No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joseph C. Garcia,
Petitioner,

vs.

Lorie Davis, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11546

In re: JOSEPH C. GARCIA,

Movant.

Motion for an Order Authorizing the
United States District Court for the Northern District of Texas
USDC No. 3:06-CV-2185

Before DENNIS, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Joseph Garcia was sentenced to death by a Texas jury and is scheduled for execution on December 4, 2018. The Texas Court of Criminal Appeals (CCA) upheld his conviction and death sentence on direct appeal, *Garcia v. State*, No. AP-74692, 2005 WL 395433, at *1 (Tex. Crim. App. Feb. 16, 2005), and his initial state habeas application was denied, *Ex parte Garcia*, No. WR-64,582-01, 2006 WL 3308744, at *1 (Tex. Crim. App. Nov. 15, 2006). In 2006, Garcia then filed an application for federal habeas relief under 28 U.S.C. § 2254 in the Northern District of Texas, which the district court denied. *See Garcia v. Davis*, 704 F. App'x 316, 319 (5th Cir. 2017); *Garcia v. Stephens*, No. 3:06-CV-2185, 2015 WL 6561274, at *1–9 (N.D. Tex. Oct. 29, 2015) (order

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

amending findings in part). We denied a certificate of appealability (COA).[1] *Garcia*, 704 F. App'x at 319.

On November 30, 2018, Garcia filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) in his 2006 federal habeas proceeding, challenging the competency of his prior federal habeas counsel.[2] Pursuant to this motion, Garcia also moved for a stay of his execution. The district court construed Garcia's motion as an unauthorized successive 28 U.S.C. § 2254 application, transferred the matter to this court, and denied a stay. It also held in the alternative that Garcia had not demonstrated entitlement to Rule 60(b) relief and denied a COA. Garcia now appeals the district court's transfer order and moves in this court for remand to the district court and a stay of his execution. We construe Garcia's motion to remand as an appeal of the district court's transfer order, as it seeks review of the propriety of that order's determination that the motion was a successive petition. He also requests a COA on the district court's Rule 60(b) rulings.

I.

Because the district court correctly determined that Garcia's Rule 60(b) motion was a successive petition and that the motion raised no cognizable grounds for authorization of a successive petition, we affirm the district court's

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[1] Garcia also sought relief in a subsequent application for writ of habeas corpus in Texas state court, which the CCA dismissed on November 30, 2018. *Ex parte Garcia*, No. 64,582-03 (Tex. Crim. App. Nov. 30, 2018).

[2] Garcia previously brought two actions under 42 U.S.C. § 1983 challenging the constitutionality of his clemency proceedings and his lethal injection protocol. We affirmed the dismissal and denial of a stay of execution in his challenge to his clemency proceedings, and affirmed the denial of a preliminary injunction in his challenge to his lethal injection protocol. *See Garcia v. Jones*, No. 18-70031 (5th Cir. Dec. 2, 2018); *Garcia v. Collier*, No. 18-70032 (5th Cir. Dec. 2, 2018). We denied a stay of execution in each case. *Id.*

transfer order, deny Garcia authorization to file a successive habeas petition, and deny his motion for stay of execution.

In order to proceed with a successive application for habeas relief under § 2254, "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). A Rule 60(b) motion is properly construed as a successive habeas petition where it "seeks to add a new ground for relief," or "attacks the federal court's previous resolution of a claim *on the merits*." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). In contrast, "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," then the Rule 60(b) motion should not be construed as a successive habeas petition. *Id.*; *see Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (holding that if "(1) the [Rule 60(b)] motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination," it should not be construed as a successive habeas petition).

Garcia contends that his motion is not a successive petition under *Gonzalez* because "there was a defect in the integrity of his federal habeas proceedings that justifies reopening this Court's judgment and giving him the opportunity to litigate his federal habeas claims with competent counsel." We review the district court's determination on this point de novo. *In re Edwards*, 865 F.3d 197, 202–03 (5th Cir. 2017). As the Supreme Court noted in *Gonzalez*, "an attack based on the movant's own conduct, or his habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." 545 U.S. at 532 n.5. Here, Garcia asserts that his federal habeas counsel failed to

investigate certain mitigation evidence, to retain an expert in trauma to evaluate this mitigation evidence, to investigate the propriety of Garcia's prior conviction for first-degree murder, and to investigate the conditions of the prison facilities from which he escaped. Garcia's assertions are based on "his habeas counsel's omissions," rather than "a defect in the integrity of his federal habeas proceedings." *Id.* at 532 & n.5. Accordingly, the district court properly concluded that Garcia's motion constituted a successive § 2254 application and did not err in transferring the motion to this court. *See* 28 U.S.C. § 2244(b)(3)(A).

We next consider whether Garcia is entitled to authorization to file his successive petition. We conclude he is not. To obtain authorization to file a successive § 2254 petition, the movant must demonstrate that the claim relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A), or that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and that the facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B).

Garcia cannot satisfy either of these exceptions. As to the first basis on which we may grant authorization—the existence of a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"—Garcia recognizes in his Rule 60(b) motion that "the Supreme Court has yet to recognize a constitutional right to the effective assistance of counsel in federal habeas corpus proceedings." As to the second exception, Garcia's claim that federal habeas counsel was ineffective by not

investigating further mitigating evidence that could have been brought at the punishment phase of his trial does not, by its nature, affect whether a "reasonable factfinder would have found [Garcia] *guilty of the underlying offense*." 28 U.S.C. § 2244(b)(2) (emphasis added); *see also In re Rodriguez*, 885 F.3d 915, 918 (5th Cir. 2018) (describing "Section 2244(b)(2)(B)(ii) as a strict form of innocence, roughly equivalent to the Supreme Court's definition of innocence or manifest miscarriage of justice" (cleaned up)). Accordingly, there is no basis on which we may allow Garcia to proceed with his successive habeas petition.

II.

Ruling in the alternative, the district court denied Garcia's Rule 60(b) motion because (1) he did not file it within a reasonable time; and (2) he failed to demonstrate extraordinary circumstances. We agree, and accordingly DENY Garcia a COA on this issue.

To succeed on a Rule 60(b) motion, the movant must show: (1) that the motion was made within a reasonable time; and (2) that extraordinary circumstances exist that justify the reopening of a final judgment. *Edwards*, 865 F.3d at 203. A district court's decision to grant or deny relief under Rule 60(b) is reviewed for abuse of discretion. *Id.*. In making this determination, a district court only abuses its discretion if it "bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (quoting *Hesling v. CSX Trans., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005)).

A.

We agree with the district court's decision to deny Garcia's Rule 60(b) motion as untimely. A Rule 60(b) motion must be made within a reasonable time unless good cause can be shown for the delay. Fed. R. Civ. P. 60(c)(1); *Edwards*, 865 F.3d at 208. Good cause is evaluated on a case-by-case basis,

and the timeliness of the motion is measured from the point at which the movant has grounds to make the motion, regardless of the time that has elapsed since judgment was entered. *Id.* "Once a party has grounds to make a Rule 60(b) motion, however, he must bring the motion reasonably promptly, though 'the determination of reasonableness is less than a scientific exercise.'" *Id.* (quoting *First RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 121 (5th Cir. 1992)).

Here, any ineffectiveness by Garcia's prior federal habeas counsel occurred before the district court's order substituting Garcia's present counsel in their place on November 23, 2015. Although Garcia argues that he attempted to litigate the claims identified by his new counsel in state court, he did not seek any additional state post-conviction relief until nearly three years later in August 2018, when he filed an initial habeas application in the separate Bexar County case. Garcia did not seek additional post-conviction relief in the Dallas County case until November 2018. Garcia presents no justification for this delay, but nevertheless cites his pending state habeas applications as the reason he could not file his Rule 60(b) motion sooner. However, this court has rejected pending state court proceedings as an excuse for Rule 60(b) untimeliness. *Beatty v. Davis*, 2018 WL 5920498, at *4 (5th Cir. Nov. 12, 2018) (holding that habeas petitioner's delay was "not excused by the fact that . . . his subsequent writ was pending in state court" (citing *Clark v. Davis*, 850 F.3d 770, 781 (5th Cir. 2017))).

In addition, Garcia's execution date has been set and re-set since the Supreme Court denied certiorari in his federal habeas case in April 2018. In June 2018, Garcia's execution was stayed until December 4. Still, he waited until November 30 to attempt to reopen his federal proceedings. Garcia provides no explanation for his failure to file his Rule 60(b) motion in the

intervening five months. *See Edwards*, 865 F.3d at 209 (holding that Rule 60(b) was motion untimely when prisoner had four months' notice of his new execution date but filed motion on "the eve of the execution"). Therefore, Garcia's Rule 60(b) motion was untimely.

B.

We agree with the district court that there are no extraordinary circumstances warranting relief from judgment. As noted above, Garcia's Rule 60(b) motion relies on the ineffective assistance of his prior federal habeas counsel as an extraordinary circumstance warranting relief from judgment. Specifically, he alleges that his prior counsel failed to raise several IATC theories in his initial habeas petition due to their failure to: (1) conduct an adequate mitigation investigation; (2) retain a trauma expert to assist in evaluating mitigation evidence; (3) investigate Garcia's 1996 murder conviction; and (4) investigate the prison conditions at the facilities where Garcia was incarcerated prior to his escape.

None of these allegations appears to have a basis in law or fact. Turning to his first contention, Garcia's argument focuses on his prior federal habeas counsel's failure to discover several sexual assaults he suffered during his childhood. However, Garcia's prior counsel hired an experienced mitigation expert, who discovered evidence that Garcia had been sexually assaulted on one prior occasion. Garcia did not inform the mitigation expert or his counsel that any additional sexual assaults had occurred, nor did he inform the district court when he was given an opportunity to do so during his evidentiary hearing. And because Garcia's Child Protective Services records indicated that he had suffered no sexual abuse, Garcia has not explained why his prior counsel would have had reason to believe they needed to investigate this issue further.

Garcia's argument that his prior federal habeas counsel should have retained a trauma expert would not be sufficient to establish ineffectiveness of trial counsel, much less federal habeas counsel. *See Hinton v. Alabama*, 571 U.S. 263, 275 (2014) ("The selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable."); *see also Batiste v. Davis*, 2017 WL 4155461, at *19 (S.D. Tex. 2017) ("Constitutional law does not require that mitigating evidence come through one specific vehicle."). In fact, Garcia does not explain why a trauma expert's observations would have caused the district court to resolve his IATC claim differently.

Garcia's third allegation—that his prior federal habeas counsel failed to investigate his 1996 murder conviction—is also unavailing, as he fails to acknowledge that his trial counsel *did* present evidence to undermine the reliability of that conviction. Accordingly, it appears that any IATC allegation on this ground would challenge the "strategy employed by trial counsel," which this court has held "does not establish ineffective assistance." *Coble v. Quarterman*, 496 F.3d 430, 436–37 (5th Cir. 2007) (addressing argument that trial counsel had not presented a "coherent theory regarding mitigation").

Finally, Garcia's contention that his prior federal habeas counsel failed to investigate the conditions in the two facilities where he was incarcerated prior to his escape does not provide sufficient grounds for Rule 60(b) relief. As with his prior conviction, Garcia's trial counsel offered at least some evidence of the presence of gang violence at the Connally Unit, the institution from which Garcia escaped, so Garcia's claim that "no court or jury" had heard evidence explaining why he escaped is dubious. In addition, Garcia does not explain why evidence of poor prison conditions would mitigate or excuse his participation in an armed robbery and murder weeks after his escape. Thus,

Garcia has not demonstrated a legal or factual basis for an IATC claim based on trial counsel's failure to present more evidence regarding prison conditions.

Ultimately, Garcia's Rule 60(b) motion appears to be based on the belief that his current federal habeas counsel—who have the benefit of hindsight—would have employed different investigative strategies than his prior federal habeas counsel. But this is not an "extraordinary circumstance" that would warrant relief from the district court's judgment. *See Edwards*, 865 F.3d at 204; *Coble*, 496 F.3d at 436–37. Accordingly, we hold that Garcia has not demonstrated an entitlement to Rule 60(b) relief.

III.

Because Garcia's § 2254 petition is barred, he has failed to make a strong showing of likelihood of success on the merits to support his motion for stay of execution.[3] *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (applying the *Nken* factors to a motion for a stay of execution).

For these reasons, the district court's transfer order is AFFIRMED, Garcia's motion for remand is DENIED, and his motion for a stay of execution is DENIED. We also DENY Garcia's alternative request for a COA, as reasonable jurists would not disagree with the district court's conclusions.

[3] Garcia must additionally show that he would "be irreparably injured absent a stay," that granting the stay would not "substantially injure the other parties interested in the proceeding," and that the public interest supports granting the motion. *Nken*, 556 U.S. at 426. Because Garcia cannot demonstrate a likelihood of success on the merits, we decline to address the remaining factors.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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December 04, 2018

Ms. Karen S. Mitchell
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Earle Cabell Federal Building
Room 1452
Dallas, TX 75242

No. 18-11546 In re: Joseph Garcia
USDC No.

Dear Ms. Mitchell,

Enclosed is a certified copy of an opinion entered on December 4, 2018. We have closed the case in this court.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Enclosure(s)

cc:
Mr. Dale Andrew Baich
Mr. Jefferson David Clendenin

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH C. GARCIA, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	Civil Action No. 3:06-cv-02185-M (Capital Case)

JUDGMENT

For the reasons set out in a memorandum opinion and order filed today, it is **ORDERED, ADJUDGED AND DECREED** that the successive habeas petition filed in this case, the pleading entitled "Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)" (doc. 142), is **TRANSFERRED** to the United States Court of Appeals for the Fifth Circuit along with the "Motion for Stay of Execution Pending Consideration and Disposition of Rule 60(b) Motion" (doc. 144). Petitioner has previously been allowed to proceed *in forma pauperis* (Mem. Op. and Order, doc. 103, at 24), and this status is continued for purposes of appeal. The Court **DENIES** a certificate of appealability.

SO ORDERED.

December 3, 2018.

BARBARA M. G. LYNN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH C. GARCIA, Petitioner,	§ §	
V.	§	Civil Action No. 3:06-CV-2185-M
LORIE DAVIS, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.	§ § § §	(Death Penalty Case)

MEMORANDUM OPINION AND ORDER
TRANSFERRING SUCCESSIVE PETITION

Petitioner Joseph C. Garcia, a Texas death-row inmate set for execution on December 4, 2018, has filed a document purporting to be a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure (Rule 60b Motion, doc. 142). In connection with this, Garcia also seeks a stay of his execution (Stay Motion, doc. 144). Respondent has filed a response in opposition to both motions (Response, doc. 146), and Garcia has filed his reply (Reply, doc. 147). Because Garcia's Rule 60b Motion appears to actually be a successive petition that this Court lacks jurisdiction to consider, it is transferred to the United States Court of Appeals for the Fifth Circuit along with the Stay Motion.

I. PROCEDURAL HISTORY

Garcia was convicted of capital murder and sentenced to death as a party to the December 2000 killing of Irving, Texas, police officer Aubrey Hawkins. *See Garcia v. Davis,* 704 F. App'x 316, 318 (5th Cir. 2017), *cert. denied,* 138 S. Ct. 1700 (2018). His conviction and sentence were affirmed on direct appeal. *See Garcia v. State,* No. AP-74692, 2005 WL 395433 (Tex. Crim. App. Feb. 16, 2005). Garcia filed a state post-conviction application for a writ of habeas corpus, but the

Texas Court of Criminal Appeals ("CCA") denied relief. *See Ex parte Garcia,* No. WR-64,582-01, 2006 WL 3308744, at *1 (Tex. Crim. App. Nov. 15, 2006).

Garcia then filed a petition for writ of habeas corpus in this Court (Pet., doc. 15), with an agreed motion to stay the federal proceedings to allow Garcia to exhaust certain claims in state court, including claims that his trial counsel provided ineffective assistance in failing to investigate possible mitigating evidence and that his state habeas counsel failed to provide competent and effective assistance of counsel by failing to conduct an independent mitigation evidence investigation and review. (Mot., doc. 16; Subsequent State Habeas Petition, doc. 16-2, at 34, 72-73.) The agreed motion was granted and these proceedings were stayed to allow Garcia to exhaust those claims. (Order, doc. 17.) The state court ultimately dismissed the subsequent application on the state procedural grounds "as an abuse of the writ" under Art. 11.071 § 5(c) of the Texas Code of Criminal Procedure. *Ex parte Garcia,* No. WR-64,582-02, 2008 WL 650302, at *1 (Tex. Crim. App. Mar. 5, 2008).

Following exhaustion, these proceedings were reopened, and Garcia filed an amended petition for writ of habeas corpus in this Court (Am. Pet., doc. 20) asserting seven grounds for relief that included subgrounds, as follows:

1. The mitigation special issue in the punishment phase failed to place the burden of proof on the prosecutor (Am. Pet. at 24-28);

2. The terms used in the punishment phase special issues were unconstitutionally vague (Am. Pet. at 28-33);

3. The requirement that ten jurors agree in order to answer the mitigation special issue "no" violated due process (Am. Pet. at 33-37);

4. The failure of the CCA to engage in a proportionality review violated due process (Am. Pet. at 38-40);

5. Garcia was deprived of the constitutionally guaranteed effective assistance of counsel at trial in that his trial counsel failed to:

(a) object to the prosecutor's challenge of a qualified juror for cause,

(b) object to a change in jury selection procedure that favored the prosecution,

(c) object to the prosecutor's argument that the verdict on guilt need not be unanimous,

(d) object to the prosecutor's mischaracterization of evidence at closing,

(e) request an anti-parties charge in punishment,

(f) object to improper party conspiracy and inferred intent instructions at the guilt/innocence phase, and

(g) properly investigate and present certain mitigating evidence.

(Am. Pet. at 40-83);

6. Garcia was deprived of the constitutionally guaranteed effective assistance of counsel in his direct appeal in that his appellate counsel failed to:

(a) raise the trial court's improper exclusion of a qualified juror,

(b) complain that jury selection was conducted in violation of a Texas statute,

(c) properly brief an issue regarding extraneous offense evidence,

(d) complain of improper jury instructions regarding intent at the guilt/innocence phase,

(e) raise as error the prosecutor's mischaracterization of evidence at closing, and

(f) raise the denial of a motion to suppress evidence obtained with invalid warrants.

(Am. Pet. at 83-115); and

7. Garcia's state habeas counsel provided ineffective assistance in failing to raise in the state habeas proceeding the asserted deficiencies of trial and appellate counsel (Am. Pet. at 116-127).

This Court granted an evidentiary hearing on whether the exception to procedural bar created in *Martinez v. Ryan,* 566 U.S. 1 (2012), and applied to Texas cases in *Trevino v. Thaler,* 569 U.S. 413 (2013), applied to Garcia's claims of ineffective assistance of trial counsel. (Order Canceling Referral and Setting Hearing, doc. 66; Order Partially Limiting Hearing, doc. 74.)

Although the purpose of the hearing was to determine whether the exception to procedural bar applied, the Court also expressed the intent to consider the same evidence in ruling on the merits of the claims if the exception to procedural bar applied.

> The Court exercises its discretion to conduct an evidentiary hearing on the determination of whether the exception to procedural bar created in *Martinez* applies to these claims. To the extent that the same evidence may prove these claims on the merits, such evidence may be considered for any claims found to fall within the exception to bar.

(Order Canceling Referral and Setting Hearing at 5.) The same order also explained the need for an evidentiary hearing to allow Garcia to compel the evidence he needed to prove his claim.

> Because the resolution of these claims may depend on evidence that may not be available to Garcia absent the means to compel it, such as trial counsel's actual knowledge of facts and law to support the reasonableness of his strategic decisions, the nature of these proceedings favors providing Petitioner the opportunity to do so.

(*Id.* at 7.) Consistent with this purpose, the Court limited the "live" testimony at the hearing to the examination of Garcia's prior attorneys, but did not limit the evidence that could be submitted in affidavit or documentary form, including expert testimony.[1] (Order Partially Limiting Hearing at 7-8.) The Court also directed the parties to come prepared to argue whether the evidence received at the hearing could be considered in ruling on the merits of any claim.

> The parties should come to the hearing prepared to address whether the limitation of § 2254(e)(2) prevents the Court from considering evidence that is presented at the hearing on the procedural issue to then also decide the merits of claims that are determined to be excused from procedural default.

(Order Partially Limiting Hearing at 2 n.1.)

As pertinent to the Rule 60b Motion, the parties presented evidence and arguments regarding Garcia's claim that trial counsel was ineffective in failing to investigate and present mitigating evidence, including evidence that during the second time that Garcia was in New York, after his mother had abandoned him there, he had been sexually abused. (Mem. Op. and Order Accepting Rec. of Magistrate Judge, doc. 103, at 19-20.) Consistent with its prior order, the Court received all written evidence submitted and limited the "live" testimony at the evidentiary hearing to Garcia's trial counsel and state habeas counsel.[2] (Tr. at 4-5; Order Partially Limiting Hearing at 7-8.) Garcia

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[1] Garcia inaccurately asserts that this Court "permitted testimony only from Garcia's prior counsel" at the hearing. (Rule 60(b) Motion at 5.) While this was true of the "live" testimony presented, the Court did not expressly limit the affidavits or other documentary evidence that could be considered.

[2] All three trial counsel were present at the hearing, but only Hugh Lucas and Bradley Keith Lollar testified. Paul Brauchle was released without having been called. (Tr. at 78.) And attorney Bruce Anton's affidavit with his expert opinion was admitted at the hearing over objection. (Tr. at 4-5.)

also offered a proffer of his own testimony at the hearing that the Court considered in the same way as if he were testifying live. (Tr. at 148-150.)

Regarding Garcia's claim that trial counsel was ineffective in failing to investigate and present evidence of his sexual abuse, the Court found that Garcia had failed to show trial counsel to be ineffective.

> It is undisputed that Garcia did not reveal any information concerning the sexual abuse to trial counsel or to either of the mental health experts that had been appointed to aid the defense by examining Garcia and offering expert testimony at his trial. (Tr. at 148-49.) It is also undisputed that the only ones that would have known of the abuse were Garcia and the perpetrator, and that the trial court would not have allowed Garcia's mental health experts to testify regarding such events unless they were corroborated. (Tr. at 153-57.) Even in the seven years since federal habeas counsel was appointed during which time they apparently received this information from Garcia, and with the opportunity to present it at the *Martinez* hearing, no corroboration has been presented to this Court or shown to have been available to trial counsel. Therefore, even if Garcia had disclosed the asserted sexual abuse to his mental health experts, they would not have been permitted to testify regarding such an uncorroborated event. In light of Garcia's decision to not testify at his trial, he has not shown how this evidence could have been presented to the jury at his trial even if it occurred and had been disclosed to his counsel and experts.

The Court also analyzed evidence relied upon by Respondent in disputing that the abuse actually occurred and considered the absence of details regarding the alleged abuse. The Court adopted the Magistrate Judge's findings and conclusions, found that the claim was not substantial under *Martinez*, dismissed the claim as procedurally barred and, in the alternative, denied it for lack of merit. (Mem. Op. and Order Accepting Rec. of Magistrate Judge, doc. 103, at 19-22.)

After the evidentiary hearing but before final orders were entered, lead appointed counsel Camille Knight rejoined the office of the Federal Public Defender for the Northern District of Texas as a trial attorney. (Motion to Withdraw and Appointed the Federal Public Defender, doc. 98, at 1.) Both appointed counsel filed an unopposed motion for co-counsel Ronald L. Goranson to withdraw

and representation of Garcia to be transferred to the Federal Public Defender for the Northern District of Texas to "provide [Garcia] continuity of counsel throughout all future proceedings." (Motion to Withdraw and Appoint the Federal Public Defender at 2.) The Court granted the motion and allowed the withdrawal and substitution of counsel, designating Assistant Federal Public Defender Camille Knight as lead counsel. (Order, doc. 99.)

Following the entry of the judgment denying relief, the Office of the Federal Public Defender for the Northern District of Texas filed a motion to reconsider, to re-open the evidence, for amended findings, additional findings, a new trial, and to alter judgment in this case, attaching voluminous exhibits. (Motion for New Trial, doc. 106.) This motion was not signed by or joined by Camille Knight. The Court entered an order noting that the Federal Public Defender for the Northern District of Texas joined in a statement before another court of this District conceding that appointment of the office of a public defender may not comply with 18 U.S.C. § 3599, the appointment statute in this case, and that the sought continuity of representation made the basis of the prior substitution was in doubt. Therefore, the Court directed the Federal Public Defender for the Northern District of Texas to file a supplemental brief to ensure that Garcia has the qualified counsel envisioned by 18 U.S.C. § 3599 at all subsequent stages of available proceedings. (Order, doc. 112.)

The Court ultimately granted a requested modification of its order denying relief pertaining to the excusal of venireman Chmurzynski, and otherwise denied the motion for new trial. (Mem. Op and Order, doc. 118.) Twenty-five days later, the Office of the Federal Public Defender for the Northern District of Texas filed a motion to withdraw and substitute the Federal Public Defender for the District of Arizona (Motion, doc. 131) which was granted (Order, doc. 132). Following this order, the Federal Public Defender for the District of Arizona handled the appeal and all subsequent

legal actions in federal court.

Garcia subsequently filed a motion in the United States Court of Appeals for the Fifth Circuit for a certificate of appealability that did not include this Court's rulings on his claim that trial counsel provided ineffective assistance of counsel in failing to investigate and present mitigating evidence, which was denied. *Garcia v. Davis,* 704 F. App'x 316 (5th Cir. 2017). Garcia then requested but was denied a writ of certiorari by the United States Supreme Court. *Garcia v. Davis,* 138 S. Ct. 1700 (April 30, 2018).

On May 24, 2018, the trial court set Garcia's execution for August 30, 2018. *State v. Garcia,* No. F01-00325-T, Order Setting Execution Date (283rd Dist. Ct., Dallas County, Tex.). Subsequently, the trial court modified this order and rescheduled the execution for December 4. *State v. Garcia,* No. F01-00325-T, Order Modifying Execution Date and Recalling Warrant of Execution (283rd Dist. Ct., Dallas County, Tex., June 27, 2018).

On November 14, 2018, Garcia filed a second subsequent application for habeas relief in the state court that included the claims made the basis of the Rule 60b Motion. (Rule 60b Motion at 5-6.) Garcia accompanied this with a motion to stay his execution. In a split decision, the Texas Court of Criminal Appeals dismissed the application "as an abuse of the writ without reviewing the merits of the claims raised" under Art. 11.071 § 5(c) of the Texas Code of Criminal Procedure and denied Garcia's motion to stay his execution. *Ex parte Garcia,* No. WR-64,582-03 (Tex. Crim. App. Nov. 30, 2018).

Garcia now seeks to alter or amend that judgment under Rule 60(b) of the Federal Rules of Civil Procedure to reopen these proceedings to present additional claims and evidence, and also seeks to stay his execution.

II. MOTIONS

Garcia's Rule 60b Motion seeks to reopen the original federal habeas proceedings for two purposes. First, he seeks "to reopen his death penalty case to present evidence that substantiates his claim that his trial counsel were ineffective." (Rule 60b Motion at 24.) This includes additional evidence in support of his claim that he was denied the effective assistance of counsel during the penalty phase of his trial when counsel failed to adequately investigate and present mitigating evidence of Garcia's history of being sexually assaulted as a minor. (Rule 60b Motion at 10-11.) Through this additional evidence, Garcia seeks to show additional instances of sexual assault in greater detail along with an expert opinion discussing the long-term effects of repeated childhood traumatization. (Rule 60b Motion at 11-12; Aff. of Victoria Reynolds, Ph.D., at A.615-681.) Second, Garcia seeks to amend his federal habeas petition to present new theories of ineffective assistance of counsel that trial counsel failed to discover and present (1) defects in the 1996 murder conviction that could have prevented its admission at his trial, and (2) evidence of the conditions at the two prison facilities where Garcia was housed prior to his escape. (Rule 60b Motion at 13-15.) Garcia also seeks to present evidence in support of these new theories that has never been considered by any court. (Rule 60b Motion at 17, 20-21.) Based on all of this, Garcia moves to stay his execution. (Stay Motion at 1-3.)

In her response, Respondent asserts that Garcia's Rule 60b Motion constitutes a second or successive petition that this Court does not have jurisdiction to consider because it has not been authorized by the United States Court of Appeals for the Fifth Circuit in accordance with 28 U.S.C. § 2244(b)(3). (Resp. at 12-18). Respondent argues in the alternative that Rule 60(b) relief is not available to Garcia because the grounds presented, the alleged ineffective assistance of prior federal

habeas counsel, would not constitute the extraordinary circumstances required for Rule 60(b) relief. (Resp. at 18-26.) Respondent also asserts that the motion is untimely. (Resp. at 26-28.) Respondent argues that Garcia's claim of ineffective assistance of trial counsel for failing to investigate and present mitigating evidence has been exhaustively litigated, is procedurally barred, successive and without merit. (Resp. at 28-39.) Finally, Respondent argues that a stay of execution is not warranted. (Resp. at 39.)

In his Reply, Garcia argues that Respondent misconstrues the Rule 60b Motion. Garcia emphasizes that his motion does not ask the Court to relitigate or review the merits of his claim, but merely seeks to present his claims with the meaningful assistance of counsel. (Reply at 1-3.) Garcia points out that he is not presenting the same claim that this Court previously considered (Reply at 4), he asserts flaws in Respondent's arguments (Reply at 1-8), and he complains that "Texas is prepared to execute him despite that he has never had proper federal review of his claim of ineffective assistance of trial counsel." (Reply at 5.)

III. SUCCESSIVE APPLICATIONS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits the circumstances under which a state prisoner may file a successive application for federal habeas relief. *See* Pub. L. 104-132, 110 Stat. 1214 (1996). A petition is successive when it raises a claim that was or could have been raised in an earlier petition. *See Hardemon v. Quarterman,* 516 F.3d 272, 275 (5th Cir. 2008). A claim presented in a second or successive application under Section 2254 must be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). That determination must be made by a three-judge panel of the Court of Appeals before Garcia may file his application in federal district court. *Id.* § 2244(b)(3).

IV. JURISDICTION

As Garcia concedes, a previous habeas challenge to his conviction has been denied by this Court. (Rule 60b Motion at 4-5.) The threshold jurisdictional question presented is whether Garcia's motion asserted under Rule 60(b) of the Federal Rules of Civil Procedure is, in fact, a successive petition under 28 U.S.C. § 2244(b) requiring Circuit authorization.

A. LAW

In *Gonzalez v. Crosby,* 545 U.S. 524 (2005), the Supreme Court provided guidance on whether a motion filed under Rule 60(b) should be construed as a successive petition under § 2244.

> In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. *Cf. Harris v. United States,* 367 F.3d 74, 80-81 (C.A.2 2004) (petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. *E.g., Rodwell v. Pepe,* 324 F.3d 66, 69 (C.A.1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. *E.g., Dunlap v. Litscher,* 301 F.3d 873, 876 (C.A.7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly. *E.g., Rodwell, supra,*

at 71-72; *Dunlap, supra,* at 876.

> We think those holdings are correct. A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute.

Id. at 530-31.

The United States Court of Appeals for the Fifth Circuit has provided further guidance for this Court in resolving the jurisdictional question.

> Because of the comparative leniency of Rule 60(b), petitioners sometimes attempt to file what are in fact second-or-successive habeas petitions under the guise of Rule 60(b) motions. *See, e.g., Gonzalez,* 545 U.S. at 531–32, 125 S. Ct. 2641; Jasper, 559 Fed. App'x. at 370. A federal court examining a Rule 60(b) motion should determine whether it either: (1) presents a new habeas claim (an "asserted federal basis for relief from a state court's judgment of conviction"), or (2) "attacks the federal court's previous resolution of a claim on the merits," *Gonzalez,* 545 U.S. at 530, 532, 125 S. Ct. 2641. If the Rule 60(b) motion does either, then it should be treated as a second-or-successive habeas petition and subjected to AEDPA's limitation on such petitions. *See* 28 U.S.C. § 2244(b); *see also Gonzalez,* 545 U.S. at 531–32, 125 S. Ct. 2641; *In re Sepulvado,* 707 F.3d 550, 552 (5th Cir. 2013). A federal court resolves the claim on the merits when it determines that there are or are not "grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)," as opposed to when a petitioner alleges "that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Gonzalez,* 545 U.S. at 532 n.4, 125 S. Ct. 2641. A Rule 60(b) motion based on "habeas counsel's omissions ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Clark v. Stephens,* 627 Fed. App'x. 305, 308 (5th Cir. 2015) (quoting *Gonzalez,* 545 U.S. at 532 n.5, 125 S. Ct. 2641).

In re Edwards, 865 F.3d 197, 203–04 (5th Cir.), *cert. denied sub nom. Edwards v. Davis,* 137 S. Ct. 909 (2017).

B. ANALYSIS

Respondent asserts that this Court does not have jurisdiction over Garcia's Rule 60b Motion

because it is, in reality, a successive habeas petition that must be dismissed or transferred to the Court of Appeals. (Resp. at 12-18.) Respondent argues that Garcia's motion "directly and substantively attacks this Court's decision regarding the merits of his constitutional claim." (Resp. at 2.) Relying upon *In re Coleman,* 768 F.3d 367 (5th Cir. 2014), Respondent argues that Garcia is "seeking relief from judgment based on new evidence that was not previously presented to this Court" and "presents that new evidence to support a claim that has already been raised and adjudicated on the merits."

Garcia argues that his motion attacks, not the substance of this Court's resolution of a claim on the merits, but only a defect in the integrity of the federal habeas proceedings: the ineffective assistance of his prior federal habeas counsel. He attempts to distinguish *Coleman* in which the "movant-appellant asserted a constitutional right" to the effective assistance of habeas counsel, as opposed to the "statutory right" that Garcia is asserting pursuant to 18 U.S.C. § 3599 to "meaningful representation in his federal habeas proceedings." (Reply at 3.) This does not appear to adequately distinguish *Coleman.*

In *Coleman,* the Court Appeals upheld the district court's determination that a motion asserted under Rule 60(b) constituted a successive habeas petition.

> Procedural defects are narrowly construed, however. They include "[f]raud on the habeas court," as well as erroneous "previous ruling [s] which precluded a merits determination ...—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." They generally do not include "an attack based on the movant's own conduct, or his habeas counsel's omissions," which "do not go to the integrity of the proceedings, but in effect ask for a second chance to have the merits determined favorably."
>
> Coleman argues that there was a defect in the integrity of her original habeas petition, namely that "the additional evidence from the four witnesses recently discovered and relevant to the 'kidnapping' issue was unavailable to this Court when

> it decided the claim previously, and the attached affidavits and the evidence contained therein are now available." Her counsel's failure to discover and present this evidence, she argues, indicated that they were constitutionally ineffective. This claim, however, is fundamentally substantive—she argues that the presence of new facts would have changed this court's original result. Moreover, Coleman does not allege that the court or prosecution prevented her from presenting such evidence, but rather argues that her own counsel was ineffective in failing to present such evidence. The Supreme Court has held that such an argument sounds in substance, not procedure. Nor is Coleman's alleged defect similar in kind to those highlighted by the Supreme Court as examples of procedural failures, such as statute-of-limitations or exhaustion rulings.

Id. at 371–72 (footnotes omitted).

The focus of the analysis in *Coleman* was not on whether the petitioner's right to the assistance of prior federal habeas counsel was constitutional or statutory, but on whether the Rule 60(b) motion presented an argument that is "fundamentally substantive" in that it asserts that "the presence of new facts would have changed this court's original result." *Id.* at 372. In this respect, Garcia's argument is also fundamentally substantive. His Rule 60b Motion resembles the petitioner's motion in *Coleman* that also asserted the ineffectiveness of prior federal habeas counsel in failing to investigate and obtain evidence that would have changed the court's prior determination.

A more difficult question is whether Garcia attacks a procedural determination by seeking to reopen the dismissal of his claim as procedurally barred. This Court granted a hearing and determined that Garcia's claim of ineffective assistance of trial counsel for failing to investigate and present mitigating evidence was found to not come within the exception to procedural bar set out in *Martinez v. Ryan*, 566 U.S. 1 (2012). (Mem. Op. and Order Accepting Rec. of Magistrate Judge at 19-22.) This was clearly a procedural ruling, but it was based on the determination that the claim had no merit. Therefore, it does not appear to be a decision that "precluded a merits determination" but one that was, instead, based on the merits determination. *Id.* at 371. Accordingly, the Court

finds that Garcia's motion attacks the substance of this Court's prior resolution of his claim and constitutes a successive habeas petition.

Further, it is not clear that Garcia is merely challenging the procedural bar of his claim. Garcia insists that the "claim that Garcia seeks to raise now is not the same as the one raised previously." (Reply at 4.) And that is not the only claim Garcia asserts in his Rule 60b Motion. Garcia also seeks to amend his federal habeas petition to present new theories of ineffective assistance of counsel that trial counsel failed to discover and present (1) defects in the 1996 murder conviction that could have prevented its admission at his trial, and (2) evidence of the conditions at the two prison facilities where Garcia was housed prior to his escape. (Rule 60b Motion at 13-15.) Garcia also seeks to present evidence in support of those new theories that had not previously been presented in the original federal habeas proceedings. Therefore, Garcia's motion advances new habeas claims, each asserting a "'federal basis for relief from a state court's judgment of conviction'." *In re Edwards,* 865 F.3d at 203 (quoting *Gonzalez,* 545 U.S. at 530).

"Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction–even claims couched in the language of a true Rule 60(b) motion–circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Gonzalez,* 545 U.S. at 531 (citing § 2244(b)(2)). In announcing this rule, the Supreme Court cited with approval the opinion in *Harris v. United States,* 367 F.3d 74 (2d Cir. 2004), in which the United States Court of Appeals for the Second Circuit rejected an attempt to reopen a case under Rule 60(b) to present a claim that was missed because of the asserted ineffective assistance of federal habeas counsel. The Supreme Court observed that "[i]n most cases, determining whether a Rule 60(b) motion advances one or more 'claims' will be relatively simple.

A motion that seeks to add a new ground for relief, as in *Harris, supra,* will of course qualify." *Gonzalez,* 545 U.S. at 532.

Since Garcia seeks to add new grounds for relief from his state-court conviction and sentence, his motion "advances one or more claims" under this standard. Because he seeks to raise claims "challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition," it is successive. *In re Sepulvado,* 707 F.3d 550, 553 (5th Cir. 2013) (quoting *In re Cain,* 137 F.3d 234, 235 (5th Cir. 1998)). Therefore, Garcia's Rule 60b Motion constitutes a successive habeas petition that requires Circuit authorization before this Court has jurisdiction under 28 U.S.C. § 2244(b).

C. STAY OF EXECUTION

In connection with his motion to obtain Rule 60(b) relief, Garcia has filed a motion to stay his execution (Stay Motion at 1-3). This Court's jurisdiction to act on this motion appears to rely upon jurisdiction over the motion to obtain Rule 60(b) relief. Because this Court lacks jurisdiction over the motion for Rule 60(b) relief, it lacks jurisdiction to rule on this motion as well. *See Hawkins v. Stephens,* No. 2:14-CV-314, 2015 WL 3882422, at *1 (S.D. Tex. June 17, 2015), *appeal dismissed* (5th Cir. Feb. 29, 2016) (citing *United States v. Key,* 205 F.3d 773, 775 (5th Cir. 2000); *In re Sepulvado,* 707 F.3d at 552.

D. TRANSFER TO COURT OF APPEALS

Garcia seeks to reopen the prior proceedings to make new claims that were not, but could have been, asserted by prior federal habeas counsel. His motion constitutes a successive habeas petition that requires authorization under 28 U.S.C. § 2244(b)(3). Because the Court of Appeals has not issued an order authorizing this Court to consider this successive Section 2254 petition, this

Court is without jurisdiction to consider it or the motions that depend upon it. This Court may either dismiss these motions for lack of jurisdiction, or it may transfer the motions to the Court of Appeals. *See In re Hartzog,* 444 F. App'x 63, 65 (5th Cir. 2011) (citing *United States v. Key,* 205 F.3d 773, 774 (5th Cir. 2000)).

"Normally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time consuming and justice-defeating." *Miller v. Hambrick,* 905 F.2d 259, 262 (9th Cir. 1990). These concerns are heightened when considering whether to stay an execution. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (discussing special concerns arising in capital proceedings leading up to an execution); *Hearn v. Thaler,* No. 3:12–CV–2140–D, 2012 WL 2715653 (N.D. Tex., July 9, 2012) (Fitzwater, C.J.). The Court finds that it is in the interest of justice to transfer both of these motions to the Court of Appeals.

V. ALTERNATIVE ANALYSIS

In the alternative, the Court finds that if Garcia's motion were properly made to seek Rule 60(b) relief, it would not be granted. In order to obtain relief under Rule 60(b)(6), the "catch-all" provision Garcia relies upon, he "must show: (1) that the motion be made within a reasonable time; and (2) extraordinary circumstances exist that justify the reopening of a final judgment." *In re Edwards,* 865 F.3d at 203 (quoting Gonzalez v. Crosby, 545 U.S. at 535).

A. REASONABLE TIME

The United States Court of Appeals for the Fifth Circuit has provided guidance on whether a Rule 60(b) motion is timely.

> A motion under Rule 60(b)(6) must be made "within a reasonable time," "unless good cause can be shown for the delay." Reasonableness turns on the "particular facts and circumstances of the case." We consider "whether the party

> opposing the motion has been prejudiced by the delay in seeking relief and ... whether the moving party had some good reason for his failure to take appropriate action sooner." "[T]imeliness ... is measured as of the point in time when the moving party has grounds to make [a Rule 60(b)] motion, regardless of the time that has elapsed since the entry of judgment."

Clark v. Davis, 850 F.3d 770, 780 (5th Cir.), *cert. denied,* 138 S. Ct. 358 (2017).

Garcia argues that he brings this motion within a reasonable time because the two-forum rule prevented him from making a subsequent state habeas application until his federal habeas proceedings were concluded by the denial of certiorari by the Supreme Court on April 30, 2018. He argues diligence in that he filed this motion on the same day that the state court denied his subsequent state habeas application. (Rule 60b Motion at 19.)

Respondent asserts that the two-forum rule was abrogated in 2004. (Resp. at 28 (citing *Ex parte Soffar,* 143 S.W.3d 804, 805 (Tex. Crim. App. 2004)).) Respondent also argues that Garcia was not diligent because he did not request a certificate of appealability from the Court of Appeals on this Court's denial of his claim that trial counsel failed to investigate and present mitigating evidence, and Garcia made no attempt to seek a remand in order to file in this Court a Rule 60(b) motion at that time. (Resp. at 26-27.) Respondent argues, "[e]ven giving Garcia the benefit of every possible doubt, his Motion is untimely because he waited more than five months to file a subsequent state habeas application" which the Fifth Circuit has recognized as enough to warrant a finding of untimeliness. (Resp. at 27 (citing *Clark,* 850 F.3d at 782.)

Garcia argues that Respondent was incorrect in arguing that the two-forum rule was abrogated in *Soffar*. (Reply at 5-6.) The Court of Appeals in *Clark* appears to agree with Respondent that Garcia "could have made concurrent state and federal filings," and therefore, the six-month period in which appointed counsel prepared Garcia's 2018 successive state habeas petition

and during which that petition was pending before the state court should not be excused. *Clark*, 850 F.3d at 783. Even so, Respondent appears to misread the time period found in *Clark* to have been unreasonable.[3] Whether or not a delay of six months is unreasonable in the filing of a Rule 60(b) motion, the Court believes that Garcia could have, at any time following the appointment of current counsel in 2015, sought a remand to this Court to file the instant motion or "a stay of the federal [proceedings to exhaust] state court remedies." *Id.* A delay of three years would clearly be unreasonable.

Even considering the recent six-month delay, Garcia has provided no explanation for why he waited until November 14, 2018, to file his subsequent state habeas petition after the Supreme Court denied his application for a writ of certiorari on April 30. In light of the state court's orders in May and June setting and modifying his execution dates, this delay is particularly troubling. This Court cannot condone an unexplained delay that requires a court to review more than 800 pages of briefing and exhibits to make the complex and important determinations raised by the pleadings in less than 3 business days before an execution.

The Court finds that the Rule 60b Motion was not filed within a reasonable time.

B. EXTRAORDINARY CIRCUMSTANCES

Garcia has not presented the extraordinary circumstances required for relief under Rule 60(b)(6). Instead, he presents complaints about the ineffective assistance of his prior federal habeas counsel that have been repeatedly rejected as sufficient to warrant Rule 60(b) relief.

Garcia argues that he was denied the meaningful assistance of counsel guaranteed by 18

[3] The Court of Appeals declined to use Clark's suggested "starting point for measuring timeliness of the Rule 60(b)(6) motion" in that case. *Clark*, 850 F.3d at 782.

U.S.C. § 3599. (Rule 60b Motion at 7-9.) Even though lead counsel immediately obtained experienced co-counsel, Garcia argues that lead counsel was not experienced enough in death penalty habeas proceedings. (Rule 60b Motion at 9.) And even though counsel quickly obtained the assistance of a qualified mitigation investigator, Garcia complains that counsel did not adequately supervise the mitigation specialist. (Rule 60b Motion at 9-10; Reply at 4.) Garcia argues that this resulted in an inadequate investigation that failed to uncover additional mitigating evidence that his current counsel has found.

Specifically, Garcia complains that his mitigation investigator in the original federal habeas proceedings only uncovered one of the instances of sexual assault that he suffered as a minor. (Rule 60b Motion at 10-11.) And Garcia complains that, even though his prior counsel obtained the assistance of mental health experts, none of them specialized in assessing the effects of childhood trauma. (Rule 60b Motion at 11-12.) Respondent points out that the new evidence submitted in support of Garcia's motion suffers from the same defect that this Court previously found would have prevented its admission at trial: the lack of corroboration for these facts in the expert's opinion. (Resp. at 34-35.)

One factor that favors Garcia's position is that his motion attacks a procedural ruling: the dismissal of his claim as procedurally barred. But this was based on the determination that his claim of ineffective assistance of trial counsel had no merit and was therefore not "substantial" under *Martinez*. Garcia does not argue this as the defect in the integrity of the prior federal habeas proceedings, and this Court is persuaded that it was not the kind of determination that "precluded a merits determination." *In re Coleman,* 768 F.3d at 371. Therefore, Garcia's Rule 60b Motion presents a substantive attack on this Court's resolution of his claim.

Further, Garcia's motion seeks to reopen these proceedings to present additional theories of ineffective assistance of counsel, and additional evidence, that were not presented in the original federal habeas proceedings. Garcia complains that, even though trial counsel presented evidence and arguments to contest the validity of Garcia's 1996 murder conviction, they failed to uncover evidence that would have supported a claim that his trial counsel in that prior murder trial had provided ineffective assistance. (Rule 60b Motion at 13-14.) Garcia also complains that, even though trial counsel provided evidence from a prison classification expert regarding his conditions of confinement if sentenced to life in prison, counsel failed to adequately investigate the conditions of his prior confinement to explain the reasons for his escape. (Rule 60b Motion at 14-15.) These allegations do not seek to reopen a procedural determination since this Court never had the opportunity to consider those theories in the original proceedings. No extraordinary circumstances are shown to justify reopening these proceedings to make such new claims.

Each of the asserted deficiencies in trial counsel's performance appear to involve strategic trial decisions, and most of them essentially come down to a matter of degrees, whether counsel investigated enough, or presented enough mitigating evidence. Garcia contends that the adequacy of trial counsel's investigation is insufficient to afford deference to such strategic decisions under *Wiggins v. Smith,* 539 U.S. 510, 521–22 (2003). (Reply at 4-5.) This was one of the reasons for the grant of an evidentiary hearing where Garcia's trial and state habeas counsel have already been examined regarding the extent of trial counsel's knowledge and mitigation investigation. (Order Partially Limiting Hearing at 7.) Without a more compelling reason to repeat that inquiry, this would appear to be the type of second-guessing of trial counsel's performance discouraged by *Strickland v. Washington,* 466 U.S. 668, 689 (1984).

If this Court were to consider Garcia motion under Rule 60(b), the motion would be **DENIED**.

VI

Garcia's motion for relief under Rule 60(b) (doc. 142) is a successive application for habeas relief and is **TRANSFERRED** to the United States Court of Appeals for the Fifth Circuit along with the application to stay his execution (Stay Motion, doc. 144). *See Henderson v. Haro,* 282 F.3d 862, 864 (5th Cir. 2002).

The Clerk of Court is **DIRECTED** to open for statistical purposes a new civil action (nature of suit 535 – death penalty habeas corpus – assigned to the same district judge) and to close the same on the basis of this Order.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a certificate of appealability. Petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Petitioner has previously been allowed to proceed in forma pauperis and this status is continued for purposes of appeal. (Mem. Op. and Order, doc. 103, at 24.)

SO ORDERED.

December 3, 2018.

BARBARA M. G. LYNN
CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70039

JOSEPH C. GARCIA,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before JOLLY, DENNIS, And PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-70039

United States Court of Appeals
Fifth Circuit
FILED
July 21, 2017
Lyle W. Cayce
Clerk

JOSEPH C. GARCIA,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:06-CV-2185

Before JOLLY, DENNIS, and PRADO, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:*

Joseph C. Garcia was convicted of capital murder and sentenced to death in a Texas state court for the December 2000 killing of Irving, Texas, police officer Aubrey Hawkins. The Texas Court of Criminal Appeals (TCCA) summarized the facts of the crime as follows:

> On December 13, 2000, seven inmates, including [Garcia], escaped from the Texas Department of Criminal Justice Connally Unit,

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

> taking with them a number of firearms stolen from the unit. On December 24th, the group committed a robbery at a sporting-goods store in Irving, killing Irving police officer Aubrey Hawkins as they fled. The escapees used the weapons they stole from the prison to commit the robbery and murder. The escapees then made their way to Colorado where they lived in an RV park until January 2001, when six were apprehended and one committed suicide.

The TCCA upheld Garcia's conviction and sentence on direct appeal. *See Garcia v. State*, No. AP-74692, 2005 WL 395433, at *1 (Tex. Crim. App. Feb. 16, 2005). Garcia filed a state post-conviction application for a writ of habeas corpus, but the TCCA denied relief. *See Ex parte Garcia*, No. WR-64,582-01, 2006 WL 3308744, at *1 (Tex. Crim. App. Nov. 15, 2006).

Garcia then filed a federal habeas application under 28 U.S.C. § 2254, in which he included several claims that he had not presented to the state courts. The district court held an evidentiary hearing as to some of those unexhausted claims to determine if Garcia could establish cause and prejudice for his procedural default. However, the court excluded from the evidentiary hearing Garcia's claims of ineffective assistance of counsel at jury selection. Ultimately, the district court denied relief on all of Garcia's claims and denied a certificate of appealability (COA). Garcia now seeks a COA from this court on his claims that: (1) trial counsel rendered ineffective assistance in failing to request an "anti-parties" jury charge; (2) trial counsel rendered ineffective assistance in failing to object to the prosecutor's closing argument; (3) appellate counsel rendered ineffective assistance in failing to challenge on appeal the trial court's admission of evidence of Garcia's prison escape; (4) the term "probability," as used in the jury charge, is unconstitutionally vague; and (5) the State's death-penalty scheme is unconstitutional because it does not require the jury to find the lack of sufficient mitigating circumstances beyond a reasonable doubt. Garcia also appeals the district court's denial of evidentiary hearings as to his claims that trial counsel rendered ineffective

assistance at jury selection. For the following reasons, we deny a COA as to all of Garcia's claims and affirm the district court's denial of evidentiary hearings. We discuss Garcia's requests for a COA before turning to his appeal of the district court's denial of evidentiary hearings.

I. APPLICATION FOR COA

Our review of this § 2254 habeas proceeding is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Foster v. Quarterman*, 466 F.3d 359, 364 (5th Cir. 2006). Under AEDPA, a habeas applicant may not appeal the district court's denial of habeas relief unless he first obtains a COA from either the district court or this court. § 2253(c). We may grant a COA only upon "a substantial showing of the denial of a constitutional right." § 2253(c)(2). When the district court rejects an applicant's constitutional claims on the merits, we will issue a COA only if the applicant shows that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). We must decide this "threshold question . . . without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 336). In a case that involves the death penalty, any doubts as to whether a COA should issue must be resolved in favor of the applicant. *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

AEDPA requires federal courts to give substantial deference to state court decisions. *See Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005). A federal court cannot grant habeas relief regarding any claim adjudicated on the merits in state court proceedings unless, as relevant in this case, the state court's decision "involved an unreasonable application of[] clearly established Federal law[] as determined by the Supreme Court of the United States."

§ 2254(d)(1). A state court's decision involves an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008).

If a claim was not exhausted in state court, a prisoner may obtain federal review only if he shows cause for that default and actual prejudice as a result of the alleged violation of federal law. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Once cause and prejudice have been established, the district court reviews the claim in the first instance; because the claims have not been "adjudicated on the merits in State court proceedings," the deferential standard of review under § 2254(d) does not apply. Rather, a federal court's review of an unexhausted claim is de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009).

a. Ineffective Assistance of Counsel

A habeas applicant who wishes to demonstrate ineffective assistance of counsel must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In considering an ineffective-assistance claim, the court must apply a "strong presumption" that counsel's performance was within the wide range of reasonable professional assistance. *Id.* at 689. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

To show prejudice, an applicant must establish 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. Reasonable probability means "a probability sufficient to undermine confidence in the outcome." *Id.* An applicant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. In his application for a COA, Garcia asserts multiple claims of ineffective assistance of counsel. We address each of them in turn.

i. Trial counsel's failure to request anti-parties charge

Garcia contends that his trial counsel rendered ineffective assistance in failing to request an "anti-parties" charge at the penalty phase of his trial. Under the Texas Law of Parties, contained in section 7.02 of the Texas Penal Code, a defendant may be held criminally responsible for the conduct of another under certain circumstances.[1] The TCCA has held that if a jury is instructed on the Law of Parties in the guilt phase of a capital trial, the trial court should, upon the defendant's request, submit an "anti-parties" charge during the penalty phase. *Martinez v. State*, 899 S.W.2d 655, 656–57 (Tex. Crim. App. 1994). An anti-parties charge informs the jury that it must limit its consideration of punishment evidence to the defendant's conduct, *id.* at 657, and it is meant to comply with the constitutional directive that, for the purposes of imposing the death penalty, the "punishment must be tailored to [the defendant's] personal responsibility and moral guilt," *Enmund v. Florida*, 458 U.S. 782, 801 (1982). During the guilt phase of Garcia's trial, the jury received a Law of Parties instruction. He contends that he was therefore

[1] As relevant here, section 7.02(b) provides:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

entitled to an anti-parties charge at the penalty phase of his trial and that his trial counsel was ineffective in failing to request such a charge.

At the punishment phase of his trial, Garcia's jury was asked to answer three "special issues" pursuant to article 37.071, section 2 of the Texas Code of Criminal Procedure. The jury was required to answer the questions presented in the first two special issues affirmatively before the death penalty could be imposed. In the second special issue, the jury was asked:

> Do you find from the evidence beyond a reasonable doubt that the defendant, JOSEPH C. GARCIA, actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken?

The jury answered this question in the affirmative.

In denying Garcia's state habeas application, the TCCA held that the second special issue provided a sufficient anti-parties charge under Texas state law. Thus, to the extent that Garcia's claim is based on state law, its lack of merit is not debatable among jurists of reason. *See Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011) ("We defer to the Texas Court of Criminal Appeals's determination of state law. It is not our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law." (quoting *Schaetzle v. Cockrell*, 343 F.3d 440, 448–49 (5th Cir.2003)). To the extent Garcia's claim is based on federal law, it similarly does not raise a debatable issue among jurists of reason, as we have previously held that the question in the second special issue satisfied *Enmund*'s requirement of an individualized liability finding by the jury during the punishment phase,[2] *see*

[2] Garcia nevertheless contends that the question submitted to the jury did not comply with constitutional mandates. He points to the Supreme Court's decision in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), in which the Court held that a felony-murder defendant who did not actually kill or attempt to kill may be sentenced to death if he (1) was a major participant in the felony committed; and (2) demonstrated reckless indifference to human life. Garcia

Ramirez v. Dretke, 398 F.3d 691, 697 (5th Cir. 2005), and Garcia does not argue that there has been any intervening change in the law.

Garcia's counsel did not render deficient performance in failing to seek a duplicative or additional instruction to which he was not entitled. *See Wood v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) (counsel cannot be considered constitutionally ineffective for failing to raise a meritless claim). Accordingly, reasonable jurists would not find the district court's rejection of this claim debatable.

ii. Trial counsel's failure to object to the prosecutor's closing argument

At Garcia's trial, the prosecution presented six alternative theories of Garcia's guilt to the jury: the killing of a peace officer as a (1) principal, (2) party, or (3) conspirator, or killing in the course of a robbery as (4) principal, (5) party, or (6) conspirator. At closing argument, the prosecutor told the jurors that they did not have to unanimously agree on a single theory of guilt in order to find Garcia guilty. In his federal habeas application, Garcia argued that his trial counsel was ineffective in failing to object to that statement by the prosecutor, as he argued that the jury had to unanimously agree at least on whether Garcia was responsible for the killing of a peace officer or for killing in the course of a robbery. The district court rejected this claim, concluding that the prosecution's alternative theories represented alternative means of

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argues that the second special issue submitted to the jury does not meet the standard established in *Tison* because it does not require a finding of reckless indifference to human life. We have previously granted a COA as to a claim that Texas's second special issue fails to comply with *Tison*. *See Gongora v. Quarterman*, No. 07-70031, 2008 WL 4656992, at *7 (5th Cir. Oct. 22, 2008). However, Garcia did not raise his *Tison*-based argument before the district court, and he has therefore forfeited it. *See, e.g.*, *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 626 (5th Cir. 2017) (citing *In re Paige*, 610 F.3d 865, 871 (5th Cir. 2010)) ("[T]his court generally does not consider arguments raised for the first time on appeal.").

committing a single offense—capital murder—and therefore did not require jury unanimity as to a particular theory.

In his application for a COA, Garcia does not challenge this conclusion. Instead, he points to other closing-argument statements by the prosecutor, which he contends were improper and may have misled the jurors to believe that they could find Garcia guilty *as a principal* based on the actions and mens rea of the seven escaped inmates as a group. However, Garcia did not make this particular argument below, and we therefore do not consider it. *See, e.g.*, *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 626 (5th Cir. 2017) (citing *In re Paige*, 610 F.3d 865, 871 (5th Cir. 2010)) ("[T]his court generally does not consider arguments raised for the first time on appeal.").

iii. Appellate counsel's failure to challenge admission of evidence of prison escape as unduly prejudicial

Garcia claims that he was denied constitutionally effective assistance because his state appellate counsel failed to argue that the extraneous offense evidence of his prison escape was erroneously admitted during the guilt phase of trial because it was unduly prejudicial. Garcia raised this claim for the first time in a subsequent state habeas application, and the state court dismissed it as procedurally defaulted. As previously explained, federal courts generally cannot grant habeas relief on claims that were not properly exhausted in state courts. *See* 28 U.S.C. § 2254(b)(1). In federal district court, Garcia argued that his lack of exhaustion and procedural default of the claim should be excused pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012), under which ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim. The district court dismissed the claim as procedurally barred, stating that *Martinez*'s exception to the procedural bar does not apply to claims of

ineffective assistance of appellate counsel. In his application for a COA, Garcia renews his contention that *Martinez* applies to claims of ineffective assistance of appellate counsel. After briefing was concluded, the Supreme Court issued its opinion in *Davila v. Davis*, 137 S. Ct. 2058 (2017), in which the Court held that *Martinez*'s exception does not apply to claims of ineffective assistance of appellate counsel. Accordingly, jurists of reasons would not find the district court's procedural ruling debatable.

b. Unconstitutionally Vague Jury Charge

As previously noted, at the punishment phase of Garcia's trial, the jury was asked to answer three "special issues" pursuant to article 37.071, section 2 of the Texas Code of Criminal Procedure, and an affirmative answer to the first two was required for a death sentence to be rendered. In the first special issue, the jury was asked: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, JOSEPH C. GARCIA, would commit criminal acts of violence that would constitute a continuing threat to society?" The jury answered this question in the affirmative.

In his federal habeas application, Garcia argued that the term "probability" as used in the first special issue is unconstitutionally vague in violation of the Due Process Clause. He conceded, however, that his claim was foreclosed by this court's precedent, *see, e.g.*, *James v. Collins*, 987 F.2d 1116, 1120 (5th Cir. 1993), and he stated that he wished to preserve it for further review. The district court therefore denied relief as to this claim for lack of merit. In his application for a COA, Garcia contends that, this court's precedent approving of the state's general use of the word "probability" notwithstanding, the use of that undefined term in his particular case was unconstitutional because the jurors had demonstrated their confusion regarding the meaning of that term during voir dire. However, here, too,

Garcia did not make this particular argument below, and we therefore do not consider it. *See, e.g.*, *Jefferson Cmty. Health Care Ctrs., Inc.*, 849 F.3d at 626.

c. Failure to Require Finding of Lack of Mitigating Circumstances Beyond Reasonable Doubt

Pursuant to article 37.071, section 2(e)(1) of the Texas Code of Criminal Procedure, the third special issue submitted to the jury at the penalty phase of Garcia's trial asked:

> Do you find, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

The jury answered this question in the negative, which was required for a death sentence to be rendered. TEX. CODE CRIM. PRO. art. 37.071, § 2(g).

On direct appeal to the TCCA, Garcia contended that the third special issue was unconstitutional in that it did not require the jury to find a lack of sufficient mitigating circumstances beyond a reasonable doubt. Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he argued that the third special issue was "the functional equivalent of [an] element[], and must therefore be proven to a jury beyond a reasonable doubt." The TCCA rejected this claim as foreclosed under its precedent. *See Garcia v. State*, No. AP-74692, 2005 WL 395433, at *4 (Tex. Crim. App. Feb. 16, 2005) (citing *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004)). In his federal habeas application, Garcia pressed the same claim while noting that it was foreclosed by this court's opinion in *Rowell v. Dretke*, 398 F.3d 370 (5th Cir. 2005).

In his application for a COA, Garcia again asserts this claim, and he points to the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), as establishing his entitlement to relief. In *Hurst*, the Court held Florida's death-penalty sentencing scheme unconstitutional because it

required the sentencing judge, not the jury, to decide whether to impose the death penalty based on the judge's independent determination and weighing of aggravating and mitigating circumstances. *Id.* at 620. In so doing, the Court relied on its prior holding in *Ring v. Arizona*, 536 U.S. 584 (2002), that capital defendants are entitled to a jury determination beyond a reasonable doubt of any fact on which the legislature conditions the imposition of the death penalty. *Hurst*, 136 S. Ct. at 621–22 (discussing *Ring*, 536 U.S. at 604).

This court has "specifically held that the Texas death penalty scheme did not violate either *Apprendi* or *Ring* by failing to require the state to prove beyond a reasonable doubt the absence of mitigating circumstances." *Allen v. Stephens*, 805 F.3d 617, 627–28 (5th Cir. 2015) (internal quotation marks omitted) (quoting *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007)). This holding rested on the reasoning that "through the guilt-innocence phase, 'the state was required to prove beyond a reasonable doubt every finding prerequisite to exposing [the defendant] to the maximum penalty of death. . . . [A] finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death.'" *Id.* at 628 (quoting *Granados v. Quarterman*, 455 F.3d 529, 536–37 (5th Cir. 2006)). Garcia has not shown how the Supreme Court's opinion in *Hurst* disturbs this court's prior analysis and holding. We are therefore bound to apply our precedent, under which there is no need for a jury to find the absence of sufficient mitigating circumstances beyond a reasonable doubt. In this light, jurists of reason would not find the district court's resolution of this claim debatable.

II. Appeal of the Denial of Evidentiary Hearings

The district court conducted an evidentiary hearing to determine whether Garcia can overcome the procedural bar that would otherwise preclude the presentation of claims that he did not exhaust in state courts. However, the court granted the State's request to exclude from the evidentiary

hearing Garcia's claims that trial counsel was ineffective for failing to object to the jury selection process and to the trial court's grant of the State's for-cause challenge to a particular veniremember. Garcia appeals the district court's denial of an evidentiary hearing as to these claims of ineffective assistance of counsel.[3] We review the district court's denial of an evidentiary hearing for abuse of discretion. *Hall v. Quarterman*, 534 F.3d 365, 367 (5th Cir. 2008). A district court does not abuse its discretion in denying an evidentiary hearing if "there is not 'a factual dispute which, if resolved in the prisoner's favor, would entitle him to relief.'" *Norman v. Stephens*, 817 F.3d 226, 235 (5th Cir. 2016) (alteration omitted) (quoting *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000)).

a. Trial Counsel's Agreement to Change Voir Dire Procedure

During voir dire of veniremembers prior to Garcia's trial, defense counsel agreed to allow the State to examine a pool of potential jurors before having to decide on the use of peremptory challenges. In his federal habeas application, Garcia claimed that counsel's agreement to this procedure constituted ineffective assistance because it deprived him of the benefit of a state law requiring the State to exercise any peremptory challenge at the conclusion of each individual voir dire. The district court granted the State's motion to deny an evidentiary hearing as to this claim because it found that Garcia had failed to properly allege that counsel's decision prejudiced his defense.

On appeal, Garcia asserts that he was entitled to an evidentiary hearing regarding his claim that counsel was ineffective in agreeing to the change in voir dire procedure.[4] However, Garcia alleges no facts that could be

[3] No COA is required to appeal the denial of an evidentiary hearing. *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016).

[4] Garcia also complains of multiple other deficiencies in counsel's performance during voir dire and argues that they entitle him to an evidentiary hearing. However, he did not

substantiated or revealed in an evidentiary hearing and that would permit a conclusion that, but for trial counsel's agreement to the changed procedure, Garcia would have obtained a different result at trial. *See Strickland*, 466 U.S. at 694. He therefore has not established a factual dispute that would entitle him to relief if resolved in his favor. Accordingly, the district court did not abuse its discretion in denying an evidentiary hearing on this claim. *See Norman*, 817 F.3d at 235.

b. Trial Counsel's Failure to Object to the Trial Court's For-Cause Dismissal of a Particular Veniremember

Garcia argues that trial counsel was ineffective in failing to object to the trial court's grant of the State's for-cause challenge to veniremember David Chmurzynski. In his juror questionnaire, Chmurzynski indicated that he was "an 8 on a scale of 1 to 10" in favor of the death penalty and that he believed in "an eye for an eye." During individual voir dire, in response to the prosecutor's questions, Chmurzynski expressed his belief that the death penalty is appropriate only "in some cases" and that "taking a life is probably the ultimate crime or ultimate evil . . . [e]specially if it's done . . . maliciously and willfully."

The prosecutor subsequently explained to Chmurzynski that some people who support the death penalty are "not sure they can sit over here and do it." He told Chmurzynski about an actual execution that took place the previous week, during which the person being executed "gasped three times for air in the middle of a sentence." The following colloquy between the prosecutor and Chmurzynski ensued:

> [Q.] People come down and tell us, you know, that's maybe not a situation that's right for them. . . . That's why we ask the question. And I liken it to washing windows on a skyscraper. I know that

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raise these claims before the district court, and we therefore do not consider them. *See, e.g.*, *Jefferson Cmty. Health Care Ctrs., Inc.*, 849 F.3d at 626.

> needs to be done, but me, personally, you can't get me up there. That's just something that I can't do.
>
> A. Right.
>
> Q. Have you thought about that? Serving on a case like that to make that decision?
>
> A. I have.
>
> Q. And what are your thoughts about whether you can participate?
>
> A. I think it would be a difficult thing for me to do.
>
> Q. That's fair. . . . You are certainly entitled to that. And I ask because I don't think it would be fair to me to say to you, too bad, get over there, anyway. I don't think it would be fair to you.
>
> A. Right.
>
> Q. And that's why I ask and I certainly don't want to put you in a position where that would compromise yourself.
>
> A. Right.

Thereafter, the State challenged Chmurzynski for cause. Garcia's counsel responded, "The defense will remain silent," and the trial court granted the State's challenge. The trial court added, "For the record, the Court, sitting higher than the jurors, I have had an opportunity to view the jurors. This juror was extremely nervous. His hands were quivering. In response to the question whether or not he could assess the death penalty, his voice broke."

In his federal habeas application, Garcia contended that Chmurzynski was removed merely because he expressed reservations about the use of the death penalty and did not endorse its use in all cases, and he asserted that removal of a veniremember for these reasons is improper. Garcia claimed that trial counsel's failure to object to Chmurzynski's for-cause dismissal therefore constituted ineffective assistance. The district court granted the State's motion to deny an evidentiary hearing as to this claim because it found that Garcia had failed to properly allege that counsel's failure to object prejudiced his defense. On appeal, Garcia asserts that he was entitled to an evidentiary

hearing regarding this claim. He contends that had trial counsel objected to Chmurzynski's dismissal, the prosecutor's for-cause challenge would not have prevailed.

"[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980). Whether a juror is excludable under this standard is a question of fact. *See Ortiz v. Quarterman*, 504 F.3d 492, 501 (5th Cir. 2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

Here, the colloquy between the prosecutor and Chmurzynski called the veniremember's ability to perform his duties in an impartial manner into question. The trial court's observations regarding Chmurzynski's demeanor reinforced the suggestion of partiality and led the court to conclude that Chmurzynski could not perform his duties as a juror in accordance with the law in deciding whether to impose the death penalty. Garcia argues that Chmurzynski's demeanor during voir dire "was entirely reasonable and within the range of normal behavior" in light of the prosecutor's vivid description of an execution. He asserts that at an evidentiary hearing, he would be able to develop evidence of trial counsel's knowledge of facts and law relevant to counsel's failure to object.

However, in light of the transcript and the trial court's sua sponte clarification of the basis for its ruling, we are unpersuaded that there is a reasonable probability that the trial court would have ruled differently on the State's challenge had Garcia's counsel objected. *See Strickland*, 466 U.S. at 694. Nor are we persuaded that there is a reasonable probability that a reviewing court would have overruled the trial court's resolution of this factual

question had a challenge been preserved.[5] *See Witt*, 469 U.S. at 426 ("[D]eference must be paid to the trial judge who sees and hears the juror."). Because an evidentiary hearing would not have affected Garcia's failure to establish prejudice by counsel's alleged error, the district court did not abuse its discretion in denying an evidentiary hearing on this claim. *See Norman*, 817 F.3d at 235.

III. CONCLUSION

Garcia's attorneys from the Arizona Federal Public Defender's Office have done an admirable job of sifting through the record and seeking to raise the strongest challenges to Garcia's conviction and sentence, but we cannot consider many of these challenges, as they were not raised before the district court. For the forgoing reasons, we conclude that Garcia has not made a substantial showing of the denial of a constitutional right and therefore deny his application for a COA, and we find no abuse of discretion in the district court's denial of evidentiary hearings.

Certified as a true copy and issued as the mandate on Jul 21, 2017

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

[5] In his brief on appeal, Garcia states in passing that "defense counsel did not question Chmurzynski to rehabilitate him to alleviate the trial court's concerns." He does not, however, further develop this contention, and he does not explain its significance and support it with relevant authority. We therefore do not consider it. *See, e.g.*, *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 784 (5th Cir. 2017) (deeming a party's challenge forfeited for inadequate briefing).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH C. GARCIA, Petitioner,	§	
V.	§	Civil Action No. 3:06-CV-2185-M
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.	§	(Death Penalty Case)

MEMORANDUM OPINION AND ORDER
ON POST-JUDGMENT MOTIONS

Petitioner Joseph C. Garcia has filed a Motion under Federal Rules of Civil Procedure 52(b), 59(a), and 59(e), to enter additional or amended findings, grant a new trial, re-open the evidence, and vacate or alter the Court's judgment. (Mot., doc. 106.) Respondent William Stephens has responded in opposition. (Resp., doc. 114.) Garcia has replied to Respondent's opposition. (Reply, doc. 117.) The Court **GRANTS** the Motion under Rule 52(b), to correct a finding regarding one of the reasons for excluding a claim from the hearing of August 14, 2014. The remainder of Garcia's Motion is **DENIED**.

I

On November 13, 2007, Garcia filed his original petition for federal habeas relief. (Pet., doc. 15.) On that same date, he filed an agreed Motion to Stay and Abate these proceedings to allow for exhaustion of state-court remedies on certain claims. (Agreed Motion, doc. 16.) This was granted (Order, doc. 17), and the state court ultimately determined that these claims were barred by the Texas abuse-of-the-writ rule. *Ex parte Garcia,* No. WR-64,582-02, 2008 WL 650302 (Tex. Crim. App. 2008). Following the return of this case to this Court, the United States Magistrate Judge

recommended that relief be denied, finding that the claims presented in the subsequent state habeas proceeding were procedurally barred. (Rec., doc. 42, at 12-14, 18.) Following the Supreme Court's opinions in *Martinez v. Ryan,* ___ U.S. ____, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler,* ___ U.S. ____, 133 S. Ct. 1911 (2013), this Court granted a hearing on whether any of Garcia's claims would come within the exception to procedural bar created in *Martinez* (the "*Martinez* hearing"), and set certain deadlines, including a deadline to file proposed findings and conclusions. (Order, doc. 66.) Subsequently, the Court limited the claims and evidence to be considered as part of the *Martinez* hearing. (Order, doc. 74.)

Garcia seeks to have this Court vacate its judgment denying relief, enter additional findings, and give him an opportunity to present additional evidence. In support of this Motion, he makes many arguments already rejected by this Court, as well as new arguments along with requested findings different from what he presented before the entry of this Court's judgment. Garcia correctly points out that one reason listed by the Court for excluding a claim from the *Martinez* hearing and denying relief on that claim was incorrect and should be modified. Because none of the other arguments have merit, all of the other requests for relief are denied.

II

Rule 52(b) of the Federal Rules of Civil Procedure provides that a court "may amend its findings—or make additional findings—and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). The purpose of a Rule 52(b) motion "is to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence." *Fontenot v. Mesa Petroleum Co.,* 791 F.2d 1207, 1219 (5th Cir.1986); *Austin v. Stephens,* No. 4:04-CV-2387, 2013 WL 3456986, at *1 (S.D. Tex. July 8, 2013).

> This is not to say, however, that a motion to amend should be employed to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits. Except for motions to amend based on newly discovered evidence, the trial court is only required to amend its findings of fact based on evidence contained in the record. To do otherwise would defeat the compelling interest in the finality of litigation.

Fontenot, 791 F.2d at 1219-20 (citations omitted).

Rule 59(a) of the Federal Rules of Civil Procedures provides that a court may grant a motion for new trial "after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." This confers discretion upon the district court to grant a new trial "where it is necessary 'to prevent an injustice.'" *United States v. Flores,* 981 F.2d 231, 237 (5th Cir. 1993) (quoting *Delta Engineering Corp. v. Scott,* 322 F.2d 11, 15–16 (5th Cir.1963)).

> Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial. Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.

Sibley v. Lemaire, 184 F.3d 481, 487 (5th Cir. 1999) (quoting *Del Rio Distributing, Inc. v. Adolph Coors Co.,* 589 F.2d 176, 179 n.3 (5th Cir.1979), and Wright & Miller, Federal Practice & Procedure § 2803, at 31–33 (3d ed.1973)).

Rule 59(e) of the Federal Rules of Civil Procedure allows a court "to rectify its own mistakes in the period immediately following entry of judgment." *White v. New Hampshire Dept. of Employment Sec.,* 455 U.S. 445, 450 (1982). It allows reconsideration of a final judgment where a party shows a need to: (1) correct a clear error of law or prevent manifest injustice; (2) present newly discovered evidence; or (3) reflect an intervening change in controlling law. *See Schiller v. Physicians Res. Group, Inc.,* 342 F.3d 563, 567 (5th Cir. 2003); *In re Benjamin Moore & Co.*, 318

F.3d 626, 629 (5th Cir. 2002). Although district courts have discretion as to whether or not to reopen a case under Rule 59(e), that discretion is not unlimited. The Fifth Circuit has "identified two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts. The task for the district court is to strike the proper balance between these competing interests." *Templet v. HydroChem Inc.,* 367 F.3d 473, 479 (5th Cir. 2004) (citations omitted).

III

It is not entirely clear what Garcia relief requests in Section I of his Motion. He argues that this Court should vacate or amend any merits findings on any claims that were excluded from the *Martinez* hearing. (Mot. at 4.) This would appear to include three ineffective assistance of counsel claims (Mot. at 2), such as a claim that had been adjudicated on the merits by the state court. At the conclusion of this section, however, Garcia requests

> that the Court either (a) vacate its alternative "merits" holding on any claims which were deemed subject to the procedural bar, or (b) grant a new hearing at which Petitioner may present the evidence related to the merits of these claims, even if the merits are only decided as an "alternative" to the procedural holding.

(Mot. at 5.) Garcia further requests that this Court "clarify whether it intended to decide the merits of those claims that were excluded from the evidentiary hearing or otherwise held to be procedurally barred." (Mot. at 4.) The Court gives the broadest interpretation to this request, interpreting it to include all ineffective assistance of counsel claims, and as a request that the Court grant an evidentiary hearing on each claim, clarify, vacate and amend its findings.

The basis for Petitioner's request appears to be that the Court made alternative findings on the merits of claims that were excluded from the evidentiary hearing. Garcia complains that he

"relied" on the Court's order limiting the scope of the evidentiary hearing, but does not describe any action he took in reliance upon those limitations. In fact, his actions before the Court do not show reliance upon, but rather objections to, these limitations (doc. 72). Respondent's proposed findings included alternative findings and conclusions on the merits. (R's prop. FoF & CoL at 25, 34-35.) If Garcia had been relying upon the limitations in that prior Order, he should have made an objection about that before the Court's findings were made. In his reply, Garcia asserts that the "assurance" in the prior order obviated the need for him to amend or supplement his objections (doc. 117 at 6), but he has not identified any additional objections he withheld in alleged reliance on the Order. Further, Garcia's request misapprehends the basis for the evidentiary hearing that was granted.

In its Orders granting an evidentiary hearing and limiting the scope of such hearing, this Court specified "that it was not conducting a hearing on the merits of any habeas claim. Instead, the hearing was granted on a preliminary procedural matter." (Order, doc. 74, at 1.) That procedural matter was " the determination of whether the exception to procedural bar created in *Martinez* applies to these claims." (Order, doc. 74, at 2 (quoting Order, doc. 66, at 5).) Because that procedural matter included whether any of the ineffective assistance of trial counsel claims subject to procedural bar were "substantial" in that they had any merit, this Court received evidence on that element of the *Martinez* exception. Ultimately, the Court concluded, none of the claims were shown to come within the exception to bar.

To the extent that Garcia argues that he was entitled to an evidentiary hearing on all claims, he is mistaken. On his claim that trial counsel failed to object to the jury instructions on party conspiracy and inferred intent under state law, that claim was adjudicated on the merits by the state court and, thus, was not subject to the procedural bar at issue in the hearing. As the Supreme Court

has held, "evidence 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." *Cullen v. Pinholster,* ___ U.S. ____, 131 S. Ct. 1388, 1400 (2011). Therefore, the claim relating to those jury instructions was properly excluded from the evidentiary hearing, and this Court properly based its decision under § 2254(d) on the record that was before the state court.

On his claims that trial counsel failed to object to the excusal of a potential juror for cause and to a change in the jury selection procedure, this Court noted that it:

> [G]ranted the Respondent's motion to exclude this claim from the *Martinez* hearing in light of the record indicating that this venireperson expressed difficulties that would prevent or substantially impair his performance as a juror, and the absence of any specific factual allegations that a biased juror actually served on this jury, that an objection would have prevailed, or that an objection would have preserved a potentially meritorious claim for appeal. (Order Limiting Hearing, doc. 74, at 4-5.)

(Mem. Op., doc. 103, at 10.) The Court finds that one of the four reasons listed in this Court's opinion as a basis for excluding that claim from the *Martinez* hearing is incorrect. Garcia was not required to prove that a biased juror actually served on the jury in order to present a *Witherspoon* error. Thus, that finding is modified to excise that reason from the Court's Opinion. Garcia has not shown to be incorrect the remaining stated reasons for the Court not allowing Garcia to present evidence on this subject at the *Martinez* hearing, however, and they require that relief be denied on the claim. Therefore, Garcia was not, and still is not, entitled to an evidentiary hearing on such claims.

To the extent Garcia contends that alternative findings are improper, he is mistaken. Alternative findings allow a reviewing court to resolve claims, when appropriate, in the event that

the primary basis for the original disposition is found incorrect on appeal. Such an approach can avoid the waste of time and judicial resources that may result from a remand that is required when no such alternative findings are made. The United States Court of Appeals for the Fifth Circuit has explained that "alternative findings can often be helpful as they can obviate the need for a remand for further fact finding when the evidentiary basis for a fact is found to be insufficient on appeal." *Palombo v. Cameron Offshore Boats, Inc.,* 108 F.3d 332 (5th Cir. 1997). This is particularly important in death penalty cases where proceedings are often long and complex. Because other valid reasons existed for excluding the "biased juror" claim from the hearing, and no valid reason is presented for invalidating the Court's alternative findings, Petitioner's request to invalidate the alternative findings is **DENIED**.

IV

In Section II of his Motion, Garcia requests that the Court make additional findings regarding his record claims, acknowledging that his position is foreclosed by Circuit precedent and is raised solely to preserve his position for appellate review. (Mot. at 5.) Respondent argues that Garcia could have, but did not, make these requests before this Court entered its judgment. (Resp. at 12-14.)

Garcia requests additional findings on three matters: a jury note, the use of "probability" in the special issues, and the lack of an anti-parties charge. Regarding the first two matters, Garcia does not identify, and this Court has not found, any briefing before this Court raising such matters prior to judgment, nor does he explain why such matters could not have been raised earlier.

Regarding the lack of an anti-parties charge, this issue was specifically explored in the evidentiary hearing before this Court. Garcia was invited to present evidence and authority

establishing that he would have been entitled to an anti-parties charge if he had requested it, but no such evidence or authority was provided. (Mem. Op. at 17.) Instead, the evidence was that Garcia would not have been entitled to a separate anti-parties charge in addition to the special issues that were given to the jury. (Tr. 45-4 7, 70-71, 130-31, 141.) The Court pressed Garcia's counsel at the hearing about this subject and the argument asserted by Petitioner was not that state law required an anti-parties charge, but that prior counsel should have nevertheless pressed for it to try to change the law.

> COUNSEL: I think the issue boils down to, Your Honor, Special [Issue] Number 2 exists, and everyone knows that. And our issue is, you know, why -- why would they not preserve something via an objection in the hopes of changing -- trying to change the case law on that.
>
> * * *
>
> THE COURT: It's all speculation about whether the trial court would have done something different from the law at the time, isn't it?
>
> COUNSEL: I understand what you're saying. I do not have additional case law to offer you.

(Tr. at 152-53.)

Further, Petitioner's newly proposed finding differs from the proposed findings he submitted on this issue before this Court's judgment. This Court previously found that in his proposed findings of fact and conclusions of law, "Garcia concurred in the twenty-fifth of Respondent's proposed findings, that 'Trial counsel testified that they did not request any further 'anti-parties' charge because Garcia was not entitled to any further charge.'" (Mem. Op. at 17 n.7 (quoting R's FoF at 11; P's FoF at 5).)

The additional findings proposed in Section II of Garcia's Motion differ from, and appear in fact to partially contradict, Garcia's briefing, evidence, statements and findings proposed prior to the entry of judgment. Garcia has not shown that the additional findings are needed to correct manifest errors of law or fact nor that they are otherwise appropriate in light of the record before this Court. Therefore, the request for additional findings is **DENIED**.

V

In Section III of his Motion, Garcia complains that this Court improperly excluded his claims of ineffective assistance of appellate counsel from those considered at the *Martinez* hearing. He argues that this exclusion was based on a "dubious" procedural conclusion that the *Martinez* exception does not apply to claims of ineffective assistance of appellate counsel. (Mot. at 9.) He requests that this Court reconsider that procedural ruling and reopen the evidence to allow him to develop further evidence regarding his claims of ineffective assistance of appellate counsel. "In the alternative, he asks that the Court either (a) vacate any merits finding as to the [ineffective assistance of appellate counsel] claims or (b) re-open the evidentiary hearing (or grant Petitioner a new evidentiary hearing) to present evidence on these claims, which will ensure that even an alternative merits ruling is based on a full evidentiary record." (Mot. at 10.) Garcia also asks the Court to enter additional findings and conclusions on the *Martinez* exception to procedural bar (Mot. at 11-12) and on the performance of counsel in his direct appeal. (Mot. at 15-16.)

Respondent argues that binding Fifth Circuit precedent holds that the *Martinez* exception does not apply to claims of ineffective assistance of appellate counsel. (Resp. at 14 (citing *Reed v. Stephens,* 739 F.3d 753, 778 n.16 (5th Cir. 2014)).) Therefore, he argues that this Court's conclusions were correct and that Garcia is not entitled to any additional or amended findings or an

evidentiary hearing on the issue. (Resp. at 14-15.) Respondent is correct. (Mem. Op. at 22.) Therefore, Petitioner's request to reconsider this procedural ruling and grant an evidentiary hearing on a claim of ineffective assistance of appellate counsel is **DENIED**.

VI

In Section IV of his Motion, Garcia requests that this Court enter findings, or alternate findings, that the performance of his state habeas counsel was deficient. (Mot. at 16-19.) He argues that this Court rejected the exception to procedural bar created in *Martinez* "for reasons completely independent of state-writ counsel's performance." (Mot. at 17.) Respondent counters that Garcia is not entitled to relief on his claim that state habeas counsel was ineffective (Resp. at 15), and asserted this Court's holding "that Garcia failed to establish cause and prejudice for the default of his IATC claims is based on its finding that state habeas counsel's performance could not have been deficient because Garcia has not identified any substantial IATC claim that was not raised in his state habeas application." (Resp. at 16 (citing Mem. Op. at 10, 11, 15, 17, and 22).) Again, Respondent is correct.

In *Martinez,* the Supreme Court did not find that ***any*** arguable deficiency by state habeas counsel would be sufficient to excuse a procedural bar. Instead, it required that, to be relevant under *Martinez,* the deficiency must have prevented the exhaustion of a claim that had some merit. "To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez,* 132 S. Ct. at 1318. The failure to raise a meritless claim is not deficient. *See Clark v. Collins,* 19 F.3d 959, 966 (5th Cir. 1994) (" Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."); *Garza v. Stephens,*

738 F.3d 669, 676 (5th Cir. 2013) cert. denied, ___ U.S. ____, 134 S. Ct. 2876 (2014) (agreeing with the district court that "there was no merit to Garza's claim and that therefore habeas counsel was not ineffective in failing to raise the claim at the first state proceeding."). Because Garcia has not presented a substantial claim of ineffective assistance of trial counsel that state habeas counsel did not present to the state court, state habeas counsel's performance could not have been ineffective for failing to assert such a claim under the standard of *Strickland v. Washington,* 466 U.S. 668 (1984). *See Martinez,* ___ U.S. ____, 132 S.Ct. at 1318 (applying the *Strickland* standard to the review of state habeas counsel's conduct).

Because the requested findings would not correct a manifest error of law or fact, prevent any injustice, or rectify any mistake, Petitioner's request is **DENIED**.

VII

In Section V of his Motion, Garcia requests that this Court vacate its findings and enter new findings on his claims that trial counsel was ineffective for failing to object to the exclusion of venireperson Chmurzynski, and that appellate counsel was ineffective for failing to raise the same issue on appeal. (Mot. at 19-28.) Specifically, Garcia requests that the Court

> clarify (or otherwise specify) that the findings do not result from a conclusion that: (a) Petitioner has failed to show that his trial counsel lacked a reasonable strategic motive, (see R&R at 20, n.7), or (b) that the venireperson's demeanor reflected an inability or impairment in discharging his duties as a juror.

(Mot. at 19.) Garcia then requests that amended or additional findings be made and renews his request for a hearing. (Mot. at 19-21.)

As this Court has previously observed, the record is sufficient to resolve this claim. At trial, Chmurzynski voiced some support for the death penalty, but when asked whether he could

participate as a juror in making a decision that would result in the imposition of a death penalty, he wavered. He answered, "I think it would be a difficult thing for me to do." (13 RR 248.) Outside of Chmurzynski's presence, the trial court asked counsel whether there were any challenges.

PROSECUTOR: We would challenge, Judge, based on his answer .

THE COURT: It will be granted.

DEFENSE COUNSEL: The defense will remain silent.

THE COURT: You may. It will be granted.

(13 RR 249.) Having witnessed the venireperson's testimony, Garcia's counsel made a decision to say nothing.

The trial court then brought the venireperson back in and discharged him. Later, the trial court made the following findings:

> THE COURT: For the record, the Court, sitting higher than the jurors, I have had an opportunity to view the jurors. This juror was extremely nervous. His hands were quivering. In response to the question whether or not he could assess the death penalty, his voice broke.

(13 RR 249.) Upon this record, the Magistrate Judge alternatively found that the venireperson was excused not because of conscientious scruples against the death penalty but because his "personal difficulty would prevent or substantially impair the performance of his duties as a juror." (Rec. at 20.) This Court agreed. Garcia had not shown that trial counsel's performance in connection with the juror was deficient or that an objection would have prevailed or even preserved a potentially meritorious claim for appeal. (Mem. Op. at 10 (citing Order Limiting Hearing at 4-5).)

Garcia argues that an additional reason this Court listed in its Memorandum Opinion for excluding this claim from the hearing was inadequate.

> As to prejudice: Mr. Garcia respectfully submits that the law does not support the Court's conclusion that he must show a biased juror served on the jury in order to show prejudice. This Court cited two Fifth Circuit cases for this proposition: *Teague v. Scott,* 60 F.3d 1167 (5th Cir. 1995); *Clark v. Collins,* 19 F.3d 959 (5th Cir. 1994). But both of these authorities deal with trial counsel's ineffective failure to remove biased jurors from the pool. *See Teague,* 60 F.3d at 1172–1173; *Clark,* 19 F.3d at 965. The cases do not address trial counsel's ineffective failure to protect jurors from erroneous challenges for cause under *Witherspoon [v. Illinois,* 391 U.S. 510, 513 (1968)].

(Mot. at 26.) Garcia is partially correct. While the Court properly set forth the requirement that Garcia show both deficient performance and prejudice, the Court's reliance upon *Teague* and *Clark* in its Order Limiting the Hearing was misplaced. Although Garcia did not object to the Court's reliance on *Teague* and *Clark* prior to judgment, in the interest of justice the Court concludes it should excise from its opinion that reason for excluding this claim from the *Martinez* hearing and denying the claim on the merits. The record is sufficient to show that the claim lacks merit.

This Court's review of the trial counsel's performance "is 'highly deferential' and this Court must apply a strong presumption that counsel's performance was reasonable or 'might be considered sound trial strategy.'" *United States v. Juarez,* 672 F.3d 381, 386 (5th Cir. 2012) (quoting *Strickland,* 466 U.S. at 689). Even if trial counsel's strategy was not clearly established, this Court need not determine the strategy as to why trial counsel did not make a meritless objection. Because Garcia has not shown that his objection would have prevailed or preserved a potentially meritorious claim for appeal, this argument is rejected.

VIII

In Section VI of his Motion, Garcia again complains of this Court's ruling that his ineffective assistance of appellate counsel claim was procedurally barred and, in the alternative, lacked merit. Counsel presents no authority to counter the binding circuit precedent that the exception to

procedural bar created in *Martinez* does not apply to claims that counsel on direct appeal was ineffective. There is no basis for this Court to have received evidence on such a claim in the *Martinez* hearing without violating the limitations set out in § 2254(e)(2).

Further, Garcia presents a new version of this claim, arguing that appellate counsel was ineffective for failing to raise the denial of suppression of evidence on the basis of rulings that the trial court made ***in a prior case***, a separate trial of one of Garcia's co-actors "when neither he nor his attorneys were present." (Mot. at 31.) This rationale for the claim was not presented in Garcia's original petition, amended petition, or objections to the recommendation of the Magistrate Judge. Garcia has provided no reason why this assertion is being raised late and could not have been raised prior to judgment. The policy interest in finality wis not served by allowing a party to reopen on this basis. *See Fontenot,* 791 F.2d at 1219-20.

Because Garcia has not identified any newly discovered evidence, intervening law or injustice flowing from this Court's consideration of the issue or any position that this Court's prior ruling on this claim was legally incorrect, this request is denied.

IX

In Section VII of his Motion, Garcia complains of this Court's determination that his ineffective assistance of trial counsel claim was not substantial. Specifically, Garcia asks the court to amend its findings on the claim regarding trial counsel allegedly being ineffective for failing to investigate and present mitigating evidence at his trial, or grant a new trial because he disagrees with with the Court's findings and claims trial counsel testified falsely at the *Martinez* hearing. (Mot. at 32-39.)

Garcia complains of this Court's finding that the qualifications of the experts whom trial counsel obtained to assist in the mitigation investigation and evaluation favorably compared to those upon whom Garcia now relies. (Mot. at 33.) In support of his motion to vacate this finding and add additional findings, Garcia asserts the existence of a disagreement between experts. (Mot. at 33-35.) Such a disagreement between experts does not demonstrate a violation of *Strickland*. *See, e.g., Fairbank v. Ayers,* 650 F.3d 1243, 1252 (9th Cir. 2011).).

Garcia alleges that trial counsel testified falsely at the *Martinez* hearing about the use of mitigation specialists, but at the *Martinez* hearing does not explain why Petitioner did not cross examine trial counsel about that subject or prove the point at the hearing. (Tr. at 69.) Further, even if mitigation specialists were being used differently at the time of the *Martinez* hearing, Garcia has not shown that the mitigation experts relied upon by trial counsel missed information or evidence that would have made a difference at trial. It is undisputed that Garcia did not reveal the most significant information about mitigation to his attorneys or experts at trial. (Mem. Op. at 19-20.) Garcia complains about the process that trial counsel utilized to investigate and present mitigating evidence, but does not show how any missed evidence could have been presented to the jury.

In sum, Garcia has not shown either deficient performance or prejudice, and both are required under *Strickland*. This request is nothing more than an attempt to redo the evidentiary hearing based on new tardy arguments that fail to establish the claim has merit.

CONCLUSION

That portion of Garcia's Motion under Federal Rules of Civil Procedure 52(b) requesting that as to Garcia's claim that trial counsel was ineffective for failing to object to the excusal of Chmurzynski for cause, because Garcia had not shown "that a biased juror actually served on this

jury" (doc. 103 at 10) is **MODIFIED** to excise that reason from the reasons given in the Memorandum Opinion and Order. For the reasons described, the remainder of Garcia's motion under Federal Rules of Civil Procedure 52(b), 59(a), and 59(e) is **DENIED**.

SO ORDERED.

Date: October 29, 2015.

BARBARA M. G. LYNN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH C. GARCIA, Petitioner,	§ §	
V.	§ §	Civil Action No. 3:06-CV-2185-M
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice Correctional Institutions Division, Respondent.	§ § § §	(Death Penalty Case)

MEMORANDUM OPINION AND ORDER
ACCEPTING AND MODIFYING FINDINGS, CONCLUSIONS, AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE, AND
DENYING A CERTIFICATE OF APPEALABILITY

Petitioner Joseph C. Garcia ("Petitioner" and "Garcia") has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. (Pet., doc. 15; Am. Pet., doc. 20.) Respondent William Stephens has answered in opposition. (Ans., doc. 34.) In his Findings, Conclusions and Recommendation to deny relief ("Recommendation," doc. 42), the United States Magistrate Judge commented that, though finding that Garcia had failed to prove certain claims, Garcia may not have been afforded an opportunity to compel production of the evidence that was needed. (Rec. at 22-23, 25-26.) Garcia made objections ("Objections," doc. 45) to the Recommendation and requested that this Court delay these proceedings to consider Supreme Court cases that ultimately created a new exception to procedural bar. This Court granted Garcia the opportunity to prove that any of his claims came within the new exception, but he has not made the required showing. Therefore, following this Court's *de novo* review of those portions of the Recommendation to which objection was made, the Court **OVERRULES** Garcia's objections, **ACCEPTS** the Recommendation as modified by this Order, and **DENIES** Garcia's application for a writ of habeas corpus.

I

Garcia is a Texas inmate convicted of capital murder and sentenced to death for the murder of police officer Aubrey Hawkins during the robbery of a sporting-goods store on Christmas Eve of 2000 with six others who escaped from a Texas prison.[1] In accordance with the jury's answers to the special issues, Garcia was sentenced to death on February 13, 2003. *State v. Garcia,* No. F01-00325-T (283rd Dist. Ct., Dallas County, Texas). Garcia's conviction and sentence were affirmed on direct appeal. *Garcia v. State*, No. AP-74,692, 2005 WL 395433 (Tex. Crim. App. Feb. 6, 2005). While his direct appeal was pending, Garcia filed an application for habeas-corpus relief in the state trial court on December 14, 2004. (Vol. 1, State Habeas Record ("SHR"), at 2.) The state trial court issued its findings of fact and conclusions of law on February 15, 2006, recommending that habeas relief be denied. (2 SHR 358-482.) Those findings were adopted by the Texas Court of Criminal Appeals ("CCA") on November 15, 2006. *Ex parte Garcia*, WR-64,582-01, 2006 WL 3308744.

On November 13, 2007 (Pet., doc. 15), after federal habeas counsel was appointed, Garcia filed a petition for habeas relief, along with an agreed motion to abate these proceedings to allow him to return to state court to exhaust certain claims (Mot., doc. 16). The motion was granted and these proceedings were abated from December 4, 2007 (Order, doc. 17), until April 2, 2008, when Garcia filed a motion to reopen (doc. 18) with his Amended Petition (Am. Pet., doc. 20). These proceedings were then reopened (Order, doc. 25) and referred to the United States Magistrate Judge, who made his Recommendation to deny relief on November 1, 2011. (Rec., doc. 42.) After an extension was granted, Garcia filed his objections (Obj., doc. 45) to the Recommendation.

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[1]These details are agreed upon by the parties. Garcia concurred in the first two of Respondent's proposed findings of fact ("R's FoF," doc. 93, at 7) and included more detail. (Garcia's proposed Findings of Fact, "P's FoF," doc. 95, at 3.)

Following the Supreme Court's opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), creating a new exception to procedural bar, these proceedings were suspended until the Supreme Court's decision in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which applied the *Martinez* exception to Texas cases. This Court then conducted an evidentiary hearing to allow Garcia to prove that any of his potentially eligible claims would come within the newly created exception to procedural bar. Based on the supplemental briefing by the parties, and the evidence and arguments presented at the hearing, the Court finds that Garcia has not shown that any of his claims come within the exception to procedural bar created in *Martinez*.

II

In his amended petition for federal habeas corpus relief, Garcia presents seven grounds for relief, some of which include multiple claims. The first four grounds for relief are based solely on the record and include complaints that (1) the mitigation special issue failed to place the burden of proof on the prosecutor, (2) the terms used in the special issues are unconstitutionally vague, (3) the requirement that ten jurors agree in order to answer the mitigation special issue "no" violates due process, and (4) the failure of the CCA to engage in a proportionality review violated due process. In his fifth ground for relief, Garcia complains that he was deprived of the constitutionally guaranteed effective assistance of counsel at trial in failing to:

(1) object to the prosecutor's challenge of a qualified juror for cause,

(2) object to a change in jury selection procedure that favored the prosecution,

(3) object to the prosecutor's argument that the verdict on guilt need not be unanimous,

(4) object to the prosecutor's mischaracterization of evidence at closing,

(5) request an anti-parties charge in punishment,

(6) object to improper party conspiracy and inferred intent instructions at the guilt/innocence phase, and

(7) properly investigate and present certain mitigating evidence.

(Am. Pet. at 40-83.) In his sixth ground for relief, Garcia complains that appellate counsel was ineffective in failing to:

(1) raise the trial court's improper exclusion of a qualified juror,

(2) complain that jury selection was conducted in violation of a Texas statute,

(3) properly brief an issue regarding extraneous offense evidence,

(4) complain of improper jury instructions regarding intent at guilt/innocence phase,

(5) raise as error the prosecutor's mischaracterization of evidence at closing, and

(6) raise the denial of a motion to suppress evidence obtained with invalid warrants.

(Am. Pet. at 83-115.) In his final ground for relief, Garcia complains that his state habeas counsel was ineffective for failing to raise the deficiencies of trial and appellate counsel in the state habeas proceeding. (Am. Pet. at 116-127.) This was presented as an independent claim for relief, but is also argued to avoid a procedural bar to other claims.

In his objections to the Recommendation of the Magistrate Judge, Garcia briefly reasserted the record claims in the first group to preserve them for appeal (Obj. at 13-14), but emphasized that the ineffective assistance of state habeas counsel should excuse any procedural bar to his claims of ineffective assistance of trial and appellate counsel, arguing that these proceedings should be stayed until the Supreme Court decided *Martinez v. Ryan*. (Obj. at 1-13.) These allegations were subsequently considered by this Court in determining whether any of his claims of ineffective

assistance of trial counsel could fall within the exception to procedural bar created in *Martinez*. Each of Garcia's objections are considered in this *de novo* review of his claims.

III

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*, 131 S. Ct. 770, 787 (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).

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). 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.2000) ("Review is *de novo* when there has been no clear adjudication on the merits.") (citing *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997)); *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 v. Cain*, 609 F.3d 774, 794 (5th Cir. 2010) (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 § 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*, 131 S. Ct. at 784. "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*, 131 S. Ct. 1388, 1398 (2011) (internal citations omitted) (quoting *Richter*, 131 S. Ct. at 786, 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 v. Taylor*, 529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 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 (Apr. 23, 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*, 131 S. Ct. at 1400. 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."

IV

A. Record Claims

In the first four grounds for relief in his Amended Petition for federal habeas corpus relief, Garcia presents claims based on the record before the state court. Three of these claims attack the trial court's instructions to the jury in the punishment phase of his trial. In his first ground for relief, Garcia complains that the mitigation special issue failed to place the burden of proof on the state. (Am. Pet. at 24-28.) In his second ground for relief, Garcia complains that the terms used in the special issues are unconstitutionally vague. (Am. Pet. at 28-33.) In his third ground for relief, Garcia complains that the requirement that ten jurors agree in order to answer the mitigation special issue "no" violates due process. (Am. Pet. at 33-37.) In his fourth ground for relief, Garcia contends that the failure of the CCA to engage in a proportionality review violated due process. (Am. Pet. at 38-40.) The Magistrate Judge found, and Garcia concedes, that these claims are foreclosed by Fifth Circuit precedent. (Rec. at 7-8; Obj. at 13-14.) The Court agrees and **ACCEPTS** the Recommendation as to these claims. Garcia's first four grounds for relief are **DENIED** for lack of merit.

B. Ineffective Assistance of Constitutionally Guaranteed Counsel

In his fifth and sixth grounds for relief, Garcia complains that he was deprived of the constitutionally guaranteed effective assistance of counsel at his trial and in his direct appeal. The Recommendation correctly set forth the two-prong standard under *Strickland v. Washington,* 466

U.S. 668 (1984), for analysis of a claim of ineffective assistance of counsel. (Rec. at 14-15.) The Magistrate Judge found that one of these claims had been denied on the merits by the state court, and recommended that this claim be denied. (Rec. at 14-18.) The Magistrate Judge also found that the remaining claims in this group were procedurally barred and, because the procedural bar was not clearly asserted, followed the procedure for raising the procedural bar *sua sponte*. (Rec. at 12-14.)

1. Complaints Against Trial Counsel

Garcia's fifth ground for relief asserts that his trial counsel provided ineffective assistance. After the Recommendation was made, the Supreme Court created an equitable exception to procedural bar in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), for substantial claims of ineffective assistance of trial counsel that were not presented to the state court due to the ineffective assistance of state habeas counsel. In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Supreme Court applied this new exception to Texas cases. Following these opinions, the Court scheduled an evidentiary hearing (the "*Martinez* hearing") to afford Garcia an opportunity to prove that any of his claims that trial counsel was ineffective would come within the new exception to bar.

At the hearing, it was established that Garcia was represented at trial by three qualified attorneys, two of whom had extensive experience in capital and death penalty litigation, and who were assisted by a highly qualified investigator.[2] Garcia was represented in his state habeas proceedings by an attorney with ample experience in prior death penalty cases, and who filed on Garcia's behalf a 125-page application for habeas relief with 46 claims for relief, including claims

[2]Garcia concurred in the fourth through seventh, and almost all of the ninth, of Respondent's proposed findings of fact that confirmed these details. (R's FoF at 8; P's FoF at 3.)

of ineffective assistance of trial counsel.[3] Based on the record before this Court and evidence presented at the hearing, the Court finds that none of Garcia's claims come within the exception to procedural bar created in *Martinez*.

a. Failure to Object to Excusal of Venireperson

Garcia complains that trial counsel were ineffective for failing to object to the prosecutor's challenge of potential juror David Chmurzynski for cause. (Am. Pet. at 43-52.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 § 5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that Garcia had not shown that counsels' performance was deficient or that an objection would have prevailed. (Rec. at 18-21.) This Court granted the Respondent's motion to exclude this claim from the *Martinez* hearing in light of the record indicating that this venireperson expressed difficulties that would prevent or substantially impair his performance as a juror, and the absence of any specific factual allegations that a biased juror actually served on this jury, that an objection would have prevailed, or that an objection would have preserved a potentially meritorious claim for appeal. (Order Limiting Hearing, doc. 74, at 4-5.) Because the allegations of this claim could not support relief, it has no merit and is not "substantial" under *Martinez*. 132 S. Ct. at 1318. Because the claim lacks merit, state habeas counsel could not have been ineffective for failing to raise 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

[3]Garcia concurred in the eighth through twelfth of Respondent's proposed findings of fact that confirmed these details, except for changing the word "trials" to "cases." (R's FoF at 8-9; P's FoF at 3-4.)

petitioner's] claim"); *Beatty v. Stephens*, 759 F.3d 455, 466 (5th Cir. 2014). Therefore, neither of the elements of *Martinez* could be satisfied, and the Recommendation to dismiss it is accepted, as modified by this Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

b. Failure to Object to Change in Jury Selection Procedures

Garcia complains that trial counsel was ineffective for failing to object to a change in the jury selection procedures that favored only the prosecution. (Am. Pet at 52-61.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that trial counsel agreed to this change and that Garcia had not overcome the presumption of reasonable trial strategy. (Rec. at 21-22.) This Court granted the Respondent's motion to exclude this claim from the *Martinez* hearing because it did not allege prejudice in that a biased venire member served on the jury but, as with the prior claim, makes conclusory assertions that are incapable of constituting prejudice under *Strickland.* (Order Limiting Hearing at 5-6.) Because the allegations of this claim could not support relief, it is not substantial under *Martinez,* 132 S. Ct. at 1318, and state habeas counsel could not have been ineffective for failing to raise it. *See Garza,* 738 F.3d at 676. Therefore, neither of the elements of *Martinez* could be satisfied, and the Recommendation to dismiss it is accepted, as modified by this Order and the Order Limiting Hearing. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

c. Failure to Object to Prosecutor's Misstatement of Law

Garcia complains that trial counsel was ineffective for failing to object to the prosecutor's closing argument in the guilt/innocence stage that the jurors did not need to agree on the indicted theory of capital murder in order to find Garcia guilty.[4] (Am. Pet. at 61-66.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that this decision not to object to closing argument was a matter of trial strategy that was not shown to be deficient. (Rec. at 22.) The Court granted Garcia the opportunity at the *Martinez* hearing to prove this claim, but he did not show that the prosecutor's argument misstated the law and that an objection would have prevailed.

State habeas counsel did not assert an ineffective-assistance-of-trial-counsel claim, but raised similar complaints against the lack of unanimity required by the jury charge (1 SHR 63-78; Tr. at 125-26), which were denied by the state court as procedurally barred and, alternatively, as lacking merit. (2 SHR 391-410.) The state court determined that Garcia's jury charge did not permit a non-unanimous verdict, but that Garcia was charged and convicted of committing only one crime under state law–the capital murder of Aubrey Hawkins–even though different theories were provided for the jury regarding how that crime was committed. (2 SHR 392-97.) The state court noted that, under its precedent, "when an indictment charges different theories under which a defendant committed a single capital murder, the jury need not agree on which theory has been proven." (2 SHR 395 (citing *Kitchens v. State,* 823 S.W.2d 256, 258 (Tex. Crim. App. 1991).) This precedent

[4]Garcia concurred in the nineteenth through twenty-first of Respondent's proposed findings of fact that confirmed the pertinent jury instructions and prosecutor's argument. (R's FoF at 10; P's FoF at 4.)

followed *Schad v. Arizona,* 501 U.S. 624, 630-31 (1991), in which the Supreme Court upheld a conviction based on a general verdict that did not require the jury to agree on whether the defendant had committed premeditated murder or felony murder because Arizona characterized first-degree murder "as a single crime as to which a verdict need not be limited to any one statutory alternative."

In the same way, Texas jury instructions charging alternate means of committing capital murder in the same application paragraph merely set forth differing methods of committing the same offense. "It is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted." *Kitchens,* 823 S.W.2d at 258.

Respondent argues that this matter of state law has been determined adversely to Garcia and is binding on the federal court. (Tr. at 163; R's FoF at 29.) This Court agrees. Federal courts in habeas proceedings do not sit in review of a state court's determination of its own laws. *See Bradshaw v. Richey,* 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). Further, a counsel's failure to object to a matter of state law that has been determined adversely to the petitioner by the state court cannot support an ineffective assistance of counsel claim in federal court. *See Paredes v. Quarterman,* 574 F.3d 281, 291 (5th Cir. 2009).

In his petition, Garcia argued that the opinion in *United States v. Holley,* 942 F.2d 916 (5th Cir. 1991), supports his position. (Am. Pet. at 64 n.177.) *Holley* is distinguishable in that it addressed whether a federal jury instruction required unanimity and was not addressing whether a

state may permissibly determine that its law provides multiple ways of committing a single offense. Even so, Garcia has not made the showing that would be necessary to prevail under *Holley*.

Holley was charged with multiple false statements and, to secure a conviction on the various themes, the government was required to prove different facts to show the knowing falsity of each statement. The United States Court of Appeals for the Fifth Circuit noted the rule in support of a general verdict when numerous factual bases for criminal liability are alleged, but held that this rule failed where "there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts." *Id.* at 926. The Court of Appeals later observed, in an unpublished opinion, that a "unanimity-of-theory instruction is a constitutional right only when 'evidence to the contrary' undermines the expectation that a general unanimity instruction suffices," and that a "habeas petitioner claiming ineffective assistance of counsel, therefore, must allege more than a duplicitous indictment. He must identify facts and circumstances that raise 'a genuine risk' of juror confusion." *United States v. Tucker,* 434 F. App'x 355, 360 (5th Cir. 2011). Garcia has not attempted to do so, despite the opportunities afforded in these proceedings.

At the evidentiary hearing, trial and state habeas counsel testified that the prosecutor's closing argument was entirely consistent with state law.[5] (Tr. at 22-23, 32-33, 69-70, 124- 28.) Garcia's examination did not attempt to impeach that position, or suggest any risk of juror confusion, but focused on whether counsel should have made objections that the law does not yet require, in order to promote a change in the law on appeal. (Tr. at 24-25, 33-35.) During the evidentiary

[5]Garcia concurred in the twenty-second of Respondent's proposed findings that "Garcia's trial counsel testified that they did not object to the prosecutor's closing argument because it was a correct statement of the law." (R's FoF at 10; P's FoF at 4.)

hearing, the Court specifically asked Garcia's counsel how the failure to object to the prosecutor's argument could be ineffective assistance under *Strickland* if it was not in conflict with state law, and counsel responded, "I would just reurge what we've briefed on the issue. I don't have anything to add to it." (Tr. at 151.) Even if *Holley* were to apply to this matter of state law, Garcia has not shown a genuine risk of juror confusion on the issue that mandates constitutional remediation.

Garcia has not shown that the law at the time actually required or even supported the objection, but argues that an assiduous attorney would have attempted to change the law through an objection. Garcia has not shown that his ineffective assistance claim is substantial under *Martinez.* "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins,* 19 F.3d 959, 966 (5th Cir. 1994). Further, state habeas counsel would not have been ineffective for failing to raise a meritless claim in the state habeas proceedings. *See Garza,* 738 F.3d at 676. Neither of the elements of *Martinez* are satisfied and the Recommendation is thus accepted, as modified by this Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

d. Failure to Object to Prosecutor's Misstatement of Evidence

In his petition, Garcia complained that trial counsel was ineffective for failing to object to the prosecutor's statement that Garcia had threatened to kill, contending it was a mischaracterization of the testimony. (Am. Pet at 66-68.) The Magistrate Judge found that this claim had been dismissed by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge found that the decision to not object to closing argument was a matter of trial strategy that was not shown to be deficient. (Rec. at 22.)

At the *Martinez* hearing, Garcia withdrew this claim. Counsel explained that, in reviewing the claim in preparation for the hearing, they determined that the prosecutor's argument "was not a misstatement of the testimony." (Tr. at 3-4.) Because it is withdrawn, the Court will dismiss the claim; in the alternative, the Recommendation is accepted, as modified by this Order. This claim is **DISMISSED** as withdrawn, and alternatively as procedurally barred, or **DENIED** for lack of merit.

e. Failure to Request an Anti-Parties Charge

Garcia complains that trial counsel was ineffective for failing to object to the lack of an anti-parties instruction to the jury in the punishment stage of his trial. (Am. Pet. at 68-71.) He argues that he would have been entitled to such an instruction if he had requested it, that the jury consider only his individual moral culpability in determining punishment, because he had been found guilty under instructions that allowed for criminal liability as a party. (Am. Pet. at 68-69.) The Magistrate Judge found that this claim had been denied by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge considered the language of Special Issue No. 2,[6] and noted Circuit precedent that the Texas special issues focused the jury on

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[6]Garcia concurred in the twenty-third of Respondent's proposed finding that "Garcia's jury received the following charge at the punishment phase of trial:

> Special Issue No. 2
> Do you find from the evidence beyond a reasonable doubt that the defendant, JOSEPH C. GARCIA, actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased but intended to kill the deceased or anticipated that a human life would be taken?

(R's FoF at 11; P's FoF at 5.)

the individual conduct of the defendant and that this structure made a separate anti-parties charge unnecessary. (Rec. at 22-23 (citing *Westley v. Johnson,* 83 F.3d 714, 723 (5th Cir. 1996)).)

The Court granted Garcia the opportunity at the *Martinez* hearing to prove this claim, but no factual or legal basis was presented at the hearing for requiring that the jury instructions include a separate anti-parties charge in addition to the special issues that were given. Trial and state habeas counsel testified that the existing law did not require any such separate instruction.[7] (Tr. 45-47, 70-71, 130-31, 141.) Garcia's examination of counsel did not attempt to impeach this position, but focused on the need to make an objection to promote a change in existing law. (Tr. at 47-48, 75-76, 142-43.) During the evidentiary hearing, Garcia's counsel was specifically asked whether there was anything to suggest than an objection to the lack of a separate anti-parties instruction would have been proper, but no other support was provided. (Tr. at 151-52.) Garcia's counsel acknowledged Special Issue No. 2, and stated that Garcia's issue is "why would they not preserve something via an objection in the hopes of . . . trying to change the case law on that." (Tr. at 152.)

It does not appear to be disputed that the law as it existed did not require or support the objection. The failure to make a meritless objection is not ineffective assistance of counsel. *See Clark,* 19 F.3d at 966. Because the allegations of this claim could not support relief, it is not substantial under *Martinez,* 132 S. Ct. at 1318, and state habeas counsel could not have been ineffective for failing to raise a meritless claim. *See Garza,* 738 F.3d at 676. Therefore, neither of the elements of *Martinez* could be satisfied and the Recommendation is accepted, as modified by this

[7]Garcia concurred in the twenty-fifth of Respondent's proposed findings, that "Trial counsel testified that they did not request any further 'anti-parties' charge because Garcia was not entitled to any further charge." (R's FoF at 11; P's FoF at 5.)

Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

f. Failure to Object to Party Conspiracy and Inferred Intent Instructions

Garcia complains that trial counsel was ineffective for failing to object to improper party conspiracy and inferred intent instructions at the guilt/innocence phase. (Am. Pet. at 71-77.) As the Magistrate Judge found, this claim had been denied by the state court on the merits.[8] (Rec. at 17.) Therefore, to obtain federal habeas relief, Garcia must demonstrate that the state court's decision on the ineffective assistance claim was contrary to, or an unreasonable application of, the standards set forth under *Strickland. See Schaetzle v. Cockrell,* 343 F.3d 440, 444 (5th Cir. 2003). This makes federal habeas review of a state court's denial of such a claim "doubly deferential." *Pinholster,* 131 S. Ct. at 1403.

Garcia's claim depends on a determination that the jury instruction was legally improper and subject to objection. As noted by the Magistrate Judge (Rec. at 17) and set out above, *see supra* Section IV, B, 1, c, this jury charge was found to be proper by the state court. Garcia has not otherwise shown that this determination violated a federal constitutional requirement. And the fact that this matter of state law has been determined adversely to Garcia means it cannot support an ineffective-assistance-of-counsel claim in federal court. *See Paredes,* 574 F.3d 921. The state court's decision was not an unreasonable application of federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d)(1). The Recommendation to deny relief is thus accepted, and this claim is **DENIED**.

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[8]Garcia concurred in the twenty-eighth and twenty-ninth of Respondent's proposed findings that set forth the state court's rejection of the merits of this claim. (R's FoF at 12; P's FoF at 6.)

g. Failure to Investigate and Present Mitigating Evidence

In his final complaint against trial counsel, Garcia complains that counsel were ineffective for failing to investigate and present certain mitigating evidence at the punishment stage of his trial. (Am. Pet. at 77-83.) The Magistrate Judge found that this claim had been denied by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) In the alternative, the Magistrate Judge noted that Garcia frames the claim as a failure to obtain a mitigation specialist, but that the record before this Court shows that trial counsel obtained the services of experts with qualifications that favorably compare with the qualifications of the mitigation expert now presented. (Rec. at 23, 25.) The Magistrate Judge also found that Garcia has not shown that any of the information uncovered by his current mitigation investigator was unknown to trial counsel at the time of trial or that the expert assistance trial counsel received was deficient, particularly in light of the record indicating that the critical information referenced in the petition was extensively placed before the jury at trial. (Rec. at 25-26.)

The Magistrate Judge acknowledged, however, that Garcia had not been afforded the opportunity to discover what was known to trial counsel to prove the claim. (Rec. at 25-26.) Following *Martinez,* this Court granted a hearing to allow Garcia the opportunity to prove that this claim is substantial and that state habeas counsel was ineffective for not presenting it to the state court. At the hearing, the mitigating evidence that was identified as not having been presented at

trial was that during the second time that Garcia was in New York, after his mother had abandoned him there, he had been sexually abused.[9]

It is undisputed that Garcia did not reveal any information concerning the sexual abuse to trial counsel or to either of the mental health experts that had been appointed to aid the defense by examining Garcia and offering expert testimony at his trial. (Tr. at 148-49.) It is also undisputed that the only ones that would have known of the abuse were Garcia and the perpetrator, and that the trial court would not have allowed Garcia's mental health experts to testify regarding such events unless they were corroborated. (Tr. at 153-57.) Even in the seven years since federal habeas counsel was appointed during which time they apparently received this information from Garcia, and with the opportunity to present it at the *Martinez* hearing, no corroboration has been presented to this Court or shown to have been available to trial counsel. Therefore, even if Garcia had disclosed the asserted sexual abuse to his mental health experts, they would not have been permitted to testify regarding such an uncorroborated event. In light of Garcia's decision to not testify at his trial, he has not shown how this evidence could have been presented to the jury at his trial even if it occurred and had been disclosed to his counsel and experts.

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[9]At the *Martinez* hearing, Garcia's counsel examined the trial counsel responsible for the mitigation case about the "one thing" that the federal habeas investigator found not to be in the evidence presented to the jury "and that concerned Mr. Garcia being sexually abused while he was in New York City." (Tr. at 39.) Garcia previously alleged that he had also witnessed violent acts including a murder during that time (Am. Pet. at 80) and included witnessing a murder in his proffer of testimony (Tr. at 149). No details have been provided about such murder, however, except that it occurred while he walked in a park. (Psychosocial History by Knox, at 10.) Garcia made no effort to examine trial counsel about the murder, and there is no indication that it had any impact on Garcia or that evidence of it would have enhanced the mitigation case presented at trial. In fact, neither of the parties' proposed findings of fact even mentioned it. Therefore, Garcia does not appear to rely upon evidence of this murder in his complaint against trial counsel's mitigation investigation and presentation. The Court's analysis focuses, instead, on the evidence that Garcia does appear to rely upon, that he was sexually abused during that same time period.

It is disputed, however, that the abuse actually occurred. Trial counsel Bradley Lollar testified that in the records of Child Protective Services, Garcia denied that he had suffered any sexual abuse.[10] (Tr. at 62.) Garcia's proffer of testimony included the statement that Garcia believed those CPS records were incorrect, but that even if they were not, he would have been 12 to 14 years old when he made the statement. (Tr. at 149.) Garcia provided no details concerning the alleged sexual assault except to identify the abuser as the younger brother of his mother's boyfriend Papa Calo, with whom he shared a room. (Psychosocial History by Knox at 10, 23; Tr. at 156.)

The Court finds that counsel reasonably investigated potential mitigating evidence and reasonably relied upon the information received, including Garcia's statements in the CPS records, in making decisions regarding the most fruitful places to focus the defense team's limited investigative resources. Therefore, Garcia has not shown how trial counsel's performance was deficient. Instead, as noted by the Magistrate Judge, much of Garcia's claim constitutes the type of second-guessing of investigative strategy that is precisely the inquiry this Court must avoid under *Strickland.* (Rec. at 26 (citing *Granados v. Quarterman,* 455 F.3d 529, 534 (5th Cir.2006)).) The Court also finds that, if such abuse occurred, Garcia has not shown how it would have been corroborated and come into evidence before the jury. Further, no details regarding the alleged sexual abuse were presented to the Court, and there is no indication that the abuse was severe or would have added materially to the extensive mitigation case presented at trial. Therefore, Garcia has not shown how he could satisfy the prejudice prong of *Strickland.*

[10]Bradley Lollar testified that he was primarily responsible for the mitigation investigation and presentation at the punishment stage. (Tr. at 28, 35-36.)

Because the allegations of this claim could not support relief, it is not substantial under *Martinez,* 132 S. Ct. at 1318, and state habeas counsel could not have been ineffective for failing to raise it. *See Garza,* 738 F.3d at 676. Therefore, neither of the elements of *Martinez* could be satisfied and the Recommendation is accepted, as modified by this Order. This claim is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

2. Complaints Against Appellate Counsel

In his sixth ground for relief, Garcia complains that appellate counsel provided ineffective assistance in six listed ways. (Am. Pet. at 83-115.) The Magistrate Judge found that these claims were denied by the state court on the independent and adequate state procedural ground of abuse-of-the-writ under Article 11.071 §5 of the Texas Code of Criminal Procedure. (Rec. at 10-14.) The exception to procedural bar created in *Martinez* is limited to claims of ineffective assistance of trial counsel and may not excuse a procedural bar of claims that appellate counsel was ineffective. *See Reed v. Stephens,* 739 F.3d 753, 778 n.16 (5th Cir. 2014); *but see Ha Van Nguyen v. Curry,* 736 F.3d 1287, 1296 (9th Cir. 2013) (holding that *Martinez* extends to claims of ineffective assistance of appellate counsel). Therefore, none of these claims were included in the *Martinez* hearing, even though some of the same issues were presented.

The Magistrate Judge correctly analyzed the merits of each of these claims, in the alternative. (Rec. at 26-31.) Regarding Garcia's claim that appellate counsel failed to raise points of error on appeal regarding the guilt phase jury instructions (Rec. at 29), the Recommendation is modified to add the discussion of the analysis above of Garcia's claims that trial counsel failed to object to the instructions at trial, *see supra* Section IV, B, 1, c, and to an improper statement of the law by the prosecutor. *See supra* Section IV, B, 1, f. Regarding the claim that appellate counsel failed to raise

as error the prosecutor's mischaracterization of evidence (Rec. at 29-30), the Recommendation is modified to note that the underlying complaint concerning trial counsel was withdrawn by Garcia at the *Martinez* hearing on the basis that the prosecutor's argument was not incorrect. (Tr. at 3-4.) The same failure to object, therefore, could not form the basis for a complaint against appellate counsel for failing to raise it. The findings and recommendations regarding the claims against appellate counsel are accepted as modified. Garcia's sixth ground for relief, including all of its claims, is **DISMISSED** as procedurally barred and, in the alternative, is **DENIED** for lack of merit.

C. Ineffective Assistance of State Habeas Counsel

In his seventh ground for relief, Garcia complains that state habeas counsel provided ineffective assistance. (Am. Pet. at 116-27.) The Magistrate Judge found that the ineffective assistance of state habeas counsel did not constitute an independent ground upon which federal habeas relief may be granted. (Rec. at 31-32.) The Magistrate Judge also found that it could not constitute cause to excuse a procedural default of other claims. (Rec. at 32.) To the extent that the equitable exception to procedural bar in *Martinez* and *Trevino* altered this rule, the Recommendation is modified by this Order to reflect those changes and to incorporate the discussions of the opportunity afforded Garcia at the *Martinez* hearing to prove his claims that trial counsel provided ineffective assistance. *See supra* Section IV, B, 1. The findings and recommendations regarding the claims against state habeas counsel are accepted, as modified by this Order. Garcia's seventh ground for relief is **DISMISSED** as not cognizable as a separate claim in federal habeas proceedings, and his arguments in support of an exception to procedural bar are **DENIED**.

V

The Objections (doc. 45) are **OVERRULED**, the Recommendation (doc. 42) is **ACCEPTED AS MODIFIED** in this Order, and the amended petition for a writ of habeas corpus (doc. 20) is **DENIED**.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a certificate of appealability. The Court **ADOPTS and INCORPORATES by reference** the Magistrate Judge's Findings, Conclusions and Recommendation filed in this case, **as MODIFIED in this Order**, in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In the event he files a notice of appeal, Garcia will be allowed to proceed *in forma pauperis*.

SO ORDERED.

Date: May 28, 2015.

BARBARA M. G. LYNN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH C. GARCIA,	§	
PETITIONER,	§	
	§	
V.	§	
	§	No. 3:06-CV-2185-M
RICK THALER, Director,	§	
Texas Department of Criminal Justice	§	(Death Penalty Case)
Correctional Institutions Division,	§	
RESPONDENT.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner **Joseph C. Garcia** has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This cause of action was referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b), implemented by automatic reference under Special Order 3-251. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge follow:

I. PROCEDURAL BACKGROUND.

Petitioner was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *Garcia v. State*, No. AP-74,692, 2005 WL 395433 (Tex. Crim. App. Feb. 16, 2005). Petitioner filed an application for a post-conviction writ of habeas corpus which was denied by the Texas Court of Criminal Appeals. *Ex parte Garcia*, Writ No. 64,582-01, 2006 WL 3308744 (Tex. Crim. App. Nov. 15, 2006). Petitioner then filed a petition for writ of habeas corpus in this court. An agreed motion to stay and abate these proceedings was granted and this case was administratively closed on December 4, 2007, so that additional claims could be exhausted in the state courts. (Order, doc. 17.)

Petitioner filed a subsequent state application for a post-conviction writ of habeas corpus which was denied under the state abuse-of-the-writ doctrine. *Ex parte Garcia*, No. WR-64,582-02, 2008 WL 650302 (Tex. Crim. App. 2008). These federal proceedings were then reopened on April 2, 2008, along with the filing of an amended petition. (Order, doc. 20.)

II. GROUNDS FOR RELIEF.

Petitioner presents seven grounds and several subgrounds for relief in three groups. The first group of claims are record claims that have been repeatedly denied in this Circuit. The second group consists of ineffective assistance of trial and appellate counsel claims, all but one of which are procedurally barred. The third group consists of ineffective assistance of state habeas counsel claims that are not cognizable on federal habeas review but are pleaded, at least in part, in an attempt to avoid the imposition of a procedural bar to ineffective-assistance-of-counsel claims in the second group. For the reasons set out below, all claims should be denied.

III. FACTUAL BACKGROUND.

The following factual background is taken from the opinion of the Texas Court of Criminal Appeals ("CCA").

> On December 13, 2000, seven inmates, including appellant, escaped from the Texas Department of Criminal Justice Connally Unit, taking with them a number of firearms stolen from the unit. On December 24th, the group committed a robbery at a sporting-goods store in Irving, killing Irving police officer Aubrey Hawkins as they fled. The escapees used the weapons they stole from the prison to commit the robbery and murder. The escapees then made their way to Colorado where they lived in an RV park until January 2001, when six were apprehended and one committed suicide.

Garcia v. State, 2005 WL 395433 at *1.

IV. STANDARD OF REVIEW.

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"). This statute sets forth a number of preliminary requirements that must be satisfied before reaching the merits of a claim made in a federal habeas proceeding.

a. Exhaustion.

Under this statute, a federal court may not grant habeas relief on any claim that the state prisoner has not first 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. ___, ____, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011). However, the federal court may 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).

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, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992); *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S.Ct. 2546, 2557, 115 L.Ed.2d 640 (1991). However, if the state procedural determination is based on state grounds that were inadequate to bar federal habeas review, or if the habeas petitioner shows than 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.2000) ("Review is de novo when there has been no clear adjudication on the merits." (citing *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir.1997))); *Mercadel v. Cain*, 179 F.3d 271, 274-275 (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 v. Cain*, 609 F.3d 774, 794 (5th Cir. 2010) (the AEDPA deferential standard of review 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 claim was unreasonably adjudicated by the state court, 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 § 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 claims in federal court that were not first 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 ____, 131 S.Ct. at 784. "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. ___, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (internal citations omitted) (quoting *Richter*, 131 S.Ct. at 786, and *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (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 opposite 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 v. Taylor*, 529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). Under the "unreasonable application" clause, a federal court may also reach the merits of a claim on federal habeas review if the state court either unreasonably applies the correct legal rule to the facts of a particular case or unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 407. The standard for determining whether a state court's application was unreasonable is an objective one and applies to all federal habeas corpus petitions which, like the instant case, were filed after April 24, 1996, provided that the claims were adjudicated on the merits in state court. *See Lindh v. Murphy*, 521 U.S. 320, 327, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court unless the record before the state court first justifies a finding of unreasonableness under § 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*, __ U.S. at __, 131 S.Ct.

at 1400. 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."

d. Independent Merits Determination.

As stated above, § 2254(d) does not authorize federal habeas relief. Therefore, relief is not available merely because this high standard is met. In the event the state-court adjudication is deemed unreasonable, the federal court must still determine whether habeas relief would otherwise be appropriate. "When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953-954, 127 S.Ct. 2842, 2858-2859 (2007). Therefore, in those rare cases when a state prisoner makes the difficult showing required under § 2254(d), then the federal court must make its own independent determination of whether habeas relief is appropriate, and conduct whatever hearings and evidentiary development are necessary to properly make that determination. *See, e.g., Wiley v. Epps*, 625 F.3d 199, 207 (5th Cir. 2010) ("when a petitioner makes a prima facie showing of mental retardation, a state court's failure to provide him with an opportunity to develop his claim deprives the state court decision of the deference ordinarily due under the AEDPA"); *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir.2007) ("where a petitioner has made a prima facie showing of retardation as Rivera did, the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due"); *Hayes v. Thaler*, 361 Fed.Appx. 563, 566 (5th Cir. 2010) (applying *Panetti* standard in review of a *Batson* jury selection habeas claim).

V. RECORD CLAIMS.

Garcia first raises four claims derived entirely from the record available in the direct appeal that he admits are foreclosed by Circuit precedent, but which are made to preserve them for further review. (Am. Pet. at 25, 29, 34, & 38.)

First, Garcia claims that the mitigation special issue violates due process in that it failed to place the burden of proof on the State. (Am. Pet at 24-28.) This claim has been repeatedly rejected in this Circuit. *See Rowell v. Dretke*, 398 F.3d 370, 376-78 (5th Cir. 2005); *Granados v. Quarterman*, 455 F.3d 529, 536 (5th Cir. 2006); *Scheanette v. Quarterman*, 482 F.3d at 828. The Sixth Amendment requirements set forth in *Apprendi* and *Ring* do not apply to mitigating factors. *See Ring*, 536 U.S. at 597 n.4; *Apprendi*, 530 U.S. at 490, n.16 (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (internal citation omitted)). Therefore, no violation of the Sixth Amendment is shown. *See also Avila v. Quarterman*, 560 F.3d 299, 314-15 (5th Cir.), *cert. denied sub nom, Avila v. Thaler*, __ U.S. __, 130 S.Ct. 536 (2009) (recognizing precedent foreclosing petitioner's complaint of the lack of a jury finding of mitigating evidence beyond a reasonable doubt).

Second, Garcia claims that the instructions to the jury in his case violated due process because the terms used in the special issues are unconstitutionally vague. (Am. Pet. at 28-33.) The United States Court of Appeals for the Fifth Circuit has consistently rejected similar complaints regarding the alleged vagueness of the same terms and also of similar terms. *See James v. Collins*, 987 F.2d 1116, 1120 (5th Cir.1993) (holding that the terms "deliberately," "probability," "criminal acts of violence," and "continuing threat to society" "have a common-sense core of meaning that criminal juries should be capable of understanding") (internal quotation omitted); *see also Hughes*

v. Johnson, 191 F.3d 607, 615 (5th Cir.1999); *Woods v. Johnson*, 75 F.3d 1017, 1033-34 (5th Cir.1996). This ground for habeas relief is also foreclosed.

Third, Garcia claims that the requirement that ten jurors agree in order to answer the mitigation special issue negatively violates his due process and jury trial guarantees. (Am. Pet. at 33-37.) He refers to this as the Texas "12/10 Rule." (Am. Pet. at 35, 36.) Garcia relies upon an extension of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) that has also been consistently rejected in this Circuit. *See Miller v. Johnson*, 200 F.3d 274, 288-89 (5th Cir. 2000) (quoting *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir.1994)). This ground for habeas relief is also foreclosed.

Fourth, Garcia claims that the failure of the CCA to engage in a proportionality review violated his due process rights. (Am. Pet. at 38-40.) However, the Supreme Court has rejected a similar complaint against the Texas death penalty statute. *See Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S.Ct. 871, 879, 79 L.Ed.2d 29, 40-41 (1984); *see also Tuilaepa v. California*, 512 U.S. 967, 974, 114 S.Ct. 2630, 2636, 129 L.Ed.2d 750, 761 (1994) (States may adopt capital sentencing processes that rely upon the jury to exercise wide discretion); *McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct. 1756, 1775, 95 L.Ed.2d 262, 288 (1987) (petitioner not entitled to proportionality review of the death sentence). This Circuit has consistently held that the Constitution does not require a comparative proportionality review of a death sentence. *See Hughes v. Johnson*, 191 F.3d 607, 622-23 (5th Cir.1999) (upholding the Texas statute); *United States v. Webster*, 162 F.3d 308, 354 (5th Cir. 1998); *United States v. Jones*, 132 F.3d 232, 240-41 (5th Cir. 1998).

Garcia's first four claims are all foreclosed by Circuit precedent and should be denied.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Petitioner also claims that his trial and appellate counsel failed to provide the effective assistance guaranteed by the Sixth Amendment in multiple listed ways. (Am. Pet. at 40-115.) Petitioner complains that trial counsel failed to (1) object to the trial court's grant of the State's challenge to venireperson David Chmurzynski (Am. Pet. at 43-52), (2) object to the jury selection process in violation of Texas law which violated his Sixth Amendment rights (Am. Pet at 52-61), (3) object to the prosecutor's misstatements of law in closing argument that the verdict on guilt did not need to be unanimous (Am. Pet. at 61-66), (4) object to the State's mischaracterization of evidence and improper argument at closing (Am. Pet. at 66-68), (5) request an anti-parties charge at the punishment phase of trial (Am. Pet. at 68-71), (6) object to improper party conspiracy and inferred-intent instructions at the guilt/innocence phase (Am. Pet. at 71-77), and (7) investigate possible mitigation evidence (Am. Pet. at 77-83). Petitioner also complains that his counsel on direct appeal failed to (1) raise the trial court's improper grant of the State's challenge to venireperson David Chmurzynski (Am. Pet. at 86-87), (2) allege that jury selection was conducted in violation of Texas statutes (Am. Pet. at 87-88), (3) properly brief issue regarding erroneous admission of extraneous offense evidence (Am. Pet. at 89-92), (4) raise points of error on jury instructions regarding intent at guilt/innocence phase of trial (Am. Pet. at 93-98), (5) raise as error the State's mischaracterization of evidence and improper argument at closing (Am. Pet. at 98-99), (6) raise the denial of a motion to suppress evidence obtained under invalid search and arrest warrants (Am. Pet. at 100-115). All but one of these claims are procedurally barred, having been raised in a subsequent habeas petition that was dismissed under the Texas abuse-of-the-writ doctrine. The one reviewable claim--that trial counsel failed to object to improper party conspiracy and

inferred-intent instructions at the guilt/innocence phase--is without merit.

a. Exhaustion and Procedural Bar.

Only one of the claims of ineffective assistance of trial and appellate counsel presented in the amended petition before this court were presented in Garcia's original state habeas petition: that trial counsel failed to object to improper party conspiracy and inferred-intent instructions at the guilt phase of trial.[1] (Am. Pet. at 71-77; 1 SHR at 2-127.) The remaining claims were presented in a subsequent state habeas action. *See Ex parte Garcia*, 2008 WL 650302, at *1. However, the CCA found that the claims filed in this subsequent action did not comply with Article 11.071 § 5 of the Texas Code of Criminal Procedure, and dismissed the action as an abuse of the writ. *Id.*

b. Applicable Law.

A federal court may not consider the merits of a habeas claim if a state court has denied relief due to a procedural default. *Sawyer v. Whitley*, 505 U.S. 333, 338, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992). The state court opinion must contain a "plain statement" that its decision rests on adequate and independent state grounds. *Harris v. Reed*, 489 U.S. 255, 261-62, 109 S.Ct. 1038, 1042-43, 103 L.Ed.2d 308 (1989); *Smith v. Collins*, 977 F.2d 951, 955 (5th Cir. 1992). To be an adequate ground for denying relief, the state procedural rule must be strictly or regularly applied to

[1]Respondent mistakenly identifies the "one reviewable claim" considered by the CCA on the merits as the claim of ineffective assistance of counsel for failing to object to ***the prosecutor's closing argument*** that the jurors did not have to unanimously agree on the precise theory of capital murder. (Ans. at 48-50, citing claim 17 filed at 1 SHR 63, and among those resolved in SHF Nos. 158-61; 2 SHR 400-401) (emphasis added). However, the claim identified in those state habeas findings related to a different claim: that trial counsel failed to object to ***the court's instructions to the jury*** regarding unanimity. (2 SHR at 274-275.) In fact, the failure-to-object-to-closing-argument claim was included in those unexhausted claims made the basis of Garcia's motion for stay and abatement and subsequent state habeas application. (Sub. St. Hab. App. at 26-30, attached to Agreed Mot. to Stay and Abate, Doc. 16).

similar claims. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-63, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982); *Johnson v. Puckett*, 176 F.3d 809, 824 (5th Cir. 1999). A petitioner can overcome a procedural default only by showing: (1) cause for the default and actual prejudice; or (2) that the application of the state procedural bar would result in a fundamental miscarriage of justice. *See Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000).

A prisoner must fully exhaust state remedies before seeking habeas relief in federal court. *See* 28 U.S.C. § 2254(b)(1)(A). This requires the prisoner to submit the factual and legal basis of any claim to the highest available state court for review in a procedurally correct manner. *See Satterwhite v. Lynaugh*, 886 F.2d 90, 92-93 (5th Cir.1989). In Texas, the Texas Court of Criminal Appeals is the highest criminal court, and a death-sentenced prisoner must present his claims to the Texas Court of Criminal Appeals in the direct appeal or an application for writ of habeas corpus. *See Bautista v. McCotter*, 793 F.2d 109, 110 (5th Cir.1986); *Rosales v. Cockrell*, 220 F.Supp.2d 593, 608 (N.D.Tex., 2001) (citing Tex.Code Crim.P. art. 37.071 § 2(h) (Vernon's Supp. 2001) ("The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.") and art. 11.071 (establishing the procedures for an applicant seeking habeas relief from a judgment imposing the death penalty)).

A federal court has limited discretion to stay a habeas petition and hold it in abeyance so a prisoner can return to state court to exhaust previously unexhausted claims. *See Rhines v. Weber*, 544 U.S. 269, 275, 125 S.Ct. 1528, 1533-34, 161 L.Ed.2d 440 (2005). However, Texas law prohibits a death-sentenced prisoner from filing a second or successive application for post-conviction relief if the grounds stated therein could have been, but were not, raised in a prior state writ application. *See* TEX.CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (Vernon 2007).

Under this statute:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id. This procedural bar also applies to unexhausted claims if the state court would likely dismiss such claims if made in a successive habeas petition under article 11.071, § 5. *See Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991) (procedural default occurs when a prisoner fails to exhaust available 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").

c. Analysis.

Since only one of the ineffective-assistance-of-counsel claims was reached on its merits, procedural bar will be addressed first.

1. Procedural Bar.

Article 11.071 § 5 of the Texas Code of Criminal Procedure has consistently been found to be an independent and adequate state law to bar federal habeas review. *See Balentine v. Thaler*, 626

F.3d 842, 856-57 (5th Cir. 2010), *reh'g denied*, 629 F.3d 470, *cert. denied*, __ U.S. ____,131 S.Ct. 2992, 180 L.Ed.2d 824 (2011); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008). In his petition, Garcia recognizes this problem and anticipates the need to overcome this procedural bar. (Pet. at 6-22.) He argues that sufficient cause-and-prejudice exist to overcome this procedural bar due to the ineffective assistance of state habeas counsel. (*See id*.) However, he also recognizes that this argument is foreclosed by Circuit precedent binding on this court, and makes the argument merely to preserve it for appellate review.[2] (Pet. at 6.) These arguments appear adequately presented to preserve them for further review.

Respondent specifically identified these claims as having been denied by the state courts on independent and adequate state grounds to bar federal habeas review, and does not indicate an intent to waive this defense.[3] However, the defense is not asserted clearly. While not suggesting an intent to waive an applicable defense, the answer argues that these claims may be denied on their merits "even without the lens of AEDPA deference." (Ans. at 52.) To the extent that there may be any confusion about this issue, this Court will follow the procedure for recognizing this procedural bar *sua sponte* out of an abundance of caution.

"In a proceeding involving a 28 U.S.C. § 2254 motion, [the United States Court of Appeals for the Fifth Circuit] stated that 'a federal district court may, in the exercise of its discretion, raise

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[2]The availability of claims foreclosed by the ineffective assistance of state habeas counsel is under review by the Supreme Court in petitions for writs of certiorari. *See Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010), *cert. granted sub nom, Martinez v. Ryan*, ___ U.S. ____, 131 S.Ct. 2960, 180 L.Ed.2d 244 (2011); *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009), *cert. granted sub nom, Maples v. Thomas*, ___ U.S. ____, 131 S.Ct. 1718, 179 L.Ed.2d 644 (2011).

[3]In fact, it appears that the respondent intended to raise all defenses that counsel believed applicable, including procedural defenses.

a habeas petitioner's procedural default *sua sponte* and then apply that default as a bar to further litigation of petitioner's claims.'" *United States v. Willis*, 273 F.3d 592, 596 (5th Cir. 2001) (footnote omitted) (citing *Magouirk v. Phillips*, 144 F.3d 348, 358 (5th Cir.1998), and *Smith v. Johnson*, 216 F.3d 521, 523-24 (5th Cir.2000) (raising the procedural bar in a § 2254 case *sua sponte* at the appellate level)). The relevant concerns are whether the petitioner has been given notice and an opportunity to respond and whether the government has waived the defense intentionally. *Smith*, 216 F.3d at 524; *Willis*, 273 F.3d at 596. Clearly, the petitioner has anticipated the defense, has adequately pleaded his argument to preserve them for further review, and no intent to waive an applicable defense is apparent from the pleadings. This recommendation will provide the basis for any further notice to the parties that may be needed to respond to the issue of procedural bar by way of objection to this report and recommendation. *See Prieto v. Quarterman*, 456 F.3d 511, 518 & n.34 (5th Cir.2006); *United States v. Willis*, 273 F.3d at 597 (5th Cir.2001) (the magistrate judge's report and recommendation to the district judge provides requisite notice to which the petitioner had ample time to respond and address the procedural default defense); *Magouirk*, 144 F.3d at 350, 360.

2. Ineffective Assistance of Trial Counsel for Failing to Object to Jury Instructions.

i. Applicable Law.

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. The two-pronged standard by which a claim of ineffective assistance of counsel is measured is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[4] The first

[4]For the claim adjudicated on their merits in the state courts, the presumption of competence required in *Strickland* combined with the deference required under § 2254(d) makes federal habeas review of a state court's denial of such a claim "doubly deferential" as set out below. *Pinholster*, __ U.S. __, 131 S.Ct. at 1403. For the other ineffective assistance claims alternatively reviewed de novo, only the *Strickland* presumption applies.

prong of *Strickland* requires the defendant to show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2064. The second prong of this test requires the defendant to show prejudice resulting from counsel's deficient performance. *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068. The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Strickland*, 466 U.S. at 697, 700, 104 S.Ct. 2069, 2071.

In measuring whether counsel's representation was deficient, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 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).

To satisfy the second prong of the *Strickland* test, the petitioner must show that counsel's errors were so egregious as to deprive the defendant of a fair trial whose result is reliable. *Strickland*, 466 U.S. at 687. The test to establish whether there was prejudice is whether "there is a reasonable probability that, but for the counsel's unprofessional errors, the trial would have been different." *Id.* at 694. A reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id.* It is not enough for a habeas petitioner to merely allege deficiencies on the part of counsel. The petitioner must affirmatively plead the resulting prejudice in the habeas petition. *Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988).

To obtain federal habeas relief on an ineffective-assistance-of-counsel claim that was adjudicated on the merits, a petitioner is required to demonstrate that the state court's decision on the ineffective assistance claim was contrary to, or an unreasonable application of, the standards set forth under *Strickland*. *See Schaetzle v. Cockrell*, 343 F.3d 440, 443-44 (5th Cir. 2003). Given the presumption of competence required in *Strickland*, this makes federal habeas review of a state court's denial of such a claim "doubly deferential." *Pinholster*, __ U.S. __, 131 S.Ct. at 1403 (citing *Knowles v. Mirzayance*, 556 U.S. ——, 129 S.Ct. 1411, 1420 (2009), and *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003) (*per curiam*)). A state prisoner seeking federal habeas relief on such grounds "must demonstrate that it was necessarily unreasonable for the [state court] to conclude: (1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the jury's sentence of death." *Id.*

ii. Analysis.

Petitioner complains that trial counsel failed to object to improper party conspiracy and inferred-intent instructions at the guilt/innocence phase because they would allow the jury to find him guilty without unanimous agreement on the individual criminal acts (Am. Pet. at 71-77). Petitioner argues that under Texas law the submission in his trial "was equivalent to a submission of two offenses because two distinct ways of committing the capital murder of Hawkins existed," murder of a peace officer under Tex. Penal Code § 19.03(a)(1), and murder in the course of a listed felony under § 19.03(a)(2). (Pet. at 75.) Petitioner argues that this distinction is shown by the different mens rea required. (*Id.*) Respondent argues that Texas law requires a general verdict and

that the instructions did not otherwise violate federal law.[5]

The state court on habeas review determined in the alternative that the jury instructions did not improperly allow for a non-unanimous verdict. (SHF 128-144; 2 SHR 392-97.) These findings were adopted by the Texas Court of Criminal Appeals. *Ex parte Garcia*, 2006 WL 3308744 at *1. Therefore, the underlying matter of state law has been determined adversely to petitioner.[6] Federal courts in post-conviction habeas corpus proceedings do not sit to review questions of state law. *See Engle v. Isaac*, 456 U.S. 107, 118-121, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *see also Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir.2000) (referring to this "long-standing principle"); *Dickerson v. Guste*, 932 F.2d 1142, 1145 (5th Cir.1991) ("We will not review a state court's interpretation of its own law in a federal habeas corpus proceeding").

Petitioner has not shown that the charge was in fact subject to an objection under state or federal law or that the absence of an objection was deficient. Trial counsel cannot be faulted for

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[5]Respondent focuses on federal requirements, pointing out that the Supreme Court has "never suggested that in returning general verdicts in such cases [one or more acts or defendants] the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." (Ans. at 62, quoting *Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S.Ct. 2491, 2497-98, 115 L.Ed.2d 555 (1991)).

[6]The state findings appear to be correct. Petitioner relies upon *Ngo v. State*, 175 S.W.3d 738 (Tex.Crim.App. 2005) to show that different offenses are alleged. (Am. Pet. at 61-62, 75.) Ngo was found trying to use his ex-wife credit cards, which had earlier been stolen. *Id.* at 741-42. He was charged with the theft of the cards, receiving the stolen cards, and with the fraudulent use of the cards. *Id.* at 742. In closing argument, the prosecutor admitted that "I don't know if I proved all three or one or two or all—I have no idea." *Id.* Under these facts, the Texas Court of Criminal Appeals held that his conviction under this general verdict violated the right to a unanimous verdict on the criminal act: stealing credit card, receiving stolen credit card, or fraudulently using credit card. *Id.* at 744-45.

Garcia's case is distinguishable in that each of the different manner and means contained in the indictment refer to the same criminal act: capital murder of Aubrey Hawkins. This is what the State Habeas Court found. (SHF Nos. 140-43; 2 SHR at 396-97.) Further, the jury was instructed in the guilt/innocence stage that their verdict must be unanimous. (2 CR at 294.)

failing to make a meritless objection. *See Turner v. Quarterman*, 481 F.3d 292, 298 (5th Cir. 2007); *Green v. Johnson*, 160 F.3d 1029, 1037 (1998). Even if the challenged conduct were deficient, no prejudice is shown. Therefore, this claim should be denied on the merits.

d. Alternative Analysis of Procedurally-Barred Claims.

In the alternative to the finding of procedural bar to all but one of the ineffective-assistance-of-counsel claims listed above, Petitioner has failed to make the required showing to obtain relief on the merits of these claims. Since these claims were not adjudicated on the merits, the deference required by 28 U.S.C. § 2254(d) would not apply. Therefore, if the claims are not procedurally barred they must be considered de novo. *See Miller*, 200 F.3d 274, 281 n.4. However, since the state court has refused to consider these claims due to Petitioner's failure to develop the factual basis for these claims in his original state habeas proceeding when his claims of ineffective assistance of trial and appellate counsel could first be considered, further evidentiary development in this Court is now prohibited by § 2254(e)(2). At this point, this Court must refuse to allow the evidentiary development that Petitioner may need to effectively challenge trial counsel's conduct by compelling the evidence he does not already have, such as testimony from trial counsel to show whether any of his challenged conduct was deficient or other evidence to show what prejudice may have resulted. Accordingly, the failure of Petitioner to meet his burden of proof will now require this Court to deny a claim on the merits if it is not otherwise procedurally barred.

1. Trial Counsel.

i. Venireperson.

Petitioner complains that trial counsel failed to object to the trial court's grant of the State's challenge to venireperson David Chmurzynski. (Am. Pet. at 43-52.) He specifically contends that

his trial counsel should have objected, pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, 512-23, 88 S.Ct. 1770, 1772-78, 20 L.Ed.2d 776 (1968), that Mr. Chmurzyski was not disqualified. However, he has not shown that counsel's performance was deficient or that such an objection would have prevailed.

The Sixth Amendment protects the right to a fair trial before an impartial jury. In *Witherspoon v. Illinois*, the Supreme Court held that the prosecution's use of an Illinois statute that excluded for cause any prospective juror with "conscientious scruples" against capital punishment to eliminate nearly half of the venire did not result in a jury that reflected the "conscience of the community," but rather "stacked the deck" in favor of the prosecution in violation of the Sixth Amendment. 391 U.S. at 521-23. Later, the Supreme Court clarified that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment" is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)); *Drew v. Collins*, 964 F.2d 411, 416-17 (5th Cir. 1992). Even an expressed willingness to follow the law does not necessarily overcome other indications of bias. *See Morgan v. Illinois*, 504 U.S. 719, 735, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). A prospective juror may believe she can follow the law and yet will actually be so biased in one direction or another that her inclusion would infect a trial with fundamental unfairness. *See Morgan*, 504 U.S. at 735; *Varga v. Quarterman*, 321 Fed. Appx. 390, 395 (5th Cir.), *cert. denied*, __ U.S. ___, 130 S.Ct. 797, 175 L.Ed.2d 562 (2009).

In applying this standard, *Witt* also explained that a presumption of correctness applies to

the trial court's determination of a challenge for bias. 469 U.S. at 430-31, 105 S.Ct. at 855-56. "[S]uch a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Id.*, 469 U.S. at 428, 105 S.Ct. at 854 (footnote omitted). The trial court need not detail its reasoning or explicitly conclude that a prospective juror is biased, so long as it is evident from the record. *See id.*, 469 U.S. at 430, 105 S.Ct. at 855. In this case, the trial judge included specific observations of the demeanor of the potential juror to support the decision to excuse such juror.

The examination of this prospective juror does not indicate that he had conscientious scruples against the death penalty, save only its imposition upon mentally retarded persons which was entirely consistent with Texas law. (13 RR at 244.) Otherwise, the prospective juror voiced support for the death penalty in appropriate cases. (13 RR 244-46.) His views on the death penalty do not appear to be the reason for excusing this juror, but instead his apparent personal discomfort with participating in the process, about which he testified that "it would be a difficult thing for me to do." (13 RR at 248.) In explaining the excusal for cause, the trial court specifically noted problems with this venireperson's demeanor: "This juror was extremely nervous. His hands were quivering. In response to the question whether or not he could assess the death penalty, his voice broke." (13 RR at 249.) The record before this court suggests that this venireperson's personal difficulty would prevent or substantially impair the performance of his duties as a juror. Petitioner has not shown that an objection by trial counsel would have prevailed, or that making it would have preserved a meritorious claim for appeal.[7] Since the record is inadequate to show merit, this Court

[7]Trial counsel did not object to the trial court's decision to excuse the prospective juror, but instead stated that they would "remain silent" on the issue. (13 RR at 249.) Trial counsel's reasons for choosing to remain silent are not included in the record before this Court, and further evidentiary

cannot fault trial counsel for failing to make a meritless objection. *See Turner*, 481 F.3d at 298; *Green*, 160 F.3d at 1037.

ii. Jury Selection Process.

Petitioner next complains that trial counsel failed to object to the jury selection process in violation of his Sixth Amendment rights. (Am. Pet at 52-61.) He asserts that the jury selection procedure violated state law in a way that favored the prosecution. Specifically, he complains that after he exercised his 15th and final peremptory challenge, the trial court changed the procedure to allow a pool of potential jurors to accumulate before the prosecution was required to exercise its peremptory challenges. This allowed the prosecution to examine each of those jurors and compare the jurors in making use of their peremptory challenges more effectively than the defense had been allowed. (Am. Pet. at 61.)

The record reflects that trial counsel did not object, but in fact agreed to allow this change in procedure to reserve peremptory strikes until a number of potential jurors had qualified.

> MR. SHOOK: The State and defense can agree on the next several jurors to qualify them, but reserve our preemptory (sic) strikes until after several have qualified. In other words, we've been doing peremptories with every juror. We will go through whether they qualify for cause and then we'll reserve to exercise those peremptories after we qualify several of them.
>
> MR. LUCAS: That's correct, Your Honor. Your Honor, just so the record will be clear, we anticipate we may be asking for additional preemptory (sic) strikes in the future. I know the Court would rule on that at the appropriate time, but we'd just like to make the Court aware that we may well be asking for additional strikes.
>
> THE COURT: Yes, sir. Okay. Ready, Brian, please. The Court certainly approves that agreement.

(37 RR at 31.) The record does not reflect the reasons for trial counsel's agreement nor what benefit

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development is now prohibited.

to the petitioner may have resulted from such agreement. The evidence is not sufficient to show ineffective assistance. Petitioner has not overcome the presumption that this was a reasonable trial strategy. *See, e.g., Miller v. Johnson*, 200 F.3d 274, 284 (5th Cir. 2000) (trial counsel's agreement with prosecution presumed reasonable). Since further evidentiary development is prohibited at this point, this ground should be denied.

iii. Prosecutor's Closing Argument.

Petitioner also complains that trial counsel failed to object to the prosecutor's misstatements of law in closing argument that the verdict on guilt did not need to be unanimous (Am. Pet. at 61-66),[8] and that trial counsel failed to object to the State's mischaracterization of evidence and improper argument at closing (Am. Pet. at 66-68). "A decision not to object to a closing argument is a matter of trial strategy." *Drew v. Collins*, 964 F.2d 411, 423 (5th Cir.1992). Petitioner has not overcome this presumption by showing that this trial strategy was deficient Since further evidentiary development is prohibited at this point, and based on the record before this Court, this ground should also be denied.

iv. Jury Instructions in Punishment Phase.

Petitioner also complains that trial counsel failed to request an anti-parties charge at the punishment phase of trial. (Am. Pet. at 68-71.) Since he was found guilty under instructions that allowed for criminal liability as a party, Petitioner would have been entitled to an anti-parties charge in the punishment phase if he had requested it. *See Nichols v. State*, 754 S.W.2d 185 (Tex.Crim.App. 1988). Petitioner also notes that the prosecutors argued that Petitioner was a future danger based

[8]Respondent asserted that this claim was the only "reviewable" claim, based on the mistaken belief that it had been reached on the merits in state habeas. (Ans. at 48-49). As stated above, a different claim was presented and reached. *Supra*, n.1.

on what the group did, rather than on what he did individually. (Pet. at 69-70, citing 56 RR at 79.) Respondent argues that even if it was deficient to not request the charge, prejudice could not be shown in light of Circuit precedent that "with the three special issues Texas law focuses the jury on the individual conduct of the defendant" and that "this structure of the punishment phase reasonably led the jury to assume the law of the parties was not applicable during this phase." *Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996) (citing *Nichols v. Scott*, 69 F.3d 1255, 1268 (5th Cir. 1995).

This structure is reflected in the following special issue that was given to the jury in the instant case:

> Do you find from the evidence beyond a reasonable doubt that the defendant, JOSEPH C. GARCIA, actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken?

(2 CR at 302.) A similar instruction was considered in *Belyeu v. Scott*, 67 F.3d 535, 543 (5th Cir.1995), to direct the jury to consider only the defendant's personal culpability, and resulted in a finding of no harm from the overruling of an objection to the absence of an anti-parties charge. Further, any failure to object or to request an anti-parties instruction is presumed to be a reasonable trial strategy. The Petitioner has not shown otherwise and further evidentiary development is now prohibited. Therefore, this claim should be denied.

v. Mitigation Investigation.

Petitioner also complains that trial counsel failed to investigate possible mitigation evidence. (Am. Pet. at 77-83.) He frames this as a failure to obtain a mitigation specialist, but the record before this Court shows that trial counsel obtained the services of an expert with qualifications that favorably compare with the qualifications of the mitigation expert now relied upon. Further, the

proper focus of this analysis is not whether trial counsel obtained a particular expert or investigator, or even whether he failed to discover and present potentially mitigating evidence. Instead, it is whether trial counsel's decision regarding his investigation was reasonable and informed by adequate information. *See Wiggins v. Smith*, 539 U.S. 510, 522-523, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003) (citing *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066).

A review of the merits of this claim requires the Court to look to the "norms of adequate investigation in preparing for the sentencing phase of a capital trial, when the defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005). Mitigating evidence can be critically important in a death penalty case. *See Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999)(citing *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982)). Trial counsel defending a death penalty case has an "obligation to conduct a thorough investigation of the defendant's background," *[Terry] Williams v. Taylor*, 529 U.S. at 396, 120 S.Ct. at 1515 (citing ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)), which "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524, 123 S.Ct. at 2537 (quoting *Guidelines* 11.4.1(C), p. 93 (1989) (emphasis omitted).

However, a "failure to develop or present mitigating background evidence is not per se deficient performance." *Moore*, 194 F.3d at 615.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words,

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

Trial counsel obtained the services of two mental health experts that testified at trial, Dr. Judy Stonedale and Dr. Gilda Kessner, Psy.D. Dr. Stonedale is described as a forensic psychiatrist on the faculty of UT Southwestern as the Assistant Director of the Forensic Fellowship with experience in the federal and state prison systems. (55 RR at 59-61.) She is also listed as a defense expert in another capital case. *Battaglia v. State*, 2005 WL 1208949 at *3 (Tex.Cr.App., 2005). Dr. Kessner is a clinical psychologist who is also listed in numerous capital cases as a defense expert, doing "forensic psychological evaluations in capital cases for risk assessment, mitigation and mental retardation." *Doyle v. Thaler*, Slip Copy, 2009 WL 3028574 at *4 (N.D.Tex., 2009). At Garcia's trial, she testified to her qualifications as a licensed clinical psychologist with a specialty in forensic psychology and criminal matters. (56 RR 10.) She testified about risk assessment and mitigation issues, specifically including his childhood background, upbringing and development. (56 RR 52.) Her qualifications would appear to favorably compare to those of Toni Knox, the investigator now relied upon by Petitioner's appointed counsel, and the petitioner has not shown otherwise. Therefore, the asserted failure to obtain the assistance of a mitigation investigator appears to lack merit.

More importantly, however, Petitioner has not shown that any of the information uncovered by investigator Knox was unknown to trial counsel at the time of trial or that the expert assistance trial counsel received was deficient. Admittedly, the petitioner may not have been able to discover

what was known to trial counsel, but the record before this court also suggests that the critical information referenced in the petition was extensively placed before the jury at Petitioner's trial through family members, friends, Petitioner's CPS caseworker (with 1,145 pages of CPS records), and his defense expert psychiatrist and psychologist. (*See* 53 RR at 204-256; 54 RR at 3-63; 55 RR at 16-18, 65-68, 71, 80, 90-92, 97-100, 137-155, 168-170; 56 RR 15-37, 54-55, 65-67; Def. Ex. No. 15.) Petitioner's current complaint appears to be a disagreement over trial strategy, which is precisely the type of inquiry that this Court should avoid. "*Strickland* does not allow second guessing of trial strategy and must be applied with keen awareness that this is an after-the-fact inquiry." *Granados v. Quarterman*, 455 F.3d 529, 534 (5th Cir.2006). If this claim is not procedurally barred, it should also be denied on the merits.

2. Appellate Counsel.

In reviewing a claim alleging ineffective assistance of appellate counsel, the traditional *Strickland* standard described in Subsection (c)(2)(i), *supra*, applies. *See Blanton v. Quarterman*, 543 F.3d 230, 240 (5th Cir. 2008); *Busby v. Dretke*, 359 F.3d at 714. Appellate counsel's failure to pursue relief on a ground that would not have prevailed on appeal will not constitute ineffective assistance. *See Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001); *see also, Penson v. Ohio*, 488 U.S. 75, 83-84 (1988) (appointed appellate counsel need not make frivolous arguments); *Medellin v. Dretke*, 371 F.3d 270, 279 (5th Cir. 2004) (where omitted claim lacks merit, ineffective assistance of counsel claim based on failure to raise claim on appeal also lacks merit); *Clark v. Collins*, 19 F.3d at 965-66 (failure to raise objection that was meritless at the time not ineffective assistance of counsel); *Williams v. Collins*, 16 F.3d 626, 635 (5th Cir. 1994) (where issue lacks merit, failure to raise issue on appeal cannot satisfy prejudice prong of *Strickland*).

i. Venireperson.

Petitioner complains that his counsel on direct appeal failed to raise the trial court's improper grant of the State's challenge to venireperson David Chmurzynski. (Am. Pet. at 86-87.) However, the trial counsel did not object, choosing instead to remain silent. (13 RR at 249.) Therefore, any potential error was not preserved. *See Salinas v. State*, 166 S.W.3d 368, 372 (Tex.App.–Fort Worth, 2005) citing TEX. R. APP. P. 33.1(a)(1)(A); *Heidelberg v. State*, 144 S.W.3d 535, 538 (Tex.Crim.App. 2004); *Mosley v. State*, 983 S.W.2d 249, 265 (Tex.Crim.App., 1998); *Bell v. State*, 938 S.W.2d 35, 54 (Tex.Crim.App.1996); *Rezac v. State*, 782 S.W.2d 869, 870 (Tex.Crim.App. 1990)). It could not have been ineffective to fail to raise a point of error that was not available. Therefore, if this claim is not procedurally barred, it should be denied on the merits.

ii. Jury Selection Process.

Petitioner also complains that his counsel on direct appeal failed to allege that jury selection was conducted in violation of Texas statutes. (Am. Pet. at 87-88.) Again, trial counsel agreed to the complained-of change in the jury selection procedure. (37 RR at 31.) No error was preserved for appeal and it was not ineffective to fail to raise an unavailable claim. Therefore, if this claim is not procedurally barred, it should also be denied on the merits.

iii. Extraneous Offense Evidence.

Petitioner also complains that his counsel on direct appeal failed to properly brief an issue regarding erroneous admission of extraneous offense evidence. (Am. Pet. at 89-92.) Petitioner claims that deficient performance is shown in that the CCA refused to review the point on appeal because it found that appellate counsel failed to adequately brief the issue. (Am. Pet. at 89.) Petitioner also contends that the issue was preserved and no limiting instructions was given by the

trial court. (*Id.*) However, Petitioner's claim appears to make the wrong complaint.

Petitioner claims that appellate counsel failed to properly raise a point of error regarding the admission of the evidence of his escape from prison under Rule 404(b) of the Texas Rules of Evidence. Petitioner asserts that "[w]hile appellate counsel did address the balancing test necessary under Rule 403 of the Texas Rules of Evidence, he failed to argue that the escape evidence prejudiced Mr. Garcia by painting him as a criminal generally." (Am. Pet. at 92.) However, the opposite appears to be the case. As Respondent points out, the CCA did address the extraneous offense complaint and found that its admission was not improper.

> Because the weapons used in the instant offense were identified as those taken from the prison, and because the taking of the weapons was intricately intertwined with the prison escape, the trial court concluded that evidence of the escape and the stolen weapons was admissible as contextual evidence. Furthermore, the court noted that the evidence of the extraneous events was limited to only that necessary to explain the connection of the weapons to the instant offense and appellant's connection to the weapons. The trial court did not abuse its discretion in admitting this evidence.

Garcia v. State, 2005 WL 395433 at *4. In contrast it was essentially the complaint under Rule 403 that the CCA refused to consider.[9] Therefore, Petitioner has not shown that appellate counsel was ineffective. Further, The trial court appeared to make the correct balancing test under Rule 403.[10]

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[9]The CCA opinion found that "[w]ith regard to appellant's claims that the admission of the evidence was more prejudicial than probative or that he was entitled to a limiting instruction regarding the evidence, he has wholly failed to present anything more than conclusory statements." *Garcia,* 2005 WL 395433 at *4. To the extent that appellate counsel failed to argue the absence of a limiting instruction, apparently there was no objection to such absence either and therefore that complaint was not preserved for appeal.

[10]The trial court stated:

> Any time the Court is called upon to make the 403 balancing test regarding extraneous offenses, I have to include the following factors and weigh the evidence accordingly.

iv. Jury Instructions in Guilt Phase.

Petitioner also complains that his counsel on direct appeal failed to raise points of error on jury instructions regarding intent at guilt/innocence phase of trial. (Am. Pet. at 93-97.) However, as noted above, it was not error for trial counsel to not make those objections to the charge. Therefore, an appellate point would not have prevailed.

v. Prosecutor's Argument.

Petitioner also complains that his counsel on direct appeal failed to raise as error the State's mischaracterization of evidence and improper argument at closing. (Am. Pet. at 98-99.) However,

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> Number one, the inherent probative value of the evidence; two, the similarly of the conduct of the offense on trial; number three, the strength of the evidence [of] extraneous offenses; number four, the nature of the extraneous conduct and its potential for impressing the jury in irrational, but indelible ways; number five, the time necessary to develop evidence giving consideration to whether the jury's attention will be diverted from the offense on trial and the State's need for the evidence including, (a) the availability of other evidence which tends to accomplish the same purpose; (b) the strength of that other evidence; (c) whether the purpose served by the extraneous conduct relates to an issue that is in dispute.
>
> The nature of the dispute in this case is regarding the weapons that were used during the robbery and the parties conducting the robbery and murder in Irving, Texas.
>
> Specifically, the defense position is that this is an extraneous offense. It's not part of the same criminal transaction or episode. The State's position is that this is all one contextural (sic) pattern of events.
>
> * * *
>
> I've heard arguments from both sides. The Court has made the appropriate balancing test. I find that the escape from the penitentiary some 11 days prior to the 24th of December is contextural (sic), will not overburden the jury, and [for] the limited purpose of admitting the testimony from [State's witness] Garcia to prove up the ownership of the weapons and the parties involved in obtaining that property.

(48 RR at 3-5).

no objection was made at the time of the prosecutor's argument. Therefore, no error was preserved for appeal. *See Threadgill v. State*, 146 S.W.3d 654, 670 (Tex.Crim.App.2004) (failure to object to prosecutor's argument during punishment phase forfeits right to complain about argument on appeal); *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex.Crim.App.1996) ("Before a defendant will be permitted to complain on appeal about an erroneous jury argument . . ., he will have to show he objected and pursued his objection to an adverse ruling."). The state courts have overruled "any prior cases to the contrary." *Cockrell*, 933 S.W .2d at 89; *Lewis v. State*, 2010 WL 2998749, at *3 (Tex.App.--Tyler, 2010, no pet.) (noting elimination of fundamental error exception to a defendant's failure to object to improper prosecutorial argument); *Price v. State*, 2011 WL 3618088 at *1 (Tex.App.--Tyler, 2011) (same).

vi. Invalid Search and Arrest.

Petitioner also complains that his appellate counsel failed to raise the denial of a motion to suppress evidence obtained under invalid search and arrest warrants. (Am. Pet. at 100-115).

Respondent incorrectly asserts that this claim is not cognizable on federal habeas review due to the limitations imposed by the Supreme Court in *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). This is not a claim of an illegal search brought under the Fourth Amendment, but a claim of ineffective assistance of counsel brought under the Sixth Amendment. Therefore, the limitations of *Stone v. Powell* do not apply, and the Supreme Court has expressly refused to extend these restrictions to the federal habeas review of Sixth Amendment claims of ineffective assistance of counsel for failing to protect rights to the exclusion of evidence allegedly obtained in violation of the Fourth Amendment. *See Kimmelman v. Morrison*, 477 U.S. 365, 379, 382-83, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Petitioner asserts that the search was illegal because of technical defects in the search and arrest warrants. (Am. Pet. at 109-114.) However, the trial court did not rely on the validity of the warrants, but determined that the evidence was legally obtained in a valid search incident to a warrantless arrest under Colorado law. (49 RR at 24-25.) Petitioner also noted that "[t]he validity of the warrants had been an issue in the three trials of other Texas Seven defendants that preceded Mr. Garcia's trial." (Am. Pet. at 100.) However, he has not shown that any different result obtained from any of the other "Texas Seven" trials or appeals, and in at least one of them the appellate claims of erroneous admission of this evidence in violation of the Fourth Amendment failed. *See e.g,. Rodriguez v. State*, 2006 WL 827833 at *1-*4 (Tex.Crim.App. 2006). Since Petitioner has not shown that any different outcome would have occurred if the claim has been raised in his appeal, this claim also fails on the merits.

Therefore, if these claims are not procedurally barred, it is recommended that they all be denied on their merits.

VII. STATE HABEAS COUNSEL.

Garcia also claims that his original state habeas counsel denied him the competent and effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. (Am. Pet. at 116-127.) However, there is no constitutional right to state habeas counsel, so there can be no constitutional violation for not providing it. *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2546, 115 L.Ed.2d 640 (1991); *but see supra*, at 13, n.2 (referencing current challenges before Supreme Court). To the extent that this is raised as an independent ground for habeas corpus relief, it is precluded by statute: "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a

proceeding arising under section 2254." 28 U.S.C. § 2254(i)); *see also Martinez v. Johnson*, 255 F.3d 229, 245 & n.22 (2001) (upholding bar to relief in § 2254(i)); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001). To the extent that this is raised as a cause to excuse any procedural default arising from state habeas counsel's failure to raise these in the original state habeas application, this argument is precluded by case authority. Since there is no constitutional right to counsel in state post-conviction habeas corpus proceedings, Garcia cannot rely on constitutionally ineffective assistance of counsel in such proceedings in order to establish cause and prejudice. *See Coleman*, 501 U.S. at 752; *Martinez v. Johnson*, 255 F.3d 229, 240-41 (5th Cir. 2001); *Beazley*, 242 F.3d at 271. Accordingly, these claims should be denied.

VIII. CONCLUSION.

Garcia has not shown that any of the claims presented in this case warrant federal habeas corpus relief from his state conviction and death sentence. Accordingly, relief should be denied.

RECOMMENDATION

This Court recommends that the petition for writ of habeas corpus filed in this case pursuant to 28 U.S.C. § 2254 be DENIED.

DATED November 1, 2011.

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO OBJECT

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir.1996).

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-64,582-02

EX PARTE JOSEPH C. GARCIA

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
FROM CAUSE NO. W01-00325-T(B) IN THE
283RD JUDICIAL DISTRICT COURT
DALLAS COUNTY

Per curiam; HERVEY, J., *not participating*.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.

In February 2003, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Garcia v. State*, No. AP-74,692 (Tex. Crim. App. Feb. 16, 2005)(not designated for publication). Applicant filed

his initial post-conviction application for writ of habeas corpus in the convicting court on December 14, 2004. This Court denied applicant relief. *Ex parte Garci*a, No. WR-64,582-01 (Tex Crim. App. Nov. 11, 2006)(not designated for publication). Application filed his first subsequent application in the trial court on November 12, 2007.

Applicant presents six allegations in the instant application. Specifically, he asserts that his trial and appellate counsel rendered ineffective assistance, and his initial habeas counsel was not competent.

We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071 § 5. Accordingly, the application is dismissed as an abuse of the writ. Art. 11.071 § 5(c).

IT IS SO ORDERED THIS THE 5TH DAY OF MARCH, 2008.

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-64,582-01

EX PARTE JOSEPH C. GARCIA

ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. W01-00325-T(A)
IN THE 283TH JUDICIAL DISTRICT COURT
DALLAS COUNTY

Per Curiam. Hervey, J., not participating.

O R D E R

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, TEX. CODE CRIM. PROC.

In February 2003, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Garcia v. State*, No. AP-74,692 slip op. (Tex. Crim. App. Feb. 16, 2005)(not designated for publication).

Applicant presents forty-six allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial judge entered findings of fact and conclusions of law and recommended relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

IT IS SO ORDERED THIS THE 15th DAY OF NOVEMBER, 2006.

Do Not Publish

A True Copy
Attest:
Louise Pearson, Clerk
Court of Criminal Appeals of Texas

By:_____
Deputy

CAUSE NO. W01-00325-T(A)

EX PARTE	§	IN THE 283RD JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
JOSEPH C. GARCIA, Applicant	§	DALLAS COUNTY, TEXAS

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the application for writ of habeas corpus, the State's original answer, and official court documents and records, the Court makes the following findings of fact and conclusions of law:

PROCEDURAL HISTORY

Applicant is confined pursuant to the judgment and sentence of this Court in cause number F01-00325-T. On February 6, 2003, a jury convicted applicant of the December 24, 2003 capital murder of Irving police officer Aubrey Hawkins. (CR 2: 295; RR 50: 56). On February 13, 2003, in accordance with the jury's answers to the special issues submitted under article 37.071 of the Texas Code of Criminal Procedure, this Court assessed applicant's punishment at death. (CR 2: 301-03, 308). The Texas Court of Criminal Appeals affirmed applicant's conviction on direct appeal. *See Garcia v. State*, No. AP-74,692 (Tex. Crim. App. Feb. 16, 2005) (not designated for publication).

On December 14, 2004, applicant filed an application for writ of habeas corpus, alleging forty-six grounds for relief. The State filed its original answer on June 10, 2005. On November 22, 2005, this Court determined that no controverted, previously

unresolved factual issues existed and ordered the parties to file proposed findings of fact and conclusions of law by December 22, 2005.

SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law:

GROUNDS 1-6: TRIAL COUNSEL'S ALLEGED FAILURE TO REQUEST A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF FELONY MURDER

Applicant's first six grounds for relief are premised on his contention that trial counsel failed to request a jury charge on felony murder as a lesser-included offense of capital murder.

FEDERAL CONSTITUTIONAL CLAIMS

In grounds one and four, applicant maintains that this alleged failure on the part of counsel deprived him of his rights to due process, trial by an impartial jury, and effective assistance of counsel under the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the United States Constitution.

Applicant's Claims Are Procedurally Barred

1. The Court notes that habeas corpus is not a substitute for an appeal. *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998). It may not, therefore, be used to litigate matters that could have been raised on direct appeal. *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001). Even constitutional claims are procedurally barred from consideration on habeas review if they could have been raised on appeal. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004).

2. The Court finds that applicant's claim in ground one that trial counsel's alleged failure to request a jury instruction on felony murder violated his federal constitutional rights to due process and trial by an impartial jury could have been, but was not, raised on direct appeal. *See Garcia.*

3. Accordingly, the Court concludes that applicant's first ground for relief is procedurally barred and should not be addressed.

4. The Court further notes that an applicant is barred from challenging the effectiveness of trial counsel for the first time of habeas review when he has failed to utilize the habeas process to develop additional evidence to support his claim. *See Ex parte Nailor*, 149 S.W.3d 125, 131-32 (Tex. Crim. App. 2004); *cf. Ex parte White*, 160 S.W.3d 46, 49 n.1, 51-55 (Tex. Crim. App. 2004) (addressing defendant's ineffective-assistance claim, although it was not raised on direct appeal, where new evidence, developed through the habeas process, was submitted to support the claim).

5. The Court finds that applicant has not submitted any new evidence, derived from the habeas process, to substantiate his allegation in ground four that he was denied his federal constitutional right to effective assistance of counsel. Instead, applicant relies exclusively on information contained in the trial record, which was available to him on direct appeal.

6. The Court finds that applicant's ineffective-assistance claims could have been, but were not, raised on direct appeal.

7. The Court concludes, therefore, that applicant's first and fourth grounds for relief are procedurally barred and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

The record does not support the factual allegations underlying applicant's claims.

8. The Court notes that a habeas applicant must prove his factual allegations by a preponderance of the evidence. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997).

9. Applicant claims that trial counsel failed to request a jury instruction on felony murder as a lesser-included offense of capital murder. Indeed, applicant contends that counsel failed to "ask for a charge on any lesser-included offense other than aggravated robbery." (Writ Application, p. 8).

10. The Court finds that the record plainly refutes applicant's allegation that trial counsel failed to request a jury instruction on felony murder. The record of the charge conference shows that applicant's counsel actually did request several lesser-included-offense instructions, including an instruction on felony murder. (RR 50: 3). This Court denied the requested instructions. (RR 50: 3).

11. Thus, the Court finds that applicant has failed to prove his factual allegations by a preponderance of the evidence.

12. Furthermore, the Court finds that, because trial counsel actually did request a jury instruction on felony murder, applicant has failed to prove by a preponderance of the evidence that his federal constitutional rights were violated by the absence of such a request.

13. The Court therefore concludes that applicant suffered no deprivation of his federal constitutional rights due to a failure on the part of trial counsel to request an instruction on felony murder. Grounds one and four should be denied.

Applicant was not denied effective assistance of counsel.

14. The Court notes that to establish ineffective assistance of counsel, applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) a probability sufficient to undermine confidence in the outcome exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999).

15. Applicant contends that trial counsel was deficient for failing to request an instruction on felony murder as a lesser-included offense of capital murder.

16. The Court finds that counsel actually did request an instruction on felony murder, which this Court denied. (RR 50: 3).

17. Accordingly, the Court finds that applicant has failed to sustain his burden of proving by a preponderance of the evidence that counsel was deficient for failing to request a jury instruction on felony murder.

18. Furthermore, the Court finds that, because counsel actually did what applicant claims he should have by requesting a jury instruction on felony murder, applicant has failed to prove by a preponderance of the evidence that counsel's performance prejudiced his defense.

19. Thus, the Court finds that counsel's performance was not deficient and did not prejudice applicant's defense.

20. The Court concludes, therefore, that applicant was not deprived of his right to effective assistance of counsel under the United States Constitution. *See, e.g., Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005) (rejecting defendant's ineffective-assistance claim where the record showed that counsel did everything defendant said he should have). Applicant's fourth ground for relief should be denied.

Applicant was not entitled to a jury instruction on felony murder.

21. The Court notes that an offense is a lesser-included offense if:

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 1981).

22. The Court recognizes that a lesser-included-offense instruction should be given if there is some evidence that would permit the jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. *See Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). In other words, there must be

some evidence from which a rational jury could acquit the defendant of the greater offense while still convicting him of the lesser-included offense. *Threadgill v. State*, 146 S.W.3d 654, 665 (Tex. Crim. App. 2004).

23. The Court finds that the indictment in this case charged applicant with the capital murder of Officer Hawkins under two different theories: (1) the intentional or knowing murder of a peace officer who was acting in the lawful discharge of an official duty; and (2) an intentional murder committed in the course of committing or attempting to commit a robbery. (CR 1: 2). *See* TEX. PENAL CODE ANN. § 19.03(a)(1)-(2) (Vernon Supp. 2005).

24. The Court notes that it is well-settled that felony murder is a lesser-included offense of capital murder committed in the course of a robbery. *See Threadgill*, 146 S.W.3d at 665; *Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999); *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993). The two offenses differ only in the culpable mental state of the offender: capital murder requires the existence of an intentional or knowing cause of death, while in felony murder, the culpable mental state for the act of felony murder is supplied by the mental state accompanying the underlying felony. *Rousseau*, 855 S.W.2d at 673 (citing *Rodriquez v. State*, 548 S.W.2d 26, 29 (Tex. Crim. App. 1977)).

25. Accordingly, the Court concludes that felony murder is a lesser-included offense under one of the theories of capital murder charged in this case: murder committed in the course of a robbery.

26. The Court finds, however, that the jury returned a general verdict of guilty after being instructed on both theories of capital murder alleged in the indictment. (CR 2: 295).

27. The Court notes that when an indictment alleges alternative theories of capital murder, "the defendant is entitled to a requested lesser-included offense charge if a rational jury could convict him only on the lesser-included offense after considering each of the alternative theories of commission." *Feldman v. State*, 71 S.W.3d 738, 752 (Tex. Crim. App. 2002) (op. on reh'g) (citing *Arevalo v. State*, 970 S.W.2d 547, 548-49 (Tex. Crim. App. 1998)). In other words, there must be some evidence negating the defendant's guilt under each theory of capital murder alleged in the indictment.

28. Thus, the Court finds that applicant's contention that he was entitled to a jury instruction on felony murder if there was evidence that neither he nor his codefendants intended to kill Officer Hawkins is not entirely accurate. Under the indictment in this case, the jury could still convict applicant of capital murder if it found that he, either as a principal or a party, *knowingly* killed the officer. (CR 2: 289-90).

29. Accordingly, the Court finds that applicant was not entitled to a jury instruction on felony murder unless there was some evidence that he and the other escapees did not act at least knowingly in causing Officer Hawkins's death.

30. The Court finds that applicant does not point to a single piece of evidence in the record showing that he and his cohorts were not at least aware that by unleashing a

hail of gunfire on Officer Hawkins as he sat, relatively defenseless, in his patrol car, they were reasonably certain to cause his death. *See* TEX. PENAL CODE ANN. § 6.03(b) (Vernon 2003) (defining "knowingly").

31. Indeed, the Court finds that the evidence shows nothing less than an intentional murder: the escapees ambushed the officer, shooting him eleven times with several different guns. (RR 47: 98-99, 119-20, 131, 139-40).

32. The Court finds, therefore, that no rational juror could find that at the moment they started shooting, it was not the escapees' conscious objective and desire to kill Officer Hawkins. *See* TEX. PENAL CODE ANN. § 6.03(a) (defining "intentionally"); *Salinas*, 163 S.W.3d at 741-42 (holding that the evidence did not raise any issue of felony murder when it showed that the defendant dragged the victim from the car and shot him in the head at close range with a shotgun); *Threadgill*, 146 S.W.3d at 665-66 (holding that there was no evidence that would permit a jury to rationally find that the defendant did not intend to cause the victim's death when he leaned into the car in which the victim was sitting and fired two shots); *Fuentes*, 991 S.W.2d at 273 (holding that there was no evidence that the defendant lacked intent to kill when he ran up to the victim, shot him twice in the chest, and fled as the victim fell into a ditch and died).

33. For the foregoing reasons, the Court finds and concludes that it properly denied applicant's request for a jury instruction on the lesser-included offense of felony murder. *See Feldman*, 71 S.W.3d at 752-53 (holding that the defendant was not entitled to an instruction on the lesser-included offense of murder because the

evidence did not negate both alternative theories of capital murder alleged in the indictment).

34. The Court finds that applicant has failed to prove by a preponderance of the evidence that he was entitled — as a matter of due process, effective assistance of counsel, and the right to a fair and impartial jury — to a jury instruction on felony murder as a lesser-included offense of capital murder.

35. Accordingly, the Court concludes that applicant was not deprived of his federal constitutional rights by the lack of a jury instruction on felony murder. Applicant's first and fourth grounds for relief should be denied.

STATE CONSTITUTIONAL CLAIMS

In his second and fifth grounds for relief, applicant contends that trial counsel's alleged failure to request a jury instruction on felony murder as a lesser-included offense of capital murder deprived him of his rights to due process, trial by an impartial jury, and effective assistance of counsel under article I, sections 3, 3A, 10, 13, 15, and 19 of the Texas Constitution.

Applicant's Claims Are Procedurally Barred

36. The Court finds that, although he presents them as separate grounds for relief, applicant argues his state constitutional claims together with the federal constitutional claims asserted in grounds one and four. He does not contend that the two constitutions offer different levels of protection with respect to the rights at issue.

37. The Court notes that the proponent of a state constitutional claim must provide the reviewing court with some basis for the application of a constitutional test beyond that required for the federal constitutional analysis. *See Ex parte Anderson*, 902 S.W.2d 695, 701 (Tex. App.—Austin 1995, pet. ref'd) (citing *Muniz v. State*, 851 S.W.2d 238, 251-52 (Tex. Crim. App. 1993)). Accordingly, the Court of Criminal Appeals has repeatedly instructed that state and federal constitutional claims should be argued separately, and the proponent should explain why the state constitution affords him more protection in a particular area of the law than the federal constitution. *See, e.g.*, *Lawton v. State*, 913 S.W.2d 542, 558 (Tex. Crim. App. 1995); *Muniz*, 851 S.W.2d at 251; *Heitman v. State*, 815 S.W.2d 681, 690 n.22 (Tex. Crim. App. 1991).

38. The Court finds that applicant has failed to properly present and argue his claims under the Texas Constitution.

39. Accordingly, the Court concludes that applicant's claims in grounds two and five have been procedurally defaulted and should not be addressed. *See Emery v. State*, 881 S.W.2d 702, 707 n.8 (Tex. Crim. App. 1994) (holding that the defendant had failed to preserve his state constitutional claim for review because he presented no argument or authority as to why the Texas Constitution afforded him greater protection than the United States Constitution).

40. Moreover, the Court finds that, as with the federal constitutional claims raised in grounds one and four, applicant could have raised his state constitutional claims on direct appeal, but did not. *See Garcia*.

41. The Court notes that habeas corpus may not be used to litigate claims that could have been brought on direct appeal. *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004).

42. For this additional reason, the Court concludes that applicant's second and fifth grounds for relief are procedurally barred and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

43. The Court finds that the Texas Constitution does not provide any greater protection than the United States Constitution with respect to the claims asserted by applicant.

44. The Court notes that the Court of Criminal Appeals has specifically held that the Texas Constitution does not provide any greater protection than the federal constitution in the area of effective assistance of counsel. *See Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992).

45. For the reasons discussed in connection with grounds one and four, therefore, the Court finds that applicant has failed to prove by a preponderance of the evidence that he was denied his rights to due process, an impartial jury trial, and effective assistance of counsel due to counsel's failure to request and to receive a jury instruction on the lesser-included offense of felony murder.

46. The Court concludes that applicant suffered no such deprivation of his state constitutional rights. His second and fifth grounds for relief should be denied.

STATUTORY CLAIMS

In his third and sixth grounds for relief, applicant maintains that counsel's alleged failure to request a jury instruction on felony murder as a lesser-included offense of capital murder deprived him of his rights to due process, an impartial jury trial, and effective assistance of counsel under articles 1.05, 1.051, 1.141, 26.04, 25.052, 36.14, and 36.15 of the Texas Code of Criminal Procedure.

Applicant's Claims Are Not Cognizable

47. The Court notes that a writ of habeas corpus may not be invoked for mere statutory irregularities in the proceedings below. *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). Habeas corpus relief is reserved for judicial defects in the trial court that render the judgment void and for denials of fundamental or constitutional rights. *Id.*

48. The Court finds that applicant does not contend that the alleged statutory violations rendered this Court's judgment void.

49. The Court concludes, therefore, that applicant's statutory claims in grounds three and six are not cognizable and should be summarily denied.

Applicant's Claims Are Procedurally Barred

50. The Court finds that, like his federal and state constitutional claims, applicant's statutory claims could have been, but were not, raised on direct appeal. *See Garcia.*

51. The Court notes that habeas corpus may not be used to litigate matters that could have been raised on direct appeal. *Boyd*, 58 S.W.3d at 136.

52. Accordingly, the Court concludes that applicant's claims in grounds three and six are procedurally barred and should not be addressed.

Alternatively, Applicant's Claims Are Without Merit

53. The Court finds that the Texas Code of Criminal Procedure does not give broader protection to applicant's rights to due process, an impartial jury trial, and effective assistance of counsel than do the federal and state constitutions. *See Hathorn*, 848 S.W.2d at 118 (holding that the Texas statutory provisions do not provide any greater protection than the federal constitution in the area of effective assistance of counsel).

54. For the reasons discussed above in connection with grounds one, two, four, and five, the Court finds that applicant has failed to prove by a preponderance of the evidence that counsel's failure to request or to receive a jury instruction on felony murder violated his rights to due process, a fair jury trial, and effective assistance of counsel under the Texas Code of Criminal Procedure.

55. The Court concludes that applicant suffered no such deprivation of his rights under the Texas Code of Criminal Procedure. Applicant's third and sixth grounds for relief should be denied.

GROUNDS 7-8: BURDEN OF PROVING THE ABSENCE OF SUFFICIENT MITIGATING CIRCUMSTANCES

FEDERAL CONSTITUTIONAL CLAIMS

In his seventh ground for relief, applicant argues that, because it does not assign a burden of proof to the mitigation special issue, Texas's death-penalty scheme denies a

capital defendant due process of law and trial by an impartial jury, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and inflicts cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. He maintains that, pursuant to the decisions of the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Blakely v. Washington*, 542 U.S. 296 (2004), the absence of sufficient mitigating circumstances is a fact legally essential to imposition of the death penalty that must be proved by the State beyond a reasonable doubt.

Applicant's Claims Are Procedurally Barred

56. The Court notes that claims that were raised and rejected on direct appeal may not be relitigated through habeas corpus. *Ramos*, 977 S.W.2d at 617; *Ex parte Drake*, 883 S.W.2d 213, 215-16 (Tex. Crim. App. 1994).

57. The Court finds that, in his ninth point of error on direct appeal, applicant, relying on *Apprendi* and its progeny, argued that article 37.071 of the Texas Code of Criminal Procedure violated the Due Process Clause of the United States Constitution because it did not require the State to prove the absence of sufficient mitigating circumstances beyond a reasonable doubt. *See Garcia*, slip op. at 9-10. The Court of Criminal Appeals rejected applicant's argument. *Id.*

58. The Court concludes that applicant is procedurally barred from raising his due process claim again on habeas review.

59. Additionally, the Court finds that applicant's remaining federal constitutional claims in his seventh ground for relief could have been asserted on direct appeal, but were not. *See Garcia.*

60. The Court notes that habeas corpus will not lie as a substitute for appeal. *Ramos*, 977 S.W.2d at 617.

61. The Court concludes, therefore, that applicant's seventh ground for relief is procedurally barred in its entirety and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

62. The Court recognizes that, in *Apprendi* and *Ring*, the Supreme Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Ring*, 536 U.S. at 600; *Apprendi*, 530 U.S. at 490.

63. The Court notes, however, that the Court of Criminal Appeals has repeatedly rejected the argument that the holdings in *Apprendi* and *Ring* apply to Texas's mitigation special issue, reasoning that a jury's finding on the mitigation issue cannot increase the penalty for capital murder beyond the prescribed statutory maximum of death. *See, e.g., Rayford v. State*, 125 S.W.3d 521, 533-34 (Tex. Crim. App. 2003), *cert. denied*, 125 S. Ct. 39 (2004); *Blue v. State*, 125 S.W.3d 491, 501 (Tex. Crim. App. 2003), *cert. denied*, 125 S. Ct. 297 (2004). On the contrary, the mitigation issue is designed to allow for the imposition of life imprisonment — a sentence *less* than the statutory maximum. *See Rayford*, 125 S.W.3d at 534.

64. While acknowledging these prior holdings, applicant maintains that the Supreme Court's more recent decision in *Blakely* calls them into question. (Writ Application, p. 24). In *Blakely*, the Supreme Court held that the statutory maximum sentence for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303. Applicant argues that, absent a negative finding on the mitigation special issue, the maximum sentence that may be imposed for capital murder is life imprisonment. (Writ Application, p. 26).

65. The Court notes that the Court of Criminal Appeals has already rejected the suggestion that *Blakely* undercuts its prior decisions regarding the applicability of *Apprendi* to Texas's mitigation special issue. *See Perry v. State*, 158 S.W.3d 438, 446-48 (Tex. Crim. App. 2004); *Woods v. State*, 152 S.W.3d 105, 120-21 (Tex. Crim. App. 2004), *cert. denied*, 125 S. Ct. 2295 (2005). In *Perry*, the Court of Criminal Appeals stressed the distinction, recognized in *Apprendi* and *Ring*, between "facts in aggravation of punishment and facts in mitigation," noting that the requirement of proof beyond a reasonable doubt applies only to the former. *Perry*, 158 S.W.3d at 448 (citing *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 490 n.16). The Court of Criminal Appeals held that "what a jury is asked to decide in the mitigation special issue is not a '[fact] legally essential to the punishment.' . . . By the time the jury reaches the mitigation special issue, the prosecution has proven all aggravating 'facts legally essential to the punishment.'" *Perry*, 158 S.W.3d at 448 (alteration in original) (quoting *Blakely*, 542 U.S. at 313).

66. The Court finds that article 37.071 requires the State to prove beyond a reasonable doubt — and the jury to find — every fact legally necessary for imposition of the death penalty. This is all that *Apprendi* and its progeny require. Once a death sentence is authorized by the jury's affirmative findings on the future-dangerousness and, if applicable, the anti-parties special issues, the mitigation special issue exists to give the jury an opportunity to reduce the defendant's sentence to life imprisonment.

67. The Court finds that applicant has not proven by a preponderance of the evidence that Texas's death penalty scheme unconstitutionally omits a burden of proof on the mitigation special issue.

68. The Court concludes, therefore, that the absence of a burden of proof for the mitigation special issue does not violate the United States Constitution. Applicant's seventh ground for relief should be denied.

STATE CONSTITUTIONAL CLAIMS

In his eighth ground for relief, applicant contends that the absence of a burden of proof for the mitigation special issue denies a capital defendant due course of law and trial by an impartial jury, in violation of Article I, sections 10 and 19 of the Texas Constitution, and inflicts cruel and unusual punishment, in violation of Article I, section 13 of the Texas Constitution.

Applicant's Claims Are Procedurally Barred

69. The Court finds that, although he presents them as a separate ground for relief, applicant argues his state constitutional claims together with the federal

constitutional claims asserted in the previous ground. He does not contend that the two constitutions offer different levels of protection.

70. The Court notes that the proponent of a state constitutional claim must provide the reviewing court with some basis for the application of a constitutional test beyond that required for the federal constitutional analysis. *See Anderson*, 902 S.W.2d at 701. State and federal constitutional claims should be argued separately, and the proponent should explain why the state constitution affords him more protection in a particular area of the law than the federal constitution. *See, e.g.*, *Lawton*, 913 S.W.2d at 558; *Muniz*, 851 S.W.2d at 251; *Heitman*, 815 S.W.2d at 690 n.22.

71. The Court finds that applicant has failed to properly present and argue his claims under the Texas Constitution.

72. Accordingly, the Court concludes that applicant's claims in his eighth ground for relief are procedurally barred and should not be addressed. *See Emery v. State*, 881 S.W.2d 702, 707 n.8 (Tex. Crim. App. 1994) (holding that the defendant had failed to preserve his state constitutional claim for review because he presented no argument or authority as to why the Texas Constitution afforded him greater protection than the United States Constitution).

73. Moreover, the Court finds that applicant could have raised his state constitutional claims on direct appeal, but chose instead to rely solely on the federal constitution. *See Garcia*, slip op. at 9-10.

74. The Court notes that habeas corpus may not be used to litigate claims that could have been brought on direct appeal. *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004).

75. For this additional reason, the Court concludes that applicant's eighth ground for relief is procedurally barred and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

76. The Court finds that the Texas Constitution does not afford capital defendants any more protection than the United States Constitution with respect to requiring a burden of proof for the mitigation special issue.

77. For the reasons set forth in response to applicant's federal constitutional claims, the Court finds that applicant has failed to prove by a preponderance of the evidence that his state constitutional rights were violated by the absence of a burden of proof on mitigation.

78. Accordingly, the Court concludes that the absence of a burden of proof for the mitigation special issue does not offend the Texas Constitution. Applicant's eighth ground for relief should be denied.

GROUNDS 9-10: ALLEGING "SPECIAL ISSUE ELEMENTS" IN CAPITAL MURDER INDICTMENTS

FEDERAL CONSTITUTIONAL CLAIMS

Relying again on *Apprendi*, applicant contends in his ninth ground for relief that he was denied his right to have the statutory special issues passed upon by a grand jury

and alleged in the indictment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Applicant's Claims Are Procedurally Barred

79. The Court finds that applicant could have raised his federal constitutional claims on direct appeal, but did not. *See Garcia.*

80. The Court notes that even constitutional claims are procedurally barred from consideration on habeas review if they could have been raised on appeal. *Townsend*, 137 S.W.3d at 81.

81. Accordingly, the Court concludes that applicant's ninth ground for relief is procedurally barred and should not be addressed.

Alternatively, Applicant's Claims Are Without Merit

82. The Court notes that the Court of Criminal Appeals has rejected the argument that *Apprendi* requires the statutory special issues to be pleaded in the indictment. *See Threadgill*, 146 S.W.3d at 672; *Rayford*, 125 S.W.3d at 533. "A defendant indicted for capital murder is effectively put on notice that the special issues under Article 37.071 will be raised, so such procedural provisions need not be alleged in the indictment." *Moore v. State*, 969 S.W.2d 4, 13 (Tex. Crim. App. 1998).

83. The Court finds that applicant has failed to sustain his burden of proving by a preponderance of the evidence that he possessed a constitutional right to have the statutory special issues passed upon by a grand jury and alleged in the indictment.

84. The Court concludes, therefore, that applicant did not have right under the United States Constitution to have the statutory special issues pleaded in the indictment. His ninth ground for relief should be denied.

STATE CONSTITUTIONAL CLAIMS

In his tenth ground for relief, applicant asserts that the Texas Constitution — specifically, Article I, sections 3, 10, 13, and 19 —- entitles him to an indictment charging the "special issue elements" of article 37.071.

Applicant's Claims Are Procedurally Barred

85. The Court finds that, once again, although he designates them as a separate ground for relief, applicant fails to provide any meaningful analysis distinguishing his state constitutional claims from the federal constitutional claims raised in his ninth ground. Applicant also fails to offer any reason for construing the Texas Constitution as conferring greater protection in this area of the law than the federal constitution.

86. Consequently, the Court concludes that applicant's state constitutional claims are procedurally barred and should not be addressed. *See Black v. State*, 26 S.W.3d 895, 896 n.4 (Tex. Crim. App. 2000).

87. In addition, the Court finds that, as with his federal claims, applicant could have brought his state constitutional claims on direct appeal. *See Garcia*.

88. The Court notes that applicant may not use a writ of habeas corpus to litigate matters that he could have raised on direct appeal. *See Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991).

89. For this additional reason, the Court concludes that applicant's tenth ground for relief is procedurally barred and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

90. The Court finds that the Texas Constitution does not afford applicant any greater protection than the United States Constitution in this area of the law.

91. For the reasons set forth in response to applicant's federal constitutional claims, therefore, the Court finds that applicant has failed to prove by a preponderance of the evidence that he possessed a right under the Texas Constitution to have the statutory special issues passed upon by a grand jury and alleged in the indictment.

92. Thus, the Court concludes that the Texas Constitution does not guarantee applicant the right to have the special issues pleaded in the indictment. Applicant's tenth ground for relief should be denied.

GROUNDS 11-14: THE STATUTORY MITIGATION SPECIAL ISSUE AS AN ADEQUATE VEHICLE FOR GIVING EFFECT TO MITIGATING EVIDENCE

FEDERAL CONSTITUTIONAL CLAIMS

In his eleventh and thirteenth grounds for relief, applicant contends that the mitigation special issue under article 37.071, section 2(e) denies capital defendants due process of law and trial by an impartial jury, and that it subjects them to cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, "because it is a sentencing factor that fails to give full effect and consideration to mitigating circumstances and fails to provide the jury with an adequate vehicle for expressing a 'reasoned response' to all of applicant's evidence

relevant to his culpability."[1] (Writ Application, p. 30). He specifically argues that the statutory mitigation instruction given to the jury at the punishment phase of his trial contains the same defects as the "nullification instructions" found to be unconstitutional in *Smith v. Texas*, 543 U.S. 37 (2004), and *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*").

Applicant's Claims Are Procedurally Barred

93. The Court finds that, although he could have, applicant did not raise these federal constitutional claims on direct appeal. *See Garcia.*

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[1] Applicant's eleventh ground for relief states:

> THE "NULLIFICATION INSTRUCTION" MANDATED IN ART. 37.071(e) TEX. CODE CRIM. PROC. DENIED APPLICANT DUE COURSE OF LAW, AN IMPARTIAL JURY AND IMPOSED CRUEL AND UNUSUAL PUNISHMENT BY VIOLATING THE PROVISIONS OF THE FIFTH, SIXTH, EIGHT[H] AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT IS A SENTENCING FACTOR WHICH FAILS TO GIVE FULL EFFECT AND CONSIDERATION TO MITIGATING CIRCUMSTANCES AND FAILS TO PROVIDE THE JURY WITH AN ADEQUATE VEHICLE FOR EXPRESSING A "REASONED RESPONSE" TO ALL OF APPLICANT'S EVIDENCE RELEVANT TO HIS CULPABILITY.

(Writ Application, pp. 29-30). His thirteenth ground for relief states:

> *APPLICANT WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO A GRAND JURY DETERMINATION AND AN INDICTMENT THAT CHARGES THE "SPECIAL ISSUE ELEMENTS" OF THE DEATH PENALTY, AND FACTS RELIED UPON TO SUPPORT THE CHARGE THAT APPLICANT IS "GUILTY" OF THE SPECIAL ISSUES IN VIOLATION OF THE FIFTH, SIXTH, EIGHT[H], AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* BECAUSE ART. 37.071(e) IS A SENTENCING FACTOR WHICH FAILS TO GIVE FULL EFFECT AND CONSIDERATION TO MITIGATING CIRCUMSTANCES AND FAILS TO PROVIDE THE JURY WITH AN ADEQUATE VEHICLE FOR EXPRESSING A "REASONED RESPONSE" TO ALL OF APPLICANT'S EVIDENCE RELEVANT TO HIS CULPABILITY.

(Writ Application, p. 30). [Emphasis added.] The portion of ground thirteen italicized above is a repeat of the claim raised in ground nine, discussed previously. (Writ Application, pp. 12-13). The latter portion is a repeat of the claim raised in applicant's eleventh ground. (Writ Application, pp. 29-30). Applicant does not explain — and the Court has been unable to determine — what the failure of the indictment to allege the special issues has to do with whether the mitigation special issue is an adequate vehicle for giving effect to mitigating evidence. Indeed, applicant does not even mention the indictment issue in his discussion of grounds eleven and thirteen. Accordingly, the Court refers the reader to its findings and conclusions with respect to applicant's ninth ground for relief for a discussion of applicant's claim concerning the indictment. The Court will otherwise treat grounds eleven and thirteen as raising identical claims.

94. The Court notes that habeas corpus will not lie as a substitute for appeal. *Ramos*, 977 S.W.2d at 616.

95. The Court concludes, therefore, that applicant's eleventh and thirteenth grounds for relief are procedurally barred and should not be addressed.

Alternatively, Applicant's Claims Are Without Merit

96. The Court recognizes that, in *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) ("*Penry I*"), the Supreme Court held that the version of article 37.071 then in effect was unconstitutional as applied because it failed to provide the jury with a means to give effect to mitigating evidence.[2]

97. In 1991, in order to comply with *Penry I*, the Texas Legislature revised article 37.071 to require that juries be instructed to "take[] into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" in determining whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Act

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[2] At the time, article 37.071(b) required that the following three special issues be submitted to the jury in a capital case:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Act of May 28, 1973, 63rd Leg., R.S., ch. 426, art. 3, § 1, 1973 Tex. Gen. Laws 1122, 1125 (amended 1991) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (Vernon Supp. 2005)). This version of article 37.071 is now codified under article 37.0711 and applies to the sentencing procedure for a capital offense committed before September 1, 1991. TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(b) (Vernon Supp. 2005).

of May 17, 1991, 72nd Leg., R.S., ch. 838, § 1, art. 37.071(e) (amended 1999) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (Vernon Supp. 2005)). This current version of article 37.071 applies to capital offenses committed on or after September 1, 1991. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(i) (Vernon Supp. 2005).

98. The Court finds that applicant's jury was given the mitigation instruction contained in the current version of article 37.071.[3] (CR 2: 303).

99. The Court notes that this instruction has been upheld by the Court of Criminal Appeals as complying with the requirement of *Penry I* that capital juries be given a vehicle for expressing a "reasoned moral response" to mitigating evidence. *Penry I*, 492 U.S. at 328; *see Massey v. State*, 933 S.W.2d 141, 156 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W.2d 482, 521 (Tex. Crim. App. 1996).

100. Still, applicant claims that the current statutory mitigation instruction is indistinguishable from the constitutionally-defective "nullification" instructions given to capital juries in the immediate wake of *Penry I*.

101. The Court notes that the 1989 *Penry I* decision created a dilemma for Texas trial courts in capital cases: these courts "could not craft entirely new jury

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[3] Specifically, the jury was instructed that if it had answered the first two special issues in the affirmative, it should proceed to answer the following special issue:

> Do you find, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

(CR 2: 303).

interrogatories, as the precise questions had been written by the state legislature. Nor could they suspend trials in anticipation of legislative remediation, as the legislature would not meet again until 1991 and its reaction was unknown." *Robertson v. Cockrell*, 325 F.3d 243, 248 (5th Cir. 2003); *see also Ex parte Staley*, 160 S.W.3d 56, 58 (Tex. Crim. App. 2005). Thus, the courts attempted to conduct trials that complied with *Penry I* by drafting extra-statutory jury instructions or supplemental special issues. *Staley*, 160 S.W.3d at 58.

102. One of these judicially-crafted, supplemental instructions was given to the sentencing jury at Penry's retrial. That instruction told the jury that it could consider mitigating circumstances in deliberating on the three statutory special issues and that if it determined that a life sentence, rather than a death sentence, was an appropriate response to Penry's "personal culpability," it should answer one of the special issues "no."[4] *Penry II*, 532 U.S. at 790.

103. Once again, the Supreme Court reversed Penry's death sentence, holding that the supplemental instruction provided "an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence." *Id.* at 800. The Court reasoned that, depending on how it was interpreted, the instruction either (1) "shackled and confined" Penry's mitigating evidence within the scope of the three

[4] This methodology was intended to ensure that both *Penry I* and Texas statutory law were followed. *See Staley*, 160 S.W.3d at 60 n.7. Under then-existing Texas law, whether the defendant was sentenced to life imprisonment or death depended solely on the jury's answers to the three, statutorily-required special issues: if the jury answered all three special issues in the affirmative, then the trial judge was required to sentence the defendant to death. *See* Act of May 28, 1973, 63rd Leg., R.S., ch. 426, art. 3, § 1, art. 37.071(e), 1973 Tex. Gen. Laws 1122, 1126 (amended 1981).

statutory special issues, none of which was broad enough to provide a vehicle for the jury to give effect to this evidence; or (2) operated as a "nullification instruction," making the jury charge as a whole "internally inconsistent" and placing "law-abiding jurors in an impossible situation." *Id.* at 798-99. The Court explained that it would have been both "logically and ethically impossible" for the jury to answer the special issues in the manner prescribed on the verdict form while at the same time obeying the command of the supplemental instruction. *Id.* at 799-800.

104. Thus, the Court held, the supplemental instruction "inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions." *Id.* at 800 (citations omitted). The Court observed, however, that a "clearly drafted catchall instruction on mitigating evidence . . . might have complied with *Penry I*" and pointed to Texas's newly-enacted statutory instruction as providing "a helpful frame of reference." *Id.* at 803. Noting its "brevity and clarity," the Court called the new statutory instruction an "adequate alternative[]" to the supplemental instruction given to Penry's jury. *Id.*

105. The Court notes that the Supreme Court has recently confronted another extra-statutory supplemental instruction given to a Texas capital sentencing jury in the period of time between *Penry I* and the enactment of a statutory mitigation issue. *See Smith*, 543 U.S. at 306-313. The instruction in *Smith* told the jury that it could

consider any evidence that it deemed mitigating, even if the evidence had no relationship to any of the statutory special issues. *Id.* at 308. If the jury believed that the death penalty was inappropriate due to the mitigating evidence, it was instructed to answer one of the special issues "no" in order to give effect to this belief. *Id.*

106. While acknowledging that this instruction was not identical to the one at issue in *Penry II*, the *Smith* Court held that the distinctions between the two instructions were "constitutionally insignificant." *Id.* at 312. The Court explained that the instruction given to Smith's jury did not resolve the ethical problem identified in *Penry II*: the jury was still "essentially instructed to return a false answer to a special issue in order to avoid a death sentence." *Id.* at 313 (citing *Penry II*, 532 U.S. at 801).

107. Applicant contends there is no principled distinction, for Eighth Amendment purposes, between the statutory mitigation instruction given to the jury in his case and the instructions found to be constitutionally defective in *Penry II* and *Smith*. Specifically, he argues that the statutory instruction inserts the same "element of capriciousness" into the sentencing decision because the jury has already been instructed to consider mitigating evidence in deliberating on the future-dangerousness and anti-parties special issues, and, by answering these two special issues in the affirmative, has already determined that a death sentence is appropriate before even reaching the mitigation special issue. Thus, he reasons,

the jurors must effectively reverse their answers to the first two special issues if they are to answer the mitigation special issue "yes." (Writ Application, p. 59).

108. The Court finds that applicant's arguments reflect a misunderstanding of the *Penry II* and *Smith* decisions.

109. The Court notes that in *Penry II*, the Supreme Court observed that "the key under *Penry I* is that the jury be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence.'" *Penry II*, 532 U.S. at 797 (quoting *Penry I*, 492 U.S. at 319). The instructions in *Penry II* and *Smith* were constitutionally infirm because the only way the jury could give effect to mitigating evidence was through its answers to the statutory special issues, none of which were broad enough to encompass all of the evidence relevant to the defendant's culpability. *Smith*, 543 U.S. at 312; *Penry II*, 532 U.S. at 796. Thus, in order to give effect to mitigating evidence that did not fit within the scope of the special issues, jurors would have to ignore the verdict-form instructions and answer one of the special issues falsely, thereby violating their oath. *See Smith*, 543 U.S. 313; *Penry II*, 532 U.S. at 799.

110. The Court finds that, as part of its verdict, the jury in this case was required to make a determination, separate and apart from its answers to the first two special issues, of whether there were sufficient mitigating circumstances to warrant a life sentence instead of the death penalty. (CR 2: 303). Thus, the jury was able to give full effect to any evidence that had mitigating relevance beyond the scope of the first two special issues.

111. Additionally, the Court finds that, contrary to applicant's contentions, the jury was not required to effectively negate its answers to the first two special issues in order to give mitigating effect to such evidence. The jury could still, even after having answered the first two special issues in the affirmative, determine that the death penalty was inappropriate because there was sufficient evidence mitigating applicant's personal moral culpability.

112. The Court finds, therefore, that the statutory mitigation instruction given in this case permitted applicant's jury "to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Perry*, 158 S.W.3d at 448-49.

113. Furthermore, the Court notes that the Court of Criminal Appeals has specifically held that Texas's statutory mitigation special issue satisfies the constitutional requirement that a capital sentencing jury be provided with an adequate vehicle for expressing a reasoned moral response to all of the evidence relevant to the defendant's culpability. *See Woods*, 152 S.W.3d at 121; *Hall v. State*, 67 S.W.3d 870, 877 (Tex. Crim. App. 2002), *vacated on other grounds by Hall v. Texas*, 537 U.S. 802 (2002). Nothing in either *Penry II* or *Smith* has altered this conclusion, especially in view of the language in *Penry II* giving tacit approval to the statutory instruction.

114. For the foregoing reasons, the Court finds that applicant has failed to prove by a preponderance of the evidence that the mitigation special issue under Article

37.071, section 2(e) is a constitutionally inadequate vehicle for giving effect to mitigating evidence.

115. The Court therefore concludes that the mitigation special issue does not violate the United States Constitution. Applicant's eleventh and thirteenth grounds for relief should be denied.

STATE CONSTITUTIONAL CLAIMS

In his twelfth and fourteenth grounds for relief, applicant contends that the statutory mitigation issue denies capital defendants due course of law and trial by an impartial jury and subjects them to cruel and unusual punishment, in violation of Article I, sections 10, 13, and 19 of the Texas Constitution, for the same reasons asserted in support of his federal constitutional claims in grounds eleven and thirteen.[5]

Applicant's Claims Are Procedurally Barred

116. The Court finds that applicant relies solely on federal constitutional authority and does not argue that the state constitution provides a greater level of protection than the federal constitution in this area of the law.

117. Accordingly, the Court concludes that applicant's state constitutional claims are procedurally barred and should be summarily denied. *See Black*, 26 S.W.3d at 896 n.4.

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[5] Like his thirteenth ground, applicant's fourteenth ground also makes an assertion about the indictment that appears to have no connection to his complaint concerning the mitigation special issue. (Writ Application, pp. 30-31). Applicant raised his state constitutional claim regarding the indictment in his tenth ground for relief, discussed previously. (Writ Application, p. 13). Accordingly, as it did with ground thirteen, the Court refers the reader to its previous discussion of the indictment issue and will otherwise treat grounds twelve and fourteen as raising identical claims.

118. Moreover, the Court finds that, as with his federal claims, applicant could have raised his state constitutional claims on direct appeal, but did not. *See Garcia.*

119. For this additional reason, the Court concludes that applicant's twelfth and fourteenth grounds for relief are procedurally barred and should not be addressed. *See Townsend*, 137 S.W.3d at 81.

Alternatively, Applicant's Claims Are Without Merit

120. The Court finds that the Texas Constitution affords capital defendants no greater protection than the United States Constitution with respect to requiring that juries be provided with an adequate vehicle for giving effect to mitigating evidence.

121. Accordingly, for the reasons set forth in response to applicant's federal constitutional claims, the Court finds that applicant has not carried his burden of proving by a preponderance of the evidence that the mitigation special issue deprived him of his state constitutional rights to due course of law and trial by an impartial jury, and subjected him to cruel and unusual punishment.

122. Accordingly, the Court concludes that applicant suffered no such deprivation of his rights under the Texas Constitution. Applicant's twelfth and fourteenth grounds for relief should be denied.

GROUNDS 15-18: UNANIMITY OF VERDICT

FEDERAL CONSTITUTIONAL CLAIMS

In his fifteenth ground for relief, applicant contends that this Court "allowed a non-unanimous verdict when [it] submitted disjunctive means of committing capital murder" and thereby deprived him of his rights to due process, an impartial jury verdict,

and freedom from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Writ Application, p. 60). In his seventeenth ground for relief, applicant contends that trial counsel's failure to object to the jury charge on this basis constituted ineffective assistance of counsel under the United States Constitution.[6]

Applicant's Claims Are Procedurally Barred

123. The Court finds that applicant did not raise any of these claims on direct appeal, although nothing prevented him from doing so. *See Garcia.*

124. The Court finds that applicant does not rely on any new evidence or law that was not available to him on direct appeal.

125. The Court notes that habeas corpus may not be used to litigate matters that could have been raised on appeal. *See Boyd*, 58 S.W.3d at 136.

126. The Court further notes that an applicant is barred from challenging the effectiveness of trial counsel for the first time on habeas review when, as here, he has failed to utilize the habeas process to develop additional evidence to support his claim. *See Nailor*, 149 S.W.3d at 131-32.

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[6] Grounds fifteen through eighteen refer to the "party 'conspiracy' instruction" under Penal Code section 7.02(b) as permitting a non-unanimous verdict. (Writ Application, pp. 60-61). Once again, there seems to be discrepancy between what applicant lists as his grounds for relief and what he actually argues. Applicant does not specifically discuss the relationship, if any, between the conspiracy instruction and the unanimity of the jury's verdict. Instead, what he appears to be arguing is that there was a potential for a non-unanimous verdict because two theories of capital murder were submitted to the jury: murder of a peace officer and murder committed in the course of a robbery. (CR 2: 282-83; Writ Application, pp. 70-71, 75). *See* TEX. PENAL CODE ANN. § 19.03(a)(1)-(2). For instance, he maintains that "the disjunctive allegations in the application paragraphs gave rise to an equivalent 'umbrella' crime because the crimes were two distinct crimes, one of murder in the course of robbery and one the murder of a police officer." (Writ Application, p. 75). Thus, the Court has interpreted grounds for relief fifteen through eighteen as a challenge to the submission of alternative theories of capital murder under section 19.03 and not as a challenge to the submission of alternative theories of parties liability under section 7.02.

127. The Court concludes, therefore, that applicant's fifteenth and seventeenth grounds for relief are procedurally barred and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

The jury charge did not allow for a non-unanimous verdict.

128. The Court finds that the indictment in this case alleged that applicant committed the offense of capital murder by (1) knowingly and intentionally causing the death of Aubrey Hawkins, a peace officer acting in the lawful discharge of an official duty, by shooting him with a firearm; and (2) intentionally causing the death of Aubrey Hawkins by shooting him with a firearm while applicant was in the course of committing and attempting to commit the offense of robbery. (CR 1: 2). *See* TEX. PENAL CODE ANN. § 19.03(a)(1)-(2).

129. The Court finds that the charge authorized the jury to find applicant guilty of capital murder if it concluded beyond a reasonable doubt that he — as a principal, a party, or a co-conspirator — caused Officer Hawkins's death under either of the two theories alleged in the indictment.[7] (CR 2: 289-92).

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[7] Thus, the jury charge contained six separate application paragraphs, instructing the jury to find applicant guilty of capital murder if it believed that he

(1) intentionally or knowingly caused the death of Aubrey Hawkins, a peace officer;

(2) with the intent to promote or assist the commission of the offense of murder, solicited, encouraged, directed, aided, or attempted to aid any one or combination of the other six escapees in intentionally or knowingly causing the death of Aubrey Hawkins, a peace officer;

(3) entered into a conspiracy with one or more of the other six escapees to commit the offense of robbery, and in the attempt to carry out this conspiracy, one or more of the other escapees intentionally or knowingly caused the death of Aubrey Hawkins, a peace officer, and intentionally or knowingly causing the death of Aubrey Hawkins was committed in furtherance of the unlawful purpose to commit robbery and should have been anticipated as a result of carrying out the conspiracy to commit robbery, whether or not applicant intended to cause the death of Aubrey Hawkins;

130. The Court finds that the jury was not instructed that it had to unanimously agree on any one particular theory.

131. The Court finds that the jury returned a general verdict, finding applicant guilty of capital murder "as charged in the indictment." (CR 2: 295).

132. The Court recognizes that a jury must be unanimous as to what specific statutory criminal act the defendant has committed. *See Ngo v. State*, No. PD-0504-04, 2005 Tex. Crim. App. LEXIS 457, at *14-15 (Mar. 16, 2005).

133. Accordingly, the Court observes that when an indictment charges the defendant with committing separate criminal acts — even if those acts constitute violations of the same statutory provision — the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of the charged criminal acts. *Id.* at *11.

134. But the Court also recognizes that a trial court does not err simply by submitting the separate offenses to the jury in the disjunctive; error lies "in failing to instruct

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(4) intentionally caused the death of Aubrey Hawkins while in the course of committing or attempting to commit the offense of robbery;

(5) with the intent to promote or assist the commission of the offense of murder, solicited, encouraged, directed, aided, or attempted to aid any one or combination of the other six escapees in intentionally causing the death of Aubrey Hawkins in the course of the commission or attempted commission of the offense of robbery; or

(6) entered into a conspiracy with one or more of the other six escapees to commit the felony offense of robbery, and in the attempt to carry out this conspiracy, one or more of the other escapees intentionally caused the death of Aubrey Hawkins, and intentionally causing the death of Aubrey Hawkins was committed in furtherance of the unlawful purpose to commit robbery and should have been anticipated as a result of carrying out the conspiracy to commit robbery, whether or not applicant intended to cause the death of Aubrey Hawkins.

(CR: 2: 289-91).

the jury that it must be unanimous in deciding which one (or more) of the . . . disjunctively submitted offenses it found [the defendant] committed." *Id.* at *24. Nor does a trial court necessarily err by allowing the jury to return a general verdict in this situation: "it does not matter which criminal act . . . the jury found [the defendant] had committed as long as each juror agreed on the same criminal act." *Id.* at *25.

135. Furthermore, the Court notes that a jury need not agree on the preliminary factual issues that underlie its verdict. *See id.* at *16; *Kitchens v. State*, 823 S.W.2d 256, 257-58 (Tex. Crim. App. 1991) (citing *Schad v. Arizona*, 501 U.S. 624, 632 (1991)). In other words, the jury must unanimously agree on *what* criminal act the defendant committed, but not on *how* the defendant committed that act. "The crucial distinction is thus between a fact that is a specific *actus reus* element of the crime and one that is 'but the means' to the commission of a specific actus reus element." *Ngo*, 2005 Tex. Crim. App. LEXIS 457, at *18 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

136. The Court observes that, in addressing a complaint that a disjunctive jury charge permitted a non-unanimous verdict, the reviewing court should first determine whether the separate application paragraphs contain different criminal acts or whether they merely instruct as to different means of committing the same criminal act. *See Holford v. State*, No. 01-04-00195-CR, 2005 Tex. App. LEXIS 3602, at *14 (Houston [1st Dist.] May 12, 2005, pet. ref'd) (citing *Ngo*, 2005 Tex. Crim. App. LEXIS 457, at *15-16).

137. In making this determination, "[a] handy, though not definitive, rule of thumb is to look to the statutory verb defining the criminal act. That verb . . . is generally the criminal act upon which all jurors must unanimously agree." *Ngo*, 2005 Tex. Crim. App. LEXIS 457, at *15 n.24.

138. The Court notes that the Court of Criminal Appeals has held that when an indictment charges different theories under which a defendant committed a single capital murder, the jury need not agree on which theory has been proven. *See Kitchens*, 823 S.W.2d at 258; *see also Hathorn v. State*, 848 S.W.2d 101, 113 (Tex. Crim. App. 1992) (holding that an indictment charging the defendant with committing a single capital murder under different subsections of section 19.03 alleged only one offense); *Bethany v. State*, 152 S.W.2d 660, 669 (Tex. App.—Texarkana 2004, pet. ref'd) (holding that the jury was not required to agree on whether the defendant killed the victim for remuneration or in the course of committing a robbery in order to convict him of capital murder); *cf. Graham v. State*, 19 S.W.3d 851, 854 (Tex. Crim. App. 2000) (holding that a capital murder indictment charging the defendant with murdering victims A and B during the same criminal transaction, murdering victim A during the course of a robbery, and murdering victim C during the course of a robbery alleged two distinct capital murder offenses, not simply three alternative theories for one offense).

139. Thus, the Court finds that capital murder is not, as applicant contends, an "umbrella" crime, under which any one of several distinct criminal acts would suffice for conviction. *Schad*, 501 U.S. at 650 (Scalia, J., concurring). The actus

reus of capital murder is murder, regardless of how the offense is alleged to have been committed.

140. The Court finds that applicant was charged with committing a single criminal act: the murder of Aubrey Hawkins. In order to convict, therefore, the jury had to unanimously agree that applicant was criminally responsible for causing Officer Hawkins's death. The jury did not, however, have to agree on which of the two aggravating factors alleged in the indictment — that Officer Hawkins was a peace officer or that he was intentionally killed in the course of a robbery — elevated the act of causing Officer Hawkins's death to a capital murder.

141. The Court finds that even if half the jury found applicant guilty of the murder of a peace officer while the other half found him guilty of murder in the course of robbery, the jury still unanimously convicted applicant of the same single, specific criminal act — the capital murder of Officer Hawkins.

142. Accordingly, the Court finds and concludes that, because applicant was charged with committing a single criminal act, this Court did not err in submitting the different theories of capital murder in the disjunctive and not requiring the jury to unanimously agree on one specific theory. *See, e.g.*, *Schad*, 501 U.S. at 632 (holding that the jury was not required to agree on whether the defendant murdered the victim "with premeditation or in the course of committing a robbery"); *Aguirre v. State*, 732 S.W.2d 320, 324-27 (Tex. Crim. App. 1987) (op. on reh'g) (holding that where the indictment charged the defendant with intentionally causing the victim's death and with causing the victim's death during

the course of committing a felony, intentional murder and felony murder were not different offenses, but merely different ways of committing the same murder); *cf. Ngo*, 2005 Tex. Crim. App. LEXIS 457, at *25 (holding that where the defendant was charged with three separate acts of credit-card abuse in a single indictment, the jury was required to unanimously agree on which of these three acts the defendant committed); *Francis v. State*, 36 S.W.3d 121, 123-25 (Tex. Crim. App. 2000) (holding that where the defendant was charged with two distinct acts of indecency with a child, which occurred at different times and dates, the jury was required to agree on the same act for conviction).

143. For the foregoing reasons, the Court finds that applicant has failed to prove by a preponderance of the evidence that the jury charge allowed a non-unanimous verdict and thereby violated his rights under the United States Constitution to due process, an impartial jury verdict, and freedom from cruel and unusual punishment.

144. The Court finds that the jury charge did not permit a non-unanimous verdict.

145. The Court concludes, therefore, that the jury charge did not deprive applicant of his federal constitutional rights. His fifteenth ground for relief should be denied.

Applicant was not harmed by the submission of disjunctive means of committing capital murder without a requirement of unanimity.

146. The Court notes that when federal constitutional error that is subject to a harm analysis is raised on habeas, the applicant bears the burden of proving by a preponderance of the evidence that the alleged error actually contributed to his

conviction or punishment. *Ex parte Fierro*, 934 S.W.2d 370, 374-75 (Tex. Crim. App. 1996).

147. The Court finds that it was not contested at trial that Officer Hawkins was intentionally killed during the course of a robbery and while he was in the lawful discharge of his official duties as a peace officer. (RR 50: 19-39). The only issue contested at trial was the degree of applicant's involvement in, and responsibility for, the officer's murder. (RR 50: 26-27, 32-39).

148. Thus, the Court finds that a juror could not have believed that applicant was guilty of committing a murder in the course of a robbery, but was not guilty of murdering a peace officer, or vice versa.

149. The Court finds that there was, therefore, no real possibility of a non-unanimous verdict in this case. *Cf. Ngo*, 2005 Tex. Crim. App. LEXIS 457, at *33-34 (holding that the defendant was harmed by the trial court's failure to instruct the jury that it must be unanimous in deciding which one of the three disjunctively-submitted offenses it found the defendant had committed, where the defendant testified and denied committing any of the three offenses and where two of the offenses were mutually exclusive).

150. The Court finds that applicant has failed to prove by a preponderance of the evidence that the absence of a instruction requiring unanimity as to which of the two theories of capital murder the jury found from the evidence actually contributed to his conviction or punishment.

151. Accordingly, the Court concludes that applicant was not harmed by the absence of a jury instruction requiring unanimity as to which type of capital murder he committed. For this additional reason, applicant's fifteenth ground for relief should be denied.

Applicant was not denied effective assistance of counsel.

152. The Court notes that to establish ineffective assistance of counsel, applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) a probability sufficient to undermine confidence in the outcome exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687; *Thompson*, 9 S.W.3d at 812.

153. The Court further notes that counsel cannot be labeled ineffective for failing to lodge a meritless objection. *See, e.g.*, *Ladd*, 3 S.W.3d at 565 (holding that counsel did not render ineffective assistance when he failed to object to the definition of "conspiracy" contained in the jury charge because that definition was not erroneous).

154. Thus, to show that counsel was ineffective for failing to object to the jury charge, applicant must show that this Court would have erred in overruling the objection. *See White*, 160 S.W.3d at 53 (citing *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996)). The success of applicant's ineffective-assistance complaint is therefore contingent on the merits of his challenge to the jury charge.

155. For the reasons discussed in relation to ground fifteen, the Court concludes that applicant's contention that the jury charge allowed for a non-unanimous verdict is without merit.

156. The Court finds that applicant has failed to prove by a preponderance of the evidence that counsel was deficient for not objecting to the jury charge on this basis.

157. Accordingly, the Court concludes that applicant was not denied his right to effective assistance of counsel under the United States Constitution.

158. Moreover, the Court finds that, absent any evidence of the rationale behind counsel's failure to object, applicant fails to defeat the strong presumption that counsel's actions fell within the wide range of reasonable, professional assistance. *See Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). To defeat this presumption, applicant must prove that there was, in fact, no plausible, professional reason for the failure to object. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

159. The Court further recognizes that the Court of Criminal Appeals has made it clear that trial counsel should ordinarily be accorded an opportunity to explain his actions before his performance is scrutinized for constitutional competence. *See id.*; *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003).

160. The Court finds that the trial record is silent as to why counsel did not object to the charge. Furthermore, the Court finds that applicant has not provided this Court with any extrinsic evidence of counsel's reasoning.

161. Accordingly, the Court finds that applicant has failed to rebut the presumption that counsel's decision not to object to the jury charge on the grounds that it allowed a non-unanimous verdict constituted reasonable assistance.

162. The Court concludes, therefore, that counsel was not ineffective under the federal constitution .

163. Additionally, the Court finds that applicant has not proven by a preponderance of the evidence that trial counsel's decision not to object to the jury charge on this basis prejudiced his defense.

164. The Court finds it highly unlikely that, given the evidence in this case, the jury was divided on whether Officer Hawkins was killed in the lawful discharge of his official duties as a peace officer or whether he was killed during a robbery.

165. Thus, the Court finds that applicant has not proven by a preponderance of the evidence that a probability sufficient to undermine confidence in the outcome exists that had unanimity been required as to the specific manner and means of committing the offense, he would not have been convicted of the capital murder of Officer Hawkins. *See Strickland*, 466 U.S. at 694; *Thompson*, 9 S.W.3d at 812.

166. For the foregoing reasons, the Court finds that applicant has not met his burden of establishing ineffective assistance of counsel under the United States Constitution.

167. The Court concludes, therefore, that counsel was not ineffective. Applicant's seventeenth ground for relief should be denied.

STATE CONSTITUTIONAL CLAIMS

In his sixteenth ground for relief, applicant contends that this Court's submission of disjunctive means of committing capital murder in the jury charge allowed a non-unanimous verdict and thereby deprived him of his rights under Article I, sections 10, 13, and 19 of the Texas Constitution to due course of law, an impartial jury verdict, and freedom from cruel and unusual punishment. In his eighteenth ground for relief, applicant contends that trial counsel's failure to object to the jury charge on this basis constituted ineffective assistance of counsel under the Texas Constitution.

Applicant's Claims Are Procedurally Barred

168. The Court finds that applicant relies solely on federal constitutional authority and does not argue that the state constitution provides a greater level of protection than the federal constitution in this area of the law.

169. Accordingly, the Court concludes that applicant's state constitutional claims are procedurally barred and should be summarily denied. *See Black*, 26 S.W.3d at 896 n.4.

170. Moreover, the Court finds that, as with his federal claims, applicant could have raised his state constitutional claims on direct appeal, but did not. *See Garcia.*

171. For this additional reason, the Court concludes that applicant's sixteenth and eighteenth grounds for relief are procedurally barred and should not be addressed. *See Townsend*, 137 S.W.3d at 81.

Alternatively, Applicant's Claims Are Without Merit

172. The Court finds that the Texas Constitution affords applicant no greater protection than the United States Constitution in this area of the law.

173. The Court finds that applicant has failed to prove by a preponderance of the evidence that the submission of disjunctive means of committing capital murder in the jury charge allowed for a non-unanimous verdict, thereby depriving him of his state constitutional rights to due course of law, an impartial jury verdict, and freedom from cruel and unusual punishment.

174. For the reasons discussed in connection with ground fifteen, the Court finds that the jury charge did not permit a non-unanimous verdict.

175. Accordingly, the court concludes that applicant suffered no deprivation of his state constitutional rights. His sixteenth ground for relief should be denied.

176. The Court also finds that applicant has failed to prove by a preponderance of the evidence that trial counsel's failure to object to the jury charge as allowing a non-unanimous verdict constituted deficient performance and prejudiced his defense.

177. For the reasons discussion in connection with ground seventeen, the Court finds that counsel was not deficient for not objecting to the jury charge on this basis and that applicant's defense was not prejudiced.

178. The Court concludes, therefore, that applicant was not deprived of his right to effective assistance of counsel under the Texas Constitution. His eighteenth ground for relief should be denied.

GROUNDS 19-20: CONSPIRACY INSTRUCTION

FEDERAL CONSTITUTIONAL CLAIMS

In his nineteenth ground for relief, applicant contends that this Court erred in instructing the jury on co-conspirator liability under section 7.02(b) of the Texas Penal Code.[8] (CR 2: 287). He argues that this instruction "allowed a lesser burden of proof of intent to secure a conviction for capital murder" and thereby violated his rights under the United States Constitution to due process, trial by an impartial jury, and freedom from cruel and unusual punishment.

Applicant's Claims Are Procedurally Barred

179. The Court finds that applicant failed to raise his challenge to the conspiracy instruction on direct appeal. *See Garcia.*

180. The Court notes that habeas corpus may not be used as a substitute for appeal. *See Nelson*, 137 S.W.3d at 667.

181. Accordingly, the Court concludes that applicant's nineteenth ground for relief is procedurally barred and should not be addressed.

Alternatively, Applicant's Claims Are Without Merit

182. The Court observes that although section 7.02(b) allows a defendant to be held criminally responsible for the conduct of another — thereby eliminating the

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[8] This statute provides:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

necessity for proving intent to commit the felony actually committed — it does not excuse the State altogether from proving a culpable mental state. *Gravis v. State*, 982 S.W.2d 933, 938 (Tex. App.—Austin 1998, pet. ref'd).

183. In fact, the statute requires the State to prove that the defendant had both the mens rea to engage in a conspiracy and the culpable mental state to commit the underlying felony. *Id.* The mental state required for the underlying felony supplies the mens rea for the felony that resulted from the conspiracy. *Id.*; *accord Cienfuegos v. State*, 113 S.W.3d 481, 493-94 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). This "transference of the mental element establishing criminal responsibility for the original act to the resulting act conforms to and preserves the traditional mens rea requirement of the criminal law." *Rodriquez*, 548 S.W.2d at 29.

184. Furthermore, the Court notes that the Court of Criminal Appeals has held that Texas's capital-punishment scheme does not unconstitutionally allow an individual to be put to death for merely being a party to a murder. *See Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992).

185. When a jury was permitted to find the defendant guilty of capital murder as a party under section 7.02, the death penalty may be assessed only if the jury determines that the defendant "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2). This ensures that a capital defendant convicted as a party or co-

conspirator will not be sentenced to death unless he is found to bear personal moral culpability for the victim's death. *See Prystash v. State*, 3 S.W.3d 522, 540 (Tex. Crim. App. 1999).

186. The Court finds that applicant's jury was given this "anti-parties" special issue instruction in the charge. (CR 2: 302).

187. Accordingly, the Court finds that applicant has failed to prove by a preponderance of the evidence that the conspiracy instruction given to the jury in this case deprived him of due process and an impartial jury verdict and subjected him to cruel and unusual punishment under the United States Constitution.

188. For the foregoing reasons, the Court concludes the conspiracy instruction it gave the jury in this case did not violate applicant's federal constitutional rights. Applicant's nineteenth ground for relief should therefore be denied.

STATE CONSTITUTIONAL CLAIMS

In his twentieth ground for relief, applicant maintains that the conspiracy instruction given to the jury in this case violated his rights to due course of law, an impartial jury verdict, and freedom from cruel and unusual punishment under Article I, sections 10, 13, and 19 of the Texas Constitution for the same reasons asserted in support of his federal constitutional claims in ground nineteen.

Applicant's Claims Are Procedurally Barred

189. The Court finds that applicant relies solely on federal constitutional authority and does not argue that the state constitution provides a greater level of protection than the federal constitution in this area of the law.

190. Accordingly, the Court concludes that applicant's state constitutional claims are procedurally barred and should be summarily denied. *See Black*, 26 S.W.3d at 896 n.4.

191. Moreover, the Court finds that, as with his federal claims, applicant could have raised his state constitutional claims on direct appeal, but did not. *See Garcia.*

192. For this additional reason, the Court concludes that applicant's twentieth ground for relief is procedurally barred and should not be addressed. *See Townsend*, 137 S.W.3d at 81.

Alternatively, Applicant's Claims Are Without Merit

193. The Court finds that the Texas Constitution does not afford applicant any greater protection than the United States Constitution with respect to the claims made.

194. The Court finds that applicant has failed to prove by a preponderance of the evidence that his rights under the Texas Constitution to due course of law, an impartial jury verdict, and freedom from cruel and unusual punishment were violated by the inclusion of a conspiracy instruction in the jury charge.

195. For the reasons discussed in connection with ground nineteen, the Court concludes that the conspiracy instruction given to the jury in this case did not violate applicant's state constitutional rights. His twentieth ground for relief should be denied.

GROUNDS 21-22: INFERRED-INTENT INSTRUCTION

FEDERAL CONSTITUTIONAL CLAIMS

In his twenty-first ground for relief, applicant contends that this Court erred in instructing the jury at the guilt phase of his trial that "[i]ntent may be inferred from the surrounding facts and circumstances including but not limited to acts done and words spoken." (CR 2: 286). He argues that this instruction constituted an improper comment on the weight of the evidence, in violation his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Applicant's Claims Are Procedurally Barred

196. The Court finds that applicant could have raised these complaints about the jury charge on direct appeal, but did not. *See Garcia.*

197. The Court notes that habeas corpus may not be used to litigate claims that could have been raised on appeal. *See Nelson*, 137 S.W.3d at 667.

198. Consequently, the Court concludes that ground twenty-one is procedurally barred and should not be addressed.

Alternatively, Applicant's Claims Are Without Merit

199. The Court acknowledges that the Court of Criminal Appeals has held that a trial court's instructing the jury that it may infer intent from acts done and words spoken "marginally falls on the wrong side of the 'improper-judicial-comment' scale because it is simply unnecessary and fails to clarify the law for the jury." *Brown v. State*, 122 S.W.3d 794, 802 (Tex. Crim. App. 2003).

200. The Court of Criminal Appeals has also held, however, that such an instruction is "mild, neutral, and an obvious common-sense proposition" and is "not, in any sense, harmful under *Almanza*." *Id.* at 803-04.

201. The Court finds that the impact of the inferred-intent instruction given in this case was likewise negligible and not harmful to applicant.

202. The Court finds that applicant has failed to prove by a preponderance of the evidence that he was harmed by the inclusion of an inferred-intent instruction in the jury charge. *See Fierro*, 934 S.W.2d at 374-75.

203. Accordingly, the Court concludes that inferred-intent instruction given to the jury in this case did not deprive applicant of his rights under the United States Constitution . His twenty-first ground for relief should be denied.

STATE CONSTITUTIONAL CLAIMS

In his twenty-second ground for relief, applicant contends that the inclusion of an inferred-intent instruction in the jury charge violated his rights under Article I, sections 10, 13, and 19 of the Texas Constitution for the same reasons asserted in support of his federal constitutional claims in ground twenty-one.

Applicant's Claims Are Procedurally Barred

204. The Court finds that applicant argues his state constitutional claims together with the federal claims asserted in the previous ground. Applicant does not contend that the two constitutions offer different levels of protection.

205. Accordingly, the Court concludes that applicant's state constitutional claims are procedurally barred and should be summarily denied. *See Black*, 26 S.W.3d at 896 n.4.

206. Moreover, as with his federal constitutional claims on this issue, applicant could have raised his state constitutional claims on direct appeal, but did not. *See Garcia*.

207. For this additional reason, the Court concludes that applicant's twenty-second ground for relief is procedurally barred and should not be addressed. *See Townsend*, 137 S.W.3d at 81.

Alternatively, Applicant's Claims Are Without Merit

208. The Court finds that the Texas Constitution affords no greater protection in this area of the law than the United States Constitution.

209. For the reasons discussed above in connection with ground twenty-one, the Court finds that applicant has failed to prove by a preponderance of the evidence that the inclusion of an inferred-intent instruction in the jury charge violated his rights under the Texas Constitution.

210. Accordingly, the Court concludes that applicant suffered no deprivation of his state constitutional rights. His twenty-second ground for relief should be denied.

GROUNDS 23-24: "FAIR CROSS SECTION" CHALLENGE

FEDERAL CONSTITUTIONAL CLAIMS

In his twenty-third ground for relief, applicant contends that trial counsel rendered ineffective assistance under both the United States Constitution by failing to challenge

the composition of the venire. Applicant maintains that Hispanics and persons eighteen to thirty-four years of age are demonstrably underrepresented on jury panels in Dallas County.

Applicant's Claims Are Procedurally Barred

211. The Court finds that applicant relies exclusively on the trial record to substantiate his complaints about trial counsel's performance.

212. Thus, the Court finds that applicant could have raised these complaints on direct appeal, although he did not. *See Garcia*; *Nailor*, 149 S.W.3d at 131-32.

213. The Court concludes that applicant has forfeited his claims. *See Townsend*, 137 S.W.3d at 81. Applicant's twenty-third ground for relief is procedurally barred and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

214. The Court recognizes that the Sixth Amendment to the United States Constitution guarantees the right of an accused to a "speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. An essential component of this Sixth Amendment guarantee is the requirement that the venire from which a petit jury is selected represent a "fair cross-section" of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528-29 (1975).

215. The Court notes that in order to establish a prima facie violation of this fair-cross-section requirement, a defendant must show that (1) the group allegedly excluded is a "distinctive group" within the community; (2) the group is not fairly

represented on venires from which juries are selected; and (3) this underrepresentation results from systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

216. The Court further notes that a habeas applicant has the burden of proving his factual allegations by a preponderance of the evidence. *Ex parte Adams*, 768 S.W.2d 281, 287-88 (Tex. Crim. App. 1989).

While Hispanics are a distinctive group in the community, eighteen- to thirty-four-year-olds are not.

217. The Court concludes that Hispanics are a distinctive group in Dallas County. *See Aldrich v. State*, 928 S.W.2d 558, 560 (Tex. Crim. App. 1996).

218. The Court has not, however, found any authority for the proposition that a particular age group may be a distinctive group for *Duren* purposes.

219. Indeed, the Court notes that appellate courts have consistently refused to classify age groups as "distinctive" under *Duren*. *See Johnson v. McCaughtry*, 92 F.3d 585, 592-93 (7th Cir. 1996) (rejecting ages 18-25 as a distinctive group and noting that age-based claims under *Duren* "have been rejected in every circuit that has considered them"); *Brewer v. Nix*, 963 F.2d 1111, 1113 (8th Cir. 1992) (rejecting ages 65 and older as a distinctive group); *Wysinger v. Davis*, 886 F.2d 295, 296 (11th Cir. 1989) (rejecting ages 18-25 as a distinctive group); *Ford v. Seabold*, 841 F.2d 677, 682 (6th Cir. 1988) (rejecting ages 18-29 as a distinctive group); *Barber v. Ponte*, 772 F.2d 982, 998 (1st Cir. 1985) (op. on reh'g en banc) (rejecting ages

18-34 as a distinctive group); *Weaver v. State*, 823 S.W.2d 371, 373 (Tex. Crim. App. 1992) (rejecting ages 65 and older as a distinctive group).

220. Furthermore, the Court finds that applicant has not provided any evidence to suggest that eighteen- to thirty-four-year-olds, in particular, share similar attitudes, values, ideas, and experiences that make them distinct from other age groups.

221. The Court finds, therefore, that applicant has not demonstrated that persons eighteen to thirty-four years of age comprise a distinctive group in the community.

222. Accordingly, with respect to this age group, the Court concludes that applicant has failed to meet the first prong of the *Duren* test. *See Barber*, 772 F.2d at 998; *see also Weaver*, 823 S.W.2d at 373 (rejecting *Duren* claim with respect to persons over 65 years of age where the defendant "offered no evidence to suggest that some common thread of shared experience or political, social, or religious viewpoint binds this group together to make it distinct from any other age group").

Applicant has not proven that Hispanics and persons eighteen to thirty-four years of age are underrepresented on Dallas County venires.

223. The Court notes that the second prong of *Duren* requires applicant to show that the number of Hispanics and persons eighteen to thirty-four years of age on Dallas County venires is not fair and reasonable in relation to the number of those individuals in Dallas County who are qualified for the jury-selection process. *See Pondexter v. State*, 942 S.W.2d 577, 580-81 (Tex. Crim. App. 1996).

224. The Court observes that, in *Pondexter*, the defendant claimed the trial court had violated the Sixth Amendment by refusing to dismiss the array after he presented

undisputed evidence that African-Americans made up twenty-two percent of the county's population but less than ten percent of the panel of prospective jurors. 942 S.W.2d at 580.

225. In response, the Court of Criminal Appeals observed that, on its face, the difference between the number of African-Americans in the county and the number on the venire might arguably raise an inference of unfairness or unreasonableness. *Id.* The Court overruled the defendant's complaint, however, because he had not shown that the percentage of African-Americans who *qualified* for the jury-selection process was the same as or similar to the total percentage of African-Americans in the population. *Id.* at 580-81; *accord United States v. Brummitt*, 665 F.2d 521, 529 (5th Cir. 1981) ("[T]o establish the prima facie case of a denial of a fair cross-section, the disparity between the proportion of members of an identifiable class on a jury list must be based not on total population but, instead, on those of the identifiable class who are eligible to serve as jurors.").

226. The Court finds that applicant has the same problem proving his fair-cross-section claim as did the defendant in *Pondexter*.

227. The Court notes that applicant claims to rely on statistics extracted from a 2000 *Dallas Morning News* article comparing the percentage of Hispanics and persons eighteen to thirty-four years of age in the population as a whole to the percentage of these groups in the Dallas County jury pool.

228. As an initial matter, the Court concludes that the mere citation of a newspaper article to this Court does not suffice to introduce into evidence the truth of the

hearsay or so-called scientific conclusions contained within the article. *See Ramdass v. Angelone*, 530 U.S. 156, 172 (2000).

229. Additionally, even if it were to assume the accuracy of applicant's statistics, the Court finds that he has presented no evidence showing what percentage of Hispanics and eighteen- to thirty-four-year-olds are actually *qualified* to participate in the jury-selection process.

230. Thus, the Court finds that applicant has not shown that the representation of these two groups on Dallas County venires is not fairly and reasonably related to the number of such persons in the community who are qualified to sit on a jury.

231. The Court finds that applicant has not proven by a preponderance of the evidence that Hispanics and people between the ages of eighteen and thirty-four are unfairly represented on jury panels in Dallas County.

232. The Court concludes, therefore, that applicant has failed to satisfy the second prong of the *Duren* test.

Applicant has not proven that Hispanics and persons eighteen to thirty-four years of age are systematically excluded from the jury-selection process.

233. The Court notes that the third prong of *Duren* requires applicant to show that the alleged underrepresentation of these groups on jury panels is inherent in the jury-selection process used in Dallas County. *Duren*, 439 U.S. at 366. Specifically, applicant must identify a particular systematic defect or operational deficiency that accounts for the alleged underrepresentation. *See United States v. Pion*, 25 F.3d 18, 23 (1st Cir. 1994).

234. The Court recognizes that because some people are simply less available than others to serve as jurors, a true cross-section is practically unobtainable. *Barber*, 772 F.2d at 997. Thus, the Supreme Court has never required that a venire be, statistically, a substantially true mirror of the community. *Id.* "[C]ourts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not *actively* prevent people from serving or actively discriminate, and so long as the system is reasonably open to all." *Id.*

235. The Court notes that affirmative barriers to selection for jury service or different selection standards for different groups are hallmarks of a Sixth Amendment violation. In *Taylor*, for example, the Supreme Court held that a Louisiana statute that prevented a woman from being selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service violated the fair-cross-section requirement. 419 U.S. at 523, 531. And in *Lacy v. State*, the Tyler Court of Appeals suggested that systematic exclusion could be established by showing that distinctive groups "were not included in the computer base from which the panel was selected." 899 S.W.2d 284, 288 (Tex. App.—Tyler 1995, no pet.).

236. The Court finds that, in Texas, the names on the jury wheel in each county are selected from the names of all persons on the current voter-registration lists and the names of all citizens who have a valid Texas driver's license or identification card. *See* TEX. GOV'T CODE ANN. § 62.001 (Vernon Supp. 2005).

237. The Court notes that this method of selection has been repeatedly upheld against Sixth Amendment attack. *See, e.g., United States v. James*, 528 F.2d 999, 1022 (5th Cir. 1976) (upholding the use of voter registration lists as the *sole* source of potential jurors).

238. The Court finds that no person, by reason of their membership in either of the distinctive groups at issue here, is prevented by law from registering to vote or from obtaining a driver's license or state identification card.

239. Moreover, the Court concludes that the failure of individual group members to avail themselves of these privileges "in the same proportion as was their share in the overall population" does not constitute systematic exclusion under *Duren*. *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir. 1988); *see also Soria v. Johnson*, 207 F.3d 232, 249 (5th Cir. 2000) ("[T]he fact that an identifiable minority group votes in a proportion lower than the rest of the population and is therefore underrepresented on jury panels presents no constitutional issue.").

240. Thus, the Court finds that applicant has failed to produce any evidence that Dallas County's jury-selection process systematically excludes Hispanics and persons eighteen to thirty-four years of age.

241. In fact, the Court perceives applicant's real complaint as directed toward what happens *after* summonses are mailed to potential jurors. Applicant claims that a disproportionate number of Hispanics and people between the ages of eighteen and thirty-four ignore jury summonses. He blames this failure to obey jury summonses on Dallas County policies, suggesting that the low pay for jury

service, coupled with the failure of Dallas County officials to enforce jury summonses, results, as a practical matter, in the underrepresentation of Hispanics and eighteen- to thirty-four-year-olds in the jury pool.

242. The Court finds applicant's assertion that low juror pay in Dallas County and the failure to enforce summonses cause Hispanics and young adults to shirk jury duty in disproportionate numbers to be pure speculation. Apart from referencing newspaper and law review articles, the Court finds that applicant does not point to any evidence that the amount of pay or the lack of consequences for failing to report are the reasons why these groups do not report.

243. The Court finds that there could be any number of personal reasons, wholly unrelated to county policies, for the failure to report.

244. The Court further finds that everyone summoned for jury duty in the criminal courts of Dallas County, regardless of age or ethnicity, receives the same pay and suffers the same consequences for failing to report.

245. The Court concludes, therefore, that the system is "reasonably open to all." *Barber*, 772 F.2d at 997. The personal decision of a particular individual to ignore a jury summons cannot be attributed to a constitutional defect in the jury-selection process itself. More importantly, the Court concludes, any discrepancies resulting from such private-sector influences do not violate the fair-cross-section requirement.

246. The Court concludes that applicant has failed to satisfy the third prong of the *Duren* test by demonstrating that the allegedly distinctive and underrepresented

groups are systematically excluded from the jury-selection process in Dallas County. Accordingly, applicant has not established a prima facie violation of the Sixth Amendment's fair-cross-section requirement.

247. The Court finds that applicant has failed to prove by a preponderance of the evidence that the venire in his case did not represent a fair cross-section of the community.

248. The Court concludes, therefore, that applicant's Sixth Amendment right to a jury drawn from a fair cross-section of the community was not violated.

Counsel was not ineffective for failing to make a meritless objection.

249. The Court notes that when a defendant claims that counsel was ineffective for failing to object or to preserve error on some issue, the defendant must show that the underlying issue has merit. *See White*, 160 S.W.3d at 53.

250. Thus, the Court observes that in order to succeed on the ineffective-assistance-of-counsel claims he makes in his twenty-third ground for relief, applicant has to demonstrate that this Court would have erred in overruling a *Duren* objection to the composition of the venire.

251. The Court finds that applicant has failed in this burden because, as discussed above, he has not shown that the venire in his case did not represent a fair cross-section of the community. *See Luckette v. State*, 906 S.W.2d 663, 667 (Tex. App.—Amarillo 1995, pet. ref'd).

252. Thus, the Court finds that a fair-cross-section complaint would have been meritless.

253. The Court concludes that counsel was not deficient for failing to lodge a meritless Sixth Amendment objection. *See Vaughn*, 931 S.W.2d at 566-67.

254. Additionally, the Court finds that applicant has not presented any evidence of counsel's reasons for not raising a fair-cross-section challenge to the venire and has not, therefore, defeated the strong presumption that counsel's actions fell within the wide range of reasonable, professional assistance.

255. Thus, the Court finds that applicant has failed to sustain his burden of proving by a preponderance of the evidence that trial counsel's decision not to challenge the venire on Sixth Amendment grounds constituted ineffective assistance.

256. Consequently, the Court concludes that counsel's decision not to raise a fair-cross-section claim did not violate applicant's right under the United States Constitution to effective assistance of counsel. Applicant's twenty-third ground for relief should be denied.

STATE CONSTITUTIONAL CLAIMS

In his twenty-fourth ground for relief, applicant contends that trial counsel's failure to object to the racial composition of the venire constituted ineffective assistance of counsel under Article I, section 10 of the Texas Constitution.

Applicant's Claims Are Procedurally Barred

257. The Court finds that applicant has not provided any reason for construing the Texas Constitution as providing more protection in this area of the law than the United States Constitution.

258. Accordingly, the Court concludes that applicant's state constitutional claims are procedurally barred and should not be addressed. *See Black*, 26 S.W.3d at 896 n.4.

259. Moreover, as with his federal constitutional claims, applicant could have raised his state constitutional claims on direct appeal, but did not. *See Garcia*.

260. For this additional reason, the Court concludes that applicant's twenty-fourth ground for relief is procedurally barred and should not be addressed. *See Townsend*, 137 S.W.3d at 81.

Alternatively, Applicant's Claims Are Without Merit

261. The Court notes that the Court of Criminal Appeals has specifically held that the Texas Constitution does not provide any greater protection than the federal constitution in the area of effective assistance of counsel. *See Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992).

262. The Court finds, therefore, that the Texas Constitution provides applicant no greater protection than the United States Constitution in this area of the law.

263. Thus, for the reasons discussed in connection with applicant's federal claims, the Court finds that applicant has failed to prove by a preponderance of the evidence that trial counsel's decision not to raise a fair-cross-section challenge to the venire constituted ineffective assistance of counsel under the Texas Constitution.

264. The Court concludes that counsel's decision not to raise a fair-cross-section challenge did not violate applicant's state constitutional right to effective assistance of counsel.

GROUNDS 25-38: DENIAL OF CHALLENGES FOR CAUSE

In grounds for relief twenty-five through thirty-eight, applicant contends that this Court violated his rights to due process and effective assistance of counsel under the federal and state constitutions by denying his challenges for cause to prospective jurors Ama Helfenbein, Thomas Tucker, Larry Carroll, Gregory Babineau, Lillian Lyles, Alan Lucien, and Robin Tucker. He argues that each of these prospective jurors possessed some bias against the law that prevented them from being fair and impartial. *See* TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2) (Vernon Supp. 2005).

Applicant's Claims Are Not Cognizable

265. The Court notes that a writ of habeas corpus is available only for relief from jurisdictional defects and violations of constitutional or fundamental rights. *Ex parte McCain*, 67 S.W.3d 204, 207 (Tex. Crim. App. 2002). Procedural errors or statutory violations may be reversible error on direct appeal, but they are not "fundamental" or "constitutional" errors that require relief on a writ of habeas corpus. *Id.* at 209-10; *see also Sanchez*, 918 S.W.2d at 527 (holding that the violation of a state statute in general is not a cognizable claim on habeas corpus); *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002) (holding that "[v]iolations of statutes, rules, or other non-constitutional doctrines are not recognized" on habeas corpus).

266. The Court concludes that the erroneous denial of a challenge for cause under article 35.16 of the Texas Code of Criminal Procedure is statutory — not

constitutional — error.[9] *See Johnson v. State*, 43 S.W.3d 1, 2, 4 (Tex. Crim. App. 2001) ("Harm for the erroneous denial of a challenge for cause is determined by the standard in Rule of Appellate Procedure 44.2(b)."). The right at issue is the defendant's statutory right to "an unbridled use of the number of peremptory challenges given." *Johnson*, 43 S.W.3d at 8 (Keller, P.J., concurring); *see* TEX. CODE CRIM. PROC. ANN. art. 35.14 (Vernon 1989), art. 35.15 (Vernon Supp. 2004-05); *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("We have long recognized that peremptory challenges are not of constitutional dimension."). This unbridled right is violated when the defendant is forced to use a peremptory challenge on a prospective juror who should have been removed for cause and, as a result, is required to accept a different juror who is objectionable to him. *Johnson*, 43 S.W.3d at 8.

267. The Court finds that applicant has alleged nothing more than statutory violations with respect to the denial of his challenges for cause. These claimed statutory violations did not deprive this Court of jurisdiction or deny applicant any fundamental or constitutional rights and are not, therefore, proper grounds for habeas relief.

268. Accordingly, the Court concludes that grounds for relief twenty-five through thirty-eight are not cognizable and should be summarily denied. *See Ex parte*

[9] In support of his argument that the erroneous denial of his challenges for cause violated his constitutional rights, applicant relies on caselaw concerning the improper exclusion — through the granting of a prosecution challenge for cause — of a prospective juror who expresses opposition to the death penalty. (Writ Application, pp. 100-26). *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Court concludes that such caselaw is irrelevant to applicant's claims, none of which allege that a prospective juror was erroneously removed for cause by the prosecution.

Banks, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) (op. on reh'g) (holding contention that trial court erred in granting challenge for cause to prospective juror because of bias under article 35.16 was not a cognizable claim on habeas corpus).

FEDERAL CONSTITUTIONAL CLAIMS

Applicant's Claims Are Procedurally Barred

269. The Court finds that applicant complained on direct appeal about the denial of his challenges for cause to these same seven prospective jurors. *See Garcia*, slip op. at 2-7. The Court of Criminal Appeals rejected applicant's complaints, holding that this Court did not abuse its discretion in denying applicant's challenges. *Id.*, slip op. at 7.

270. The Court finds that applicant does not raise any new or different arguments to contest this Court's rulings. Instead, he merely reasserts, usually verbatim, the arguments he made in his brief on direct appeal.

271. The Court notes that claims that have already been raised and rejected on direct appeal may not be relitigated through habeas corpus. *Ramos*, 977 S.W.2d at 617.

272. Thus, the Court concludes that applicant's federal constitutional claims in grounds twenty-five, twenty-seven, twenty-nine, thirty-one, thirty-three, thirty-five, and thirty-seven are procedurally barred and should be summarily denied.

Alternatively, Applicant's Claims Are Without Merit

Applicant has failed to prove that the challenged jurors were biased against the law.

273. The Court recognizes that the defense may challenge for cause a prospective juror who has a bias or prejudice against any of the law applicable to the case upon

which the defense is entitled to rely. TEX. CODE CRIM. PROC. ANN. art. 35.16(c)(2). A "bias against the law" is a refusal to consider or apply the relevant law. *Sadler v. State*, 977 S.W.2d 140, 142 (Tex. Crim. App. 1998). Bias exists when certain beliefs or opinions would prevent or substantially impair a prospective juror from carrying out the duties of a juror in accordance with the law. *Id.* A challenge for cause may also be made to a prospective juror who exhibits a bias or prejudice against the defendant. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9).

Ama Helfenbein

In his twenty-fifth ground for relief, applicant contends that prospective juror Ama Helfenbein should have been struck for cause because she (1) would answer the anti-parties special issue "yes" if the State proved that applicant conspired to commit an offense, knowing that one or more of his co-conspirators would be armed; and (2) could not consider the five-year minimum sentence for the lesser-included offense of murder. (RR 8: 154-55).

Helfenbein did not have a bias against the law concerning the anti-parties special issue.

274. The Court finds that, under examination by the State, Helfenbein said she would answer the anti-parties special issue according to what the evidence revealed about applicant's involvement in the murder. (RR 8: 106-09, 114). She agreed to "[k]eep [her] mind open" and listen to all the evidence. (RR 8: 126). Later, defense counsel questioned Helfenbein concerning her understanding of actual

anticipation under the second special issue by posing several hypothetical scenarios:

Q. [DEFENSE COUNSEL] Let me ask you another question regarding Special Issue No. 2. You see down there that it says that one of the ways you can get death is if you anticipate that a human life would be taken. [The prosecutor] talked to you about the people going in the bank vault. Two people go in, two people come out, and there's a bunch of dead bodies. That situation could be pretty cut and dried to some people.

But it could be kind of a conundrum for other people, because you don't know what went on in the bank vault, except that the people died, you know. And his example, you don't know who killed them. You don't know if one guy says, hey, quit shooting, you know, don't kill these people. I'm not, you know, I didn't buy into this, you know, please quit. You know, they may have attacked each other or whatever. So you don't know, other than the fact that two go in and none of the victims come out.

Do you still think that it would be that easy to decide life or death in that situation?

A. [PROSPECTIVE JUROR] I didn't say it would be easy. But the chances are, if two people go in and a room full of people are killed, one could have done something to stop part of that.

Q. Well, in [the prosecutor's] example, there's only one pistol.

A. Uh-huh.

Q. And attacking somebody with a pistol when you can see that he's killing people may not be something that would lead to your longevity, either, as you can well imagine. The other thing is, it says anticipated that a human life would be taken.

What if you and I drive to this store and you know that I'm going to go in and rob it. And you say, look, don't hurt anybody. Just go in and bring back the money and we'll split it up. But don't hurt anybody. Is that anticipating that a human life would be taken?

A. They are going to go in and carry out a robbery with a gun in hand?

Q. No. But I'm talking about you sitting in the car and you say, look, don't hurt anybody.

A. I'd have to be some kind of stupid.

Q. Well, we're not—but all I'm asking you is, would that be enough to show that you anticipated that a human life could be taken? Because see, what you're doing is, you're telling the person who commits the murder definitely not to do that. However, you can see that by your very act of saying, don't hurt anybody, that you may be anticipating that a human life would be taken. See where I'm coming from?

A. I see where you are coming from, but that's almost like telling a young child don't do it. So you have got to have some type of anticipating in that situation.

Q. Could there never be, in your mind, could there never be a way that you wouldn't anticipate that a human life would be taken if you participated in some sort of criminal activity where somebody was armed with a firearm?

A. I rarely say never because you have to leave yourself some margin.

Q. I understand that. But in your way of thinking, if, going back to [the prosecutor's] example, or any other example, if there's more than one person and one person is armed, would the other people always be in some anticipation that a human life would be taken?

A. Yes.

Q. Okay. Simply because they were aware that that one person was armed and could, would, always have the potential to kill someone?

A. Yes, because the potential would exist.

Q. And so that in and of itself would answer that part of Special Issue No. 2, in your mind, yes; is that correct?

A. Yes.

Q. In other words, that would always be a situation where the person should have anticipated that would happen?

A. Yes.

. . . .

Q. Well, let's take another aspect of that. I doubt you thought you would come down here for a criminal law course. A conspiracy is—let's go back to the bank robbery or whatever.

Conspiracy is where two people agree to produce a certain crime, to rob the bank. And going back to the example of the bank vault. They agreed to drive up there and to rob the bank. That's their conspiracy. And then something else happens, i.e., the murder, while they're conspiring to rob the bank.

Would that—would you always find in that situation that they should have anticipated that event to have occurred?

A. If they go in with a gun in hand, there's always an anticipation that somebody will get shot.

Q. So if the State were able to prove that one or more of the participants in a conspiracy or a joint enterprise were armed, Special Issue No. 2 would be answered yes in your mind?

A. Yes.

(RR 8: 149-153).

275. As a threshold matter, the Court finds that applicant did not contend at trial that Helfenbein was challengeable for cause because she would answer the anti-parties special issue "yes" based on evidence that applicant participated in an offense involving weapons. (RR 8: 154-55).

276. Accordingly, the Court concludes that applicant is procedurally barred from advancing this complaint on habeas review. *See Ex parte Pena*, 71 S.W.3d 336, 337 (Tex. Crim. App. 2002) (holding that the rules regarding preservation of error apply on habeas review); *see also Mooney v. State*, 817 S.W.2d 693, 703 (Tex.

Crim. App. 1991) (holding that a defendant could not contend on appeal that a juror was unqualified because he had been exposed to outside information about the case, where the challenge for cause at trial was limited to the juror's testimony concerning the definitions of the terms "intentional" and "deliberate").

277. Moreover, the Court concludes that even if applicant had presented such a complaint, this Court would not have abused its discretion in rejecting it.

278. As the Court of Criminal Appeals noted in its opinion on direct appeal, the record does not indicate that any distinction was made during voir dire between the law of party liability in the guilt phase of trial and the law governing the anti-parties issue at punishment. *See Garcia*, slip op. at 5.

279. The Court notes that, while a jury's finding of guilt will in some cases be the functional equivalent of an affirmative answer to the anti-parties special issue, this is not always so. A defendant may be found guilty of capital murder under a parties theory without meeting the requirements for an affirmative answer to the anti-parties punishment issue. *Id.*, slip op. at 5-6 (citing *Valle v. State*, 109 S.W.3d 500, 503-04 (Tex. Crim. App. 2003)).

280. The Court finds that applicant has not met his burden of showing that Helfenbein understood the requirements of the law, but could not overcome her prejudice well enough to follow it. *Id.*, slip op. at 6.

281. Furthermore, the Court finds that applicant has not proven by a preponderance of the evidence that Helfenbein's views would have substantially impaired her ability to carry out her oath and instructions in accordance with the law. Applicant cites

no authority for the proposition that a prospective juror is challengeable for cause because she would infer actual anticipation under the anti-parties special issue from the defendant's involvement in an armed criminal endeavor.

282. The Court concludes that applicant's dissatisfaction with the way in which Helfenbein defined proof beyond a reasonable doubt of actual anticipation did not require Helfenbein's removal for cause. *See Castillo v. State*, 913 S.W.2d 529, 534 (Tex. Crim. App. 1995) ("This Court has repeatedly held the fact that a person is armed when entering the area of a crime or while committing a crime is itself of probative value in proving deliberate conduct.").

283. The Court further concludes that, to the extent applicant's complaint is that Helfenbein should have been struck for cause because she would "automatically" answer the anti-parties special issue "yes," it is likewise without merit.

284. The Court recognizes that the defense may challenge for cause a prospective juror who would automatically answer the first or second special issue "yes" after finding the defendant guilty. *See Feldman*, 71 S.W.3d at 745. In other words, a prospective juror who professes an inability to reconsider guilt evidence in the particular context of the special issues has demonstrated a bias against the law. *See Gardner v. State*, 730 S.W.2d 675, 680 (Tex. Crim. App. 1987). The critical determination to be made is whether the challenged juror would answer the special issues based on the evidence presented, rather than merely relying on the earlier finding of guilt. *Pierce v. State*, 777 S.W.2d 399, 404 (Tex. Crim. App. 1989).

285. The Court finds that Helfenbein never said she would automatically answer the anti-parties issue "yes" after finding applicant guilty. To the contrary, her responses indicated that she could reconsider the evidence of guilt within the context of the second special issue's requirement of actual anticipation. *See id.* at 412 (holding that the trial court did not err in denying a challenge for cause to a prospective juror whose answers indicated that she would base her answer to the future-dangerousness special issue on an examination of the evidence, even though neither the prosecution nor defense counsel could provide a hypothetical situation in which she would answer the future-dangerousness special issue "no").

286. Moreover, the Court finds that even if Helfenbein's remarks to defense counsel suggested that she would automatically answer the anti-parties special issue "yes," they conflicted with her initial assurances to the State that she would first consider all the evidence. (RR 8: 114, 126). *See Feldman*, 71 S.W.3d at 744; *see also Wolfe v. State*, 917 S.W.2d 270, 276 (Tex. Crim. App. 1996) (holding that an appellate court must defer to the trial court's ruling on a challenge for cause when the record supports both the ability and inability of the prospective juror to follow the law); *Banda v. State*, 890 S.W.2d 42, 58 (Tex. Crim. App. 1994) (holding that the trial court did not abuse its discretion in denying a challenge for cause where, although some of the prospective juror's testimony indicated that he would presume "yes" answers to the special issues, the record contained sufficient evidence to the contrary to support the trial court's ruling).

287. The Court finds that applicant has failed to prove by a preponderance of the evidence that Helfenbein was biased against the law with respect to the anti-parties special issue.

288. The Court finds that Hefenbein held no such bias.

Helfenbein did not have a bias against the law concerning the minimum punishment for murder.

289. The Court finds that when questioned by the State, Helfenbein said she could keep an open mind and make a punishment decision based on the evidence. (RR 8: 124). To the defense, however, Helfenbein said she "doubt[ed]" she could assess a five-year sentence after having found someone guilty of murder. (RR 8: 147-48). She also said that, if she were the "queen of Texas," the minimum sentence for murder would be thirty years' imprisonment. (RR 8: 148-49).

290. The Court recognizes that a prospective juror who is unable to consider the full punishment range for any offense of which the defendant may be convicted possesses a bias against the law. *Ladd*, 3 S.W.3d at 559. But a prospective juror is not biased simply because she cannot immediately envision a scenario in which the minimum punishment would be appropriate. *Id.* The crucial consideration is whether the prospective juror could keep an open mind until she has heard all the evidence. *Johnson v. State*, 982 S.W.2d 403, 405-06 (Tex. Crim. App. 1998).

291. The Court finds that Helfenbein's statement that she "doubt[ed]" she could assess a five-year sentence could have been reasonably interpreted to mean that she simply could not, at that moment, envision a situation in which she might find the

minimum punishment appropriate. That Helfenbein could not imagine such a situation during voir dire, however, does not necessarily mean that she could not assess the minimum punishment if an appropriate scenario presented itself at trial. *See Ladd*, 3 S.W.3d at 559; *see also Williams v. State*, 773 S.W.2d 525, 537 (Tex. Crim. App. 1988) (holding that the trial court did not err in denying a challenge for cause based on an inability to consider five years for the lesser-included offense of murder, where the prospective juror only said that he did not "think" he could consider five years).

292. Additionally, the Court observes that there is a distinction between a prospective juror who has a bias or prejudice against the law and one who is merely entertaining an opinion. *Penry v. State*, 903 S.W.2d 715, 728 (Tex. Crim. App. 1995). Thus, Helfenbein's personal belief that the minimum punishment for murder should be much higher does not automatically translate into an inability or unwillingness to follow the law as it currently stands.

293. The Court finds that applicant has failed to carry his burden of proving by a preponderance of the evidence that Helfenbein was biased against the law concerning the statutory minimum punishment for murder.

294. The Court finds that Helfenbein held no such bias.

Thomas Tucker

In his twenty-seventh ground for relief, applicant contends that prospective juror Thomas Tucker should have been struck for cause because he believed that a person who had already committed one murder would always be a continuing threat to society,

thereby relieving the State of its burden to prove future dangerousness beyond a reasonable doubt.

295. The Court finds that, under questioning by the State, Tucker said he would follow this Court's instructions and the law and would answer each of the special issues according to the evidence. (RR 9: 111-12). He said he understood it was the State's burden to prove that the future-dangerousness special issue should be answered "yes" and he could answer this issue either "yes" or "no" depending on the evidence. (RR 9: 128-30). He also said that he "may be predisposed" toward believing that somebody guilty of capital murder would be "willing to do it again":

> If I have found the individual to be guilty, in my mind, that tells me that there will always be a probability, regardless if you were run over by a bus and you are now a quadriplegic. In my mind there's still a probability that you may at some time in the future be capable of committing another criminal act that might constitute a threat to society.

(RR 9: 130, 133).

296. The Court finds that further questioning by the State revealed that Tucker was equating a "probability" under the future-dangerousness special issue with a "possibility." (RR 9: 133). After the prosecutor explained that a "probability" meant more than a mere "possibility" or "chance," Tucker said he could follow the law and listen to the evidence before deciding the future-dangerousness issue. (RR 9: 133-35).

297. The Court finds that during his examination by the defense, Tucker confirmed that "[d]eep down," he believed that a convicted capital murderer would probably

commit violent criminal acts in the future. (RR 9: 147-48). Still, he maintained that while he may be inclined to think such a probability existed, he would not automatically answer the future-dangerousness special issue "yes." (RR 9: 148-49). Additionally, upon questioning by this Court, Tucker said he would hold the State to its burden of proof on this issue. (RR 9: 170).

298. The Court finds that applicant has failed to prove by a preponderance of the evidence that Tucker's views would have substantially impaired his ability to carry out his oath and instructions in accordance with the law. *See Garcia*, slip op. at 7.

299. The Court notes that once a prospective juror demonstrates he can set aside his personal feelings and follow the trial court's instructions, he is not disqualified as a matter of law. *Kemp v. State*, 846 S.W.2d 289, 298 (Tex. Crim. App. 1992).

300. The Court finds that Tucker repeatedly assured both the State and this Court that despite his personal beliefs about the likelihood of a capital murderer's being violent in the future, he would follow the law and require the State to prove beyond a reasonable doubt that the answer to the future-dangerousness special issue should be "yes." (RR 9: 111-12, 129-30, 134-35, 170).

301. Moreover, to the extent Tucker vacillated on his ability to follow the law, this Court was in the best position to determine whether he was indeed biased. *See Feldman*, 71 S.W.3d at 744; *see also Teague v. State*, 864 S.W.2d 505, 514 (Tex. Crim. App. 1993) (holding that the trial court did not err in denying a challenge for cause where the prospective juror initially indicated to defense counsel that he

"felt" he would automatically answer the special issues "yes," but his later answers to the prosecutor indicated that he would follow the law and answer the special issues based on the evidence presented), *overruled on other grounds by Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993); *Cooks v. State*, 844 S.W.2d 697, 713 (Tex. Crim. App. 1992) (upholding the denial of a challenge for cause where some of the prospective juror's responses to defense questioning indicated that she would automatically answer the special issues on a finding of guilt, but the trial court specifically questioned juror on the matter and elicited contrary responses, as did the State).

302. The Court finds that applicant has failed to prove by a preponderance of the evidence that Tucker was biased against the law governing the future-dangerousness special issue.

303. The Court finds that Tucker held no such bias.

Larry Carroll

In his twenty-ninth ground for relief, applicant contends that prospective juror Larry Carroll should have been struck for cause because he (1) would always answer the future-dangerousness special issue "yes" and (2) believed that mere presence alone makes one a party to an offense. (RR 12: 106).

Carroll did not have a bias against the law concerning the future-dangerousness special issue.

304. The Court finds that during questioning by the State, Carroll agreed he could hold the State to its burden of proof on the future-dangerousness special issue and could

answer it "yes" or "no" according to the evidence. (RR 12: 64-68). He acknowledged there might be situations in which someone who had been convicted of capital murder would not pose a continuing threat to society. (RR 12: 67-68).

305. The Court find that under defense examination, Carroll was questioned about his "feelings" regarding the future-dangerousness special issue:

> Q. [DEFENSE COUNSEL] That is what the law is. Now, a lot of jurors, frankly, have problems with that concept. Because this is what they tell us. Well, if the State has already proven to me right here in court that the person on trial is a person who is engaged in a robbery, first of all, and then during the course of that robbery intentionally killed a police officer when he knew he was a police officer, well, that is the type of person who to me is always going to be a continuing threat. Okay?
>
> A. [PROSPECTIVE JUROR] Okay.
>
> Q. So many jurors tell us that by the time they have heard the evidence which convinced them the defendant was guilty, they don't need to hear anything else in regards to Special Issue Number 1, that has already been answered for them. Okay? And so that they say, well, my answer is always going to be yes, if the State has proven to me that the person here on trial is an intentional murderer and did so under one of those aggravating factors that are listed there in front of you. How do you feel about that?
>
> A. I agree with it.
>
> Q. Now, you understand, Mr. Carroll, that that is not what the law says again, and I'm going back over that. The law says that a jury has to presume that the answer to the question is no. Okay? Even though they have found somebody guilty of capital murder, an intentional murder with one of those aggravating factors. Okay? But many jurors just like yourself have told us that that you feel, and we don't have any quarrel with them feeling that way, it is just something we need to know right now.
>
> A. Uh-huh.
>
> Q. And is that, Mr. Carroll, the way you feel?

A. Yeah.

(RR 12: 91-92).

306. The Court finds that later, in response to this Court's inquiries, Carroll returned to the position he had taken with the State and assured this Court that he would presume the answer to the future-dangerousness special issue to be "no" and require the State to prove beyond a reasonable doubt that it should be "yes." (RR 12: 105).

307. The Court notes that an isolated statement will not require a prospective juror's removal for cause if his voir dire responses, considered as a whole, demonstrate he can follow the law. *Cooks*, 844 S.W.2d at 711.

308. The Court finds that Carroll repeatedly said he would follow the law and require the State to meet its burden of proof on the future-dangerousness special issue. (RR 12: 64-65, 105).

309. Additionally, the Court finds that Carroll said several times that he would wait to hear all the facts before determining whether applicant would pose a future danger. (RR 12: 65-68). He agreed, therefore, that a guilty verdict should not dictate his answers to the special issues. (RR 12: 67).

310. Moreover, the Court finds that Carroll was, at best, a vacillating veniremember with respect to his ability to answer the future-dangerousness special issue "no." *Garcia*, slip op. at 7.

311. This Court was therefore in the best position to resolve Carroll's qualifications as a juror. *See Banda*, 890 S.W.2d at 55 ("It is not error on the part of the trial court to deny a challenge for cause to a veniremember who gives equivocal answers on whether or not he would automatically say 'yes' to one of the special issues.")

312. The Court finds that applicant has failed to prove by a preponderance of the evidence that Carroll was biased against the law concerning the future-dangerousness special issue.

313. The Court finds that Carroll's voir dire responses, considered as a whole, demonstrate that he could follow the law regarding the future-dangerousness issue.

Carroll did not have a bias against the law of parties.

314. The Court finds that during his examination by the State regarding the law of parties, Carroll said he agreed with this rule. (RR 12: 75). To the defense, however, Carroll intimated that as long as applicant was *present* during the commission of the offense, he would find him guilty as a party. (RR 12: 95).

315. The Court notes that before a prospective juror may be struck for having a bias against the law, the relevant law must be explained to him and he must be asked whether he can follow the law despite his personal views. *Sells v. State*, 121 S.W.3d 748, 759 (Tex. Crim. App.), *cert. denied*, 540 U.S. 986 (2003).

316. The Court finds that Carroll's responses to the State's questions showed he understood and could apply the law regarding party liability. (RR 12: 74-75).

317. Nevertheless, applicant contends that the following exchange demonstrates Carroll's bias:

> Q. [DEFENSE COUNSEL] . . . Some people have, frankly, told us that, well, I understand what those requirements are, I see what you're saying. But my belief is that if a person went into it, was in any way participated with the robbery and if a person happened, even if they didn't think it through that far, that that is going to be enough for me and I'm going to find—I'm going to find him guilty, number one, and I'm going to find the answer to Special Issue Number 2 to be yes. As long as the State has got to show they were there and they were present, but that is really all they're going to have to show me. How do you feel about that?
>
> A. [PROSPECTIVE JUROR] That's right.

(RR 12: 95).

318. The Court finds that while this exchange may reveal something about Carroll's personal feelings or beliefs, it does not establish that he would be unable to abide by the law that mere presence alone does not make one a party to an offense. It does not, in other words, show that Carroll's personal views would prevent him from following the law. *See id.* (holding that the proponent of a challenge for cause must show that the prospective juror understands the law and cannot overcome his prejudice well enough to follow it).

319. Moreover, as the Court of Criminal Appeals held on direct appeal, to the extent Carroll made contradictory statements, this Court was in the best position to resolve his qualifications. *See Garcia*, slip op. at 7; *see also Swearingen v. State*, 101 S.W.3d 89, 99 (Tex. Crim. App. 2003).

320. For all the foregoing reasons, the Court finds that applicant has not proven by a preponderance of the evidence that Carroll was biased against the law of parties.

321. The Court finds that, given his earlier assurances to the State, Carroll held no such bias. *See Rachal v. State*, 917 S.W.2d 799, 814 (Tex. Crim. App. 1996) (holding that the trial court did not abuse its discretion in denying a challenge for cause where the prospective juror was never directly asked if he could follow the law, and never clearly stated that he could not do so).

Gregory Babineau

In his thirty-first ground for relief, applicant contends that prospective juror Gregory Babineau should have been struck for cause because he (1) would return a guilty verdict even if the State failed to prove the manner and means of death as alleged in the indictment, (2) believed an indictment was some evidence of guilt, (3) could never consider a five-year sentence for the lesser-included offense of murder, (4) would always answer the future-dangerousness special issue "yes," and (5) could never find sufficient mitigating circumstances to warrant a "yes" answer to the mitigation special issue. (RR 14: 82-85). Applicant also maintains that Babineau exhibited a bias against him by saying he would always believe a police officer's testimony over that of a lay witness. (RR 14: 83).

Babineau did not have a bias against the law concerning the State's burden of proof.

322. The Court finds that Babineau assured the State that he would require the prosecution to prove beyond a reasonable doubt each and every element of the charged offense. (RR 14: 27-28). Later, defense counsel quizzed him on his ability to return a not-guilty verdict if the State's proof failed on a "technicality":

Q. [DEFENSE COUNSEL] . . . [I]t always comes down to a situation in which you know in your heart of hearts that the person on trial is guilty. You know, it's not like there's some questions in your mind as to whether they identified him. . . . [W]e could put it on videotape. . . . And you could look at the film and say that's the guy that is sitting over there in the defendant's chair and, yeah, that's the clerk in the store that got shot and you can be convinced because not only are you hearing testimony, but you can see it on the screen. But then when you get down there, there's something that they left out. . . . You see the guy go in and he shoots the clerk three or four times. And then on the video you see him lean over the clerk, make some motion and then he leaves the store. And they allege that . . . the defendant took the life of so and so by shooting him with a firearm. You look at the video and you see him walk in and he's got a gun in his hand and you see him shoot and you see the clerk fall and you see him leave.

A. [PROSPECTIVE JUROR] Okay.

Q. Medical examiner comes in here and says, yeah, I examined the body of the clerk and he was shot five times at close range, nine millimeter. What killed him, though, was somebody stabbed him in the heart. The gunshot wounds didn't kill him at all. That explains, then, at that point in time what the guy was doing when he was leaning over the clerk. And it's the same person you can see on the video.

A. Uh-huh.

Q. Some people say, look, if that's the law, I don't want to have any part of it. Go find you some other jurors, because I couldn't go home and go to my work and I couldn't go home and face my wife and kids and tell them that I had let somebody off because some dumb prosecutor couldn't get the county right or some prosecutor didn't talk to the medical examiner and find out what killed somebody. What do you think about that?

. . . .

A. Would it bother me? No. To make the right decision.

Q. Would you find him guilty anyway?

A. I would find him guilty, yes.

. . . .

Q. [T]he defendant is the person who brought about his death, but because of the State's failure of evidence, the law, or the Court's charge, would require that you find the defendant not guilty.

I'm just thinking that talking to you, seeing you answered the questions both from the State and myself, that that would be about as offensive to your conscience as anything we can dream of?

A. We would have to prove [sic] him not guilty because of that one little technicality because he died of a knife stab wound, instead of gunshot wound, even though you saw him get shot?

Q. That's correct?

A. That sucks.

. . . .

Q. But, you know, they just—somebody was asleep at the switch and they didn't figure out, hey, it happened somewhere else. So once again, it would be a mistake on their part, no question in your mind, I take it you couldn't, you couldn't find that, right?

A. Correct.

(RR 14: 58-62).

323. The Court finds that upon further questioning by this Court, Babineau said that while he was not "comfortable" acquitting a defendant because the State had failed to prove an element such as manner and means, he could follow the law. (RR 14: 78-80).

324. The Court finds that, by applicant's own admission, Babineau was at best a vacillating veniremember with respect to his ability to follow the law concerning the State's burden of proof. (Writ Application, p. 93).

325. As the Court of Criminal Appeals recognized on direct appeal, this Court was in the best position to determine whether Babineau held a bias against the law. *See Garcia*, slip op. at 7.

326. Moreover, the Court notes that a prospective juror need not agree with the law so long as his personal views do not substantially impair his ability to abide by his oath as a juror. *Rayford v. State*, 125 S.W.3d 521, 532 (Tex. Crim. App. 2003).

327. The Court finds that Babineau initially said he would require the State to prove beyond a reasonable doubt each and every element of the offense as alleged in the indictment. (RR 14: 27-28). Later, when confronted with a troubling scenario in which he would be forced to acquit an ostensibly guilty defendant due to the State's failure to allege and prove the proper manner and means, Babineau understandably found such a prospect disagreeable. (RR 14: 61). Ultimately, however, after this Court reiterated the law, Babineau said that despite his discomfort and "[b]ecause that's the law," he could find applicant not guilty if the State failed to prove even a relatively trivial averment in the indictment. (RR 14: 79-80).

328. Thus, the Court finds that Babineau recognized the distinction between his personal scruples and his responsibilities as a juror.

329. Consequently, this Court finds that Babineau's personal views would not have impaired his obligation to follow the law.

330. The Court finds that applicant has failed to prove by a preponderance of the evidence that Babineau was biased against the law concerning the State's burden of proof.

331. The Court finds that Babineau held no such bias. *See Cantu v. State*, 842 S.W.2d 667, 683 (Tex. Crim. App. 1992) (upholding the denial of a challenge for cause where the record showed that the prospective juror was confused when he indicated he might find the defendant guilty even if the State failed to prove all the elements of the offense as alleged in the indictment; upon further questioning by the trial court, he said he could follow the law and hold the State to its burden of proof); *Lane v. State*, 822 S.W.2d 35, 47-48 (Tex. Crim. App. 1991) (holding that the trial court did not err in denying a challenge for cause to a prospective juror who said he would find the defendant guilty even if the State failed to prove "some technical thing" in the indictment such as the location of the offense, where, after the law was clarified, he stated without hesitation that he could follow the law and the judge's instructions).

Babineau did not have a bias against the law concerning the presumption of innocence.

332. The Court finds that Babineau first told the State that he agreed with the presumption of innocence and that he would not consider the indictment as any evidence of applicant's guilt. (RR 14: 28-29). To the defense, however, Babineau said that he suspected applicant "must have done something," or, as defense counsel put it, "if there's this much smoke down here, there has to be a fire somewhere." (RR 14: 72-73). When asked whether applicant's current

incarceration sufficed for him to presume applicant guilty, Babineau replied that he "would like to hear evidence and all that." (RR 14: 73). Still, he said he was fairly certain that applicant had done "something." (RR 14: 73).

333. The Court notes that a reviewing court must defer to the trial court's decision on a challenge for cause when the record supports both the ability and the inability of the prospective juror to follow the law. *Wolfe*, 917 S.W.2d at 276.

334. The Court finds Babineau gave repeated assurances that he could keep an open mind and hold the State to its burden of proof. (RR 14: 28-29).

335. Accordingly, the Court finds that Babineau would have held the State to its burden of proof and would not have considered the indictment as evidence of applicant's guilt. *See Ladd*, 3 S.W.3d at 560 (holding that the trial court did not abuse its discretion in denying a challenge for cause to a prospective juror who told defense counsel that he thought the defendant's arrest and indictment "suggest[ed]" guilt; that "where there's smoke, there's fire"; and that "if someone is one trial, there's at least some reason for them to have been brought in before the court" where, upon questioning by the State and the trial court, the prospective juror repeatedly said he could hold the State to its burden of proof).

336. The Court finds that applicant has failed to prove by a preponderance of the evidence that Babineau was biased against the law concerning the presumption of innocence.

337. The Court finds that Babineau held no such bias.

Babineau did not have a bias against the law concerning the minimum punishment for murder.

338. The Court finds that in response to questioning by the State, Babineau said that if he found applicant guilty of the lesser-included offense of murder, he could keep an open mind with respect to punishment and could even impose a five-year sentence if he thought it was the "right thing to do." (RR 14: 32). Later, when defense counsel asked whether he would ever be able to assess a five-year sentence for murder, Babineau replied, "No, I don't think so." (RR 14: 64). Ultimately, however, Babineau assured this Court that he could contemplate a five-year sentence where appropriate. (RR 14: 80).

339. Once again, given these vacillating responses, this Court was in the best position to ascertain Babineau's qualifications as a juror. *See Garcia*, slip op. at 7; *see also Feldman*, 71 S.W.3d at 744.

340. Considering Babineau's many assurances that he could remain open-minded to the possibility that five years might be an appropriate punishment under some circumstances, the Court finds that Babineau would have complied with the law regarding the minimum punishment for murder. (RR 14: 32, 80). *See Cooks*, 844 S.W.2d at 709-10 (holding that the trial court did not err in denying challenges for cause to prospective jurors who initially expressed reservations about assessing the minimum punishment for the lesser-included offense, but ultimately said they could follow the law and remain open-minded).

341. The Court finds that applicant has failed to prove by a preponderance of the evidence that Babineau was biased against the law concerning the minimum punishment for murder.

342. The Court finds that Babineau held no such bias.

Babineau did not have a bias against the law concerning the future-dangerousness special issue.

343. The Court finds that Babineau initially told the State that he could answer this issue "yes" or "no" depending on whether the State met its burden of proof. (RR 14: 37-39, 41-43). Later, defense counsel questioned Babineau concerning what evidence he would look to in answering the future-dangerousness issue:

> Q. [DEFENSE COUNSEL] . . . Let's say that you find the defendant guilty beyond a reasonable doubt of committing a capital murder. At that point in time the State may present other evidence to you or they may not present other evidence. In other words, they may show that you have been in prison ever since he turned adult or they may not show anything. They may not have anything else to put on.
>
> So when you get to question No. 1, you are asked is he going to be a continuing danger to society because he committed criminal acts of violence, a lot of people say, look, I was convinced beyond a reasonable doubt that the person I was dealing with is the type of person that would and did commit capital murder, the answer to question No. 1 is pretty easy. Sure he's going to be a continuing threat to society. He's already gone out and robbed and killed somebody or robbed and raped somebody, whatever the crime he's charged with?
>
> A. [PROSPECTIVE JUROR] Uh-huh.
>
> Q. What do you think about that, Mr. Babineau?
>
> A. They have to show evidence to prove it, right?
>
> Q. If they have got any. There may not be any, but some people say, look, what evidence do I need? I've already found that he not only

committed an intentional murder, but he committed an intentional robbery or intentional rape or an intentional burglary or I could check off the list. And, you know, I don't need any more proof, other than the crime itself to answer question No. 1.

What do you think? Would you have to look to something else or would the facts of the case itself answer that for you?

A. The facts should answer that for me.

Q. I'm sorry?

A. The facts I think—I'm not sure.

Q. Well, it's a hard question. All I'm asking you is, is you understand what at this point—before you get to Special Issue No. 1, see, we have to project ahead of time and pretend that things have happened or not. But we have to—we have to put you in a position to where—and eleven other people have heard evidence in the courtroom that's convinced all twelve of you beyond a reasonable doubt that the person on trial is not only a murderer, a murder that you thought the only logical punishment would be—would be life or death, but they have proven not only is the person a murderer, but he's a capital murderer. Somebody that not only murdered intentionally, but did something that would aggravate it.

And then, like I say, may be more evidence there; may be no more evidence. But I'm kind of getting the impression, and if I'm wrong, correct me, but I kind of get the impression that when you get to Special Issue No. 1, that you probably automatically answer that that should be yes, that the person would be a continuing threat to society because they are going to be violent in the future. Is that the way—

A. Yes.

Q. So let me get this—let me see if I'm hearing you correctly. If you get to Special Issue No. 1, if you found the person guilty in your mind, the answer to Special Issue No. 1 would always be yes. Is that a correct statement?

A. Most likely, yes, it would.

(RR 14: 69-71).

344. The Court finds that, at the close of the voir dire examination, it again explained the law with respect to the future-dangerousness special issue and then specifically asked Babineau whether he could return a "no" answer if the State failed to meet its burden of proof. (RR 14: 80-81). Babineau said he could indeed answer "no" under those circumstances. (RR 14: 81).

345. The Court finds that although Babineau did say that he "probably" or "[m]ost likely" would answer the future-dangerousness special issue "yes," he also recognized that it was the State's burden to prove future dangerousness.

346. The Court finds that the totality of Babineau's voir dire responses indicates that his answer to the future-dangerousness issue would not be dictated by the guilty verdict, but would, rather, be determined by an examination of all the evidence, including the facts of the offense. *See Cooks*, 844 S.W.2d at 713 ("[T]he facts and circumstances of a capital offense alone, if particularly heinous in nature, can be sufficient to support an affirmative response to the anti-parties special issue.").

347. In any event, the Court finds that Babineau was, at best, a vacillating veniremember. This Court was therefore in the best position to resolve his conflicting responses. *See Garcia*, slip op. at 7; *see also Feldman*, 71 S.W.3d at 748 (upholding the denial of a challenge for cause where, depending on who asked the question, the prospective juror vacillated on whether she would automatically return a "yes" answer to the future dangerousness issue).

348. The Court finds that applicant has failed to prove by a preponderance of the evidence that Babineau was biased against the law governing the future-dangerousness special issue.

349. The Court finds that Babineau held no such bias.

Babineau did not have a bias against the law concerning the mitigation special issue.

350. The Court finds that Babineau assured the State that even after having answered the first two special issues "yes," he could answer the mitigation issue "yes" or "no" according to the evidence. (RR 14: 46-47). Though he admitted he could not immediately think of anything he would regard as mitigating evidence, he agreed to give the issue "the fair weight it deserves." (RR 14: 47).

351. The Court finds that Babineau equivocated under defense questioning, however: at first, he told defense counsel he could be persuaded to answer the mitigation special issue "yes"; later, he said he could never find sufficient mitigating circumstances to warrant a life sentence. (RR 14: 76-78).

352. The Court finds that, ultimately, Babineau told this Court that he could answer the mitigation special issue "yes" or "no" depending on the evidence. (RR 14: 81-82). Additionally, Babineau specifically assured this Court that he could answer this issue "yes" even though applicant would then receive a life sentence. (RR 14: 82). *See Coleman v. State*, 881 S.W.2d 344, 352 (Tex. Crim. App. 1994) (holding that the trial court did not err in denying a challenge for cause for an inability to consider mitigating evidence where the record showed that the prospective juror could listen to all the evidence with an open mind).

353. The Court finds that any hesitation on Babineau's part was simply due to his confessed inability to readily envision the kind of evidence he might consider mitigating. (RR 14: 47).

354. The Court notes that a juror need not regard any particular evidence as mitigating. *Allridge v. State*, 850 S.W.2d 471, 481-82 (Tex. Crim. App. 1991). The law requires only that jurors consider all the evidence in determining whether the defendant's "moral blameworthiness" should be reduced. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(4); *Maldonado v. State*, 998 S.W.2d 239, 250 (Tex. Crim. App. 1999).

355. The Court finds that Babineau specifically acknowledged that there "could be some evidence out there" to warrant a "yes" answer to the mitigation special issue and agreed to keep an open mind to such evidence. (RR 14: 46-47, 76-77).

356. The Court finds that applicant has failed to prove by a preponderance of the evidence that Babineau was biased against the law concerning the mitigation special issue.

357. The Court finds that, considering his voir dire responses as a whole, Babineau held no such bias.

Babineau did not have a bias against applicant.

Finally, applicant contends Babineau should have been struck for cause because he could not impartially judge the credibility of witnesses. Specifically, he claims that Babineau would always find a police officer more credible than a lay witness.

358. The Court recognizes that a defendant may insist on jurors who will impartially judge the credibility of witnesses. *Hernandez v. State*, 563 S.W.2d 947, 950 (Tex. Crim. App. 1978).

359. The Court further recognizes that a prospective juror who believes that a police officer would never lie under oath has an impermissible bias against the defendant under article 35.16(a)(9). TEX. CODE CRIM. PROC. ANN. art. 35.16 (a)(9); *Lane*, 822 S.W.2d at 42.

360. The Court finds that Babineau gave vacillating responses to the question whether he would always believe the testimony of a police officer over that of a lay witness. He first assured the State that in the event of a conflict, he could disbelieve a police officer's testimony if he found the lay witness more credible. (RR 14: 47-48). Later, however, he told the defense that he would always believe the police officer "simply because he was a police officer and for no other reason." (RR 14: 66-67). Still later, in response to questioning by this Court, Babineau said he would *not* always believe a police officer's testimony. (RR 14: 80).

361. The Court notes that it was best equipped to resolve the prospective juror's contradictory responses. *See Garcia*, slip op. at 7; *see also Lane*, 822 S.W.2d at 45 (holding that the trial court did not abuse its discretion in denying a challenge for cause where, although the prospective juror gave some responses indicating that she was predisposed to always believe police officers, she also said that she would evaluate a police officer's credibility as she would any other witness's).

362. The Court finds that applicant has failed to prove by a preponderance of the evidence that Babineau was biased against him.

363. The Court finds that Babineau held no such bias.

Lillian Lyles

In his thirty-third, applicant contends that prospective juror Lillian Lyles should have been struck for cause because she (1) would answer the anti-parties special issue "yes" if she found that applicant had participated in an offense in which weapons were used, (2) would automatically answer the mitigation special issue "no," and (3) could never assess a five-year sentence for murder. (RR 25: 76-77).

Lyles did not have a bias against the law concerning the anti-parties special issue.

364. The Court finds that Lyles told the State that she would consider all the evidence before answering the anti-parties special issue and would require the State to prove beyond a reasonable doubt that the answer should be "yes." (RR 25: 42). She further assured the State that she would "keep [her] mind open" throughout the entire trial and would not "automatically answer anything" before hearing all the evidence. (RR 25: 51).

365. The Court finds that Lyles told defense counsel that there is "always a chance" during an armed robbery that "somebody will get hurt." (RR 25: 59-60). She agreed, however, that there might be a distinction in punishment as between the party who actually shot and killed the victim and the party who participated in the robbery, but did not take an active role in the killing. (RR 25: 59). She also said that, in determining the proper punishment for the non-shooter, she would look to

the evidence and what it revealed about "how much that person knew about what was going on." (RR 25: 63-64).

366. The Court finds that when defense counsel pressed her further, Lyles's responses became more ambiguous:

> Q. [DEFENSE COUNSEL] . . . [The prosecution] ha[s] to prove to you that the defendant anticipated that a human life would be taken. Does that mean more than it's just possible out there that it could happen?
>
> A. [PROSPECTIVE JUROR] Yes. If you, a person goes into a situation where there are weapons being used, I mean there's that likelihood that something could happen, something bad.
>
> Q. What I understand then, you're saying if an individual goes in with a weapon that that answer would always be that you would anticipate a human life would be taken?
>
> A. Could be. It could be. A human life could be taken, not that it will be, but it could be.
>
> Q. Okay. So, if, in fact, you found the defendant did, in fact, participate where there where weapons involved, is it fair to say that you would always find that he anticipated that a human life would be taken? Is that fair?
>
> A. Yes, uh-huh.

(RR 25: 64-65).

367. The Court finds that Lyles later assured the Court that she would make the State prove beyond a reasonable doubt that the anti-parties special issue should be answered "yes." (RR 25: 74).

368. The Court finds that, in challenging Lyles for cause, applicant argued that she had "unequivocally stated that she would always find the answer to Special Issue No. 2 to be yes, if she found the defendant guilty as a party in a capital murder case, and

if weapons were used, which necessarily is going to be the case in a murder case." (RR 25: 76).

369. The Court finds that Lyles did indeed say she would always find in such a scenario that applicant anticipated a human life *would* be taken. (RR 25: 65). Immediately before this statement, however, she had taken pains to point out that she would only find that applicant anticipated a human life *could* be taken. (RR 25: 65).

370. The Court finds that Lyles may have misunderstood defense counsel's questions; she may have also misunderstood the relevant law.

371. Moreover, the Court finds that applicant cites no authority for the proposition that a prospective juror is challengeable for cause simply because she would infer actual anticipation from the defendant's participation in an armed offense.

372. The Court finds that Lyles's responses indicate that she would base her answer to the anti-parties special issue on the evidence.

373. The Court notes that the fact that Lyles would require less or different evidence than applicant would have liked to be convinced beyond a reasonable doubt of actual anticipation does not mean that she was biased against the law. *Cf. Howard v. State*, 941 S.W.2d 102, 127 (Tex. Crim. App. 1996) (holding that it was the State's burden, as the challenging party, to show that the prospective juror's refusal to answer the future-dangerousness issue in the affirmative without evidence that the accused had committed a prior murder was predicated on something other than her personal threshold of reasonable doubt).

374. The Court finds that applicant has failed to sustain his burden of proving by a preponderance of the evidence that Lyles was biased against the law governing the anti-parties special issue.

375. The Court finds that Lyles held no such bias.

Lyles did not have a bias against the law concerning the mitigation special issue.

376. The Court finds that under questioning by the State, Lyles acknowledged that a defendant's youth or "how [he was] brought up" might be a mitigating circumstance. (RR 25: 44-45). She said she could "keep [her] mind open" to potentially mitigating evidence and could answer the mitigation special issue "yes," knowing that applicant would receive a life sentence. (RR 25: 45-46).

377. The Court finds that Lyles later told defense counsel that she could never "see that there is anything mitigating to give a person a life sentence." (RR 25: 65-66).

378. The Court finds that Lyles ultimately assured this Court that if presented with sufficient evidence, she could return a "yes" answer to the mitigation special issue. (RR 25: 74).

379. The Court finds that defense counsel's questions required Lyles to immediately envision a situation in which she would answer the mitigation special issue "yes." (RR 25: 65-66).

380. The Court notes that Lyles's inability to do so did not require her removal for cause, given that she had already assured the State and this Court that she would keep an open mind and would base her answer on the evidence. (RR 25: 45-46, 74). *See Maldonado*, 998 S.W.2d at 251 (deferring to the trial court's decision to

deny a challenge for cause where the prospective juror vacillated, but ultimately expressed his willingness to consider character and background evidence in answering the mitigation special issue); *McCoy v. State*, 713 S.W.2d 940, 951 (Tex. Crim. App. 1986) (holding that a prospective juror's inability to envision a situation in which he would respond "yes" or "no" to a special issue is not automatically grounds for reversing a trial court's ruling denying a challenge for cause).

381. Furthermore, to the extent Lyles vacillated on her ability to give proper consideration to the mitigation special issue, this Court was in the best position to determine whether she did indeed have a bias against the law. *See Garcia*, slip op. at 7.

382. The Court finds that applicant has failed to prove by a preponderance of the evidence that Lyles was biased against the law concerning the mitigation special issue.

383. The Court finds that Lyles held no such bias.

Lyles did not have a bias against the law concerning the minimum punishment for murder.

384. The Court finds that Lyles assured both the State and the Court that she could remain open-minded to the full range of punishment and that she could assess as little as five years' imprisonment in an appropriate case. (RR 25: 49-50, 75-76). She told the defense, on the other hand, that she could never assess a five-year sentence for murder. (RR 25: 66-68).

385. As the Court of Criminal Appeals noted on direct appeal, the Court finds that Lyles was, at best, a vacillating veniremember. *Garcia*, slip op. at 7.

386. Because Lyles ultimately said she could consider the full range of punishment, the Court finds that Lyles could have followed the law with respect to the minimum punishment for murder. (RR 25: 75-76). *See Garcia*, slip op. at 7; *see also Rosales v. State*, 4 S.W.3d 228, 233 (Tex. Crim. App. 1999) (holding that the trial court did not err in denying a challenge for cause where the prospective juror equivocated regarding his ability to consider a five-year sentence for murder, but ultimately assured the trial court that he could consider the full range of punishment).

387. The Court finds that applicant has failed to prove by a preponderance of the evidence that Lyles was biased against the law regarding the minimum punishment for murder.

388. The Court finds that Lyles held no such bias.

Alan Lucien

In his thirty-fifth ground for relief, applicant contends that prospective juror Alan Lucien should have been struck for cause because he (1) would answer the anti-parties special issue "yes" if the evidence showed that applicant agreed to participate in an offense in which weapons would be used and (2) could never assess a five-year sentence for murder. (RR 36: 169).

Lucien did not have a bias against the law concerning the anti-parties special issue.

389. The Court finds that Lucien told the State that he could consider all the evidence in answering the anti-parties special issue. (RR 36: 129, 132-33). As with prospective juror Lyles, however, defense counsel's questioning on this subject yielded ambiguous responses. (RR 36: 157-160).

390. The Court finds that there may have been some confusion regarding the difference between anticipating that a human life *would* be taken and anticipating that a human life *could* be taken:

> Q. [DEFENSE COUNSEL] How would you ever be able to tell that I was anticipating that somebody else other than myself was about to kill someone?
>
> A. [PROSPECTIVE JUROR] Well, I would have to think that you'd have to look at the intention going into committing the crime, of that individual, was going to anticipate that somebody *could possibly* be killed before they went, before they ever went in to commit that crime.
>
> . . . .
>
> Q. Let's say that myself and Mr. Lucas decide to go rob a bank. We're kind of a low budget operation, we've only got one gun. So, he's got a car, I've got a gun, we go down there, and I get out of the car, and he says, don't hurt anybody. I don't want, you know, I've already brought you down here and I'm not going to go in, but I don't want you to hurt anybody. Would that be anticipating that a human life would be taken?
>
> A. Yes, it would.
>
> Q. Even though his intent in saying that is to prevent a human life from being taken, right?
>
> A. Yes, sir. But to me that's anticipating that it *could* happen. It's a *possibility* whenever they go in and commit that crime, even though they're not planning on killing anybody, there's a possibility that someone *could* be killed. To me that's an anticipation of the consequences that *could* happen once that crime was committed.

Q. Okay. Let me ask you this. If we have a situation where people band together to do a certain crime.

A. Yes, sir.

Q. There's weapons involved. Would you always find that because of that they were anticipating that a human life would be taken?

A. There's always that *possibility*, and I think you always have to anticipate that that is the consequences that *could* occur under those circumstances.

Q. As far as you're concerned, if the State shows that people agreed to do the offense and there were weapons involved. . . . One or more, you know. . . . Just something that could cause someone's death. . . . That all the people would then, the answer to Special No. 2, Special Issue No. 2 would always be yes, that they anticipated that a human life would be taken?

A. They anticipate, yes, sir.

(RR 36: 158-60). [Emphasis added.]

391. The Court finds that it later attempted to clarify Lucien's position:

THE COURT: . . . If you'll look at Special Issue No. 2, that last line anticipated that a human life would be taken. . . . From time to time in some of your remarks you said if someone took guns to a situation that they would anticipate that a life could be taken?

PROSPECTIVE JUROR: Could be taken.

THE COURT: Do you see the difference between would and could?

PROSPECTIVE JUROR: Could be taken is it might happen. Would be taken, it's going to happen. And so they're anticipating when they're going in they're going to kill somebody.

THE COURT: Okay. Would you make the State of Texas prove the answer to Special Issue No. 2 is yes beyond a reasonable doubt?

PROSPECTIVE JUROR: Yes.

(RR 36: 166-67).

392. The Court finds that, to the extent his responses during defense examination suggested that he would automatically answer the anti-parties special issue "yes" if he found applicant guilty as a party, Lucien's failure to appreciate the difference between "would" and "could" calls the certainty of those responses into doubt. (RR 36: 159-60). Once the Court pointed out this distinction, Lucien said he would hold the State to its burden of proof on the anti-parties special issue. (RR 36: 166-67). This corresponds with his earlier assurances to the State that he would look at all the evidence and that he would return a "yes" answer only if the State had met its burden of proving that applicant actually anticipated that a human life would be taken. (RR 36: 129, 132-33).

393. The Court finds that, looking at the voir dire examination as a whole, Lucien would not have automatically answered the anti-parties special issue "yes." *See Cockrum v. State*, 758 S.W.2d 577, 586-87 (Tex. Crim. App. 1988) (upholding the denial of a challenge for cause where the record revealed that the prospective juror was initially confused by counsel's questions and unfamiliar with the law, but ultimately said she could follow the law).

394. In addition, as previously discussed, the Court notes that Lucien was not challengeable for cause simply because he would find that applicant anticipated that a human life would be taken based on the fact that applicant participated in a crime involving weapons.

395. The Court finds that the above exchange with defense counsel reveals how Lucien would weigh evidence that applicant took part in an armed crime in answering the anti-parties special issue.

396. The Court concludes that the fact that Lucien would find such evidence sufficient to prove actual anticipation does not demonstrate a bias against the law; it merely shows Lucien's personal understanding of proof beyond a reasonable doubt on this issue. *See Castillo*, 913 S.W.2d at 534.

397. The Court finds that applicant has failed to prove by a preponderance of the evidence that Lucien was biased against the law concerning the anti-parties special issue.

398. The Court finds that Lucien held no such bias.

Lucien did not have a bias against the law concerning the minimum punishment for murder.

399. The Court finds that Lucien repeatedly assured the State and this Court that he could consider the full punishment range for murder and that he could assess a five-year sentence "[i]f the facts and circumstances warranted." (RR 36: 142-43, 168).

400. Nevertheless, applicant contends that Lucien should have been struck for cause because he told defense counsel that he "[p]robably" could not consider a five-year sentence. (RR 36: 165).

401. The Court notes that the Court of Criminal Appeals has upheld the denial of a challenge for cause under similar facts. *See Rosales*, 4 S.W.3d at 233 (holding

that the trial court did not err in denying a challenge for cause to a prospective juror who told defense counsel he "probably" could not consider the five-year minimum sentence for murder, but, on questioning by the trial court, confirmed that he could consider the full punishment range).

402. The Court find that, at most, Lucien vacillated on his ability to follow the law. *See Garcia*, slip op. at 7.

403. The Court finds that applicant has failed to prove by a preponderance of the evidence that Lucien was biased against the law regarding the minimum punishment for murder.

404. The Court finds that Lucien held no such bias.

Robin Tucker

In his thirty-seventh ground for relief, applicant contends that prospective juror Robin Tucker should have been struck for cause because she (1) would always answer the future-dangerousness special issue "yes," (2) would expect the defense to bring forth mitigating evidence to justify imposing a life sentence, and (3) could never assess a five-year sentence for murder. (RR 37: 103-04).

Tucker did not have a bias against the law concerning the future-dangerousness special issue.

405. The Court finds that Tucker told the State that she could presume the answer to the future-dangerousness special issue to be "no" and require the State to prove that the answer should be "yes." (RR 37: 72-73).

406. The Court finds that later, in response to defense questioning, Tucker said that someone who had been convicted of capital murder would probably be a violent person in the future. (RR 37: 90). She also indicated, however, that she would have to consider the evidence in answering this question. (RR 37: 89).

407. The Court finds that that Tucker ultimately told the Court she could answer the future-dangerousness special issue "yes" or "no" depending on the evidence. (RR 37: 101).

408. The Court finds that Tucker assured both the State and this Court that she could answer the future-dangerousness special issue based on the evidence presented. (RR 37: 72-73, 101). *See Ladd*, 3 S.W.3d at 558-59 (holding that the trial court did not err in denying a challenge for cause where the prospective juror said he was inclined to answer the special issues in such a way that the death penalty would be assessed, but repeatedly assured the State and the trial court that he would answer the special issues based on the evidence).

409. The Court finds that applicant has failed to prove by a preponderance of the evidence that Tucker was biased against the law governing the future-dangerousness special issue.

410. The Court finds that Tucker held no such bias.

Tucker did not have a bias against the law concerning the mitigation special issue.

411. The Court finds that under questioning by the State, Tucker said she could keep her mind open to possible mitigating evidence. While she later told defense

counsel that she expected such mitigating evidence to be presented by the defense, this remark did not evince a bias against the law. (RR 37: 86-87).

412. The Court notes that because the law does not assign the burden of proof on the mitigation special issue to the State, a prospective juror is not subject to a challenge for cause simply because she would place the burden of proving the existence of mitigating circumstances on the defense. *See Ladd*, 3 S.W.3d at 559.

413. The Court finds that applicant has failed to sustain his burden of proving by a preponderance of the evidence that Tucker was biased against the law concerning the mitigation special issue.

414. The Court finds that Tucker held no such bias.

Tucker did not have a bias against the law concerning the minimum punishment for murder.

415. The Court finds that although she told the defense that she could never assess a five-year sentence for murder, Tucker told the State and this Court that she could remain open to the entire punishment range and could give a five-year sentence in an appropriate case. (RR 37: 81, 99-100, 101-02).

416. Because Tucker vacillated with respect to her ability to consider the minimum punishment for murder, this Court was in the best position to resolve her qualifications as a juror. *See Garcia*, slip op. at 7.

417. The Court finds that applicant has failed to prove by a preponderance of the evidence that Tucker was biased against the law regarding the minimum punishment for murder.

418. The Court finds that Tucker held no such bias.

419. In sum, the Court finds that applicant has failed to prove by preponderance of the evidence that any of the challenged veniremembers were biased against the law.

420. The Court concludes, therefore, that it properly denied applicant's challenges for cause and did not, therefore, violate his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

STATE CONSTITUTIONAL CLAIMS

Applicant's Claims Are Procedurally Barred

421. The Court finds that applicant argues his state constitutional claims together with his federal constitutional claims and does not contend that the two constitutions offer different levels of protection in this area of the law.

422. The Court concludes, therefore, that applicant's state constitutional claims have been procedurally defaulted and should be summarily denied. *See Emery*, 881 S.W.2d at 707 n.8.

423. Moreover, the Court finds that applicant could have raised his state constitutional claims on direct appeal, but chose instead to rely solely on the federal constitution.

424. The Court notes that habeas corpus may not be used to litigate claims that could have been brought on direct appeal. *Nelson*, 137 S.W.3d at 667.

425. For this additional reason, the Court concludes that applicant's state constitutional claims in grounds twenty-six, twenty-eight, thirty, thirty-two, thirty-four, thirty-six, and thirty-eight are procedurally barred and should not be addressed.

Alternatively, Applicant's Claims Are Without Merit

426. The Court finds that the Texas Constitution affords no greater protection in this area of the law than the United States Constitution.

427. Accordingly, for the reasons discussed in connection with applicant's federal constitutional claims, the Court finds that applicant has failed to prove by a preponderance of the evidence that his state constitutional rights were violated by the denial of his challenges for cause.

428. The Court concludes that applicant suffered no such deprivation of his rights under the Texas Constitution. Grounds for relief twenty-six, twenty-eight, thirty, thirty-two, thirty-four, thirty-six, and thirty-eight should be denied.

Applicant Was Not Harmed By the Denial of His Challenges for Cause

429. The Court notes that when federal constitutional error that is subject to a harm analysis is raised on habeas, the applicant bears the burden of proving by a preponderance of the evidence that the alleged error actually contributed to his conviction or punishment. *Fierro*, 934 S.W.2d at 374-75.

430. As previously noted, the United States Supreme Court has rejected the notion that the loss of a peremptory challenge due to the erroneous denial of a defense challenge for cause violates the constitutional right to an impartial jury. *See Ross*, 487 U.S. at 81.

431. Moreover, the Court finds that of the veniremembers challenged, only Robin Tucker and Susan Hutchinson actually sat on applicant's jury.

432. The Court finds that applicant has not shown that either Robin Tucker or Susan Hutchinson were not fair and impartial jurors. Accordingly, the Court finds that applicant has failed to demonstrate that he was deprived of a lawfully constituted jury.

433. The Court concludes that applicant has failed to prove by a preponderance of the evidence that any error in the denial of his challenges for cause contributed to his conviction or punishment. *See Ex parte Williams*, 65 S.W.3d 656, 658 (Tex. Crim. App. 2001).

434. The Court also concludes that, even under the less stringent harmless-error standard employed when these types of claims are raised on direct appeal, applicant has failed to demonstrate any harm.

435. The Court notes that under state law, "harm from the erroneous denial of a defense challenge for cause focuses on whether a peremptory challenge 'was wrongfully taken from [the defendant].'" *Newbury v. State*, 135 S.W.3d 22, 30-31 (Tex. Crim. App. 2004) (citing *Johnson*, 43 S.W.3d at 6). Harm occurs when (1) the defendant exercises a peremptory challenge on a prospective juror whom the trial court should have excused for cause at the defendant's request, (2) the defendant uses all of his statutorily allotted peremptory challenges, and (3) the defendant unsuccessfully requests an additional peremptory challenge to use on another veniremember whom the defendant identifies as "objectionable" and who actually sits on the jury. *Newbury*, 135 S.W.3d at 31. If the defendant received additional peremptory challenges beyond the fifteen allotted by statute, he must show that the

trial court erroneously denied a number of defense challenges for cause equal to at least one more than the number of additional peremptory challenges granted in order to show harm. *Id.*

436. The Court finds that, because applicant was not granted any additional peremptory challenges beyond those mandated by statute, he need only show that one of his challenges for cause was erroneously denied in order to demonstrate harm.

437. For the reasons set forth above, the Court finds that applicant has failed to meet even this minimal burden.

438. Accordingly, the Court concludes that applicant was not harmed by the denial of his challenges for cause.

439. For all the foregoing reasons, grounds for relief twenty-five through thirty-eight should be denied.

GROUND 39: APPELLATE REVIEW OF THE JURY'S ANSWER TO THE MITIGATION SPECIAL ISSUE

In his thirty-ninth ground for relief, applicant claims that Texas's death-penalty scheme violates the Eighth and Fourteenth Amendments to the United States Constitution because it does not permit "meaningful appellate review" of the jury's answer to the mitigation special issue. He argues that the Court of Criminal Appeals has a constitutional and statutory duty to review the sufficiency of the evidence to support the jury's negative answer the mitigation special issue. *See* TEX. CODE CRIM. PROC. ANN. art. 44.251(a) (Vernon Supp. 2005) ("The court of criminal appeals shall reform a sentence of death to a sentence of confinement . . . for life if the court finds that there is

insufficient evidence to support . . . a negative answer to an issue submitted to a jury under Section 2(e), Article 37.071 . . . of this code.")

Applicant's Claim Is Procedurally Barred

440. The Court finds that applicant could have raised this complaint on direct appeal, but did not. *See Garcia.*

441. The Court recognizes that the purpose of habeas corpus is to determine the lawfulness of confinement, not to litigate claims that the applicant neglected to raise on direct appeal. *See Ex parte McGowen*, 645 S.W.2d 286, 288 (Tex. Crim. App. 1983).

442. Accordingly, the Court concludes that applicant's thirty-ninth ground for relief is procedurally barred and should be summarily denied.

Alternatively, Applicant's Claim Is Without Merit

443. The Court finds that applicant has failed to prove by a preponderance of the evidence that Texas's death-penalty scheme violates his federal constitutional rights.

444. The Court notes that the Court of Criminal Appeals has already addressed and rejected the claim that article 37.071 is infirm as a matter of federal constitutional law because it precludes a meaningful review of the sufficiency of mitigating evidence. *See McFarland*, 928 S.W.2d at 498-99; *see also Tong*, 25 S.W.3d at 715; *Ladd*, 3 S.W.3d at 573. The Court of Criminal Appeals held that the constitutionality of article 37.071 is not contingent on appellate review of the mitigation issue: "So long as the jury is not precluded from hearing and

effectuating mitigating evidence, we have never regarded appellate review of mitigating evidence to be an essential component of a constitutionally acceptable capital punishment scheme." *McFarland*, 928 S.W.2d at 499. Indeed, the Court noted, such review would be a practical impossibility. *Id.*

445. Thus, the Court concludes that the failure of Texas's death-penalty scheme to permit "meaningful appellate review" of the jury's answer to the mitigation special issue does not violate the United States Constitution. Applicant's thirty-ninth ground for relief should be denied.

GROUND 40: PROPORTIONALITY REVIEW

In his fortieth ground for relief, applicant contends that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the Court of Criminal Appeals conduct a proportionality review in death-penalty cases.

Applicant's Claim Is Procedurally Barred

446. The Court finds that applicant could have argued on direct appeal that he had a constitutional right to a proportionality review of his death sentence, but failed to do so.

447. Thus, the Court concludes that applicant has forfeited this claim. *See Townsend*, 137 S.W.3d at 81. Applicant's fortieth ground for relief is procedurally barred and should not be addressed.

Alternatively, Applicant's Claim Is Without Merit

448. The Court finds that applicant has failed to prove any constitutional violation by a preponderance of the evidence.

449. The Court notes that the Court of Criminal Appeals has previously rejected the contention that the Due Process Clause requires it to conduct proportionality reviews in death-penalty cases. *See King v. State*, 953 S.W.2d 266, 273 (Tex. Crim. App. 1997); *Hughes v. State*, 897 S.W.2d 285, 294 (Tex. Crim. App. 1994).

450. Thus, the Court concludes that applicant is not entitled to a proportionality review of his death sentence. Applicant's fortieth ground for relief should be denied.

GROUND 41: DEFINING "MITIGATING EVIDENCE"

In his forty-first ground for relief, applicant contends that Texas's death-penalty scheme violates the Eighth and Fourteenth Amendments to the United States Constitution because it limits the concept of mitigation to factors that make the capital defendant less morally blameworthy for his crime.

Applicant's Claim Is Procedurally Barred

451. The Court finds that applicant's claim that the statutory definition of mitigating evidence is unconstitutionally narrow is one that could have been, but was not, brought on direct appeal. *See Garcia*.

452. The Court notes that an applicant may not use habeas corpus to litigate a claim that he could have raised on appeal. *See Boyd*, 58 S.W.3d at 136.

453. Accordingly, the Court concludes that applicant's forty-first ground for relief is procedurally barred and should be summarily denied.

Alternatively, Applicant's Claim Is Without Merit

454. The Court finds that applicant has failed to prove by a preponderance of the evidence that Texas's death penalty scheme violates the Eighth and Fourteenth Amendments to the United States Constitution.

455. The Court notes that article 37.071 defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(4).

456. The Court further notes that the Court of Criminal Appeals has held that "[b]ecause the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror," the statute "does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness," as applicant contends. *Raby v. State*, 970 S.W.2d 1, 9 (Tex. Crim. App. 1998); *Cantu v. State*, 939 S.W.2d 627, 649 (Tex. Crim. App. 1996).

457. Accordingly, the Court concludes that the statute's definition of mitigating evidence is not unconstitutionally narrow. Applicant's forty-first ground for relief should be denied.

GROUND 42: JURY'S SENTENCING DISCRETION

Applicant contends in his forty-second ground for relief that the statutory mitigation special issue violates the Eighth and Fourteenth Amendments to the United States Constitution because it permits the very type of open-ended discretion condemned by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972).

Applicant's Claim Is Procedurally Barred

458. The Court finds that applicant could have raised his *Furman* claim on direct appeal.

459. The Court concludes that by failing to do so, applicant has forfeited this claim. *See Townsend*, 137 S.W.3d at 81. Applicant's forty-second ground for relief is procedurally barred.

Alternatively, Applicant's Claim Is Without Merit

460. The Court finds that applicant has failed to prove any constitutional violation by a preponderance of the evidence.

461. The Court notes that the Court of Criminal Appeals has rejected the contention that Texas's statutory mitigation issue allows the type of open-ended discretion condemned in *Furman*. *See Moore v. State*, 999 S.W.2d 385, 408 (Tex. Crim. App. 1999); *Pondexter*, 942 S.W.2d at 587. The Court in *Furman* was concerned with the open-ended discretion permitted by statutes that failed to narrow the class of death-eligible defendants. *Pondexter*, 942 S.W.2d at 587. "There is no prohibition against allowing juries to decide what evidence is mitigating, and how much weight they are going to give it." *Id.*

462. The Court therefore concludes that the mitigation special issue is not unconstitutional and applicant's *Furman* claim is without merit. His forty-second ground for relief should be denied.

GROUND 43: BURDEN OF PROVING AGGRAVATING CIRCUMSTANCES

In his forty-third ground for relief, applicant contends that the statutory mitigation special issue violates the Eighth and Fourteenth Amendments to the United States Constitution because it fails to place the burden of proving aggravating circumstances on the State.

Applicant's Claim Is Procedurally Barred

463. The Court finds that applicant could have raised on direct appeal this challenge to the mitigation special issue, but he did not. *See Garcia.*

464. The Court notes that habeas corpus does not exist to provide an applicant with a second opportunity to raise appellate claims. *See McGowen*, 645 S.W.2d at 288.

465. Thus, the Court concludes that applicant's forty-third ground for relief is procedurally barred and should not be addressed.

Alternatively, Applicant's Claim Is Without Merit

466. The Court finds that applicant has failed to prove by a preponderance of the evidence that the mitigation special issue violates the Eighth and Fourteenth Amendments.

467. The Court notes that the Court of Criminal Appeals has repeatedly rejected the argument that the mitigation special issue is unconstitutional because it does not place on the State the burden of proof regarding aggravating evidence. *See Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004), *cert. denied*, 125 S. Ct. 1697 (2005); *Moore*, 999 S.W.2d at 408; *Williams v. State*, 937 S.W.2d 479, 491 (Tex. Crim. App. 1996). Because Texas law imposes on the State the burden

of proving certain prescribed aggravating circumstances, a burden of proof need not be prescribed for aggravating circumstances that might be considered in connection with the open-ended mitigation issue. *Williams*, 937 S.W.2d at 491.

468. Thus, the Court concludes that applicant's constitutional challenge to the mitigation special issue is without merit. His forty-third ground for relief should be denied.

GROUNDS 44-45: INDIVIDUALIZED SENTENCING

FEDERAL CONSTITUTIONAL CLAIM

In his forty-fifth ground for relief, applicant contends that the death penalty, as it is administered in Texas, constitutes cruel and unusual punishment under the United States Constitution because of the impossibility of restricting the jury's discretion to impose the death penalty while at the same time giving the jury unlimited discretion to consider mitigating evidence. In support of this contention, applicant relies on Justice Blackmun's dissent in *Callins v. Collins*, 510 U.S. 1141 (1994).

Applicant's Claim Is Procedurally Barred

469. The Court finds that the Court of Criminal Appeals overruled applicant's federal constitutional complaint when he raised it in his twelfth point of error on direct appeal. *See Garcia*, slip op. at 10.

470. The Court notes that claims raised and rejected on direct appeal are procedurally barred from reconsideration on habeas review. *See Ramos*, 977 S.W.2d at 617.

471. The Court therefore concludes that applicant's forty-fifth ground for relief is procedurally barred and should not be addressed.

Alternatively, Applicant's Claim Is Without Merit

472. The Court finds that applicant has failed to prove by a preponderance of the evidence that Texas's death penalty scheme violates the United States Constitution.

473. The Court notes that the Court of Criminal Appeals has repeatedly rejected the argument that Texas's death-penalty scheme violates the federal constitution because it fails to appropriately channel the jury's discretion. *See Rayford*, 125 S.W.3d at 532; *Cannady v. State*, 11 S.W.3d 205, 214 (Tex. Crim. App. 2000) (citing *Raby*, 970 S.W.2d at 7; *Lawton*, 913 S.W.2d at 558).

474. The Court finds that applicant has asserted no new or different arguments challenging these prior authorities.

475. Thus, the Court concludes that the death penalty in Texas does not constitute cruel and unusual punishment under the United States Constitution. Applicant's forty-fifth ground for relief should be denied.

STATE CONSTITUTIONAL CLAIM

In his forty-fourth ground for relief, applicant contends that the death penalty constitutes cruel and unusual punishment under the Texas Constitution.

Applicant's Claim Is Procedurally Barred

476. The Court finds that although he did not, applicant could have raised his state constitutional claim on direct appeal.

477. The Court notes that the writ of habeas corpus may not be used to advance claims that should have been brought on direct appeal. *See Nelson*, 137 S.W.3d at 667.

478. Moreover, the Court finds that applicant does not explain why the Texas Constitution provides or should provide any different or greater protection against cruel and unusual punishment than the protection afforded under the United States Constitution.

479. The Court concludes that applicant has procedurally defaulted his state constitutional claim by failing to support it with separate argument and authority. Applicant's state constitutional arguments will not be made for him. *See Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993).

480. For the foregoing reasons, the Court concludes that applicant's forty-fourth ground for relief is procedurally barred and should be summarily denied.

Alternatively, Applicant's Claim Is Without Merit

481. The Court finds that applicant has failed to prove by a preponderance of the evidence that Texas's death-penalty scheme violates the Texas Constitution.

482. The Court notes that in *Cannady*, the Court of Criminal Appeals rejected a claim that Texas's death-penalty scheme violates Article I, section 13 of the state constitution due to the impossibility of reconciling the competing constitutional requirements of consistency and fairness. 11 S.W.3d at 214.

483. Thus, the Court concludes that that the death penalty does not constitute cruel and unusual punishment under the Texas Constitution. Applicant's forty-fourth ground for relief should be denied.

GROUND 46: THE "12/10" RULE AND THE PROHIBITION AGAINST INFORMING THE JURY OF THE EFFECT OF A DEADLOCK

In his forty-sixth ground for relief, applicant contends that Texas's death-penalty scheme violates the Eighth and Fourteenth Amendments to the United States Constitution because the rule that the first two special issues may not be answered "yes," and the third special issue may not be answered "no," unless at least ten jurors agree "may arbitrarily force the jury to continue deliberating" if it fails to garner the requisite number of votes to answer one of the special issues. He argues that the jury should be informed that a deadlock on any of the special issues will result in a life sentence for the defendant.

Applicant's Claim Is Procedurally Barred

484. The Court finds that applicant raised this exact complaint in his eleventh point of error on direct appeal, and the Court of Criminal Appeals rejected it. *See Garcia*, slip op. at 10.

485. The Court notes that claims that have already been raised and rejected on direct appeal will not be considered on habeas corpus. *Ramos*, 977 S.W.2d at 617.

486. The Court concludes that applicant's forty-sixth ground for relief is procedurally barred and should not be addressed.

Alternatively, Applicant's Claim Is Without Merit

487. The Court finds that applicant has failed to prove any constitutional violation by a preponderance of the evidence.

488. The Court notes that the Court of Criminal Appeals has repeatedly rejected identical attacks on the constitutionality of Texas's "12/10" rule. *Rayford*, 125

S.W.3d at 532 (citing *Turner v. State*, 87 S.W.3d 111, 118 (Tex. Crim. App. 2002); *Jackson v. State*, 33 S.W.3d 828, 841 (Tex. Crim. App. 2000); *McFarland*, 928 S.W.2d at 519). The instructions on answering the special issues do not mislead the jury into thinking that the death penalty will be imposed unless ten or more jurors agree to answer the special issues in favor of a life sentence. *See Prystash*, 3 S.W.3d at 536. "Any juror who wishes to vote life contrary to the votes of the majority is 'given an avenue to accommodate the complained-of potential disagreements,' for 'every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues.'" *Id.* (quoting *McFarland*, 928 S.W.2d at 519; *Lawton*, 913 S.W.2d at 559).

489. The Court therefore concludes that Texas's "12/10" rule is not unconstitutional. Applicant's forty-sixth ground for relief should be denied.

ORDER

THE CLERK IS **ORDERED** to prepare a transcript of all papers in cause number W01-00325-T(A) and to transmit same to the Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. Applicant's Application for Writ of Habeas Corpus filed in cause number W01-00325-T(A), including any exhibits;

2. The State's Original Answer to Application for Writ of Habeas Corpus filed in cause number W01-00325-T(A);

3. The State's ~~and applicant's~~ proposed findings of fact and conclusions of law;

4. This Court's findings of fact, conclusions of law, and order;

5. This Court's November 22, 2005 order finding no controverted, previously unresolved factual issues and setting deadlines for filing proposed findings of fact and conclusions of law; and

6. The indictment, judgment, sentence, docket sheet, and appellate record in cause number W01-00325-T(A), unless these have been previously forwarded to the Court of Criminal Appeal.

THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's findings of fact and conclusions of law, including its order, to Richard E. Langlois, attorney for applicant, 217 Arden Grove, San Antonio, Texas 78215, and to counsel for the State.

SIGNED the 15th day of Feb, 2006.

Becky Gregory, Judge
283rd Judicial District Court
Dallas County, Texas

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-74,692

JOSEPH C. GARCIA, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
OF CAUSE NO. F01-00325-T FROM THE 283RD JUDICIAL DISTRICT COURT
DALLAS COUNTY

MEYERS, J., ***delivered the opinion of the Court, in which*** **Keller, P.J.,** ***and*** **Price, Womack, Johnson, Keasler, Holcomb,** ***and*** **Cochran, JJ.** ***joined.*** **Hervey, J.,** ***did not participate.***

OPINION

In February 2003, a jury convicted appellant of capital murder. TEX. PENAL CODE ANN. § 19.03(a). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, sections 2(b) and 2(e), the trial judge sentenced appellant to death. Art. 37.071, § 2(g).[1] Direct appeal to this Court is

[1] Unless otherwise indicated all references to Articles refer to the Code of Criminal Procedure.

automatic. Art. 37.071, § 2(h). Appellant raises thirteen points of error. We affirm.

FACTS

On December 13, 2000, seven inmates, including appellant, escaped from the Texas Department of Criminal Justice Connally Unit, taking with them a number of firearms stolen from the unit. On December 24th, the group committed a robbery at a sporting-goods store in Irving, killing Irving police officer Aubrey Hawkins as they fled. The escapees used the weapons they stole from the prison to commit the robbery and murder. The escapees then made their way to Colorado where they lived in an RV park until January 2001, when six were apprehended and one committed suicide.

VOIR DIRE

In points of error one through seven, appellant claims that the trial court erred in overruling his challenges for cause to seven veniremembers. In each point of error, appellant briefly sets out the subject matter of some of the questions he asked the prospective juror, and then generally paraphrases the answers he received. Thereafter, appellant's entire argument/discussion under each point reads as follows:

> Following the questioning of [the prospective juror], the appellant asserted a clear and specific challenge for cause. [The prospective juror] was challenged for [insert stated basis for challenge]. The appellant was entitled under law to a juror who [repeat stated basis for challenge]. The Court erroneously denied the appellant's challenge for cause. Appellant's rights to an impartial jury under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution were violated, as well as, his rights to a juror free of any bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely under Texas Code of Criminal Procedure, Article 35.16(c)(2).

Finally, appellant concludes each point by stating that he preserved error on the point by using a peremptory challenge on the prospective juror, exhausting all of this challenges, asking for and being denied more, and identifying an objectionable juror. With the single exception of setting out what is required to preserve error on these points, appellant has not cited to any authority. However, we will, in the interest of justice, review the record and address the points on their merits. A review of the record shows that the points are otherwise preserved for review. *See Feldman v. State*, 71 S.W.3d 738, 743-45 (Tex. Crim. App. 2002); *Green v. State*, 934 S.W.2d 92, 105 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1200 (1997).

A defendant may properly challenge any prospective juror who has a bias or prejudice against him or against any phase of the law upon which he is entitled to rely. Art. 35.16(a)(9) and (c)(2). When reviewing a trial court's decision to grant or deny a challenge for cause, we look at the entire record to determine if there is sufficient evidence to support the trial court's ruling. *Feldman*, 71 S.W.3d at 743-45; *Patrick v. State*, 906 S.W.2d 481, 488 (Tex. Crim. App. 1995), *cert. denied*, 517 U.S. 1106 (1996). The test is whether the bias or prejudice would substantially impair the prospective juror's ability to carry out his oath and instructions in accordance with the law. *Feldman*, 71 S.W.3d at 743-45. Before prospective jurors may be excused for cause on this basis, however, the law must be explained to them and they must be asked whether they can follow that law regardless of their personal views. *Id.* Finally, the proponent of a

challenge for cause has the burden of establishing that the challenge is proper. *Id.* at 747. The proponent does not meet this burden until he or she has shown that the veniremember understood the requirements of the law and could not overcome his or her prejudice well enough to follow it. *Id.* When the record reflects that a venireperson vacillated or equivocated on his or her ability to follow the law, the reviewing court must defer to the trial court. *Moore v. State*, 999 S.W.2d 385, 400 (Tex. Crim. App. 1999), *cert. denied*, 530 U.S. 1216 (2000); *Brown v. State*, 913 S.W.2d 577, 580 (Tex. Crim. App. 1996).

In his first point of error, appellant complains that the trial court should have granted his challenge for cause to prospective juror Ama Helfenbein for two reasons. First, she was unable to consider the minimum punishment of five years for murder. Second, she opined that if any participant in a crime was armed, then she would always conclude that the State had met its burden to show that all participants should have anticipated that a life would be taken in the commission of the offense and answer the anti-parties issue "yes." *See* Art. 37.071 § 2(b)(2).

When discussing lesser-included offenses, the prosecutor explained to Helfenbein that lesser offenses carry different punishment ranges than capital murder, and a defendant may be sentenced to as little as five years if convicted of one of these lesser-included offenses. When asked whether she could keep her mind open to the full range of punishment, Helfenbein responded that she could. Appellant subsequently asked Helfenbein whether, if the jury found him guilty only of murder, she could sentence him

to five years in the penitentiary. Helfenbein responded, "I doubt it." No further questions were asked on the topic. Given this record, appellant has failed to carry his burden to show that Helfenbein's views would substantially impair the prospective juror's ability to carry out her oath and instructions in accordance with the law.

With regard to the law of parties, the record shows that the prosecutor generally explained the law of parties to Helfenbein. When asked whether a party to a crime should be held accountable for that crime, Helfenbein responded that it would depend on the evidence, case by case. When discussing the anti-parties issue that is presented in the punishment phase, the prosecutor told Helfenbein that the question always started out with a "no" answer, but explained nothing further. In response to appellant's questions, Helfenbein stated that, if more than one person was involved in a crime, and one of those persons were armed, then she felt that the other people involved would anticipate that a human life would be taken in the commission of the offense. Appellant then asked, "So if the State were able to prove that one or more of the participants in a conspiracy or a joint enterprise were armed, [the anti-parties issue] would be answered yes in your mind?" Helfenbein answered the question with a simple, "Yes."

The record does not indicate that any distinction was made between the law of party liability in the guilt phase of trial and the law governing the anti-parties issue at punishment. In some cases, a jury's finding of guilt will be the functional equivalent of an affirmative answer to the anti-parties special issue; however, that is not always so.

Valle v. State, 109 S.W.3d 500, 503-04 (Tex. Crim. App. 2003). A defendant may be found guilty of capital murder under a parties theory without meeting the requirements for an affirmative answer to the anti-parties punishment issue. *Id.* Without more, appellant has not met his burden to show that Helfenbein understood the requirements of the law but could not overcome her prejudice well enough to follow it. Nor has appellant shown that Helfenbein's views would have substantially impaired her ability to carry out her oath and instructions in accordance with the law.

The trial court did not abuse its discretion in denying appellant's challenge for cause to Helfenbein. Appellant's first point of error is overruled.

In his second point of error, appellant complains that the trial court should have granted his challenge for cause to prospective juror Thomas Tucker because Tucker believed that a person who had committed one murder would always be a continuing threat to society, thereby relieving the State of its burden to prove the future-dangerousness issue beyond a reasonable doubt. During a discussion with the prosecutor on the future-dangerousness issue, Tucker commented that if he believed that the defendant was guilty of the crime with which he was charged, he might be "predisposed" to believe that the person would be willing to commit another violent act. However, after the prosecutor further explained the law, Tucker stated that, although he might find it difficult, he believed that he could follow the law. During questioning by appellant, Tucker confirmed that he would not automatically answer the future-dangerousness

question "yes" just because he had found the defendant guilty.

Given the record, we hold that appellant has failed to show that Tucker's views would have substantially impaired his ability to carry out his oath and instructions in accordance with the law. The trial court did not abuse its discretion in denying appellant's challenge for cause to Tucker. Appellant's second point of error is overruled.

In his third, fourth, fifth, sixth, and seventh points of error, appellant complains that the trial court should have granted his challenges for cause to prospective jurors Larry Carroll, Gregory Babineau, Lillian Lyles, Alan Lucien, and Robin Tucker. In each point, appellant states that the prospective juror gave conflicting answers concerning the complained-of issues, but also concedes that the prospective juror ultimately told the court that he or she could follow the law.

By appellant's own admission, each of these prospective jurors was at best a vacillating veniremember. When the record reflects that a venireperson vacillated or equivocated on his or her ability to follow the law, the reviewing court must defer to the trial court. *Moore*, 999 S.W.2d at 400; *Brown*, 913 S.W.2d at 580.

Given appellant's arguments and a review of the record, we hold that appellant has failed to meet his burden to show that any of the prospective jurors were challengeable for cause. The trial court did not abuse its discretion in denying appellant's challenges. Appellant's third through seventh points of error are overruled.

EXTRANEOUS OFFENSE EVIDENCE

In his eighth point of error, appellant complains that the trial court erred in admitting evidence during the guilt phase concerning two extraneous offenses: (1) appellant's escaping from prison, and (2) the escapees' taking of numerous firearms during the escape. Appellant asserts that the admission of this evidence violated Texas Rules of Evidence 401, 402, 403, and 404(b). He also asserts that the trial court should have granted his request for a limiting instruction once the evidence was admitted.

While Rule of Evidence 404(b) states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," the rule goes on to say, "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . ." See also Montgomery v. State, 810 S.W.2d 372, 388-89 (Tex. Crim. App. 1990) (opinion on rehearing). Evidence of another crime, wrong, or act also may be admissible as same-transaction contextual evidence where "several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, . . .of any one of them cannot be given without showing the others." *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000); *Rogers v. State*, 853 S.W.2d 29, 33 (Tex. Crim. App. 1993). The jury is entitled to know all relevant surrounding facts and circumstances of the charged offense. *Wyatt*, 23 S.W.3d at 25. However, under Rule 404(b), same-transaction contextual evidence is admissible only when the offense would make little or no sense

without also bringing in the same-transaction evidence, and it is admissible "only to the extent that it is necessary to the jury's understanding of the offense." *Id.*

Because the weapons used in the instant offense were identified as those taken from the prison, and because the taking of the weapons was intricately intertwined with the prison escape, the trial court concluded that evidence of the escape and the stolen weapons was admissible as contextual evidence. Furthermore, the court noted that the evidence of the extraneous events was limited to only that necessary to explain the connection of the weapons to the instant offense and appellant's connection to the weapons. The trial court did not abuse its discretion in admitting this evidence.

With regard to appellant's claims that the admission of the evidence was more prejudicial than probative or that he was entitled to a limiting instruction regarding the evidence, he has wholly failed to present anything more than conclusory statements. He has inadequately briefed these complaints, and we will not address them. TEX. R. APP. P. 38.1(h). Point of error eight is overruled.

CONSTITUTIONALITY OF STATUTE

In his final four points of error, appellant challenges the constitutionality of the Texas death-penalty scheme. In his ninth point, he asserts that the mitigation question of Article 37.071, section 2(e) is unconstitutional because the State is not required to prove the absence of sufficient mitigating circumstances beyond a reasonable doubt, as dictated by the United States Supreme Court's opinions in *Apprendi v. New Jersey*, 530 U.S. 466

(2000), and its progeny. In his tenth point, appellant asserts that Article 37.071, section 2(b)(1), was unconstitutionally applied in his case because the court refused to define the term "probability" and the phrase "criminal acts of violence." In his eleventh point of error, appellant challenges the "10/12" rule of Article 37.071. In his twelfth point, appellant asserts that the scheme is unconstitutional "because of the impossibility of simultaneously restricting the jury's discretion to impose the death penalty while also allowing the jury unlimited discretion to consider all evidence militating against imposition of the death penalty." This Court has previously considered and rejected all of these claims, and appellant has given us no reason to reconsider them here. *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004). Appellant's ninth through twelfth points of error are overruled.

Appellant asserts in his thirteenth point of error that the cumulative effect of the above-enumerated constitutional violations denied him due process of law. Because appellant has not shown any constitutional violations, there can be no cumulative effect. *Id.* at 829. Point of error thirteen is overruled.

We affirm the judgment of the trial court.

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