UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK ROBERTSON, Petitioner, VS. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 3:13-CV-0728-G (Death Penalty Case)

MEMORANDUM OPINION AND ORDER

Petitioner Mark Robertson has filed an amended application for a writ of habeas corpus under 28 U.S.C. § 2254 ("Amended Petition") (docket entry 47), asserting claims that his trial counsel provided ineffective assistance and that his due process rights were violated by the presentation of false or inaccurate evidence in the punishment stage of his trial. The application is **DENIED**.

I

In 1991, Robertson was convicted of capital murder and sentenced to death for the 1989 robbery and murder of Edna Brau in Dallas County, Texas. See *State v. Robertson*, No. F89-85961-NL (Crim. Dist. Ct. No. 5, Dallas Co., Tex. Feb. 11,

1991). Clerk's Record ("CR") (docket entry 27) at 321-25. His conviction and sentence were affirmed on direct appeal. See *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 853 (1994). The state court then set an execution date, but withdrew it to allow Robertson to file his application for a post-conviction writ of habeas corpus in state court, and then for the state court to give full consideration to it. The state district court sitting in review of the habeas petition ("State Habeas Court") recommended that post-conviction habeas relief be denied. See *Ex parte Robertson*, No. W89-85961-NL-(A) (Crim. Dist. Ct. No. 5, Dallas County, Tex. June 26, 1998). These findings and recommendation were adopted by the Texas Court of Criminal Appeals ("CCA"). See *Ex parte Robertson*, Writ No. 30,077-01 (Tex. Crim. App. Nov. 18, 1998). Robertson then filed an application for habeas relief in federal court, which was also denied. See *Robertson v. Johnson*, 3:98-CV-2768-G (N.D. Tex. May 15, 2000), *COA denied sub nom. Robertson v. Johnson*, 234 F.3d 890 (5th Cir. 2000), *vacated and remanded*, 533 U.S. 901 (2001), *en banc denial of relief sub nom. Robertson v. Cockrell*, 325 F.3d 243 (5th Cir. 2003).

Following the conclusion of Robertson's original state and federal post-conviction review, the state court again set his execution for August 20, 2003. On August 12, 2003, Robertson filed a subsequent application for writ of habeas corpus and motion to stay his execution in the CCA, which authorized the subsequent application and granted the stay of execution. See *Ex parte Robertson*, No. 30,077-02

(Tex. Crim. App. Aug. 19, 2003) (docket entry 27-36 at 275-276). Following the remand, the CCA adopted the trial court's findings that Robertson had presented mitigating evidence for which, under *Penry v. Lynaugh*, 492 U.S. 302 (1989), there had to be an adequate means for the jury to consider beyond the limits of the special issues, that Robertson had requested such a means, and that, when presented with the nullification instruction, Robertson objected that it still did not give the jury a proper means to consider his mitigating evidence. See *Ex parte Robertson*, No. AP-74,720, 2008 WL 748373 (Tex. Crim. App. Mar. 12, 2008). The CCA granted relief, reversed the sentence, and remanded for a new trial on punishment. See *id.*

On retrial with the new special issues, the jury again answered them in a manner that required imposition of a death sentence. *See* State Clerk's Record of Second Punishment Trial ("SCR") (docket entry 27-42) at 197-99, 210-11. The CCA affirmed the new death sentence. See *Robertson v. State*, No. AP-71,224, 2011 WL 1161381 (Tex. Crim. App. Mar. 9, 2011), *cert. denied*, 565 U.S. 1095 (2011). On state post-conviction habeas review, Robertson presented one claim to the state district court on habeas review: that trial counsel provided ineffective assistance for failing to investigate and present mitigating evidence. The state habeas court conducted an evidentiary hearing and entered findings, conclusions and a recommendation to deny relief. *See* State Clerk's Habeas Record following Second Punishment Trial ("SHR") (docket entry 28-27) at 1126-99. The CCA adopted the

findings "except for paragraphs 1, 2, and 3, which indicate that the allegation is procedurally barred," and denied relief. *Ex parte Robertson*, No. WR-30,077-03, 2013 WL 135667, at *1 (Tex. Crim. App. Jan. 9, 2013).

II

At the retrial, the prosecution entered into evidence multiple confessions that Robertson gave that he had shot his friend, Sean Hill, while they were fishing, then murdered Hill's grandmother, Edna Brau, stole her purse and jewelry and Hill's drugs and left in Brau's car. The CCA quoted from Robertson's written confession.

> On Saturday night around 9 PM I decided to walk over to Sean's house on Hathaway where he lived with his grandmother. When I got there, Sean was in his room watching T.V. We sat around watched TV and did some pot and crank. We then decided to go fishing out in the backyard. We were using one stick with a string and a hook. We would trade off, I think we caught some seven catfishes. While we were fishing, I think we were kneeling. I pulled my gun out of my pants and shot Sean once in the head. After I shot him, Sean fell in the water. I then ran in the house through Sean's bedroom and into the bathroom where I splashed some water over my face. I then walked into the den where Mrs. Hill, Sean's grandmother, was watching TV and I shot her once. I unplugged the TV because it was playing and so was the radio in the bedroom.
>
> I looked through her bedroom drawers and found her purse on the make-up counter. I saw some costume jewelry but left it alone. I did take a wristwatch which I later threw away in a garbage can but I don't remember where. I then ran into Sean's room and took his crank which was left on the bed. I then drove off in Mrs. Hill's car. I went on home and then went to Showtime on Greenville and

> Lover's where I wiped it all down and left it there. I then walked back home. Next day while listening to the evening news I heard about their bodies being found. I couldn't sleep for the next couple of days so I figured that I would just leave. I walked back to the parking lot at Showtime where I got in the car and decided to drive to Las Vegas where my parents used to bring me. I had left the car in the parking lot. I threw the purse away in a dumpster at the Village Apts. I think that I left on Tuesday sometime around 4 PM. I drove all the way to Albuquerque, N. Mexico where I spent the night and the following day I drove to Vegas. I was staying at the SuLinda Motel in Vegas. I met Nikki two or three days later at the Circus-Circus. I used my roommate's money to get to Vegas. He had some $700.00 in cash in his room. I think that Mrs. Hill's purse had some $37.00 in cash which I took. These past few days I didn't know what to do and when I got arrested I felt relieved for the most part because I didn't have to run anymore.

Robertson, 871 S.W.2d at 704-05. The state court findings regarding these confessions are entitled to deference under 28 U.S.C. 2254(e).

III

Before this court, Robertson makes two claims for federal habeas relief: (1) that trial counsel failed to adequately investigate and develop mitigating evidence Amended Petition at 15-50, and (2) that his death sentence was based on materially inaccurate evidence, Amended Petition at 51-62. Respondent Lorie Davis asserts that Robertson's first claim is unexhausted and procedurally barred by the Texas abuse-of-the-writ doctrine, Answer (docket entry 50) at 2, 48-61, and that both claims lack merit. Answer at 61-71. Robertson agrees that his first claim is

unexhausted but argues that it comes within the exception to the procedural bar created in *Martinez v. Ryan*, 566 U.S. 1 (2012), as applied to Texas in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Amended Petition at 38-50; Reply (docket entry 51) at 4-7.

IV

Federal habeas review of these claims is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), setting forth preliminary requirements that must be satisfied before reaching the merits of a claim made in these proceedings.

A. Exhaustion

Under the AEDPA, a federal court may not grant habeas relief on any claim that the state prisoner has not exhausted in the state corrective process available to protect his rights. *See* 28 U.S.C. § 2254(b)(1)(A); *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The federal court may, however, deny relief on the merits notwithstanding any failure to exhaust. *See* 28 U.S.C. § 2254(b)(2); *Miller v. Dretke*, 431 F.3d 241, 245 (5th Cir. 2005), *cert. denied*, 549 U.S. 838 (2006).

B. State-Court Procedural Determinations

If the state court denies the claim on state procedural grounds, a federal court will not reach the merits of those claims if it determines that the state law grounds are independent of the federal claim and adequate to bar federal review. See *Sawyer*

v. Whitley, 505 U.S. 333, 338 (1992). The same rule would apply "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991), *modified by Martinez v. Ryan*, 566 U.S. 1 (2012); *Woodfox v. Cain*, 609 F.3d 774, 793 (5th Cir. 2010).

If, however, the state procedural determination is based on state grounds that were inadequate to bar federal habeas review, or if the habeas petitioner shows that an exception to the bar applies, the federal court must resolve the claim without the deference AEDPA otherwise requires. See *Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000); *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998); *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999) ("the AEDPA deference scheme outlined in 28 U.S.C. § 2254(d) does not apply" to claims not adjudicated on the merits by the state court); *Woodfox*, 609 F.3d at 794 (the AEDPA deferential standard would not apply to a procedural decision of the state court).

C. State-Court Merits Determinations

If the state court denies the claim on the merits, a federal court may not grant relief unless it first determines that the state court unreasonably adjudicated the claim, as defined in § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.

In the context of the § 2254(d) analysis, "adjudicated on the merits" is a term of art referring to a state court's disposition of a case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). This provision does not authorize habeas relief, but restricts this court's power to grant relief to state prisoners by barring the relitigation of claims in federal court that were not unreasonably denied by the state courts. The AEDPA limits, rather than expands, the availability of habeas relief. See *Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Richter*, 562 U.S. at 98. "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which

demands that state-court rulings be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations omitted) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Under the "contrary to" clause, a federal court is not prohibited from granting federal habeas relief if the state court either arrives at a conclusion contrary to that reached by the United States Supreme Court on a question of law or decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. See *Williams*, 529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir.), *cert. denied*, 531 U.S. 1002 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ 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 prisoner's case. *Williams*, 529 U.S. at 413. The Supreme Court has repeatedly reaffirmed the high and difficult standard that must be met.

> "'[C]learly established Federal law'" for purposes of § 2254(d)(1) includes only "'the holdings, as opposed to the dicta, of this Court's decisions.'" And an "unreasonable application of" those holdings must be "'objectively unreasonable,'" not merely wrong; even "clear error" will not suffice. Rather, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (citations omitted).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court, unless the record before the state court satisfies § 2254(d). "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. 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." *Pinholster*, 563 U.S. at 185. The evidence required under § 2254(d)(2) must show that the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

V

In his first claim, Robertson complains that he was denied the effective assistance of counsel in the punishment retrial because his appointed counsel failed to conduct an adequate mitigation investigation. Amended Petition at 15-50. Specifically, Robertson asserts that his counsel "unreasonably narrowed the scope of, and prematurely ceased, the [mitigation] investigation despite red flags that signaled further investigation needed to be done into [Robertson's] mental state at the time of the offense, into maternal and paternal genetic-and-environmental influences, and into [Robertson's] early childhood." Amended Petition at 15.

Respondent asserts that this claim was not presented to the state court and is, therefore, unexhausted and now procedurally barred. Answer at 48-52. Robertson agrees that this claim was not presented to the state court, but argues that it comes within the exception to the procedural bar created in *Martinez*. Amended Petition at 38-50; Reply at 5-7. Respondent argues that the claim does not fall within the exception to the procedural bar created in *Martinez* because it is insubstantial and state habeas counsel was not ineffective. Answer at 52-61. In the alternative, Respondent asserts that the claim lacks merit. Answer at 61-62.

A. State Court Action

In the post-conviction habeas application filed in state court, Robertson presented one claim, that his "Sixth Amendment right to counsel was violated when he received ineffective assistance of counsel as a result of his legal team's failure to adequately investigate and present mitigation evidence as required by *Wiggins v. Smith*, 123 S.Ct. 2547 (2003) and *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003)." SHR (docket entry 28-27) at 8. The state court described the claim:

> In his sole ground for relief, Robertson complains trial counsel Richard Franklin and Robbie McClung failed to adequately investigate and present mitigation evidence, specifically that they were ineffective for (a) failing to follow mitigation expert Dr. Kelly Goodness' advice to present certain themes at trial (Application at 25-27); (b) failing to call psychologist Dr. Mark Vigen as a witness at trial (Application at 27-29); (c) failing to depose Robertson's friend Doris Jordi prior to trial and present the deposition to the jury (Application at 29-30); and

> (d) failing to obtain a copy of Robertson's 2001 clemency petition from former counsel Randy Schaffer's file. (Application at 30-31.) In support of his claims of ineffectiveness Robertson cites *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) and *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003).

SHR at 1150 (citing State Habeas Application at 6, 16-17). The state habeas court conducted an evidentiary hearing on this claim from January 23-26, 2012, Vol. 1-5, State Habeas Reporter's Record ("SHRR") (docket entry 28-22), and resolved disputed factual findings against Robertson in denying relief.

While the state habeas court concluded that the claim was procedurally barred because it could have been but was not presented in his direct appeal, the CCA did not adopt that finding. Instead, the CCA adopted the state habeas court's alternative findings that denied this claim on its merits. See *Ex parte Robertson*, No. WR-30077-03, 2013 WL 135667 at *1.

The adopted findings included details of the pretrial appointment of "highly qualified death penalty counsel" for the trial and appellate purposes that included trial assistance "to formulate and execute an effective trial strategy for mitigation." SHR (docket entry 28-25) at 1155-57. The state court found that trial counsel put on a comprehensive mitigation case that "covered Robertson's life span and painted a picture of a person who suffered as an abused, parentless child, who turned to drugs as a result, and who ultimately thrived in the highly structured environment of TDCJ." SHR (docket entry 28-25) at 1186.

182. The Court finds the defense team hired or consulted with the following experts in preparing Robertson's mitigation case: forensic psychologist Kristi Compton; forensic psychologist and prison consultant Mark Vigen; clinical psychologist and substance abuse expert Ari Kalechstein; psychologist and mitigation expert Kelly Goodness; prison expert S.O. Woods; former Texas Department of Criminal Justice employee Larry Fitzgerald; and future dangerousness expert Jon Sorenson. (Franklin Affidavit, p. 1; WR3: 54-55, 68-69, 81, 112-113).

* * *

185. The Court finds the defense team hired Dr. Goodness as a mitigation consultant. (Tatum Affidavit, p. 1; Franklin Affidavit, pp. 2). The Court finds Dr. Goodness worked closely with the defense team, investigated Robertson's background, and suggested salient potentially mitigating factors. (Tatum Affidavit, p. 1). The Court finds Franklin's following description of Dr. Goodness' role to be reliable:

> Dr. Goodness was our mitigation expert. She began the process of gathering mitigation evidence by interviewing [Robertson], his family members, and friends who knew [Robertson] prior to his incarceration. Dr. Goodness and her assistant prepared elaborate summaries of all interviews for the defense team's use. The three defense attorneys participated in her interviews of the family members. Dr. Goodness reviewed the entire defense file, including [Robertson's] educational and mental health records, and the discovery CDs provided by the prosecution. The initial interviews and document review led her to other resources and individuals to contact and interview. The mitigation investigation included gathering information and family photos. She

> developed ideas regarding which experts to consult based on the information gathered. Dr. Goodness recommended using Dr. Compton and Dr. Kalechstein. The team mutually decided to utilize Dr. Vigen, Mr. Woods, and Dr. Sorenson. Dr. Goodness and the defense team participated in numerous strategy meetings, email exchanges, updates on interviews, and discussions regarding her investigation. Prior to jury selection, Dr. Goodness offered opinions concerning the ideal defense juror and suggested scaled questions to be included in the juror questionnaire. She proposed evidence to present at trial, how to present it, questions to ask, and what order to ask them. Dr. Goodness was in the courtroom throughout trial. She offered critiques on the evidence as it developed and made recommendations regarding how to handle certain situations. She recommended specific direct-examination or cross-examination questions to ask during the testimony of various witnesses.

(Franklin Affidavit, pp. 2-3.)

186. The Court finds the attachments to Franklin's affidavit include a timeline of Robertson's life from birth to age 39 created by Dr. Vigen (Exhibit A), a summary of records titled "Document Review" (Exhibit B), and an outline by Dr. Goodness of information gathered (Exhibit C). (*See* Franklin Affidavit, p. 4). The Court finds these items are representative of the thoroughness of the mitigation investigation and reflect the wide variety of categories of documents that the defense team scrutinized for mitigation evidence (school records, military records, substance abuse treatment records, court records, probation records, police and jail records, and prison records) and the numerous individuals the team interviewed.

187. The Court finds McClung's following description of the development of the mitigation evidence to be reliable:

> Our initial strategy in developing the mitigation case was to obtain a detailed history from family members, particularly regarding the violence in [Robertson's] childhood home, the violence in his parents' marriage, and the family's progression to Texas. We contacted all of [Robertson's] siblings; however, only one sister agreed to testify. The next step in developing the mitigation case was to use professionals to explain to the jury how that type of a family history affects a person and how the family history particularly affected [Robertson].
>
> We utilized Dr. Compton to explain how the family's dysfunctional environment affected [Robertson's] prenatal, birth, and juvenile development and behavior. Dr. Compton was very familiar with the timelines of [Robertson's] development and life span. She utilized a power point presentation at trial and graphs to demonstrate the factors contributing to [Robertson's] development, including [Robertson's] father's genetic contribution (in other words his psychopathy), environmental influences, the series of abandonments [Robertson] was subjected to, and the trauma of witnessing physical abuse in his home.
>
> Our strategy in explaining who [Robertson] was to the jury continued with Dr. Ari Kalechstein, a psychologist and expert on addiction, who described the progression of [Robertson's] drug abuse. Evidence of [Robertson's] extensive substance abuse and Dr. Kalechstein's testimony were also the

> basis of Richard's closing argument that Edna Brau's murder was not deliberate beyond a reasonable doubt and the jury should answer "no" to the deliberateness special issue, on the basis that [Robertson's] substance use interfered with his development, contributed to his impulsivity, and resulted in a lack of thought processes during the offense.
>
> The next prong of our strategy in the mitigation case was to examine [Robertson's] life from his incarceration to the present day. Evidence [Robertson] was not violent while on death row was the best evidence he was not a future danger. We were excited about the jury having the opportunity to see that [Robertson] successfully conformed his behavior to the requirements of prison. One of the charms of [Robertson's] case was that he was incarcerated on two different death rows—the Ellis Unit until 1999, where far fewer restrictions existed, and the present day death row on the Polunsky Unit. The jury was able to see that in both situations, even the less restrictive environment, [Robertson] incurred only minor disciplinary infractions.

(McClung Affidavit, p. 2).

SHR (docket entry 28-25) at 1186-91. These findings are entitled to deference under 28 U.S.C. § 2254(e).

B. Law

Claims of ineffective assistance of counsel are measured by the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong of *Strickland* requires the habeas petitioner to show that counsel's performance was

deficient. See *id.* at 687. The second prong of this test requires the petitioner to show prejudice resulting from counsel's deficient performance. See *id.* at 694. The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. See *id.* at 697.

In measuring whether counsel's representation was deficient, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. See *id.* at 687-88; *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997). "It is well settled that effective assistance is not equivalent to errorless counsel or counsel judged ineffectively by hindsight." *Tijerina v. Estelle*, 692 F.2d 3, 7 (5th Cir. 1982). A court reviewing an ineffectiveness claim must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence or that, under the circumstances, the challenged action might be considered sound trial strategy. *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992), *cert. denied*, 509 U.S. 921 (1993). There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Richter*, 562 U.S. 106. In *Richter*, the Supreme Court noted the "wide latitude counsel must have in making tactical decisions" and the need to avoid judicial second-guessing. *Id.* (quoting *Strickland*, 466 U.S. at 689). "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." *Id.*, 562 U.S. at 110.

To satisfy the second prong of the *Strickland* test, the petitioner must show that counsel's errors were so serious "as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The test to establish prejudice under this prong is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability under this test is "a probability sufficient to undermine confidence in the outcome." *Id.*

Claims not presented in the original state habeas proceeding are subject to a state procedural bar. Texas law precludes successive habeas claims except in narrow circumstances. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5 (West 2015). This is a codification of the judicially created Texas abuse-of-the-writ doctrine. See *Barrientes v. Johnson*, 221 F.3d 741, 759 n.10 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001). Under this state law, a habeas petitioner is procedurally barred from returning to the Texas courts to exhaust his claims unless the petitioner presents a factual or legal basis for a claim that was previously unavailable or shows that, but for a violation of the United States Constitution, no rational juror would have found for the State. See *id.* at 758 n.9.

The United States Court of Appeals for the Fifth Circuit has repeatedly "held that 'the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.'" *Canales v. Stephens*, 765 F.3d 551, 566 (5th Cir. 2014) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008)). Therefore, unexhausted claims that could not make the showing required by this state law would be considered procedurally barred from review on the merits in this Court unless an exception is shown. See *Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir.), *cert. denied*, 534 U.S. 945 (2001).

C. Analysis

Both parties agree that the claim now presented by Robertson in federal court was not properly exhausted by presenting it to the state court. They disagree on whether the claim falls within the exception to procedural bar created in *Martinez*. To show that the ineffective-assistance-of-trial-counsel claim falls within the exception, Robertson must demonstrate (1) that the claim is "substantial" in that it "has some merit," and (2) that the claim was not presented to the state court because the habeas petitioner had no state habeas counsel or because his state habeas counsel was ineffective under the *Strickland* standard. *Martinez*, 566 U.S. at 14. Respondent can defeat this by showing either that the claim "is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the

initial-review collateral proceeding did not perform below constitutional standards." *Id.* at 16. Therefore, a determination of whether this claim falls within the procedural bar first requires an examination of whether the asserted claim has any merit.

In his amended petition, Robertson alleges that trial counsel were deficient in that they prematurely ceased investigation of two areas: (1) "maternal-and-paternal genetic-and-environmental influences, and into [Robertson's] early childhood," Amended Petition at 18-28, and (2) "the mental state underlying the behaviors of Mark Robertson." Amended Petition at 28-34. Regarding prejudice, Robertson alleges "upon information and belief" that a reasonable investigation into his psycho-social history would have revealed

> that [Robertson] suffered substantial abuse at the hands of his biological father, as well as deprivation and neglect throughout childhood from all of his parental figures. In addition, he may have suffered from an untreated, but treatable, mental illness. Further, a chronology reflects that [Robertson] experienced one of the most significant of traumatic stressors of his life, the Circle Tallant Stressor, which adversely affected his cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought. [Robertson] spiraled out of control in the weeks immediately preceding, and culminated in, the murders of Saunders, Brau and Hill. ***Had the jury known the real Mark Robertson, they would not have sentenced him to death.***

Amended Petition at 35 (emphasis added). The highlighted language above implies that the claim included the failure to ***present*** this information to the jury so that they could have known it, as may be required to show the prejudice prong of *Strickland*.

In her answer, Respondent characterizes the complaint that trial counsel failed to develop "and present" mitigating evidence in 5 areas: "(1) regarding the paternal side of his family (*id.* at 26-27); (2) the psychological, emotional, and physical health of his mother to show that he was at risk for Reactive Attachment Disorder (*id.* at 27-29); (3) his early childhood years in the crime-ridden town of El Monte, California (*id.* at 29-34); (4) the trauma of his breakup with his girlfriend [Circle Lisa Tallant] months before the murders (*id.* at 34-37); and (5) evidence showing that he had a treatable mental illness (*id.* at 37-40)." Answer at 12. Respondent argues that Robertson failed to "demonstrate the required *Strickland* prejudice," because he did not show for any uncalled witness "that the witness's testimony would have been favorable," and "that the witness would have testified at trial." Answer at 53 (citing *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985)). "Robertson does not name the missing witnesses or the missing evidence, does not show that the witnesses or evidence is available, and does not show that such hypothetical testimony or evidence would have aided his cause." Answer at 53.

In his reply, Robertson responds to this by clarifying his claim to eliminate any allegation that he has failed to ***present*** mitigating evidence and to narrow his claim to

a failure-to-investigate only, emphatically denying that he alleges any failure to present mitigating evidence.

> However, the Director seeks to refute Mr. Robertson's IATC *Wiggins* Claim as though it were a failure-to present claim. Specifically, the Director recasts Mr. Robertson's allegations that trial counsel failed to reasonably investigate their client's background as "in the nature of a claim complaining of an uncalled witness." Doc #50 at 59 of 79. An allegation that trial counsel did not thoroughly investigate or made an unreasonable decision to cease investigating is not a claim complaining of an uncalled witness. The latter concerns what evidence trial counsel decided not to present while the former concerns what information trial counsel failed to learn.

Reply at 2 (emphasis in original). Robertson emphasizes that he does not assert any failure to present mitigating evidence and does not carry forward any of those claims made in the state court. Reply at 2-3.

Notwithstanding the exhaustion question, Robertson's claim as clarified does not assert the required prejudice. To show prejudice, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the context of a complaint that counsel failed to investigate and discover potential lay or expert testimony about his background, abuse, mental state and any treatable mental illness, a habeas petitioner must show how the undiscovered testimony would have made a difference in the evidence presented at trial and in its outcome.

> An applicant "who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). To prevail on an ineffective assistance claim based upon uncalled witnesses, an applicant must name the witness, demonstrate that the witness would have testified, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable. See *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985).

Gregory v. Thaler, 601 F.3d 347, 352 (5th Cir.), *cert. denied*, 562 U.S. 911 (2010). Only then can the reviewing court "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Because Robertson has failed to make the required showing for this court to know what any allegedly missing evidence would have been, this court cannot reweigh the evidence in aggravation against such unknown evidence.

Although Robertson's petition attempts to show prejudice by alleging that the jury would not have sentenced him to death if they had "known the real Mark Robertson," he later contradicts this implied presentation element in his reply by withdrawing any allegation that trial counsel failed to present this evidence to the jury so that they could have known it. Without any corresponding allegation regarding how this failure to investigate impacted trial counsel's presentation to the jury deciding his punishment, Robertson does not say how any such failure could have resulted in harm or prejudice.

In the alternative, even if it is assumed *arguendo* that Robertson is asserting prejudice in trial counsel's failure to ***present*** mitigating evidence, Respondent's argument remains correct. Robertson has not made the prejudice showing required to complain of any uncalled witnesses, and his attempt to avoid this requirement by removing any allegation of deficient presentation seems to acknowledge that. Complaints regarding uncalled witnesses are "disfavored," as the decision whether to call a witness is a matter of trial strategy. *Gregory*, 601 F.3d at 352-53 (citing *Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 2007), and *Alexander*, 775 F.2d at 602).

Robertson has also not rebutted the presumption of correctness afforded the relevant findings of the state court. These findings and the procedural history of this case show that this is not a case where trial counsel completely failed to investigate and present mitigating evidence. Indeed, Robertson had the benefit of multiple lawyers in his original trial, appeal, state and federal habeas proceedings and was granted a retrial specifically to "give the jury a proper means to consider his mitigating evidence" developed in the original trial. *Ex parte Robertson*, 2008 WL 748373, at *1. At the retrial, Robertson's counsel also sought and obtained the assistance of a team of punishment phase experts including "forensic psychologist Kristi Compton; forensic psychologist and prison consultant Mark Vigen; clinical psychologist and substance abuse expert Ari Kalechstein; psychologist and mitigation

expert Kelly Goodness; prison expert S.O. Woods; former Texas Department of Criminal Justice employee Larry Fitzgerald; and future dangerousness expert Jon Sorenson." SHR (docket entry 28-25) at 1187. The state court found that trial counsel utilized these experts to conduct a thorough mitigation investigation that included the review of a wide variety of documents, interviews with numerous individuals, and a time line of Robertson's life. SHR (docket entry 28-25) at 1189.

This claim asserts Robertson's current disagreement with his prior expert's opinions rather than a deficiency in the conduct of his trial counsel. Robertson claims that the opinion of his defense expert at trial "was not valid or reliable" because it did not have an "adequate factual foundation." Amended Petition at 36. Specifically, Robertson complains that his defense team obtained "anecdotal" information from multiple witnesses that his father was "a pretty violent, mean individual," Amended Petition at 21 (citing volume 41, Reporter's Record ("RR") at 72-74), but did not investigate his father's "psycho-social history, the environment and family into which [Robertson's father] had been born, or his mental and physical health." Amended Petition at 21. Robertson speculates that such an investigation "could have revealed that the behavior of [Robertson's father] was because of reasons other than that he was a psychopath." Amended Petition at 21.

Robertson also alleges that Dr. Compton failed to conduct an adequate inquiry into his early childhood, from "birth to age 5, his attachment to his mother or other

caretaker, and the caretaker's ability and willingness to nurture [Robertson] in infancy," before concluding that he suffered from reactive attachment disorder. Amended Petition at 23 (citing 41 RR 80-81). Further, Robertson complains that his early childhood years in a rough, crime-filled area of California were inadequately investigated to show the environmental factors that influenced his early development. Amended Petition at 23-28. Robertson also complains that these experts did not adequately investigate and consider the emotional impact on him resulting from the termination of his relationship with his girlfriend, Circle Tallant, who testified in the prior trial about their break-up and the abortion of their child. Amended Petition at 28-31 (referring to this as the "Circle Tallant Stressor"). Robertson also complains that these experts did not adequately investigate and consider whether he suffered from a treatable bipolar disorder mentioned in the transcripts of the prior trial that they reviewed rather than the untreatable anti-social personality disorder that they diagnosed him to have. Amended Petition at 31-34.

These complaints are directed against his prior experts rather than counsel. To make a viable claim of the deprivation of the effective assistance of counsel under *Strickland* for failing to provide an expert with information, the petitioner must show that the expert requested the information and that the information would have made a difference to the expert's opinion. See *Bloom v. Calderon*, 132 F.3d 1267, 1278 (9th Cir. 1997), *cert. denied*, 523 U.S. 1145 (1998) (cited with approval by *Roberts v.*

Dretke, 356 F.3d 632, 640 (5th Cir. 2004), *cert. denied*, 544 U.S. 963 (2005)); *Segundo v. Stephens*, No. 4:10-CV-0970-Y, 2015 WL 3766746 at *2 (N.D. Tex. June 17, 2015) *COA denied sub nom, Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. July 28, 2016); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111 (1996).

In *Hendricks*, the United States Court of Appeals for the Ninth Circuit observed that an attorney has no duty to provide information to an expert that is not requested by the expert.

> To now impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation. An integral part of an expert's specialized skill at analyzing information is an understanding of what information is relevant to reaching a conclusion.

70 F.3d at 1038. Further, a claimant should show that the testifying experts would have changed their opinions if they had the missing information. See, *e.g.*, *Roberts v. Singletary*, 794 F. Supp. 1106, 1131-32 (S.D. Fla. 1992) (holding ineffective assistance of counsel not shown when experts did not state that the additional information would have changed the diagnosis in any meaningful way and did not express inability to base conclusions on available information), *aff'd*, 29 F.3d 1474 (11th Cir. 1994), *cert. denied*, 515 U.S. 1133 (1995).

In contrast, when counsel provides the defense expert with the information that the expert considered necessary to form an expert opinion, and the expert does, in fact, investigate the potential defense, "[l]ater disagreement by other experts as to the conclusions does not demonstrate a violation of *Strickland*." *Fairbank v. Ayers*, 650 F.3d 1243, 1252 (9th Cir. 2011), *cert. denied*, 565 U.S. 1276 (2012). In *Segundo v. Davis*, "trial counsel obtained the services of a mitigation specialist, fact investigator, and two mental-health experts" who "conducted multiple interviews with Segundo and his family, performed psychological evaluations, and reviewed medical records." 831 F.3d at 352. Segundo alleged that trial counsel was ineffective for failing to provide a social history to properly investigate his intellectual disability, "[b]ut none of the experts retained by trial counsel indicated that they were missing information needed to form an accurate conclusion that Segundo is not intellectually disabled." *Id.* The Court of Appeals held that "[c]ounsel 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, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." *Id.* (quoting *Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004)); see also *Turner v. Epps*, 412 Fed. App'x 696, 704 (5th Cir. 2011) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel

should be able to rely on that expert to alert counsel to additional needed information . . . ."), *cert. denied*, 565 U.S. 1115 (2012).

Robertson has not shown that his prior experts did not have sufficient information, that any of the prior experts requested from counsel the information that he now identifies, or that if they had, that any of the information his experts would have received would have changed any of their opinions. There is no evidence showing that trial counsel did anything other than rely upon what appeared to be objectively reasonable evaluations and opinions of his own expert witnesses.

Robertson has not satisfied the deficiency prong of *Strickland* because he merely complains about his experts and not trial counsel. His claim boils down to a disagreement between experts that is insufficient to support relief on an ineffective assistance of counsel claim. "It will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect from the second prospective witness." *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir.), *cert. denied*, 492 U.S. 936 (1989), quoted with approval in *Woodward v. Epps*, 380 F. Supp. 2d 788, 791 (S.D. Miss. 2005). Such a disagreement between experts does not establish ineffective assistance of counsel. See *Bell v. Thompson*, 545 U.S. 794, 809-10 (2005) (approving decision of Tennessee Court of Criminal Appeals that trial counsel could not be faulted for relying upon the opinions of his two medical experts).

Robertson has not satisfied the prejudice prong of *Strickland* because he does not allege any failure to present mitigating evidence that could have resulted from any deficient investigation, what the missing evidence would have been, and how it would have made a difference at trial. Because Robertson has not satisfied either prong of *Strickland*, this claim lacks any merit and may be denied on that basis notwithstanding any failure to exhaust. *See* 28 U.S.C. § 2254(b)(2).

The exhaustion problem raises further obstacles. Before this court, Robertson has expressly abandoned his exhausted claim. While this court would consider *de novo* an unadjudicated claim that is shown to come within the *Martinez* exception, the court is not required to grant funding or an evidentiary hearing for a procedurally barred claim in the hope that it might someday be shown to come within an exception. The court does not encourage habeas petitioners to abandon potentially meritorious claims that were thoroughly exhausted in the state court or to transform fully exhausted claims into unexhausted ones in order to avoid the *Pinholster* limitation on evidentiary development of the exhausted claims in federal court. This use of *Martinez* would run counter to the exhaustion requirement and "encourage sandbagging in state court to obtain *de novo* review of a petitioner's 'real' claim in federal court." *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir.), *cert. denied*, 136 S. Ct. 86 (2015).

To be clear, Robertson's allegations before this court differ from those presented to the state court not only because he expressly disavows any presentation element in his complaint against trial counsel. Robertson's reply also clarifies that he refuses to assert the allegations of the exhausted claim presented to the state court in his post-conviction habeas application.

> In this proceeding, Mr. Robertson has not alleged that trial counsel were deficient for (1) failing to follow the presentation recommendations of defense mental health expert Dr. Kelly Goodness; (2) failing to present testimony from Dr. Mark Vigen; (3) failing to present deposition testimony from Doris Jordi; (4) failure to obtain a copy of Mr. Robertson's clemency application; or (5) telling jurors that Mr. Robertson had previously been sentenced to death. Those issues were raised in state habeas, but, as will be more fully discussed below, Section III. infra, Mr. Robertson did not carry forward the state habeas IATC claims into federal habeas.

Reply (docket entry 51) at 2-3 (emphasis in original).

Because Robertson has not incorporated those complaints into his federal petition, and expressly refuses to do so, it appears that he has indeed alleged a new and unexhausted claim. This does not, however, entitle him to funding and evidentiary development in federal court. See *Allen v. Stephens*, 805 F.3d 617, 638-39 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2382 (2016) ("we have rejected the argument that *Martinez* and *Trevino* require the granting of funds to develop claims such as Allen's.") (citing *Crutsinger v. Stephens*, 576 Fed. App'x 422, 431 (5th Cir. 2014) ("*Martinez* . . . does not mandate pre-petition funding, nor does it alter our rule that a

prisoner cannot show a substantial need for funds when his claim is procedurally barred from review."), *cert. denied*, 135 S.Ct. 1401 (2015). This also does not eliminate the presumption of correctness afforded relevant state court findings, or a habeas petitioner's duty to rebut such findings by clear and convincing evidence under 28 U.S.C. 2254(e).

Even if Robertson's claim may be read to include a complaint regarding counsel's failure to present evidence to his jury at trial, he has not shown that such a complaint would have any merit. Therefore, he has not identified a substantial claim of ineffective assistance of trial counsel that could satisfy this element of *Martinez* and come within this exception to procedural bar. Further, Robertson has not shown that his state habeas counsel provided ineffective assistance in order to satisfy that element of *Martinez*, nor, does it appear, could he.

State habeas counsel obtained investigative and expert assistance and presented a *Wiggins* claim of ineffective assistance of trial counsel to the state court in post-conviction habeas review that was arguably stronger than the instant claim. That claim included a complaint that trial counsel failed to present mitigation evidence at trial, went beyond a mere disagreement between experts, and was considered by the state court to be substantial enough to warrant a three-day evidentiary hearing. Further, since Robertson has not presented a substantial claim of ineffective assistance of trial counsel that was not presented to the state court,

state habeas counsel could not have been ineffective in failing to present it. See *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) (agreeing with the district court that "habeas counsel was not ineffective in failing to raise [a] claim at the first state proceeding" because "there was no merit to [the petitioner's] claim"), *cert. denied*, 134 S.Ct. 2876 (2014); *Beatty v. Stephens*, 759 F.3d 455, 466 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 2312 (2015); *Braziel v. Stephens*, No. 3:09-CV-1591-M, 2015 WL 3454115 at *10 (N.D. Tex.), *COA denied*, 631 F. App'x 225 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1825 (May 2, 2016).

Therefore, Robertson's first claim is **DISMISSED** as unexhausted and procedurally barred. In the alternative, it is **DENIED** for lack of merit notwithstanding any failure to exhaust.

VI

In his second claim, Robertson complains that he was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments "because his death sentence was based on materially inaccurate evidence from Warden Nelson." Amended Petition at 51. Specifically, Robertson argues that the state court decision that he had not shown that Warden Nelson's testimony was "false or misleading," was contrary to and an unreasonable application of federal law, and also based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings in violation of 28 U.S.C. § 2254(d). Amended Petition at

57-62. Construing this as a due process claim, Respondent argues that it lacks merit. Answer at 62-71.

A. State Court Action

On direct appeal to the CCA from the new death sentence, Robertson complained that the state had presented false and misleading testimony from its expert witness, Warden Melodye Nelson, regarding the following five matters:

> (1) whether or not the Defendant would "automatically" enter the system as a [classification level] G3 [prisoner]; (2) the prison personnel were underpaid, short staffed and one officer is often looking after 150 inmates; (3) there was more violence in the general population than there was in administrative segregation; (4) a year ago the Texas Department of Criminal Justice was 4,000 correctional officers short; an inmate can come and go from their cells to work; (5) the prison is filled with psychopaths.

Appellant's Brief before CCA (docket entry 27-44 at 105) at 77. To prove the falsity of Nelson's testimony, Robertson relied upon the testimony of his expert, S.O. Woods, Jr., that was offered in the hearing on his motion for new trial.

Regarding Nelson's testimony that Robertson would "automatically" enter the system at the middle level restriction of a G3 classified inmate if he had been given a life sentence, Woods agreed that was the "rule of thumb for any sentence over 50 years." Supplemental Reporter's Record ("Supp. RR") (docket entry 30) at 9. Woods explained that the prison's computer system would have made the assessment of that level or the less restrictive G2 level, and that the responsible committee would

have probably assigned the less restrictive G2 level because they did not have reason to override the computer assessment. Supp. RR at 40. Woods' only concern was that he thought that the term "automatic" was "not a good choice of words." Supp. RR at 15. "I never disagreed with that decision. I just said it wasn't automatic." Supp. RR at 40.

In finding that Robertson had not shown any falsity in this part of Nelson's testimony, the CCA stated "[a]lthough Woods disagreed with the warden's choice of words, the evidence indicates that [Robertson] was eligible for [the even less restrictive] G2 status if given a life sentence." *Robertson*, 2011 WL 1161381 at *8. The CCA also found that there was no reason in the record to deviate from that determination.

Regarding Nelson's testimony that the prison personnel were underpaid, short-staffed and one officer may look after 150 inmates, Woods agreed that the prison system was understaffed but could not confirm the numbers that Nelson used.

> I didn't find anybody that generally agreed with [Nelson's] statement, among those people [in the prison system] that I interviewed. They led me to believe that there would be situations -- and my experience tells me that there's situations -- where one or two or three officers might supervise large groups of inmates, for instance, on a recreation yard or chow hall or in a hallway or maybe in a gymnasium or something like that.

Supp. RR at 18. He testified that this was referred to as "indirect supervision." Supp. RR at 18.

Woods also testified that "TDC is such a complex operation and it consist of so many different and variety of units that it's impossible to come up with anything like a ratio that says there's so many officers to so many inmates." Supp. RR at 19. Woods came up with an estimated worst ratio of one officer to eighteen inmates by doing "royal math," dividing the total number of prison officers on the TDC payroll by the total number of inmates listed as the TDC population, rather than using any actual data from the prison regarding supervision ratios that might have distinguished between the needs of different units and different levels of supervision. Supp. RR at 19-20.[1] Woods' opinion on this point appears to be little more than a guess.

During the cross-examination of Woods at the hearing on the motion for new trial, the prosecutor asked Woods if Nelson's testimony regarding this ratio was presented as an extreme example rather than a regular occurrence. Woods did not disagree that a supervision ratio might on a rare occasion be higher, as Nelson suggested, but explained that he thought she was referring to a regular occurrence because she had "used the word 'often.' That's what came out to me. I think the word 'often' was in there, something like that. That made it sound like it was common. That's where I didn't agree with it." Supp. RR at 43. On that point, the prosecutor was content to "let the record speak to that." Supp. RR at 43.

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[1] Woods contrasted his estimated worst ratio with the indirect supervision of large groups. Supp. RR at 45. He also testified that, in the distant past, he had supervised as many as 600 inmates by himself. Supp. RR at 44.

During the trial, Nelson was asked whether the prison was understaffed. She responded,

> That's very easily said. Yes sir. We are very underpaid. And for one -- you know for every one staff member they ***may*** be in charge of ***up to*** 150 offenders. You can't -- you know they can't keep a direct eye on all 150 of those offenders. So you're watching one and ten are doing something else.

42 RR (docket entry 30-8) at 87 (emphasis added). In this testimony, Nelson appears to set up the most extreme potential limits to point out how understaffing can impact an officer's ability to supervise inmates. In fact, this testimony appears to refer to indirect supervision as it suggests that direct supervision is not possible for such a large ratio.

Nelson also mentioned this ratio during the trial, when asked whether an inmate would have a greater opportunity to commit violence if they went into a less restrictive general prison population category than they would if they went into administrative segregation or death row. Nelson testified:

> Yes, sir. The statistics of one correctional officer watching 150 versus two watching 84 -- I mean there's a large decrease in the amount of supervision that goes into watching a G2 offender or observing the actions of a G2 versus the actions of our administrative segregation offenders.

42 RR (docket entry 30-8) at 116. Nelson's point in this testimony appears to focus on the increased opportunity in the general population to commit acts of violence

than there is in administrative segregation and not what the normal or appropriate direct supervision ratios in the prison system would be.

On this point, Woods agreed that there was a greater opportunity for prisoners in the general prison population to commit acts of violence, that there was greater freedom in the general population, that there was a greater number of incidents in the general population due to the greater numbers, and that prisoners in administrative segregation are highly controlled and guarded at a higher rate than those in the general population. Supp. RR (docket entry 30) at 23, 47. But Woods also believed that the prisoners in administrative segregation had a greater desire to commit acts of violence, emphasizing, however, that this was only his opinion based on common sense and not on any hard evidence. "I don't know that I can support that statistically. It's common sense. They're bad inmates and they would be more likely to want to act out on the officers." Supp. RR (docket entry 30) at 24-25. On cross-examination, Woods acknowledged that Nelson had corrected the prosecutor regarding this subject and did not leave the impression that the general population had the worst violence in the prison. Supp. RR (docket entry 30) at 47-48.

Regarding Nelson's testimony that the Texas Department of Criminal Justice was 4,000 correctional officers short the prior year, Woods testified that there was a shortage but guessed that it would not have been that high.

> Well that's a continuing problem with the agency, is overturn of staff. I'm not sure about the 4,000 number

> being an accurate number. I do know that two weeks ago they were down by 900 officers system wide which with a 110 or so units, that means it's probably about ten per unit.
>
> * * *
>
> As far as a year ago, I try to keep up with current trends at TDC because of the work that I do and things. The 4,000, I think, was high. I don't know how high, but I think it was high for a year ago.

Supp. RR (docket entry 30) at 26.

Regarding Nelson's testimony that an inmate in the general population can come and go from their cells to work, the CCA thoroughly compared the testimony of Nelson and Woods on this issue and found that they were "substantially identical." *Robertson*, 2011 WL 1161381 at *10.

Finally, Nelson testified at trial that she would agree with the defense counsel's statement that the prison is filled with psychopaths. 42 RR (docket entry 30-8) at 111, 116. In the hearing on the motion for new trial, Woods did not present any facts or statistics on this point, and agreed that there were probably more psychopaths in the prison system, but doubted that there would be very much more. "We probably have more in the prison system because they're criminally oriented in a lot of cases. But I wouldn't suspect the population of psychopaths in the prison is too terribly much higher than that outside the prison." Supp. RR (docket entry 30) at 30. Again, Woods' language suggests no more than a guess.

Robertson also called Dr. Mark Vigen in support of his motion for new trial to establish that, although he was present and heard Nelson's testimony, Vigen would not have been able to testify during the trial on these matters because of the time it would take for him to obtain the necessary data. Supp. RR (docket entry 30) at 73-75. Although Vigen had expressed concerns to defense counsel about some of Nelson's opinions, he didn't have the data he thought he would need to dispute them. Supp. RR (docket entry 30) at 73-75. Specifically, Vigen testified that Nelson had a different understanding than he did about the things raised in the motion for new trial, such as whether an inmate would "automatically" receive G3 status and whether the prison had been 4,000 officers short, and he later consulted with Woods regarding those things before the hearing on the motion for new trial. Supp. RR (docket entry 30) at 78-81. Vigen also testified that he had evaluated Robertson and, if called at trial, would have offered the opinion that Robertson "would qualify for the diagnosis of anti-social personality disorder and that he had psychopathic tendencies." Supp. RR (docket entry 30) at 82.

After noting the lack of a trial objection to Nelson's testimony and leaving open the question of whether Robertson's complaints were preserved, the CCA analyzed each of these items of disputed expert opinion and concluded that Robertson had not demonstrated Nelson's testimony to be false or misleading and

had not shown that the trial court abused its discretion in denying the motion for new trial. See *Robertson*, 2011 WL 1161381 at *7-10.

B. Law

Robertson relies upon *Napue v. Illinois*, 360 U.S. 264, 269 (1959), in support of his argument that a conviction obtained through perjury, known to be such by representatives of the State, violates due process, even when the State, although not soliciting the perjury, allows it to go uncorrected when it appears. Amended Petition at 59. To prove a due process violation under *Napue*, a petitioner must establish that (1) the testimony was false, (2) the government knew the testimony was false, and (3) the testimony was material. See *Summers v. Dretke*, 431 F.3d 861, 872 (5th Cir. 2005), *cert. denied*, 549 U.S. 840 (2006); *United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002).

Robertson also relies upon *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988), in support of his assertion that his death sentence was procured in violation of the Eighth Amendment because it was based on "materially inaccurate" evidence. Amended Petition at 61-62; Reply at 8. The United States Court of Appeals for the Fifth Circuit has held that, notwithstanding the difference between a claim of false testimony and the use of an invalid aggravator, to sustain a claim under *Johnson*, a habeas petitioner must establish that the testimony was "false and material." See *Hernandez v. Johnson*, 213 F.3d 243, 252 (5th Cir.) (citing *Fuller v. Johnson*, 114 F.3d

491, 497 (5th Cir. 1997), *cert. denied*, 531 U.S. 966 (2000)).[2] This would correspond with two of the three elements of a due process claim under *Napue*.

C. Analysis

Robertson argues that he is entitled to relief because the state court's decision to deny relief was contrary to and an unreasonable application of federal law, and also was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Amended Petition at 57, 61-62 (citing 28 U.S.C. § 2254(d)). In addition to the five areas of concern with Nelson's testimony presented to the CCA, however, Robertson also asserts that Nelson had given false testimony in a different trial affecting her credibility that was never revealed to Robertson's jury, and that she had "testified to a speculative 'parade of horribles,' with no evidence whatsoever that Mr. Robertson had altered his coffee pot and scalded a guard with boiling water, or broke his headphones and transmitted gang information." Amended Petition at 53, 57-59.

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[2] Robertson also argues an opinion of the CCA in support of this claim. Amended Petition at 59 (citing *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010)); Reply at 8-9. Under § 2254(d), however, only a state court decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" can make the required showing. This would not include state court decisions, but "only 'the holdings, as opposed to the dicta, of [United States Supreme Court] decisions.'" *Woodall*, 134 S. Ct. at 1702.

Were this court to consider these additional assertions as part of the claim presented in these proceedings, it would render the entire claim unexhausted and, now, subject to a procedural bar by the Texas abuse-of-the-writ rule. See *Coleman*, 501 U.S. at 735 n.1; *Woodfox*, 609 F.3d at 793. This state rule is an independent and adequate state ground for to support a procedural bar against federal habeas review. *Canales*, 765 F.3d at 566. It is unnecessary, however, to construe this claim as unexhausted and procedurally barred.

Because Robertson argues only that the state court's decision was unreasonable under § 2254(d), this court should properly limit itself to the asserted § 2254(d) inquiry. Under that standard, Robertson's new evidence and arguments cannot be considered by this court because they were not part of the claim submitted to the CCA on direct appeal. See *Pinholster*, 563 U.S. at 185.

In the alternative, these additional assertions would lack merit. Robertson complains that Nelson gave inaccurate testimony in another capital case about the classification status of that other defendant (Juan Lizcano) that Robinson's jury never heard. Amended Petition at 59. At the hearing on Robertson's motion for new trial, Robertson's counsel agreed with the State that the testimony in that other case did not apply to Robertson because it was limited to inmates sentenced to life without parole. Supp. RR (docket entry 30) at 4-5. Robertson has not shown that Nelson's testimony in that other case would have been relevant to Nelson's

testimony in Robertson's case and admissible to impeach her. Therefore, even if this issue had been exhausted, it lacks merit.

Further, Robertson has not shown that any of Nelson's testimony regarding the so-called "parade of horribles" was in any way false or misleading. Nelson explained that Robertson's prison disciplinary infractions may "sound like nothing" but are based in rules that are designed to protect both the inmates and the guards from certain safety and security risks that she described. 42 RR (docket entry 30-8) at 98-103. Robertson does not attempt to show that any of Nelson's testimony regarding these items was incorrect or in conflict with any testimony of his expert, Woods. Robertson merely complains that the CCA later characterized these prison infractions as "minor." Amended Petition at 58.

In any event, Robertson has not shown that the state court unreasonably determined that Nelson's testimony was not false or misleading. In fact, the state court's determinations appear to be correct.

A mere disagreement between experts is not normally sufficient to show that the opinion testimony of one of them is false or misleading. See *Boyle v. Johnson*, 93 F.3d 180, 186 (5th Cir. 1996) (holding that "the fact that other experts disagreed" was insufficient to show the state's expert testimony to be false or misleading), *cert. denied*, 519 U.S. 1120 (1997); *Clark v. Johnson*, 202 F.3d 760, 767 (5th Cir.) (holding disagreement between experts was insufficient to overcome state habeas court's

factual determination that the prosecution expert's testimony was not false or misleading), *cert. denied*, 531 U.S. 831 (2000); *Harris v. Vasquez*, 949 F.2d 1497, 1524 (9th Cir. 1990) (holding that conflicting psychiatric opinions did not show that the state's expert testimony was false, noting that "psychiatrists disagree widely and frequently" (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)), *cert. denied*, 503 U.S. 910 (1992)); *Campbell v. Gregory*, 867 F.2d 1146, 1148 (8th Cir. 1989) (presenting differing testimony from new expert in motion for new trial did not establish falsity of prior expert's opinion offered at trial); *Devoe v. Davis*, No. A-14-CA-151-SS, 2016 WL 5408169, at *18 (W.D. Tex. Sept. 27, 2016) (rejecting claim that state presented false or misleading expert testimony regarding the TDCJ's inmate classification system). But even if it could be sufficient, Robertson's expert testimony would not.

Robertson's expert, Woods, did not accuse Nelson of perjury but expressed his opinions as speculation about the accuracy of her opinions and disagreement with word choices. Woods admitted that he did not have the hard evidence or statistics to disprove Nelson and used language indicating that he was guessing she was probably wrong. Rather than accusing Nelson of testifying falsely, Woods emphasized that he merely disagreed with her choice of words or focused on language that he read into the transcript of her testimony that does not appear in the record before this court.

This is patently insufficient to show Nelson's testimony to be false or misleading in violation of the Constitution.

Robertson has not overcome the presumption of correctness afforded state court findings, much less shown that the state court unreasonably determined that Nelson's testimony was not false or misleading in violation of the Constitution. In fact, the record before this court supports the state court's decision. Therefore, Robertson's second claim is **DENIED**.

VII

Robertson's application for a writ of habeas corpus is **DENIED**.

In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the court **DENIES** Robertson a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. See *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); 28 U.S.C. § 2253(c)(2). If Robertson files a notice of appeal, he may proceed *in forma pauperis* on appeal.

SO ORDERED.

March 30, 2017.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK ROBERTSON, Petitioner, VS. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 3:13-CV-0728-G (Death Penalty Case)

JUDGMENT

This action came on for consideration by the court, and the issues having been duly considered and a decision duly rendered,

It is therefore **ORDERED, ADJUDGED** and **DECREED** that all relief requested be, and the same is, hereby **DENIED**.

It is further **ORDERED** that the clerk shall transmit a true copy of this judgment to the parties.

March 30, 2017.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

2011 WL 1161381
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.

Mark ROBERTSON, Appellant
v.
The STATE of Texas.

No. AP–71,224.
|
March 9, 2011.

Synopsis

Background: Defendant was convicted in the Criminal District Court, Number Five, Dallas County, of capital murder in the course of robbery and was sentenced to death. On automatic appeal, the Court of Criminal Appeals, 871 S.W.2d 701, affirmed. The Court of Criminal Appeals subsequently granted a new punishment hearing, and defendant was again sentenced to death.

Holdings: On automatic appeal, the Court of Criminal Appeals, Keller, P.J., held that:

[1] evidence was legally sufficient to support jury's affirmative answer to the future dangerousness special issue;

[2] trial court's denial of defendant's *Batson* challenge to the State's peremptory strike of prospective juror was not clearly erroneous;

[3] trial court did not err by allowing the State to read testimony by witnesses from the original trial who were now deceased and unavailable for cross-examination; and

[4] trial court's instruction to disregard the State's sidebar comment sufficed to prevent the jury from being unfairly prejudiced by the comment.

Affirmed.

West Headnotes (10)

[1] **Sentencing and Punishment**
Dangerousness

Evidence during penalty phase of capital case was legally sufficient to support jury's affirmative answer to the future dangerousness special issue; defendant shot and killed two people, after his arrest, witnesses described him as smiling and indifferent, as if it were a joke, defendant had also committed armed robbery and a wide variety of drug-related offenses, and defendant's psychologist testified that at the time of the offense defendant was a sociopath, and at the time of trial he was still diagnosed with anti-social personality disorder, for which there was neither cure nor treatment.

2 Cases that cite this headnote

[2] **Jury**
Peremptory challenges

Trial court's denial of capital defendant's *Batson* challenge to the State's peremptory strike of prospective juror was not clearly erroneous; juror was the only one to say that she would be unable to take the oath of a juror, which was the initial reason that the State attempted to strike her for cause.

Cases that cite this headnote

[3] **Jury**
Weight and effect of evidence

A prospective juror in a capital case is not challengeable for cause simply because he would place the burden of proof on mitigation on the defense.

Cases that cite this headnote

[4] **Jury**
Weight and effect of evidence

A prospective juror in a capital case is not challengeable for cause simply because he

does not consider a particular type of evidence to be mitigating.

Cases that cite this headnote

[5] **Criminal Law**
Adding to or changing grounds of objection

Capital defendant failed to preserve for appellate review claim that trial court erred in denying his challenge for cause against prospective juror on grounds that juror would automatically find defendant to be a future danger, where defendant did not allege this reason as part of his challenge to the trial court.

Cases that cite this headnote

[6] **Jury**
Bias and Prejudice

Trial court did not abuse its discretion in denying capital defendant's challenge for cause against prospective juror, despite defendant's claim that juror was biased against him and would not consider his, nor any other, mitigating evidence; when directly questioned about his ability to be fair and impartial, and follow the law, juror responded that yes, he could consider the mitigation issue.

Cases that cite this headnote

[7] **Criminal Law**
Competency of jurors and challenges

Capital defendant failed to preserve for appellate review claim that the erroneous denial of his challenges for cause deprived him of a lawfully constituted, unbiased, and unprejudiced group of jurors, and that this denied him a fair trial in violation of the United States Constitution, the Texas Constitution and the Texas Code of Criminal Procedure, where these objections were not presented to the trial court.

Cases that cite this headnote

[8] **Criminal Law**
Points and authorities

Capital defendant's claim that the trial court erred in denying "trial objection number two" as to each and every member of the venire was inadequately briefed; trial objection number two was a written objection to "improper exclusion of [a] juror with scruples against death," defendant's brief paired the argument for this issue with the argument for another issue, and it did not argue any issue presented in trial objection number two. Rules App.Proc., Rule 38.1(i).

Cases that cite this headnote

[9] **Sentencing and Punishment**
Admissibility

Sentencing and Punishment
Determination and disposition

Upon remand for new punishment hearing in capital case, trial court did not err by allowing the State to read testimony by witnesses from the original trial who were now deceased and unavailable for cross-examination, despite defendant's claim that because the law of mitigation had developed since the original trial, defense counsel at the original trial did not understand what mitigation was, and thus, defense counsel could not have conducted effective cross-examination to develop mitigation evidence; the witnesses were available for cross-examination at the initial trial, record from that trial showed that defense counsel was well aware of the mitigation issue, and defense counsel at the original trial had a motive to present mitigation evidence similar to counsel at re-trial.

2 Cases that cite this headnote

[10] **Sentencing and Punishment**
Arguments and conduct of counsel

Trial court's instruction to disregard the State's sidebar comment about witness during her testimony in penalty phase of capital

case sufficed to prevent the jury from being unfairly prejudiced by the State's comment, and thus, mistrial was not warranted; prosecutor's comment was that witness did not murder anyone despite her difficult background, the statement was not intended for the jury, but was a remark to the judge in a sidebar response to defendant's objections, and the trial court sustained the defendant's objection to the comment.

Cases that cite this headnote

On Direct Appeal from Criminal District Court, Number Five, Dallas County.

Opinion

KELLER, P.J., delivered the opinion of the unanimous Court.

***1** In 1989 appellant was indicted for capital murder in the course of robbery. In 1991 he was tried and sentenced to death. His sentence was affirmed on direct appeal.[1] In 2008, this Court granted a new punishment hearing[2] under *Penry II*.[3] In July of 2009, appellant was again sentenced to death. Direct appeal to this Court is automatic.[4] Finding no reversible error, we shall affirm.

I. SUFFICIENCY OF THE EVIDENCE

A. Legal Sufficiency—Future Dangerousness

[1] In issue number twenty-four, appellant argues that the evidence is legally insufficient to support the jury's answer to the future dangerousness special issue because, at the time of his new trial on punishment, he had spent eighteen years on death row with no violent infractions. He asserts that, because of this, it is evident that he would not constitute a continuing threat to society.

When assessing whether there is sufficient evidence of future dangerousness, we review the evidence in the light most favorable to the jury's affirmative answer and determine whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability that appellant would constitute a continuing threat to society.[5]

A jury may consider a variety of factors when considering the future dangerousness issue, including: the circumstances of the offense, including the defendant's state of mind and whether he was working alone or with other parties; the calculated nature of his acts; the forethought and deliberation exhibited by the crime's execution; the existence of a prior criminal record and the severity of the prior crimes; the defendant's age and personal circumstances at the time of the offense; whether the defendant was acting under duress or the domination of another at the time of the offense; psychiatric evidence; and character evidence.[6] The circumstances of an offense can be some of the most revealing evidence of future dangerousness and may be sufficient to independently support an affirmative answer to the future dangerousness issue.[7] The special issue focuses upon the particular individual's character for violence, not merely the quantity or quality of the institutional restraints put on that person.[8]

In the instant offense, appellant killed two people. He ambushed nineteen-year-old Sean Hill while Hill was fishing, and he shot Hill's grandmother, Edna Brau, between the eyes while she slept. After his arrest, witnesses described him as smiling and indifferent, as if it were a joke.[9]

The State presented evidence of other offenses and bad acts, including evidence that appellant, as a young teenager, brought a gun to school and threatened to shoot other students. Appellant had strangled cats and had stomped birds to death.[10] He had also committed armed robbery and a wide variety of drug-related offenses.[11] While he was on deferred adjudication for an aggravated robbery, appellant killed 7–Eleven store employee Jeffrey Saunders.

***2** Appellant's psychologist, Dr. Compton, testified that at the time of the offense appellant was a sociopath, and at the time of trial he was still diagnosed with anti-social personality disorder, for which there is neither cure nor treatment. Dr. Compton also testified that appellant exhibited narcissism, grandiosity, manipulative behavior and that he displayed signs of remorse for his crimes only

as his execution date drew near. Dr. Compton agreed that the restrictive death row environment limits anti-social behavior.

Viewed in the light most favorable to the verdict, there is sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that there is a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society. Issue number twenty-four is overruled.

B. Factual Sufficiency

In issues twenty-five and twenty-six, appellant urges us to examine the factual sufficiency of the evidence to support the jury's answer to the future-dangerousness special issue. This court does not review future dangerousness for factual sufficiency. [12] Furthermore, we no longer conduct factual-sufficiency analyses for issues on which the State carries the burden of proof beyond a reasonable doubt. [13] Issues twenty-five and twenty-six are overruled.

C. Factual Sufficiency—Mitigation

In issues thirty-two and thirty-three, appellant claims that the jury's answer to the mitigation special issue was against the weight and preponderance of the evidence. We do not conduct a sufficiency review of the jury's answer to the mitigation special issue. [14] Issues thirty-two and thirty-three are overruled.

II. *VOIR DIRE* ISSUES

A. *Batson* Challenge

[2] In issue number one, appellant claims that the trial court erred in overruling his *Batson* [15] challenge to the State's peremptory strike of prospective juror McClendon. *Batson* provides a three-step process for a trial court to use in deciding a claim that a peremptory strike was based on race:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. [16]

A trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. [17] Often the best evidence of discriminatory intent is the demeanor of the prosecutor exercising the challenge. [18] Step three of the Batson inquiry includes an evaluation of the prosecutor's credibility. [19] Additionally, race-neutral reasons for peremptory challenges often turn on aspects of a prospective juror's demeanor, such as nervousness or inattention, causing the trial court's observations to be even more important. [20] The trial court must evaluate, not only whether the prosecutor's demeanor shows discriminatory intent, but also whether the prospective juror's demeanor displayed the basis for the strike. [21] A trial court may perform a comparison of accepted jurors versus the challenged juror. [22] Disparate treatment may enter into both the trial judge's assessment of the prosecutor's credibility and the determination of the racial neutrality of the peremptory challenge. [23]

***3** Following McClendon's individual voir dire, the State challenged her for cause. Appellant opposed the strike, and the court denied the challenge. The State then used a peremptory challenge to strike McClendon from the jury. Appellant challenged the strike under *Batson.* In response, the prosecutor stated:

> I want the record to reflect some of these statements were in her questionnaire. She was talking about how alcohol and drugs is a disease, with regards to the genetic predisposition. She talked about voluntary intoxication may not be worthy of a death penalty. Intoxication is a big issue in this case. She talked about how most criminals are actually victims of society, and extenuating circumstances should not be considered. She strongly disagreed on that.
>
> The State felt she was the type of juror—any type of mitigating evidence that would have been presented, she would have latched on to and would have answered that last special issue to the point where the defendant would receive a life sentence instead of the death sentence. And that's only if she became qualified.

> It was the State's position, Judge—and I think the Court can even read the transcript with the State and Defense presented after that day, that this juror specifically said, "No, I do not think I could take that oath." And then I pressed her on it. She said, "No, I could not take the oath to sit as a juror in a case like this."
>
> Obviously, the Judge made his ruling and we abided by the ruling. But then someone who we felt couldn't even be comfortable taking the oath and potentially sentencing someone to die, the State was forced to use a peremptory strike on that particular juror. It had nothing to do with the race of the juror or the sex of the juror, it just had to do with her answers throughout her questionnaire, as well as her answers to myself, when I was questioning her.
>
> Another point they brought up was with regards to the Karla Faye Tucker case. She would have given that person, who we all know, another chance and would have pardoned her, she said on the record, as well. [24]
>
> So based on a collective of all her answers in the questionnaire, as well as her answers to myself, as well as the fact that we still feel that she couldn't even take the oath to sit on a case like this, that is the reason that the State used a peremptory challenge on Ms. McClendon, juror 1129.
>
> The defense made no attempt to rebut the State's race-neutral explanation and made no further comment. The court denied appellant's *Batson* challenge.

A comparison of McClendon's responses to those of persons acceptable to the State fails to refute the State's race-neutral explanation. Appellant urges that several jurors accepted by the State wanted to hear any and all mitigating evidence, and that others were concerned about the gravity of the decision or might consider intoxication to be a mitigating circumstance. None of the accepted jurors expressed all of these feelings in concert, nor to the degree that McClendon did. Moreover, McClendon was the only one to say that she would be unable to take the oath of a juror, which is the initial reason that the State attempted to strike her for cause.

*4 Viewing the evidence in the light most favorable to the trial court's ruling, we cannot conclude that the trial court's ruling on the peremptory strike of prospective juror McClendon was clearly erroneous. Issue one is overruled.

B. Challenges for Cause

In issues two through sixteen, appellant claims that the trial court erred in denying appellant's challenges for cause against certain prospective jurors.

To show harm when a challenge for cause is denied, appellant must demonstrate that, on the record, he: 1) asserted a clear and specific challenge for cause; 2) used a peremptory challenge on the complained-of prospective juror; 3) exhausted all of his peremptory challenges; 4) requested additional strikes and was denied; and 5) identified an objectionable juror who served on the jury. [25]

In the present case, the record shows that appellant exhausted his peremptory challenges and received one additional peremptory challenge. In order to show harm, appellant must demonstrate that the trial court erroneously denied his challenge to two complained-of prospective jurors. [26]

We review a trial court's ruling on a challenge for cause with considerable deference because the trial court is in the best position to evaluate the prospective juror's demeanor and responses. [27] This is particularly so when the challenged prospective juror vacillates or seems confused. [28] When reviewing a trial court's decision on a challenge for cause, we look at the entire record of voir dire to determine if there is sufficient evidence to support the trial court's ruling. [29] We will reverse a trial court's ruling on a challenge for cause only if an abuse of discretion is evident. [30]

A prospective juror may be challenged for cause for bias against any phase of the law upon which the State or the defendant is entitled to rely. [31] Bias against the law is refusal to consider or apply the relevant law. [32] A prospective juror is biased when his beliefs or opinions would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. [33] However, before a prospective juror can be excused for cause on this basis, the law must be explained

to him and he must be asked whether he can follow that law regardless of his personal views.[34] The proponent of a challenge for cause does not meet his burden until he has shown that the prospective juror understood the requirement of the law and could not overcome his prejudice well enough to follow it.[35]

[3] In issue number two, appellant claims that the trial court erred in denying his challenge for cause against prospective juror Westlund. At trial, appellant objected to Westlund because she would shift the burden of proof on mitigation to the defense; thus, she would not be able to follow the oath required of a juror.

No burden of proof exists for either appellant or the State on mitigation.[36] Appellant bears a burden of production on mitigation, however.[37] It was not clear from Westlund's answers that she understood this distinction. An examination of the record shows that this distinction was not explained to her, nor was she asked if, understanding the law, she could set aside her personal views and follow the law. Moreover, a prospective juror is not challengeable for cause "simply because he would place the burden of proof on mitigation on the defense."[38] The record does not indicate any abuse of discretion in denying the challenge. Issue number two is overruled.

*5 [4] In issues number three, four, and six through fifteen appellant claims that the trial court erred in denying his challenges for cause against prospective jurors Slaten, Arnett, Massey, Combs–Hollie, Dent, Spurger,[39] Donihoo, Stanberry, Wetzel, Williams, Wallin[40] and Stanford. Citing Justice Scalia's dissent in *Morgan v. Illinois*[41] for support, appellant objected that these prospective jurors "[could] not give equal consideration to Mr. Robertson's mitigation, given the facts." Because appellant expected to introduce certain types of evidence that these prospective jurors indicated that they would not find mitigating, appellant argues that these prospective jurors were biased against him, his evidence, and the law on which he would rely, and were incapable of taking the juror's oath. Appellant submitted a written objection and argument on these grounds, referred to as "Trial Objection Number 1." Later challenges based on this ground were sometimes simply communicated to the court as challenges based on "trial objection one."

In *Standefer v. State,* we held that "a prospective juror is not challengeable for cause simply because he does not consider a particular type of evidence to be mitigating."[42] "[W]hether a prospective juror considers a particular type of evidence to be mitigating is not a proper area of inquiry."[43] Also, a prospective juror is not required to give an example of something that he would consider mitigating.[44] Issues three, four, and six through fifteen are overruled.

[5] In issue number sixteen, appellant claims that the trial court erred in denying his challenge for cause against prospective juror Jordan on the basis of trial objection number one. As explained above, a juror is not required to find any particular evidence to be mitigating. Appellant also argues in his brief that Jordan would automatically find appellant to be a future danger. Appellant did not allege this reason as part of his challenge to the trial court. To preserve error, a complaining party must make a timely and specific request, objection or motion and obtain a ruling from the trial court.[45] This claim was not preserved for appeal.[46] Moreover, when the law was clarified to him, Jordan stated that he would require the State to prove future dangerousness beyond a reasonable doubt. Issue number sixteen is overruled.

In issue number nineteen, appellant claims that the trial court erred in denying trial objection number one as to each member of the venire. As explained above, this court has held that a prospective juror is not challengeable for cause simply because he does not consider a particular type of evidence to be mitigating, and whether a juror considers a particular type of evidence mitigating is not a proper area of inquiry.[47] Issue number nineteen is overruled.

In issue number twenty-one, appellant argues that the trial court erred in overruling his objection to the unconstitutionality of the jury selection process as a whole. He asserts that because the trial court denied his strikes for cause against jurors who "[could] not consider Mr. Robertson's mitigation evidence," the jury was unconstitutionally formed, denying him due process and a fair trial. Appellant argues that state judges in Texas are not adequately trained in applying federal law in death-penalty cases, that the trial court did not

correctly apply the law in this case, and that this led to an unconstitutional jury in appellant's case.

*6 This amounts to a claim that, because the trial court overruled trial objection number one, the jury was unconstitutionally formed. *Morgan* provides that a juror who will automatically vote for the death penalty may be removed for cause.[48] It does not require a commitment to believe any particular type of evidence to be mitigating.[49] As explained above, a prospective juror is not challengeable for cause simply because he may or may not consider any particular type of evidence to be mitigating.[50] Further, whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry.[51] Thus, a trial court does not err by refusing to allow a defendant to ask prospective jurors questions based on facts peculiar to the case on trial.[52] All that the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give effect to that evidence if the jury finds it to be mitigating.[53] A review of the record and the preceding issues demonstrates that the trial court did not err in its rulings. Issue twenty-one is overruled.

[6] In issue number five, appellant claims that the trial court erred in denying his challenge for cause against prospective juror Murphy. Appellant objected that Murphy was biased against him and would not consider his, nor any other, mitigating evidence. In a conference out of Murphy's presence, the parties agreed that the court should further question him. Subsequently, the court recalled Murphy and questioned him directly about his ability to be fair and impartial, and follow the law. The court asked:

> Would you be predisposed to not consider any mitigating evidence? Or can you keep an open mind? Can you consider any evidence that might be presented by either side, understanding that neither side has the burden of proof? Or something you've heard through the course of the trial that you thought was sufficient-mitigating circumstance, [sic] to extend a life sentence to the defendant rather than the death penalty and answer the question 'yes'—and that's what the law would require you to do. Can you do that? If you can't, then you need to tell us you can't. If you can, then you need to tell us you can. Only you know.

Murphy responded that yes, he could consider the mitigation issue, and the challenge for cause was denied. After examining the entire record, and in light of the appropriate deference to the trial court's ruling, we do not find an abuse of discretion in denying this challenge. Issue number five is overruled.

[7] In issues number seventeen and eighteen, appellant contends that the erroneous denial of his challenges for cause detailed above deprived him of a lawfully constituted, unbiased, and unprejudiced group of jurors. He claims that this denied him a fair trial in violation of the United States Constitution, the Texas Constitution and the Texas Code of Criminal Procedure. These objections were not presented to the trial court; thus they are not preserved for review. We further note that none of the denied challenges for cause that appellant complains of were erroneous. Issues seventeen and eighteen are overruled.

*7 [8] In issue number twenty, appellant claims that the trial court erred in denying "trial objection number two" as to each and every member of the venire. Trial objection number two is a written objection to "improper exclusion of [a] juror with scruples against death"[54] and appellant was allowed a running objection on this basis. Appellant does not now argue that any jurors were improperly excluded on this basis, nor does he argue that he was harmed. Appellant's brief pairs the argument for this issue with the argument for issue nineteen, but it does not argue any issue presented in trial objection number two; thus this claim is inadequately briefed.[55] Issue number twenty is overruled.

III. TRIAL ISSUES

A. False Testimony

In issues twenty-two and twenty-three, appellant claims that the trial court erred in denying his motion for new trial, and for denying him a fair trial and due process in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. He asserts that the State knowingly presented false and highly misleading testimony about appellant's future dangerousness.

Due process is offended when the State knowingly or unknowingly offers material evidence that is false or misleading. [56] An examination of the evidence adduced at trial demonstrates that it was neither false nor misleading —thus we need not address its materiality.

The State called Warden Melodye Nelson as an expert witness about future dangerousness. Warden Nelson described how an inmate's living conditions are restricted through the use of a classification system ranking inmates from G1 (least restrictive) through G5 (most restrictive) and administrative segregation. Appellant complains about the warden's statements concerning the following: that appellant would automatically be classified as a G3 inmate; that prison personnel are underpaid and short staffed, that one officer may look after 150 inmates, and that a year previously the Texas Department of Criminal Justice was 4,000 officers short; that there is more violence in the general population than in administrative segregation; that inmates can come and go from their cells to work; and that prison is filled with psychopaths. At appellant's hearing on the motion for new trial, appellant presented experts S.O. Woods and Dr. Mark Vigen, whose testimony was intended to counter the warden's testimony and show that her testimony was false or misleading.

Although appellant did not object to this testimony contemporaneously, the trial court granted a hearing on the motion. Assuming, without deciding, that appellant's complaints were preserved, we will address the issues.

1. Appellant would automatically be classified as a G3 inmate.

Warden Nelson testified at trial that if appellant were sentenced to life with parole (under the law in effect at the time of his conviction) he would be automatically classified as a G3 prisoner, a classification including any offender sentenced to fifty years or more who had not served at least ten years. She further testified that after ten years a G3 inmate would be eligible for promotion to G2 status. Because appellant's disciplinary record during the eighteen years he spent on death row contained only minor infractions, the warden stated that he would automatically be categorized as a G2 if given a life sentence. At the hearing on the motion for new trial, the State also presented an affidavit from Cay Cannon, a member of the State Classification Committee, opining that appellant would be classified as a G2.

***8** At the hearing, Woods stated that, "As far as the G3 being an automatic, that's the rule of thumb for any sentence over fifty years, new inmate less than ten years of service time, those kinds of factors." He disagreed with Warden Nelson's use of the word "automatic," stating that it "was not a good choice of words." He explained that although TDCJ uses software that automatically determines an offender's status, TDCJ personnel may override this classification if there are reasons to do so.

Although Woods disagreed with the warden's choice of words, the evidence indicates that appellant was eligible for G2 status if given a life sentence. Further, analysis of appellant's disciplinary record by the experts showed no reason that the automatic classification produced by TDCJ software would have been overridden by TDCJ classification personnel.

2. Prison personnel are underpaid and short staffed, that an officer may look after 150 inmates, and that a year previously TDCJ was 4000 officers short.

Warden Nelson testified that TDCJ employees are underpaid, stating that an entry-level correctional officer received "about the same as what a Wal–Mart warehouse worker [did]." She also indicated that there was rapid turnover, chronic under-staffing, and that "one staff member may be in charge of up to 150 offenders." She explained that because of this it was difficult to keep control over inmate access to contraband. She also explained that although she did not know the current figure, TDCJ was short 4,000 personnel the year before, and this shortage was not evenly distributed throughout the system. Rather, some units were very short-staffed, particularly in remote areas.

Woods testified that his investigation did not turn up anyone at TDCJ who agreed that one guard supervising 150 inmates was a typical situation. He stated that using current TDCJ employment figures and inmate figures, he calculated that there was approximately one guard for every eight inmates and that the worst case was one guard for every eighteen inmates, but "the fact is that TDC [sic] is such a complex operation and it consists of so many different variety of units that it's impossible to come up with anything like a ratio that says there's so many officers to so many inmates." He stated that there were occasions where inmates would be under "indirect supervision" such as in chow halls or in a recreation yard "where one or two

or three officers might supervise large groups of inmates." Woods acknowledged that he did not know about the 4,000 figure of two years before, but that as of two weeks before, TDCJ was short 900 officers.

Because the warden's testimony referred to a specific time period, and because there is no evidence of any inaccuracy in the warden's statement, there is no reason to believe that any juror was confused or misled by her testimony about TDCJ staffing.

3. General population has more violence than administrative segregation.

***9** Warden Nelson testified at trial that incidents of violence were more prevalent in general population than in administrative segregation or death row. Woods testified at the hearing that although he cannot refute the warden's statements statistically, "It's common sense" that those inmates on administrative segregation are more dangerous. Woods agreed, however, that simply because of the size of the general population, there is more opportunity for violence, concluding that the warden's testimony did not give a false impression about the amount or nature of violence in prison.

Appellant asserts that Warden Nelson's testimony was misleading but does not suggest how it was so. Although appellant's expert might have delivered the information differently, the testimony itself did not give the jury a false impression.

4. Inmates can come and go from their cells to work.

At trial, the following exchange occurred between defense counsel and Warden Nelson:

> Q. Now, when these people who were work-eligible in the G3s, who have some sort of a job somewhere in the system, they don't get up in the morning after the alarm goes off, walk out of their cell, walk out into the hallway and go to wherever it is they've got a job, do they?
>
> A. Yes, sir.
>
> Q. They do?
>
> A. Yes, sir.
>
> Q. And how—how are they controlled at all then, if they can have that much freedom?
>
> A. Well, I'll give you a for instance. Let's say they work in the laundry. What would happen is, the laundry staff would call that particular housing area and tell them to turn out all of the laundry workers. The staff that's working that particular living area has what we call a turn-out roster or roster. They'll make a verbal call: "All first-shift laundry workers, get up and go to work." You know, get ready for work. They'll turn 'em out. Say, "Okay. We're going to open all your cell doors. All you laundry workers be at the doors and you all step out." They go and close all the doors. They check 'em off, and then they leave the building. In some cases, staff will call and say, "Tell laundry, hey, I got 'em coming at you." Or they would get busy turning out kitchen workers and not tell the laundry they had ten coming, and then they would just walk to the laundry. And that's the process for all general population basic offenders who go to work.
>
> Q. Well, that's what I'm saying: There are people who are trying to keep up with them.
>
> A. Uh-huh. Yes. We track them out the door. Yeah.
>
> Q. Right. And they're supposed to wind up where they're supposed to wind up. Otherwise, you know that —or you should know about that, right?
>
> A. We wouldn't know it until a count time showed up and one of 'em wasn't where he was supposed to be. Or they called and—you know, they got down there to the laundry, laundry officer checks 'em all in and maybe an inmate that's on his tracking roster isn't there. He calls that living area and says, "Where is inmate Joe? Well, he turned out?" And then it's a process of trying to figure out where he stopped in the process. Did he go by the medical department? Did he stop in the education department? So we would have a process of elimination, to try and find his physical whereabouts. And we do counts eight times in a 24–hour period. So somewhere in that process, we would be able to find his whereabouts.
>
> ***10** Q. That's what I'm saying: You're keeping up with these people. I mean, they're not, willy-nilly, roaming around on their own, like you would when you were working at a 7–Eleven out in the free world: you get up and go inside the 7–Eleven.
>
> A. They're all inside the perimeter fence.

Q. And you watch your count. You worry about it, when they're missing, and then you go find 'em.

A. Yes, sir.

When, at the hearing on the motion for new trial, Woods was asked to describe how inmates move from their cells to their assignments, he replied:

> Well, prison in Texas is one of the most structured organizations you'll ever see. Inmates are accounted for constantly. They're physically counted at least once every shift. Usually, a lot more than that. They all have assigned housing areas. They have assigned jobs. They have assigned schools. Everything that they do is dictated to them. So, naturally, their turn-out list of all the housing areas that—say inmate Joe is going to go to this place. There's going to be a person at the other end expecting him. When he doesn't show up, somebody's going to go looking for him. So if you go onto a unit and walk through a facility, yeah, there's lots of inmates moving up and down the halls, out in the yards and doing various things. But they all have destinations. And that movement is controlled. The hallways are single-file. There's no grouping of inmates or stopping to talk and visit. Those kind of things.

This testimony is substantially identical to that presented by the warden at trial. Woods's testimony does not establish that the warden's testimony was false or misleading.

5. Prison is filled with psychopaths.

At trial, the prosecution attempted to introduce evidence about the frequency and type of violence in TDCJ generally. Defense counsel objected to the document's relevance, stating that "the law requires individualized punishment" and that "[appellant] can't help it if there are a bunch of psychopaths in prison." Defense counsel's objection was sustained, and examination of Warden Nelson continued discussing opportunities for violence in the general population. The prosecutor later asked Nelson, "I think defense characterized the prison as filled with psychopaths. Do you remember that?" The warden replied that she did. The prosecutor asked if she agreed with that, and the warden replied, "Yes, sir."

At the hearing, Woods testified that there are probably more psychopaths in prison but that it would be inaccurate to say that every inmate is a psychopath. This testimony contradicts neither defense counsel's characterization of prison as being filled with psychopaths nor the warden's agreement. Moreover, appellant opened the door to the question by making the comment.

Appellant has not demonstrated that Warden Nelson's testimony was false or misleading. Furthermore, he has not shown that the trial court abused its discretion in denying his motion for new trial. Issues twenty-two and twenty-three are overruled.

B. Confrontation

***11** **[9]** In issue number twenty-seven, appellant asserts that the trial court erred by allowing the State to read testimony by witnesses from the original trial who are now deceased and unavailable for cross-examination. Appellant claims that because the law of mitigation has developed since the original trial, defense counsel at the original trial did not understand what mitigation was. Thus, he claims, defense counsel could not have conducted effective cross-examination to develop mitigation evidence.

The Sixth Amendment's Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him." [57] Generally, prior testimony is admissible only if a witness is unavailable and if the defendant had the opportunity to cross-examine the witness. [58] Texas Rule of Evidence 804(b)(1) permits the use of prior testimony in criminal cases if the defendant had a similar motive to develop testimony. Generally, "when the parties, the charge, and the issues to be litigated are the same in the first and second trials, the two proceedings are necessarily the same and former testimony is admissible." [59]

At this re-trial, appellant objected to the admission of the prior testimony of Milton Gish and Gene Lahourkade, both of whom testified at the 1991 capital murder trial. Gish was unavailable because he was dead, and Lahourkade's mental and physical condition prevented him from testifying. Both witnesses were available for cross-examination at the initial trial. The record from that trial shows that defense counsel was well aware of the mitigation issue. Contrary to appellant's claim that mitigation "didn't really exist much back when this case was tried," *Penry I*[60] had recognized the issue two years before the first trial, and appellant's original trial was replete with mitigation evidence. Defense counsel at the original trial had a motive to present mitigation evidence similar to counsel at re-trial. Whether appellant would have conducted the same cross-examination now does not affect that motive.[61] The trial court did not err in admitting the prior testimony. Issue twenty-seven is overruled.

C. Confessions

In issues twenty-eight and twenty-nine, appellant contends that the trial court erred in admitting his oral and written confessions to police. In appellant's 1991 trial, defense counsel moved to suppress his statements to police; this motion was denied after a hearing. In his present trial, defense counsel re-urged the objections presented at the original trial, and the trial court responded, "[T]he evidence that came in is still in. The objections originally made to that evidence are still valid objections and are preserved for appellate purposes."

Assuming, without deciding, that this was a specific, timely objection, sufficient to preserve error, if any, we will address his claim. As we stated in our earlier opinion on direct appeal,[62] appellant's oral confession was admitted under Article 38.22, section 3(c) of the Texas Code of Criminal Procedure, which provides:

> ***12** Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

We also stated that:

> The only warnings which must precede an oral confession admitted under section 3(c) are the *Miranda* warnings. In this instance, appellant informed Sergeant Medina of the crime, as well as the crime weapon and its location. Appellant confessed to the sergeant that he had used a .38 caliber pistol, that he had stolen the gun from a car parked at a club in Dallas, and that the gun was in a jewelry box on the floor board in the back seat of the stolen blue Cadillac. Pursuant to appellant's directions, the Nevada police officers located the alleged murder weapon. That weapon was identified by Texas forensic authorities as the murder weapon. Because the confession contains assertions of facts which were found to be true and which help establish appellant's guilt, the confession was admissible under article 38.22, section 3(c) of the Texas Code of Criminal Procedure.[63]

Evidence at the 1991 trial showed that appellant was properly warned as required by *Miranda;* thus, appellant's oral statements were admissible.

Furthermore, although appellant asserts that his written statement is inadmissible as well, an examination of the record shows that the written statement met all the requirements of Article 38.22, section 2 of the Texas Code of Criminal Procedure. Issues twenty-eight and twenty-nine are overruled.

D. Extraneous Conduct Notice

In issue thirty, appellant claims that the trial court erred by allowing Terry Barron to testify because she was not on the State's extraneous offense list.

The State called Terry Barron as a rebuttal witness after appellant's witness testified that he was "always a good kid and serious round them." Appellant objected that Barron was not on the witness list and that there was no notice of intent to introduce her testimony about an extraneous act. The State explained that it brought Barron in to rebut appellant's mitigation witnesses, it had not planned to put her on the stand until a few days before, and it had immediately notified defense counsel about Barron and the substance of her testimony. The trial court overruled the objection and allowed Barron to testify.

Texas Code of Criminal Procedure Article 37.0711 provides that evidence may be presented "as to any matter that the court deems relevant to sentence." [64] Article 37.0711 is identical in this respect to a previous iteration of Article 37.071 that we have held did not require notice of extraneous bad acts. [65] Thus, under 37.0711 extraneous-conduct evidence is admissible at the punishment phase of a capital trial absent a showing of unfair surprise. [66] Although appellant refers to Barron as a surprise witness, he does not show that he was unfairly surprised. Furthermore, as we stated in *Jaubert:*

> ***13** [W]hen the State presents extraneous offense evidence in rebuttal to mitigation evidence offered by the defendant, advance notice of intent to offer the extraneous offense evidence is not possible: In such a situation, the defendant, rather than the State, determines whether a contested issue will be raised, and his determination will not be made known until he presents his case. It would be practically impossible for the State to give notice until that time. [67]

Barron's testimony was offered in rebuttal to mitigation evidence suggesting that appellant valued human life. [68] The State provided notice immediately upon deciding to use Barron's testimony. Issue thirty is overruled.

E. Sidebar Comment

[10] In issue thirty-one, appellant claims that the trial court erred by not declaring a mistrial after a sidebar comment by the prosecutor during Barron's testimony. While Barron testified about her background, appellant objected to the relevance of her testimony. The State replied, "Judge, I have no problem, we're going to get there. But I think that the jury is allowed to know somebody who's lived through what she has lived through, has not killed three people." Appellant objected to the State's sidebar comment, and the court sustained the objection. Later on, appellant re-urged his objection, and it was again sustained, whereupon he asked for a mistrial. After an off-the-record discussion, the following exchange occurred:

> Court: Okay. Back on the record.
>
> State: May I proceed, Judge?
>
> Court: Just a moment. There's been an objection by the defense.
>
> Appellant: Can I carry that for a moment and talk—decide how I want to do that?
>
> Court: All right. Proceed. In the meantime, we'll continue with testimony.
>
> Appellant: Yes, sir.

Barron's testimony continued, and she was eventually released. After another witness was called and released, appellant told the court:

> For the record, I want to clear up an objection, Your Honor, I made earlier in the testimony of Terry Barron. I had objected to the testimony of Ms. Barron's brother's horrible childhood, as being sort of mitigating evidence. And the prosecutor made a comment that she did not kill anybody.
>
> I would ask the court to instruct the jury to disregard all the testimony and the comment of the assistant district attorney, regarding her horrible background.

The court then instructed the jury to disregard the State's sidebar comment and denied appellant's subsequent request for a mistrial. [69]

We review a trial court's denial of a motion for mistrial under an abuse-of-discretion standard. [70] The purpose of an instruction to disregard is to cure any harm or prejudice resulting from events that have already occurred. [71] Where the prejudice is curable, an instruction to disregard eliminates the need for a mistrial. [72] A mistrial is required only if "the objectionable events are so emotionally inflammatory that curative instructions are not likely to

prevent the jury from being unfairly prejudiced against the defendant." [73]

***14** In this case, the alleged inflammatory event was the State's remark to the judge in a sidebar response to appellant's objections, not a statement intended for the jury. Defense counsel immediately objected to the State's comment, and the trial court ruled in appellant's favor. Defense counsel did not request a mistrial at this time. It was not until appellant asked to clear up his objection, after an intervening witness, that a mistrial was requested and an adverse ruling obtained. Assuming that this served as a timely objection, this sort of sidebar remark is curable through an instruction to disregard. [74] We find that the trial court's instruction to disregard sufficed to prevent the jury from being unfairly prejudiced by the State's comment about Barron. Issue thirty overruled.

IV. DEATH–PENALTY ISSUES

In issues thirty-two through forty-four, appellant presents several challenges to the constitutionality of Texas death penalty law. He acknowledges that these issues have been decided adversely to his position in the past and invites us to reconsider our holdings. We decline to do so.

In issue thirty-six, appellant claims that the trial court erred in denying his motion to preclude the death penalty as a punishment option because state law does not provide a method for determining the death-worthiness of a defendant. This claim has been addressed and rejected previously. [75]

In issues thirty-four, thirty-five and thirty-seven through forty-four, appellant presents issues identical to those presented to this Court in *Saldano.* As we did in *Saldano,* we decline appellant's invitation to review our prior decisions. [76] Issues thirty-two through forty-four are overruled.

The judgment of the trial court is affirmed.

All Citations

Not Reported in S.W.3d, 2011 WL 1161381

Footnotes

1 *Robertson v. State,* 871 S.W.2d 701 (Tex.Crim.App.1993).
2 *Ex parte Robertson,* No. 74,720, (Tex.Crim.App. Mar. 12, 2008).
3 *Penry v. Johnson,* 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001).
4 TEX.CODE CRIM. PROC. art. 37.0711, § 3(j).
5 *Estrada v. State,* 313 S.W.3d 274, 284 (Tex.Crim.App.2010).
6 *Keeton v. State,* 724 S.W.2d 58, 61 (Tex.Crim.App.1987).
7 *Druery v. State,* 225 S.W.3d 491, 507 (Tex.Crim.App.2007).
8 *Coble v. State,* —— S.W.3d —— 2010, Tex.Crim.App. LEXIS 1297 (Tex.Crim.App. Oct. 13, 2010).
9 *Garcia v. State,* 126 S.W.3d 921 (Tex.Crim.App.2004).
10 *Davis v. State,* 313 S.W.3d 317, 348 (Tex.Crim.App.2010).
11 *Howard v. State,* 153 S.W.3d 382, 384 (Tex.Crim.App.2004).
12 *See McGinn v. State,* 961 S.W.2d 161, 169 (Tex.Crim.App.1998).
13 *See Brooks v. State,* 323 S.W.3d 893, 912 (Tex.Crim.App.2010).
14 *See e.g., Green v. State,* 934 S.W.2d 92, 106–07 (Tex.Crim.App.1996); *Prystash v. State,* 3 S.W.3d 522, 535–36 (Tex.Crim.App.1999).
15 *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).
16 *Miller–El v. Cockrell,* 537 U.S. 322, 328–29, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (citations omitted).
17 *Gibson v. State,* 144 S.W.3d 530, 534 (Tex.Crim.App.2004).
18 *Snyder v. Louisiana,* 522 U.S. 472, 477 (2008).
19 *Batson,* 476 U.S. at 98, n. 21.
20 *Snyder,* 552 U.S. at 477.
21 *Id.*
22 *Young v. State,* 826 S.W.2d 141, 145–46 (Tex.Crim.App.1991).

23 *Id.*

24 In reviewing the record, we note that McClendon did not indicate that she would pardon Karla Faye Tucker. However, as the *Batson* challenge was raised two days after the exchange took place, it is likely that Healy confused McClendon with another prospective juror, Ms. Hardy, who was excused by agreement.

25 *Sells v. State,* 121 S.W.3d 748, 758 (Tex.Crim.App.2003).

26 *Davis,* 313 S.W.3d at 343.

27 *Saldano v. State,* 232 S.W.3d 77, 91 (Tex.Crim.App.2007) (citing *Colburn v. State,* 966 S.W.2d 511 (Tex.Crim.App.1998)) (internal quotations omitted).

28 *Garcia v. State,* 919 S.W.2d 370, 401 (Tex.Crim.App.1996).

29 *Feldman v. State,* 71 S.W.3d 738, 744 (Tex.Crim.App.2002).

30 *Saldano,* 232 S.W.3d at 91 (internal quotations omitted).

31 TEX.CODE.CRIM. PROC. art. 35.16(b)(3), (c)(2).

32 *Sadler v. State,* 977 S.W.2d 140, 142 (Tex.Crim.App.1998) (citing *Riley v. State,* 889 S.W.2d 290, 295 (Tex.Crim.App.1993)) (internal quotations ommitted).

33 *Sadler,* 977 S.W.2d at 142.

34 *Feldman,* 71 S.W.3d at 744.

35 *Id.* at 747.

36 *Colella v. State,* 915 S.W.2d 834, 845 (Tex.Crim.App.1995) (citing *Barnes v. State,* 876 S.W.2d 316, 330 (Tex.Crim.App.1994)).

37 *McFarland v. State,* 928 S.W.2d 482, 498 (Tex.Crim.App.1996).

38 *Saldano,* 232 S.W.3d at 92.

39 Spurger was also challenged on the basis of a physical impairment. During voir dire, Spurger explained that she consulted with her doctor about participation in the trial, and that as long as she took her medication and was allowed periodic breaks, this would not interfere with her service as a juror.

40 Appellant also objected that "[Wallin] doesn't have a clue of what we're doing here." A complete review of the record shows that before voir dire Ms. Wallin was simply unaware of the law, and that when it was explained to her she understood and could follow it.

41 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

42 *Standefer v. State,* 59 S.W.3d 177, 181 (Tex.Crim.App.2001) (citing *Raby v. State,* 970 S.W.2d 1, 3 (Tex.Crim.App.1998)).

43 *Id.*

44 *Threadgill v. State,* 146 S.W.3d 654, 668 (Tex.Crim.App.2004).

45 TEX.R.APP. P. 33.1.

46 *Harris v. State,* 784 S.W.2d 5, 27 (Tex.Crim.App.1989).

47 *Standefer,* 59 S.W.3d at 181.

48 *Morgan,* 504 U.S. at 738.

49 *See Id.*

50 *Standefer,* 59 S.W.3d at 181. *See also Raby v. State,* 970 S.W.2d 1 (Tex.Crim.App.1998), *Green v. State,* 912 S.W.2d 189 (Tex.Crim.App.1995).

51 *Standefer,* 59 S.W.3d at 181.

52 *Raby,* 970 S.W.2d at 3.

53 *Id.*

54 In fact, trial objection number two appears to be a script for counsel to follow when making an objection to the trial court, rather than an objection in its own right.

55 TEX.R.APP. P. 38.1(i).

56 *See Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

57 U.S. CONST. amend. VI.

58 *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

59 *Martinez v. State,* 327 S.W.3d 727, 739 (Tex.Crim.App.2010)(citing *Bryan v. State,* 837 S.W.2d 637, 644 (Tex.Crim.App.1992)).

60 *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

61 *Martinez,* 327 S.W.3d at 739 (citations omitted).

62 *Robertson v. State,* 871 S.W.2d 701 (Tex.Crim.App.1993).

63 *Id.* at 714 (citations omitted).

64 TEX.CODE CRIM. PROC. art. 37.0711, § 3(a)(1).

65 *Hughes v. State,* 24 S.W.3d 833, 842 (Tex.Crim.App.2000).

66 *Id.*

67 *Jaubert v. State,* 74 S.W.3d 1, 4 (Tex.Crim.App.2002).

68 Barron's testimony would be admissible under the present iteration of Article 37.071 as well. The current version of Article 37.071 states in relevant part that the introduction of extraneous conduct evidence at the punishment phase of a capital case is governed by the notice requirements of Section 3(g), Article 37.07. Under its plain language, Article 37.07 § 3(g) incorporates by reference Rule 404(b)'s manner of giving notice. Rule 404(b) requires notice before extraneous crimes or bad acts are admissible in the State's case-in-chief. Thus, we explained in *Jaubert,* Article 37.07's notice requirement applies to evidence of acts introduced during the State's case-in-chief. By extension, since Article 37.071 incorporates the notice requirements of Article 37.07, which in turn incorporates the notice requirements Rule 404(b), Article 37.071's notice requirements apply only to evidence of extraneous offenses or bad acts introduced during the State's case-in-chief on punishment.

69 The trial court treated this as a timely, specific objection; therefore we will assume, without deciding, that it was.

70 *Hawkins v. State,* 135 S.W.3d 72, 77 (Tex.Crim.App.2004).

71 *Young v. State,* 137 S.W.3d 65, 69 (Tex.Crim.App.2004).

72 *Id.*

73 *Id.* at 71.

74 *See, e.g., Hendricks v. State,* 640 S.W.2d 932, 939 (Tex.Crim.App.1982).

75 *Lucero v. State,* 246 S.W.3d 86, 102 (Tex.Crim.App.2008).

76 *Saldano,* 232 S.W.3d at 100–08. In that case, they were points 19, 25, 51, 52, 54, 56, 57, 58, 59, and 61.

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