

defense expert.”); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995) (“In general, an attorney is entitled to rely on the opinions of mental health experts in deciding whether to pursue an insanity or diminished capacity defense.”). None of Mr. Gardner’s experts identified abandonment rage as a possible defense before trial, which indicates that the State court’s decision is reasonable regarding this issue.

Counsel stated that even if they had known about abandonment rage, they would not have presented the defense at Mr. Gardner’s trial during the guilt-innocence phase. 2 SHCR 339. First, they believed that raising an abandonment rage defense at the guilt-innocence phase would have opened the door to a host of bad acts committed by Mr. Gardner. 2 SHCR 339. Further, they did not believe that Collin County jurors would have responded to this defensive theory. 2 SHCR 339. The State habeas court accepted these explanations. 2 SHCR 387 (Findings 22 & 25). The State habeas court further found that as a matter of state law, Mr. Gardner’s prior history of violence would have been admissible at the guilt-innocence phase if abandonment rage had been offered as a defense and that such evidence would have been highly prejudicial. 2 SHCR 387 (Findings 26 & 27). Accordingly, the State habeas court found that “[c]ounsel’s decision to pursue a fact-based rather than psychological defense and limit the State’s rebuttal evidence was a reasoned strategic choice. . .” 2 SHCR 387 (Finding 28). The State court’s alternative holding on deficiency is reasonable.

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Strickland*, 466 U.S. at 690. Presenting or withholding certain evidence is clearly within counsel’s reasoned, strategic discretion. *See, e.g., Darden v. Wainwright*, 477 U.S. 168, 185–86 (1986) (counsel reasonably withheld most of the defendant’s available mitigation evidence). Counsel may reasonably consider the atmosphere of

the convicting county's population in formulating a strategy. *See, e.g., Strickland*, 466 U.S. at 695. That is what Mr. Gardner's counsel explained in this case—they would not have presented a “novel” psychological defense in a historically conservative county, and they would not have allowed the State to introduce punishment evidence at the guilt-innocence phase of trial. 2 SHCR 339. The State court's decision on this matter was not unreasonable.

The State habeas court noted that neither Dr. Kessner nor Mr. Gardner's State habeas mitigation specialist, Toni Knox, believed that abandonment rage theory was applicable to the guilt-innocence phase (2 SHCR 388 (Findings 30 & 31)) and that even if it had been presented, it would have provided only “psychological context” but not a legal justification for Mrs. Gardner's murder (2 SHCR 388 (Finding 32)). This supports that court's finding that it was reasonable for counsel not to have advanced a legally inapplicable defense. 2 SHCR 38 (Finding 33). The State habeas court additionally found that abandonment rage was not an appropriate defense for Mr. Gardner. The court noted that Mr. Gardner had a history of random violence unconnected to any abandonment. 2 SHCR 388 (Finding 34). The court also found that the State's evidence showed that abandonment was not the impetus behind Mrs. Gardner's murder; rather, it was the divorce proceeding in which Mrs. Gardner was a prospective witness. 2 SHCR 389 (Finding 35). Consequently, the State habeas court found that “[c]ounsel were not unreasonable for declining to present a defensive theory that not supported by the evidence.” 2 SHCR 389 (Finding 36).

The State habeas court also noted that while abandonment rage theory may be applicable to the retaliation manner and means, it had no bearing on the burglary manner and means. 2 SHCR 389 (Finding 37). Regardless of whether Mr. Gardner killed Tammy because of her abandonment or her status as a prospective witness, he still did not have effective consent to

enter her home on the evening of her death. Because abandonment rage did not have any effect on the burglary manner and means, the State habeas court found that counsel were not unreasonable in failing to have advanced a defensive theory that did not address all alternative means of proving capital murder. 2 SHCR 389 (Finding 38).

These three further findings of non-deficiency—failing to advance a legally inapplicable defensive theory, failing to advance an unsupported defensive theory, and failing to advance a less than comprehensive defensive theory—are all reasonable findings by the State habeas court. *See Mirzayance*, 556 U.S. at 127 (“The law does not require counsel to raise every available nonfrivolous defense. . . . Counsel also is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim’s dismal prospects for success—for recommending that a weak claim be dropped altogether.”); *Haines v. Risley*, 412 F.3d 285, 289 (1st Cir. 2005) (“[T]o couple a weak argument with a stronger one may detract from the latter . . .”).

The State habeas court found that Mr. Gardner was not prejudiced by the failure to raise abandonment rage during the guilt/innocence phase. 2 SHCR 390 (Findings 41 & 42). This finding is directly intertwined with some of the findings above—that abandonment rage did not legally negate retaliation (2 SHCR 388 (Finding 32)), that abandonment rage did not fit well with Mr. Gardner’s “history of random violence unconnected to any abandonment” (2 SHCR 388 (Finding 34)); that the State’s evidence “showed that the impending divorce was the impetus for Tammy’s murder,” not abandonment (2 SHCR 389 (Finding 35)), and that abandonment rage did not negate the burglary manner and means (2 SHCR 389 (Finding 37)). These findings are reasonable determinations by the State habeas court.

Retaliation occurs when a person “intentionally or knowingly harms or threatens to harm another by an unlawful act . . . in retaliation for or on account of the service or status of

another as a . . . prospective witness.” Tex. Penal Code § 36.06(a)(1)(A); *accord* 1 CR (219-81121-06) 6 (final re- indictment). Mr. Gardner intended to harm, or knowingly harmed, Tammy by an unlawful act—he shot her. Mr. Gardner does not take issue with that element of retaliation. Mr. Gardner does, however, challenge the reason for harming Tammy. He now claims that he shot her because she abandoned him, while the State alleged that Mr. Gardner killed Tammy because she was divorcing him, an act that necessarily included her participation as a witness against Mr. Gardner in order to finalize the divorce.

The State proved that Mrs. Gardner had filed for divorce (SX 39) and that she had to testify under oath in order to complete the divorce (20 RR 99–100). The State also proffered evidence that it was not the termination of the relationship that angered Mr. Gardner but the act of divorce itself. For example, Mr. Gardner became agitated after Tammy filed the divorce petition. 19 RR 206–10. Mr. Gardner seems to argue that he could have committed retaliation only if he intended to prevent Tammy from testifying. (Dkt. # 16, at p. 41). However, retaliation can occur even where it is not the defendant’s primary objective to stop the witness from testifying. The State proved that Tammy, as a prospective witness, was part of the divorce and provided sufficient evidence for the jury to believe that the divorce was the impetus of the killing, not abandonment. Given the evidence at trial, it is unlikely that the jury would have been swayed by abandonment rage as the impetus for the killing instead of Tammy’s status as a prospective witness.

The evidence proffered by Mr. Gardner during the State habeas hearing indicated that Mr. Gardner was prone to violence for reasons other than abandonment. For example, Mr. Gardner killed Rhoda because she would not divorce him. *See* 1 SHCR 159. Mr. Gardner had random “anger episodes.” *See* 1 SHCR 195. He was violent with his ex-wife Westmoreland. *See* 1 SHCR 191.

Mr. Gardner's own evidence indicates that he was violent because a former wife would not leave him, and was violent in situations not connected to real or perceived abandonment. Considering Mr. Gardner's own evidence is inconsistent with abandonment rage theory, it is improbable that the jury would have accepted such explanation.

Finally, abandonment rage theory does not negate the burglary manner and means. A person commits burglary "if, without the effective consent of the owner, the person . . . enters a building or habitation and commits or attempts to commit a felony, theft, or an assault." Tex. Penal Code § 30.02(a)(3); *accord* 1 CR (219-81121-06) 6 (final re-indictment). There is no doubt that Mr. Gardner entered Mrs. Gardner's home with the intent to murder her—he borrowed his brother-in-law's pickup truck under false pretenses, stole a .44 magnum pistol, and drove straight to Mrs. Gardner's house from Mississippi.

Further, the Court of Criminal Appeals observed that there was "ample circumstantial evidence that Tammy did not consent to [Mr. Gardner's] middle-of-the- night entry" *Gardner*, 306 S.W.3d at 287. The following evidence supported the theory that Mr. Gardner did not have effective consent to enter Mrs. Gardner's home:

- Jacquie West, Candace Akins, and Tammy's daughter, Jessie, testified that Tammy was terrified of [Mr. Gardner] and believed that he would kill her.
- Tammy had repeatedly told them that she would never get out of her marriage to [Mr. Gardner] alive, that he would kill her first.
- Jessie testified that, on the afternoon of Tammy's death, [Mr. Gardner] kept sending her text messages, asking about whether she planned to go through with the divorce, and, when Tammy did not respond to those messages, his messages became shorter and bigger until they culminated with repeated texts: "YES OR NO?" Tammy was frantic as she drove down the road with Jessie.
- Immediately before her murder, Tammy had spent three hours visiting with the vice-president of her company seeking his assistance to help her "disappear" so that no one could track her down.

- [Mr. Gardner] had kept a second set of keys to Tammy's house when he left at Christmas after giving one set to Tammy's son, John.
- The physical condition of the bedroom leads to a reasonable inference that Tammy was surprised by the intruder and shot as she was sitting up in bed, propped up by pillows.

Gardner, 306 S.W.3d at 287.

The Court of Criminal Appeals summarized the inferences that could have been reasonably drawn by the jury given the evidence before them:

The jury could infer from this evidence that Tammy would not, and did not, give [Mr. Gardner] consent to enter her home after 11 p.m. on January 23, 2005. Viewing the totality of the evidence, the jury could reasonably infer that [Mr. Gardner] drove to Tammy's isolated rural home, used his extra key to open the front door, walked down to the bedroom to confront Tammy sitting up in bed, shot her through the right temple, took the house keys from her purse hanging on the bedpost, locked the front door as he left, put Tammy's keys into the tool box in Tammy's truck, stopped at a ditch two to three miles down the road (perhaps to throw his extra set of keys into the ditch), and then drove back to Mississippi. Tammy, meanwhile, was still conscious enough to put on her red robe, which was hanging on the bedpost, look outside to see [Mr. Gardner] departing in the white Ford truck with Mississippi plates, and then call 911 to summon an ambulance.

Id. at 287–88.

Mr. Gardner states that abandonment rage theory negates the burglary manner and means by proposing that evidence of “abandonment rage in guilt/innocence would have refuted burglary.” (Dkt. # 16, at p. 50). Mr. Gardner does not provide support for this statement.

Further, recent case law further demonstrates the reasonableness of the State court's decision. In *Rayford v. Stephens*, 622 F. App'x 315 (5th Cir. 2015), Rayford claimed that the two murders he committed stemmed from “abandonment rage” and that his attorneys should have presented this defensive theory at trial. 662 F. App'x at 320. The State habeas court rejected the claim noting that abandonment rage “would only show a motive for the murders [and] would not negate *mens rea* or otherwise excuse the killings . . . [and] would not be mitigating.” *Id.* at

322, 336. The Fifth Circuit upheld the denial of federal habeas relief finding that the State court decision was objectively reasonable. *Id.* at 336–37.

In affirming the denial of relief, the Fifth Circuit recognized that the abandonment rage theory would present negative information. *Id.* at 337. The court noted that “while the theory would offer a *reason* for Rayford’s violent rage, it would simultaneously undercut his argument on the future dangerousness issue.” *Id.* Thus, trial counsel was not deficient because “a tactical decision not to pursue and present potential mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance.” *Id.* (quoting *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999)). Like the situation in *Rayford*, Mr. Gardner failed to prove trial counsel’s deficiency in failing to investigate abandonment rage or that any harm came of the omission. Trial counsel were not deficient in failing to make the defense of “abandonment rage” a consistent theme between both phases of trial.

Mr. Gardner cannot obtain habeas relief as to his abandonment-rage claims. *See Rayford*, 622 F. App’x at 336–37. Abandonment rage theory does not undermine the burglary manner and means. Even if Mr. Gardner was uncontrollably furious at his failed relationship, he did not have effective consent to enter Tammy’s home and then shoot her while she lay in bed. Those facts are sufficient to sustain capital murder in this case and are not impacted by Mr. Gardner’s abandonment rage defense. Accordingly, there is no reasonable probability of a different result at the guilt-innocence phase of trial had abandonment rage been advanced as a defense. The State habeas court’s decision to deny relief on this point is not objectively unreasonable.

2. *The State court's rejection of the theory that counsel were ineffective for failing to advance a consistent and effective theory throughout both phases of trial was reasonable (Claim Two).*

Mr. Gardner contends that counsel advanced a defense that was not consistent between the guilt-innocence and punishment phases of trial and that the inconsistent defense was ultimately a losing strategy. (Dkt. # 16, at pp. 63–87). Essentially, Mr. Gardner criticizes counsel's performance because they did not advance the abandonment rage defense in both phases of trial. (Dkt. # 16, at pp. 68–71). Mr. Gardner claims that prejudice is either presumed (Dkt. # 16, at p. 72) or is present based on the facts in this case (Dkt. # 16, at pp. 72–87) because counsel did not advance this theory. Mr. Gardner, however, cannot show deficiency or prejudice, as it is not presumed, and Mr. Gardner does not show that the State court's decision was contrary to Supreme Court precedent or an unreasonable application thereof.

Counsel explained in their affidavit to the State habeas court that they adopted two strategies—one for the guilt-innocence phase and one for the punishment phase. 2 SHCR 339. Counsel averred that in the guilt-innocence phase, they attempted to negate the two manner and means of capital murder—burglary and retaliation. 2 SHCR 339–40. As to burglary, counsel focused on showing that there was no forced entry into Mrs. Gardner's home, namely “that [Mr. Gardner] entered the residence by invitation and nothing else.” 2 SHCR 340. To negate retaliation, counsel pointed out that Mr. Gardner had not contested the divorce and that the divorce could have been completed without Mr. Gardner's participation. 2 SHCR 340.

Mr. Gardner reasserts that the State court decision is not entitled to AEDPA deference because there was no live evidentiary hearing. (Dkt. # 16, at pp. 86–87). AEDPA deference applies despite the fact that the court ruled on the papers instead of conducting a live hearing. *Carter v. Johnson*, 131 F.3d 452, 460 n.13 (5th Cir. 1997) (collecting cases); *see also Hudson v.*

Quarterman, 273 F. App'x 331, 335 (5th Cir. 2008) (citing *Carter v. Johnson* with approval).

The State habeas judge, who also presided over Mr. Gardner's trial, was able to evaluate Mr. Gardner's State habeas claims, including whether the affidavits sufficiently showed that counsel should have discovered and offered the specified mitigating evidence, informed by the court's knowledge of the trial proceedings and defense counsel's performance at trial. The lack of a live hearing in State court thus does not defeat the presumption of deference in this case. *See Valdez*, 274 F.3d at 951.

In the punishment phase, counsel had a two-pronged strategy. First, counsel attempted to humanize Mr. Gardner, and second, counsel focused on the State's burden of proving future dangerousness in prison beyond a reasonable doubt. 2 SHCR 340–41. As to the first prong, counsel explained that the mitigation expert “discovered little or nothing that was deemed useful for trial,” that Mr. Gardner's father chose not to attend Mr. Gardner's trial, and that Mr. Gardner's mother was too “emotionally unstable” to testify. 2 SHCR 340–41. As to the second prong, counsel relied on the fact that the State, during voir dire, emphasized that they had the burden on proving future dangerousness beyond a reasonable doubt, and “that future dangerousness could be measured in terms of the society that existed in prison.” 2 SHCR 341.

Counsel noted that the State, at trial, put on no evidence concerning Mr. Gardner's likelihood of future danger while incarcerated. But, if they had presented evidence showing that Mr. Gardner had a low likelihood of future violence in prison, “the State would call at least one expert to rebut our testimony giving the jury an out.” 2 SHCR 341. Recognizing that the State did not present evidence concerning Mr. Gardner's future dangerousness in prison, counsel consulted with John Niland of the Texas Defender Service and Bill Schultz, a local attorney, regarding the decision to rest without presenting evidence of Mr. Gardner's low probability of

violence in prison, “and both agreed that it seemed sound.” 2 SHCR 341–42.

The State habeas court found that counsel purposefully chose different strategies during both phases of trial (2 SHCR 390 (Finding 45)). Counsel focused on negating the manner and means of capital murder at guilt-innocence (2 SHCR 390 (Finding 46)) At punishment, they humanized Mr. Gardner and relied on the argument that the State failed to meet its burden to prove future dangerousness beyond a reasonable doubt (2 SHCR 390 (Finding 48)). The court determined that these were reasoned strategies. 2 SHCR 390 (Findings 47 & 49). Although they were different, they were not inconsistent with each other. 2 SHCR 390–91 (Finding 50). While acknowledging that counsel should seek a single theory of a case, the court found that in this case, it was reasonable to have multiple theories. 2 SHCR 391 (Findings 52, 53 & 54).

The State habeas court also found that prejudice was not presumed because counsel “subjected the prosecution’s evidence to meaningful adversarial testing” (2 SHCR 391 (Findings 55 & 56)), and that presentation of abandonment rage would not have affected the jury’s decision on guilt or innocence (2 SHCR 392 (Finding 57)), or punishment (2 SHCR 392 (Findings 58, 59, 60 & 61)). This is largely because abandonment rage did not legally excuse the killings (2 SHCR 388 (Findings 32, 35 & 37)), is not supported or is inconsistent with the evidence proffered by Mr. Gardner (2 SHCR 388 (Finding 34), 392 (Finding 59)) and would have been double-edged (2 SHCR 392 (Findings 58 & 60)). The decision of the State court is objectively reasonable.

The Director points out that counsel did not present abandonment rage as a consistent defense throughout trial because the investigators and experts did not inform them of such a defense. 2 SHCR 387 (Findings 23 & 24). Federal law is in accord with the State court’s decision that counsel are not deficient in failing to present a psychological defense if their experts do not