

raise the issue. *See Couch*, 632 F.3d at 246; *McClain*, 552 F.3d at 1252; *Sims*, 425 F.3d at 585–86; *Dowthitt*, 230 F.3d at 747–48; *Hendricks*, 70 F.3d at 1038. Accordingly, the State court’s decision was reasonable on grounds of non-deficient performance alone.

Counsel’s strategy for the guilt-innocence phase was reasonable. They focused on negating the burglary and retaliation manner and means. 2 SHCR 340. The defense options in this case were limited. There was compelling evidence that Mr. Gardner killed Mrs. Gardner. In her last few minutes of consciousness, Mrs. Gardner identified Mr. Gardner as her assailant. She further accurately described the vehicle he was driving. This evidence was corroborated by Mr. Gardner’s sister, brother-in-law, credit card statements, fingerprints, and microscopic fiber analysis. In light of the overwhelming evidence that Mr. Gardner killed Mrs. Gardner, a reasonable attorney could have decided that the most prudent defensive course would be to limit Mr. Gardner’s exposure to a death sentence by holding the State to its burden of proving the manner and means which enhanced the crime to capital murder. *Richter*, 562 U.S. at 109, 131 S. Ct. at 790 (“To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.”).

Disagreement with counsel’s strategy does not show deficiency. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (“Even the best criminal defense attorneys would not defend a particular client in the same way.”). The State court’s decision is objectively reasonable on this point.

Counsel’s strategy for punishment was an attempt to humanize Mr. Gardner by calling Mr. Gardner’s sister, who testified about physical and emotional abuse inflicted by Mr. Gardner’s parents, and pleaded for Mr. Gardner’s life, and by calling Mr. Gardner’s co-workers. Counsel additionally hired investigators and experts to conduct a mitigation investigation but “had discovered little or nothing that was deemed useful.” 2 SHCR 340–41.

Counsel explained that:

We did check Mr. Gardner's prior childhood accidents and injuries on our mitigation [investigation]. There didn't seem to be anything other than what Elaine Holifield [Mr. Gardner's sister] testified to. There was [sic] no serious illnesses at any time. There was physical abuse to [Mr. Gardner] and Elaine. We have testimony to that. There was no sexual abuse of any type.

The—the immediate family was checked as to the size of the immediate family, which was four—plus grandchildren. We checked with—as far as the relationship and attitudes toward the member that was drug—we checked whether or not there was drug or alcohol abuse by Mr. Gardner or any members of the family. There was no—we checked whether there was any mental health treatment that would aid in mitigation in this case and—and also to the cohesiveness of the family. We've done that through all our experts. The family standard of living and living conditions.

There were no available school records for Mr. Gardner. They were all too old and could not be captured. We checked as far as the social relationships with members of, basically, the opposite sex, marriage, divorces, et cetera; and that's all come into evidence. And any—all awards or honors or special accomplishments. That can be shown by his Army records. And any and all traumatic experiences, anything at all, especially proud moments. Memberships in relig—religious, social, educational and charitable organizations. And as far as his best and worst side memories.

Those are all items that our experts and myself have checked and determined what to put on in this case.

23 RR 77–78.

Three days before the start of the punishment phase of trial Mr. Gardner told his attorneys that he did not want a mitigation case presented. *See* 23 RR 76. Counsel sought to have Mr. Gardner's father and mother testify on his behalf, but they chose to be unavailable.² SHCR 341; *see* 23 RR 54 (Mr. Gardner's sister testifying that she would not let Mr. Gardner's parents attend trial). Counsel cannot present what does not exist, and the State court's decision on this point is objectively reasonable. *See Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009) (“We must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing.”) (quoting *Dowthitt*, 230 F.3d at 743).

Counsel made a strategic decision to rest their punishment case without presenting a risk assessment expert. As early as the *voire dire* jurors knew that the State had assumed the burden of proving future dangerousness beyond a reasonable doubt, including future danger within a prison society. But the State put on no evidence regarding Mr. Gardner's probability of violence while incarcerated. 2 SHCR 341–42; *see, e.g.*, 6 RR 14–17 (State accepting burden of proving future dangerousness including in “prison society”). Counsel informed the trial court that they purposefully chose to omit calling a risk assessment expert as a matter of strategy and that Mr. Gardner concurred in their judgment. 23 RR 74–75. Had counsel attempted to put on risk assessment evidence, the State was prepared to put on their own expert in rebuttal. 2 SHCR 341.

Counsel tried to demonstrate that Mr. Gardner was a good inmate by introducing his jail records. The State responded by calling A.P. Merillat, a well-known TDCJ expert, to rebut the implication that Mr. Gardner was a good prisoner. 23 RR 61–64. In order to prevent Merillat's testimony, counsel withdrew the jail records as an exhibit. 23 RR 64–65. If the mere implication that Mr. Gardner was well-behaved in prison was enough to trigger the State's rebuttal, an expert's risk assessment testimony would have triggered further action by the State. Counsel may reasonably formulate a strategy based on holding the State to its burden of proof. *See Richter*, 562 U.S. at 109, 131 S. Ct. at 790. Counsel may also reasonably withhold evidence it suspects will evoke a strong response from the State. *See Strickland*, 466 U.S. at 699, 104 S. Ct. 2070–71. Accordingly, the State court's decision to deny relief on this point was reasonable.

The State court's finding that failing to present the theory of “rage abandonment” throughout trial counsel was not deficient not an unreasonable determination of Supreme Court precedent. Presenting the rage abandonment theory means that an attorney would have (1) conceded that Mr. Gardner killed Mrs. Gardner as a predicate to advancing the defense; (2) hoped that

abandonment rage negated the retaliation manner and means despite considerable contrary evidence that the divorce, and not the split, triggered the killing; (3) conceded manner and means of the burglary because abandonment rage strengthens the idea that Mr. Gardner entered Mrs. Gardner's home with the intent to kill her and without her effective consent; (4) hoped that the jury viewed abandonment rage as mitigating evidence although it demonstrates Mr. Gardner's violent tendencies; and (5) conceded future danger, as the condition only makes Mr. Gardner more likely to explode in a violent rage.

An attorney is hardly deficient for avoiding the pitfalls attached to the theory of abandonment rage. Mr. Gardner argues that this court should consider the juror affidavits that the State habeas court struck as inadmissible. Pet. at pp. 61–63, 83–84. For the reasons set out above in section A(4) this court may not consider the juror affidavits. And even if the affidavits were to be considered, it cannot be said that they demonstrate Mr. Gardner's contention that trial counsel were wrong in believing conservative Collin County jurors were not likely to accept an abandonment rage theory. Pet. at pp. 24–25.

Each juror that Mr. Gardner points to couched their consideration language in vague terms. For example, one juror stated that the evidence “may have affected my sentencing deliberations” (1 SHCR 103), while another stated that she “would have seriously considered” the evidence (1 SHCR 104). None of the affidavits state with specificity that abandonment rage would have been considered or that such evidence would have caused any of the jurors to change their mind. Simply because the jurors would have considered abandonment rage had it been presented at trial—as any juror would have been required to do—does not transform the theory from “novel” to “scientifically accepted.” In other words, jurors must consider all of the evidence admitted before them, whether it is novel or well-researched.

Counsel were not concerned with whether jurors would have just considered abandonment rage theory, but whether such a defense was an effective theory to which the jury would have responded. 2 SHCR 339. Tailoring strategies for a local population is a permissible consideration for an attorney. *See Strickland*, 466 U.S. at 695, 104 S. Ct. 2068. Even if Mr. Gardner's trial counsel were wrong about these particular jurors, Mr. Gardner has not shown that trial counsel's perception of the Collin County venire pool was wrong. Even if the the juror affidavits could be considered, they do not undermine counsel's reasonable actions prior to trial. They do not provide clear and convincing evidence undermining specific fact-findings by the State habeas court, show the unreasonableness of that court's decision, or provide a basis for an evidentiary hearing.

As such, the State habeas court did not act unreasonably on this issue. It was reasonable for the State court to reject presumed prejudice, as this case is not like those where counsel failed to challenge any aspect of the State's case. Prejudice is presumed

in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all. The Supreme Court recently has emphasized that for [*United States v. Cronic*, 466 U.S. 648 (1984)] to apply, the attorney's failure must be complete. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, the Court held that a case does not come under *Cronic* merely because counsel failed to oppose the prosecution . . . at specific points in the trial. It is not enough for the defendant to show mere shoddy representation or to prove the existence of errors, omissions, or strategic blunders by counsel. Bad lawyering, regardless of how bad, does not support the per se presumption of prejudice.

Johnson v. Cockrell, 301 F.3d 234, 238 (5th Cir. 2002)(internal citations and quotations omitted)(emphasis added). The present case does not present a *Cronic*- type situation and the State court's refusal to apply *per se* prejudice was not unreasonable.

As to guilt-innocence, presentation of abandonment rage would not have affected the jury's decision. The presentation of abandonment rage would not have altered the outcome of trial concerning Mr. Gardner's guilt. The evidence at trial showed that the divorce triggered Mr.

Gardner's homicidal behavior. Mr. Gardner's own State habeas evidence contradicted the argument that his uncontrollable rage emanates from abandonment; and abandonment rage theory does nothing to detract from the burglary manner and means. Rather, it strengthens the State's case on that point. The decision of the State court is reasonable on this matter.

Further, there is no reasonable probability that the jury's decision would have been different as to punishment. It cannot be said that abandonment rage is supported by Mr. Gardner's State habeas evidence or the evidence at trial. Mr. Gardner killed his former wife Rhoda because she would not leave him—the opposite of abandonment. *See* 1 SHCR 159. Mr. Gardner became violent with Westmoreland shortly after they married. *See* 1 SHCR 191. Mr. Gardner became violent with Mrs. Gardner soon after their marriage. *See* 19 RR 192–96, 214, 232–35, 285–86; 20 RR 152. Mr. Gardner was violent with his stepchildren. *See* 22 RR 43, 69, 71–72, 77, 124–27. Mr. Gardner experienced “anger episodes” not related to abandonment. 1 SHCR 195. Such a defense theory would have been unlikely to sway any jury.

The theory of “abandonment rage” would have supported the State's case on future dangerousness, and weakened the mitigation case, as it demonstrates the capacity for violence. The failure to present a mental health issue, especially one so poorly supported by the evidence, does not amount to prejudice, where it will likely do more harm than good. *See, e.g., Dowthitt*, 230 F.3d at 745 (“[T]rial counsel's actions in not discovering and presenting the records to the jury to bring out indications of mental illness do not create a ‘probability sufficient to undermine confidence in the outcome.’”). *Cf. Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252 (2002) (noting that mental health issues can support a future dangerousness case more than provide a case of mitigation). The State habeas court's denial of relief on the claim of prejudice does not amount to an unreasonable application of Supreme Court precedent.

C. The State court's decision that counsel were not ineffective for failing to develop and present mitigating evidence was not unreasonable (Claims Three and Four).

Mr. Gardner claims that counsel were ineffective because they did not perform an adequate mitigation investigation—ground three—and then present the mitigating evidence that should have been discovered—ground four—at the punishment phase of trial. Pet. at pp. 88–128.³ Mr. Gardner asserts that the investigation was inept. *See* Pet. at p. 105. He further contends that the information gathered by counsel was not appropriately arranged. *See* Pet. at p. 105. Mr. Gardner contends that these deficiencies had an impact on many of counsel's strategic decisions. *See* Pet. at pp. 106–07. Mr. Gardner argues that if the mitigation investigation had been conducted properly, counsel would have discovered and presented evidence explaining Mr. Gardner's murder of Rhoda. *See* Pet. at pp. 107–11. He further argues that a proper investigation would have corroborated the abuse Mr. Gardner suffered at the hands of his father. *See* Pet. at p. 111. He claims that a thorough investigation could have provided justification for Mr. Gardner's actions through the rage abandonment theory. *See* Pet. at pp. 111–13. Mr. Gardner claims such an investigation would have led to different result. *See* Pet. at pp. 114–28. This court finds that the State court's decision to deny relief, was neither contrary to, nor an unreasonable application of, Supreme Court precedent.

1. The State court record and the State court's decision to deny relief

Mr. Gardner's counsel explained their investigation to the State habeas court by affidavit. Lead counsel started a fact investigation upon appointment, which the investigator and mitigation specialist took over. 2 SHCR 342. Second chair counsel, the investigator, and the mitigation

³ Mr. Gardner lists claims three and four separately but briefs them as a single claim. Pet. at pp. 88–128. Therefore, these claims are consolidated for discussion and disposition.

specialist thereafter traveled to Mississippi—Mr. Gardner’s long-time home and where most of his family and friends lived—to develop mitigation witnesses derived from “family contacts, interviews with [Mr. Gardner] and interviews with childhood friends.” 2 SHCR 342. These three individuals also spent considerable time with Mr. Gardner’s parents, attempting to probe allegations of childhood abuse, but the parents denied inflicting such treatment and insisted that Mr. Gardner was a “normal kid.” 2 SHCR 342–43. Their refusal or inability to cooperate “led to very little of importance being developed through the time spent with them.” 2 SHCR 343.

Counsel were candid in their assessment of the mitigation investigation, including taking issue with their mitigation specialist who they acknowledged was “overly close” with Mr. Gardner’s family, and was paranoid about discovery, so she therefore refused to put her investigation on paper. 2 SHCR 342–43. Counsel never stated, however, that they did not receive the results of the mitigation specialist’s investigation (presumably through oral reports). But even if they did not, counsel stated that most of the information developed in Mr. Gardner’s State habeas proceeding was of little value and not new to them. 2 SHCR 343.

Counsel knew that Mr. Gardner had participated in the gay and transgender community, but they weren’t able to develop any witnesses through their investigator. 2 SHCR 343. Mr. Gardner allegedly had a relationship with a male transvestite working as a drag queen in Dallas nightclubs. They were not able to locate this individual, who went by the name “China Blue.” 1 SHCR 170–71. Counsel further stated they would not have introduced such evidence because it “would have hurt, more than helped, Mr. Gardner” given the conservative attitudes of Collin County jurors. 2 SHCR 343.

Counsel also would not have called William “Billy” Stone, Mr. Gardner’s Army friend, while they were stationed in Hawaii. 2 SHCR 343–44. Stone characterized Mr. Gardner as a

womanizer whose “constant focus on sex would not have [had] a positive effect on any jury and especially a Collin County jury.” 2 SHCR 344.

Counsel also addressed the supposed failure to present mitigating evidence. They explained that the available evidence “could cause more harm than good.” 2 SHCR 344. Counsel elaborated there “wasn’t much [evidence] available given the life style [Mr. Gardner] had lived including his past homosexual relationships, his past history of violence in many if not all of [his] relationships and the limited testimony from his family.” 2 SHCR 344–45. While Mr. Gardner’s sister “spoke of the unbearable abuse” inflicted by Mr. Gardner’s parents, his parents “would not, or refused to, admit to any abusive behavior on their part.” 2 SHCR 345.

Counsel retained a mental health expert “to examine and address . . . abandonment issues concerning [Mr. Gardner].” 2 SHCR 345. The mental health expert did not testify because “at the conclusion of watching some of the [State’s] testimony[,], specifically when the step-daughter stated [Mr. Gardner] had been very abusive to her—she decided she didn’t want to testify because of [sic] lack of information and felt that he was psychotic.” 2 SHCR 345.

Counsel concluded that they had consulted with their two testifying experts “before letting them know of [the] decision not to present their testimony.” 2 SHCR 346. Further, counsel consulted with John Niland, an attorney with the Texas Defender Service, and a local attorney, Bill Schultz, regarding their mitigation strategy and “both concluded that [the] decision was a sound trial strategy.” 2 SHCR 346.

The State habeas court found that “[c]ounsel thoroughly investigated and prepared for [Mr. Gardner’s] trial, including traveling to Mississippi to interview witnesses and hiring a mitigation [specialist], a private investigator, and two mental health experts.” 2 SHCR 393 (Finding 64).

The court also found that counsel investigated Mr. Gardner's "childhood, medical and family history, prior drug and alcohol abuse, education, military service and other personal history" and that such investigation was in line with the recommended practices of various courts. 2 SHCR 393 (Findings 65 & 66).

The State habeas court also noted that counsel discovered a host of evidence not favorable to Mr. Gardner including: (1) Mr. Gardner's prior deviant sexual relationships; (2) a history of violence in prior relationships; (3) and a mental health expert's opinion that Mr. Gardner was psychotic. 2 SHCR 393–94 (Finding 68). The court further declared that counsel discovered much of the same evidence presented by Mr. Gardner during the state habeas proceeding and that counsel did not have to prepare such information in a "timeline" format. 2 SHCR 394 (Findings 69 & 70). The court concluded that counsel's performance was not deficient. 2 SHCR 394 (Finding 72).

In addition, the State habeas court held that Mr. Gardner had not proven prejudice. 2 SHCR 395 (Finding 74). The court found that the affidavits of Sylvia, Donald, and Randy Reeves "did not provide credible, helpful testimony." 2 SHCR 395 (Finding 75 & 76). The court noted that in fact, the Reeves' affidavits provided multiple instances of information unfavorable to Mr. Gardner, such as: (1) contradicting Mr. Gardner's explanations concerning the murder of Rhoda; (2) highlighting the similarities between the murders of Mrs. Gardner and Rhoda; (3) proving that Mr. Gardner "manipulate[d] those around him;" (4) showing that Mr. Gardner was "frequently and irrationally angry"; and (5) bringing attention to the fact that none of the Reeveses had anything to do with Mr. Gardner after he assaulted Becky nearly twenty years earlier. 2 SHCR 395–96 (Finding 76).