. For the past --

Q. You've been scheming with Maria, haven't you?

A. Well --

Q. Scheming with your sister, Brandy?

A. I was getting -- I was trying to work out a plan to get them to help benefit my case. Yeah.

Q. All year you've been doing that; scheming, planning, plotting; manipulating Maria as best you could. Correct?

A. Correct.
Q. You don't care about Maria, do you?
A. I don't have no strong feelings for her, no.
Q. And you haven't since this happened. You haven't had strong feelings for her, but you kept her close, didn't you?
A. She's pregnant with my child. Really what kept me close to her the whole time when I was really staying with her was her son Ryan. I fell in love with her little boy. Me and her we would argue a lot. She was insecure. She wasn't really even someone I would date, you know what I'm saying.
Q. But somebody you would sleep with.
A. We slept together. Yeah.
Q. Somebody you would knock up.
A. The reason I continued staying there -- I met her on the internet. I met her on the internet. Within a week, I went over there. We watched some movies, had a couple of beers and we had sex. After we had sex, she automatically, I guess, felt that I was compelled to be with her like we were together because she gave herself to me. I told her, Look, I just got out of prison; I'm not trying to be tied down by a woman, you know what I'm saying; I want to enjoy my freedom.

25 I guess she had me on her buddy list. When



1 I would be at my sister's and I would use the computer,
2 she would automatically know I was on it. Are you talking
3 to another girl; whatnot. I didn't like that. So one day
4 we got in a big ol' argument over the phone. I told her,
5 You know what, it's best you just stop; we need to space
6 out; you're pushing me too fast; you're expecting a little
7 too much out of me. And we stopped talking. We stopped
8 talking.
9 And I had just got out from the
10 unauthorized use in October. And that's when they were
11 questioning me about -- questioning me about the
12 aggravated robbery. I got bonded out. I was bonded out.
13 After I met Maria, I met another girl. I
14 went to her house and we were talking for a couple of
15 days. The third day I went to her house, the day I found
16 out I came on the news for aggravated robbery on Crime
17 Stoppers.
18 That whole day, that whole night when I was
19 at -- at her house, I kept -- I kept thinking of my
20 options, you know what I'm saying, what to do, what to do.
21 My dad was like, You can't ruin the rest of your life; You

22 need to turn yourself in. My mom, she's already turned me
23 in before. So I didn't know if she knew at that time. And
24 if she did, I wasn't going go around there because I knew
25 she would turn me in. I didn't want to go to my sister's



1 because I knew eventually they would find out where my
2 sister lives and look for me over there.
3 So the person who popped up in my head was
4 Maria. She had her own place. She was somewhat
5 established. So I went over there late at night. I didn't
6 tell her what I was on the news for. I told her I was
7 having problems with my sister and needed a place to rest
8 my head for a couple of days if she would let me. She did.
9 And that's how I started staying there.
10 If you want the honest truth, I was really
11 just using her. I didn't have no feelings for her
12 whatsoever. I felt, you know what I'm saying, nobody knew
13 where I was staying at, so I can chill there for a while
14 till I figure out.
15 What I was really doing is I was plotting
16 on robbing a bank. I always fantasized about robbing a
17 bank. It's always been a fantasy of mine. So the whole
18 time I was staying there, that's what I was doing. I was

working on a plan on how to rob a bank. I didn't want to go in there with a gun and, Hey, give me all your money. I wanted it to be a little sophisticated.

Q. Thus all those yellow pages that we found?

A. Uh huh.

Q. That's what you were planning to do?

A. Yep.



Q. But you didn't care about Maria and you have basically kept her close this past year because you wanted to make sure she didn't testify against you.

A. At the beginning I -- I always felt she's the one that called Crime Stoppers. I still feel that right now. At the beginning I was -- I read in the -- in the law how a spouse can't testify against another spouse. But there's -- there's an exception to that, you know what I'm saying, if you get married after the fact they can still compel her to testify against the matter that happened before they got married. I realized that. So I kind of basically blew that off. But from the jump, I was asking her to get married with me so that way they couldn't force her to testify against me.

Q. Okay. Let's listen to that conversation.

(Pause In Proceedings)

MS. GREEN: We're having technical difficulties.

Q. (BY MS. GREEN) But you know that you're recorded talking about getting married, but that's not going to work. Right?

A. Uh huh.

Q. Because you finally figured it out by reading law books.

A. Uh huh.



Q. And you also talked to Maria about the fact that we would have to find her before she could testify. Right?

A. Correct.

Q. So you were encouraging her to leave town; get lost --

A. Yeah.

Q. -- vanish so that we couldn't find her. Right?

A. Uh huh.

Q. And you weren't thinking about what kind of trouble she might get in, did you, during this whole plotting and scheming?

A. There was a letter I wrote to her. And I also

13 assessed her up on everything, even the penalties.

14 Q. Penalties for what?

15 A. I told her -- this is what I told her. I said,

16 If they subpoena you to go to court and you don't show,

17 well then you violated the law. I said, you know what I'm

18 saying, They're going to go after you, and go after you

19 pretty tough because you're a potential key witness in

20 this case. Now if you vanish before they subpoena you,

21 well you haven't violated the law. So they really can't

22 go after you as hard as if you -- they had subpoenaed you.

23 I said, Chances are, they're going to subpoena you

24 sometime around -- around the time the trial starts. And

25 I was somewhat encouraging her to disappear.



1 Q. Somewhat encouraging her?

2 A. Uh huh.

3 Q. Strongly encouraging her, weren't you?

4 A. Strongly encouraging her, yes.

5 Q. Because you knew what she would say if we put

6 her on the stand?

7 A. Yep.

8 Q. Because you told her -- you confessed to her the

9 night of the murder, didn't you?

A. I did.

Q. You told her everything. Correct?

A. I told her not every, every thing, but I told her that I did something I couldn't forgive myself for, and that she would see it on the news. She watched the news and saw that there was a murder that took place in -- at her apartments. So right there she automatically knew what I was talking about.

Q. It went a little bit different than that, didn't it? Do you remember going from her apartment complex, after the murder, over to Brandy and Alton's house?

A. I told her not to go to the apartment, to come straight to my sister's.

Q. And she did?

A. And she did.

Q. And you sat her down and you told her that you



were bored, and so you crawled through the attic to steal some stuff, and you had to kill the kid because he saw you.

A. That's what I told her. She didn't know that I was planning to go into the next-door neighbors to burglarize any of her --

Q. But you told Maria you were bored; wanted to steal some stuff, and had to kill the kid because he saw you. Correct?

A. I told her something like that. Yes.

Q. Because that's the truth. Correct?

A. I didn't kill him because he saw me. I was already wanted for aggravated robbery. I knew eventually -- once I got caught for the aggravated robberies, I was going to do basically a life sentence because of my background history and what I got. I tried to justify my actions by saying that I was doing it to protect Ryan.

Q. Right.

A. But it wasn't because he saw my face. Tovar saw my face. I didn't do nothing to him.

MS. GREEN: Judge, could we take a break. I'm having a malfunction here.

THE COURT: Yes. Let's take about 10 minutes.



( Recess )

THE COURT: All right. Be seated.

All right. We're still on cross.

Ms. Green?

MS. GREEN: Yes, sir.

Q. (BY MS. GREEN) Okay, Mr. Luna, let's go back to a little more of your scheming and plotting with Maria. And this is from quite recently. This is from January the 7th of this year.

(Played Audio Tape)

Q. (BY MS. GREEN) You were quite interested in what was going on in other capital murders that have gone on in the last couple of months, aren't you?

A. I was -- I read the newspaper a lot. I watch the news when I can.

Q. And you've talked to some of the recent capital murders defendants, haven't you?

A. Uh huh.

Q. You've talked to Noah Espada, who killed the two people when he got fired from Poly Esther's. You had conversations with him. Right?

A. Yeah. We were writing to each other for a while.

Q. And you talked to the one that Maria was just referencing that raped a woman and then killed the clerk, got the death penalty about three weeks ago. You talked to

him?

A. Maybe about three times. We didn't socialize. Like, me and Noah were writing to each other. But me and that other dude, we didn't talk to each other on a regular basis. I ran into him because we were both here in court. I ran into him when they were chaining us, putting us on the bus. And that's when he was telling me he got found guilty.

Q. And how about Ronnie Joe Neal? You've been talking to him?

A. There was a couple of times I talked to him in the holdover.

Q. You all comparing notes?

A. No. We weren't comparing no notes.

(Played Audio Tape)

MS. GREEN: Sorry, Judge.

(Played Audio Tape)

(Pause In Proceedings)

Q. (BY MS. GREEN) What did you do with the McGloughlins' dog?

A. I took it.

Q. What did you do with it?

A. Gave it away.

Q. To who?

A. To a real close friend of mine.

Q. Who?

A. Name's Albert, too, but it's not Albert Flores. I don't know his last name.

Q. What about the Chihuahua? What about Vicky's Chihuahua?

A. The one with me that day is the one that took it, L Dog. They also call him Lucky. But he is the one that took --

Q. So the Chihuahua, the cute little puppy she talks about, that's not Vicky's?

A. That's -- she saw it, but I didn't give it to her. We made an exchange. I told him, Either you want the dog or you want the little handgun. He goes, I want the dog. So I kept the handgun.

Q. Let's talk a little bit about your cousin, Andrew. You were very anxious to talk to him as well, weren't you?

A. I was curious why you all would want to talk to him. He didn't know nothing about anything I did.

Q. The fact of the matter is, Mr. Luna, that you sent your sister Brandy over to Andrew's house when he wouldn't come see you. You sent your sister Brandy over there to ask him to give you an alibi. Correct?

A. Correct.

25 Q. Okay. And that resulted in your sister getting



1 indicted for witness tampering, didn't it?

2 A. It did.

3 Q. Let's see if I can play your conversation with

4 your cousin Andrew.

5 (Pause In Proceedings)

6 (Played Audio Tape)

7 Q. (BY MS. GREEN) The old Joe Luna?

8 A. The old Joe Luna.

9 Q. And that was your sister Brandy?

10 A. That was my sister Brandy.

11 Q. When did you tell Brandy you committed this

12 murder?

13 A. I never told nobody I committed it, not even

14 Maria. I just gave the assumption that I did it.

15 Q. When did you tell Brandy an assumption that you

16 committed this murder?

17 A. She never got that from me.

18 Q. Let's talk a little bit about the stolen body

19 armor. You tried to sell that body armor through Raymond

20 Valero to get some money. Correct?

21 A. Correct.

Q. And you had your sister Brandy do the transaction. Correct?

A. Correct.

(Played Audio Tape)



Q. (BY MS. GREEN) That's the old Joe Luna?

A. That's the old Joe Luna.

Q. And you told Ray Valero about the murder, didn't you?

A. The way he got up here and testified, that's not how I told him. He fabricated a lot of the stuff. I told him certain things about it. But I didn't -- I didn't confess to him the way he's saying I confessed. He never gave me no weed or no cigarettes. A handcuff key. That's who I got it from. I made a deal with him about the body armor. I said, Since you gave me the handcuff -- let me tell you --

Q. I didn't ask you how you got the handcuff key. How would Ray Valero know all the details he knew?

A. I had some articles of -- of the case, the newspaper articles. I told him what Detective Titus told me they had. Detective Titus -- when I was in the office with Titus, she painted a picture from the jump. I never

admitted to her. I never did nothing. She was like, How did you do it; You went through the attic, surprised him, got in a fight; Is that how you got the busted lip. Because I had a scratched on my lip. I had got that from my dog. And I said, That's not what happened.

She gave me the impression that whoever called Crime Stoppers said that I got a fight with this



dude and that's how I got these marks. That's what I told Chino, Roland, whatever his name is.

(Pause In Proceedings)

Q. (BY MS. GREEN) I want to play another very recent call. In fact, it's from February 5th to Maria. Maybe you can educate us about some of the language in here.

(Played Audio Tape)

MS. GREEN: Sorry, Judge. The icons are not in the same order they used to be. It's making it a little more difficult.

THE COURT: That's okay.

(Pause In Proceedings)

Q. (BY MS. GREEN) Well, I'm having a technical failure. But you had a conversation with Maria on

16 February 5th of this year when you talk about the green
17 light and Raymond Valero. What do you mean by the green
18 light?
19 A. When I ran into him, I ran into him in BD. BD
20 right side. And some people on BD left side are Xed out.
21 They're affiliated with Mexico Mafia, or they're snitches,
22 or they did something where they got Xed out. So they
23 have a permanent green light.
24 Q. What does it mean to have a permanent green
25 light?



1 A. Somebody who is affiliated with Mexican Mafia
2 sees them, they're supposed to drop them.
3 Q. Supposed to kill them?
4 A. Smash them, kill them, whatever, depending on, I
5 guess, what the green light is for.
6 Q. And didn't you tell Maria that you weren't
7 worried about Raymond Valero because he had the green
8 light and he would be back in jail and he would be taken
9 care of?
10 A. I said something like that.
11 Q. You said something like that, didn't you?
12 A. Uh huh.

Q. And that was in February of 06?

A. I don't remember the date, but --

Q. Just recently. A month ago.

A. Uh huh.

Q. But that was the old Joe Luna, I take it?

A. Uh huh.

Q. So all these fellas that have recently gone on trial for capital murder, some of whom have been convicted and given the death sentence, namely Noah Espada and Christopher Young, did you talk with them about strategy; about how you should play it?

A. When I used to write Noah Espada, we talked about religion. I would question him about the process of



trial because he went to trial before I did. I questioned him about jury selection and what was it about just so I could have a general idea what it's about. But mainly our conversations were about religion. That was it. I never questioned him about his case. He never questioned me about mine.

Q. Isn't it a fact, Mr. Luna, that throughout the past year you have plotted, and planned, and schemed, and the scheme that you finally came up with was, if I tell

this jury I want the death penalty, they're going to be so sickened by my crimes that they're going to give me what I don't want, which is, according to you, a life sentence. Isn't that what this little show is all about?

A. No. I don't see myself spending the rest of my life in prison. I get out I'll be 70 years old. What am I going to have? Everybody I know, my mom, my dad, chances are, they're going to be passed away. I ain't going to have nothing. I get out -- I would have spent more life in prison in 40 years than I have spent in my whole life. So what would I have to lose. Given the death sentence I would be able to focus my attention on getting strengthened spiritually and not be sidetracked.

This is not no scheme. This is the truth. I'm not afraid of getting the lethal injection. I'm not afraid of death. So no, this is not no scheme.



Q. So all this past year your letters, your phone calls, that's -- that's nothing. That has nothing to do with this?

A. Finally come to the realization, as I said earlier, that I was following -- chasing a false sense of hope. The real hope is in the Bible.

Q. So the fact of the matter is, Mr. Luna, that you knew -- when you got caught for the aggravated robberies that you were wanted for in February of 2005, you knew that when you got caught, you were going to get a life sentence. Correct?

A. I knew they would give -- I would get enough time that would equal out to a life sentence.

Q. And you knew because you had two or three aggravated robberies that carry up to life in prison, you knew that because of your criminal history and because of the awful nature of those home invasions, you knew there was a very good chance that you would have those life sentences stacked one on top of each other. Correct?

A. Correct.

Q. So you knew on February the 17th of 2005 that if Michael Andrade lived to tell the police what you had done, you knew it was all over, didn't you?

A. What do you mean by that? It was all over.

Q. You knew that you were never going to see the



light of day. And so that's why you killed him, isn't it?

A. At that time I was already wanted for aggravated robbery. I already knew I was not going to see the light

of day. That's not why I did it.

Q. That's not why you did it.

A. No.

Q. But you did do it?

A. Yeah.

Q. And there's no question about that?

A. No question about it.

Q. And you knew you were looking at life then?

A. I did.

Q. Let me make sure we have all this straight, Mr. Luna. You want this jury to answer special issue number one, yes; that you are a future danger?

A. Because I am.

Q. And you want this jury to answer special issue number two, no; because there is no sufficient mitigating reason to spare your life. That's what you want. Correct?

A. Correct.

Q. No question about it?

A. No question about it.

Q. Are you going to give up all your appeals?

A. I'm not going to try to appeal to nothing.

Q. Okay. So you're done.

LISA J. RAMOS, OFFICIAL COURT REPORTER
379TH JUDICIAL DISTRICT COURT

A. Yep.

Q. And that's what you want.

A. That's exactly what I want.

Q. And it's your testimony that this isn't some sort of little reverse psychology ploy?

A. No.

Q. Okay. Thank you, Mr. Luna.

MS. GREEN: Pass the witness.

REDIRECT EXAMINATION

QUESTIONS BY MR. TREVINO:

Q. Mr. Luna, do you have anything else you want to tell the jury?

A. I said everything I want to say.

THE COURT: Ms. Green?

MS. GREEN: No.

THE COURT: Can you go back to the jury room and let me talk to the lawyers and find out what time we're going to start tomorrow and I'll let you know in a few minutes.

(Jury Not Present)

THE COURT: We're in recess.

( Recess )

REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. 2006-CR-0033

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE DISTRICT COURT |
| VS. | § | 379TH JUDICIAL DISTRICT |
| JOE LUNA | § | BEXAR COUNTY, TEXAS |

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POST CONVICTION WRIT OF HABEAS CORPUS

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On November 16, 2012, between the hours of 9:53 a.m. and 4:14 p.m., the following proceedings came on to be heard in the above-entitled and numbered before the Honorable Bert Richardson, Judge presiding, held in San Antonio, Bexar County, Texas:

Proceedings reported by computerized stenotype machine.

COPY

OFFICIAL COURT REPORTER
399TH DISTRICT COURT
SAN ANTONIO, TEXAS

APPEARANCES:

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(Open court, Defendant present.)

THE COURT: Okay. This is Cause Number -- just get the different cause numbers, 2006-CR-0033. That was the trial court cause number out of the 379th. State of Texas vs. Joe Luna. I also have an AP number which is 75358. I'm Judge Bert Richardson. If I could just have the parties identify themselves. We're here on a post conviction writ on Joe Luna. For the State?

MR. VALDEZ: Enrico Valdez.

THE COURT: Okay.

MR. VALDEZ: And Mary Beth Welsh.

THE COURT: All right.

MR. GROSS: Good morning, Your Honor. I'm Michael Gross for Joe Luna.

THE COURT: Okay. And you have a trusty associate sitting behind you; correct?

MR. GROSS: Yes, sir.

THE COURT: Okay.

MR. GROSS: Jeff Weatherford also with me on this case, Your Honor.

THE COURT: Okay. All right. He's welcome to sit at counsel table if you need an extra chair. So I'll leave that up to you if you need some extra room or anything like that.

MR. GROSS: That would be great, Judge. Thanks.

THE COURT: Okay. I'm Judge Bert Richardson, I'm