

193-96, 214-15.) But both experts in this case were subject to very thorough and effective cross-examination. In fact, as discussed earlier, counsel showed that *Dr. Price* lacked information because he did not talk to Jones's family members and did not know about Jones's contacts with Mattie Long. (36 RR 145-46.) Counsel also showed that Dr. Price had probably misinterpreted the April jail incident as a demand for respect. (36 RR 121.) Overall, Jones does not support his conclusion that his experts lacked information that would have changed the outcome at both phases of trial.

Jones fails to demonstrate that counsel's alleged deficiencies, either individually or considered in their totality, demonstrate prejudice sufficient to undermine confidence in the verdict. The Court denies claim 2.

V. Claim 3

In claim 3, Jones alleges counsel was ineffective for failing to develop condition-of-the-mind evidence that could have negated the *mens-rea* element and lessened Jones's moral culpability at punishment. He argues that the frenzied and out-of-control character of the killing plus other red flags in the record suggested a need to further investigate Jones's mental health. Counsel's selection of expert witnesses is the paradigmatic example of the type of strategic choice that, when made after a thorough investigation of the law and facts, is virtually unchallengeable. See *Hinton*, 134 S.Ct. at 1089. The Court will address the alleged red flags to determine if counsel's selection of experts amounted to deficient representation.

A. Alcohol Addiction and "Settled Insanity"

[20] Jones first contends his counsel should have investigated further into his alcohol addiction, which would have supported a settled-insanity defense. (Doc. 129, p. 81.) The Texas common law defense of settled insanity was otherwise known as "*delirium tremens*." See *Evers v. State*, 31 Tex.Crim. 318, 20 S.W. 744, 748 (Tex.Crim.App.1892).¹⁴ It did not survive the enactment of the Texas Penal Code. The CCA has unanimously held that the only affirmative defense available for those who commit crimes while suffering from an abnormal mental disease or defect is insanity *661 under Texas Penal Code section 8.01. *Mays v. State*, 318 S.W.3d 368, 385 (Tex.Crim.App.2010); see also *Sprouse v. Thaler*, No. 3:10-CV-00317-P, 2013 WL 1285468, at *9 (N.D.Tex.

Mar. 29, 2013), *aff'd sub nom. Sprouse v. Stephens*, 748 F.3d 609 (5th Cir.2014), *cert. denied*, — U.S. —, 135 S.Ct. 477, 190 L.Ed.2d 362 (2014). Counsel was not ineffective for failing to investigate a defense that did not exist. See *Koch*, 907 F.2d at 527 (counsel is not required to make futile motions or objections).

Nevertheless, Jones contends that today's scientific literature refers to settled insanity as frontal-lobe dysfunction, and he cites a scientific article and an internet website. This argument fails in several respects. Although Jones quotes from these sources extensively, he does not provide authority that equates the former legal defense of settled insanity with the frontal-lobe damage discussed in the articles. In addition, the articles do not appear to have been in existence when trial was conducted in February of 2001. Thus, counsel could not be ineffective for failing to investigate their content as the modern-day version of settled insanity. See *Kulbicki*, 2015 WL 5774453, at *2, — U.S. —, 136 S.Ct. 2, — L.Ed.2d — (holding that counsel were not ineffective for failing to predict developments in forensic science).

The gist of the proffered sources is that alcohol abuse damages the frontal lobe and possibly weakens a person's ability to inhibit his behavior. (Doc. 129, p. 83-84.) Assuming this is true, the inability to inhibit one's behavior does not show a lack of criminal intent; it shows, at best, that a person does not have the ability to resist acting upon his criminal intent. Such evidence is not a defense in Texas. See generally *Ruffin*, 270 S.W.3d at 593 (holding that Texas does not recognize defenses that would permit the exoneration or mitigation of an offense because of a person's supposed psychiatric compulsion or an inability to engage in normal reflection or moral judgment). Simply put, Jones offers no viable legal theory under which a jury could conclude that, at the time he beat the victim to death with a baseball bat, he did not intend the deadly consequences of that act.

Finally, assuming a settled-insanity defense (or the proffered modern version of it) had been available to Jones, it is caused by long-continued drunkenness and brought on by the "abstinence of drink." *Evers*, 20 S.W. at 748 (defining settled insanity as *delirium tremens*, "caused by the breaking down of the person's system by long-continued or habitual drunkenness, and brought on by the abstinence of drink") (emphasis added). But there is no indication in the record that Jones was suffering from the effects of alcohol withdrawal at the time of the murder. Jones merely points to testimony that Tiffany Jones did not recall Jones's drinking cognac while

packaging drugs for sale in the hours before the murder. (31 RR 69, 84).

For all these reasons, Jones does not show that counsel was deficient in his investigation or use of evidence regarding Jones's alcohol abuse. Further, Jones fails to demonstrate, based on the alleged deficiency, that the result of the proceeding would have been different.

B. Childhood trauma

[21] Jones alleges that counsel failed to sufficiently investigate Jones's childhood abuse and its potential to cause long-term changes in the brain, as explained in a scientific article from 2006. As stated previously, counsel cannot be ineffective for failing to investigate the contents of a scientific article that did not exist at the time of trial.

Jones hypothesizes that he was prejudiced because “such evidence of traumatic childhood abuse can be relevant and admissible *662 ... in the guilt/innocence phase to negate the *mens rea* element of capital murder when traumatic childhood events affect memory, learning, ability to regulate mood, and social development, and result in frontal lobe pathology.” (Doc. 129, p. 84-85.) Jones again fails to explain how, given the facts of this murder, such characteristics could show a lack of intent to kill, rather than simply psychiatric compulsion or an inability to engage in normal reflection or moral judgment. Jones fails to demonstrate deficient representation or prejudice in counsel's investigation and use of childhood trauma evidence.

C. Polysubstance abuse

[22] Jones alleges that counsel failed to sufficiently investigate his drug addiction. He asserts that individuals with histories of childhood abuse are at greater risk for trying drugs as a means of reducing the emotional pain and for developing an addiction. He further contends that addiction that occurs prior to the age of majority is admissible to negate the *mens rea* of capital murder “if it could be shown that his drug craving on the night of the offense increased his agitation, exaggerated his response to stimuli, reduced his threshold for anger, and thereby impaired the ability of [Jones] to govern his conduct.” (Doc. 129, p. 85-86.)

Jones fails to acknowledge that his counsel **did** present evidence of childhood abuse as the cause of Jones's mental disorder and drug abuse. Dr. Finn testified that Jones developed [dissociative disorder](#) in early childhood as a result of “severe and repeated abuse, both physically and sexually,” which developed even more in adolescence. He testified that Jones used drugs to medicate himself and deaden himself emotionally. (35 RR 150-52.) To the extent Jones relies on the scientific theory that childhood trauma causes physical changes to the brain, the sources Jones relies upon are the same article referenced previously plus links to internet articles that are either not available or post-date the trial. Counsel cannot be deficient for failing to investigate information that did not exist at the time of trial.

[23] Jones also fails to assert or demonstrate prejudice because he provides no authority for his argument that drug addiction before the age of majority negates the *mens rea* of capital murder. As with the two prior subclaims, his argument that drug cravings increased his agitation, exaggerated his response to stimuli, reduced his threshold for anger, and impaired his ability to govern his conduct would not show that he lacked intent to kill. Such characteristics would actually support the State's theory of the offense by showing that drug addiction was Jones's motive for committing murder. *E.g.*, [Jackson v. State](#), 160 S.W.3d 568, 572 (Tex.Crim.App.2005) (holding that paranoia due to [schizophrenia](#) does not negate intent to kill but provides motive for murder). Jones fails to demonstrate a deficient investigation into his drug addiction and fails to allege or prove prejudice.

D. Dissociative [personality and antisocial disorder](#)

In two lightly briefed subsections, Jones appears to contend that counsel should have further investigated his [dissociative disorder](#) and his life history to refute Dr. Price's testimony that Jones was a psychopath. The complaint appears to be that counsel overlooked a physiological basis for [antisocial personality disorder](#).¹⁵ (Doc. 129, p. 86-87, 89.)

[24] *663 The experts for the defense and the State both administered the same psychopathy checklist, but unlike Dr. Price, Dr. Finn did not diagnose Jones with [antisocial personality disorder](#). (36 RR 58, 61.) Offering a physiological explanation for [antisocial personality disorder](#) would therefore have undermined the defense expert or, at best, confused the jury, since the defense expert did not make that diagnosis. Further, Jones appears to rely on a July 2001

article to support the notion that psychopathy is not a choice but a product of frontal-lobe pathology. (Doc. 129, p. 89.) This article did not exist in February of 2001 when the trial occurred. Counsel is not deficient for failing to pursue a scientific theory underlying a diagnosis that his expert did not make, and that was postulated in an article that did not yet exist.

[25] Further, Jones cannot show prejudice. To the extent the State's expert opined that Jones was a psychopath, trial counsel elicited a concession from Dr. Price that psychopaths do not “wake up one day and decide” to be antisocial, but rather are a product of their life circumstances. (36 RR 138.) This concession accomplished the same end that Jones's frontal-lobe theory would have accomplished, namely, that psychopaths do not chose to be that way.

In any case, Jones provides no evidence that he actually suffers from a frontal-lobe pathology that might explain his violent behavior. And the article he relies upon discusses methodological flaws in its supporting data, one of which is that few studies adequately address concurrent causes of violent behavior, such as emotional stress, drug and alcohol misuse, physical and sexual abuse, family breakdown, and poverty. *See* M.C. Brower and B.H. Price, *Neuropsychiatry of Frontal Lobe Dysfunction in Violent and Criminal Behavior: A Critical Review*, 71 J. NEUROLOGY, NEUROSURGERY AND PSYCHIATRY 720 (July 2001). Significantly, all of these other potential causes of violence were present in Jones's life, which would greatly diminish the value of the article as an explanation for his crime.

Counsel presented a cohesive theory that Jones's childhood trauma and abuse led to [dissociative disorder](#) and drug addiction, which ultimately caused “James” to murder the victim. Jones's childhood abuse and early drug and [alcohol addiction](#) were not seriously refuted by the State or its expert, a fact that counsel emphasized to the jury. (36 RR 184.) So, even assuming that counsel could have discovered and presented the scientific theory that childhood abuse and drug and [alcohol addiction](#) affect brain development as Jones suggests, it would add little additional support to the defense theory that Jones's behavior was not a product of volitional choice. With respect to condition-of-mind evidence, Jones does not demonstrate deficient performance or prejudice sufficient to undermine confidence in the outcome. The Court denies claim 3.

VI. Claim 4

In claim 4, Jones argues that counsel's inadequate life history investigation caused his experts to provide unreliable evaluations on sanity, competency to confess, competency to stand trial, and mental-health-based mitigation. (Doc. 129, p. 91-93.) Jones reasserts the deficiencies alleged in claim 2 regarding Brownlee's time and budget. Jones then argues that, due to the financial and time constraints, Dr. Finn and Dr. Wadsworth had an inadequate life history, and Dr. Finn did not have all the information needed for the Hare Psychopathy checklist and could not explain discrepancies in Jones's IQ scores. (Doc. 129, p. 92-93.)

The Court has already addressed these alleged inadequacies. While Jones argues that counsel should have spent more time [*664](#) and money, these things do not demonstrate a deficient investigation. Counsel can always do “more.” *See Kitchens*, 190 F.3d at 703 (holding that arguments about whether counsel investigated enough or presented enough mitigating evidence come down to a matter of degrees and are even less susceptible to judicial second-guessing).

The Court has also addressed Jones's complaint about Dr. Finn's cross-examination. The information that was unknown to Dr. Finn was known to counsel and would not have changed Dr. Finn's diagnosis. Furthermore, the assertion that Dr. Finn was “unable to explain the discrepancies in the IQ scores” is not shown by the testimony that Jones cites. In the exchange with the prosecutor, Dr. Finn was not asked to explain why Jones's pretrial IQ score was lower than his childhood scores. (35 RR 170-71.) The Court denies claim 4.

VII. FUNDING

[26] In his Reply, Jones argues that the Court's denial of his requested funding and a one-year continuance prevented him from carrying his burden to show “some merit” to his claims against trial counsel and state habeas counsel. He contends this violates 18 U.S.C. § 3599, *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), and *Martinez/Trevino*. (Doc. 149, p. 43-59.)

The Court vacated its dismissal order and reopened this case on February 6, 2014. (Doc. 113.) The Court ordered Jones to file an amended petition within ninety days. Jones requested the assistance of co-counsel to meet this deadline on the

ground that Ms. Brandt's efforts during the preceding six years had been directed toward the equitable-tolling issue. In response, Michael Mowla was appointed a week later on February 13, 2014. (Doc. 114, 115.)

On March 23, Jones filed a motion for continuance, seeking a new due date that was one year from the date the case was reopened. The motion again argued that Ms. Brandt's appointment had been limited to litigating the issue of equitable tolling. The motion implied that Ms. Brandt had never had the opportunity to conduct a full investigation and records review. (Doc. 116.) On April 1, 2014, the Court granted the motion in part, allowing Jones six weeks, in addition to the original ninety days, to file amended briefing. (Doc. 118.) Jones moved for reconsideration, which the Court denied. (Docs. 119, 120.)

Twenty-eight days before the due date, Jones moved for leave to file a first application for funding to be heard *ex parte* and under seal, which the Court denied. (Docs. 121, 122, 123.) Twenty days before the due date, Jones publicly filed a motion seeking \$30,000 to fund a 400-hour mitigation investigation. (Doc. 124.) Jones again argued that it was Ms. Brandt's first opportunity to seek funding because she had been previously appointed for the sole purpose of litigating the equitable tolling issue. (Doc. 124, p. 5, 7.) One week before the due date, Jones filed a second motion for continuance, reasserting his request for a full year to file the amended petition. (Doc. 126.) The Court denied the request for funds because, among other things, Jones failed to demonstrate that \$30,000 was reasonably necessary and failed to justify exceeding the \$7,500 statutory limit. (Doc. 127.) The Court denied the second motion for continuance because Jones presented no authority that equitable tolling restored him to the position he was in at the conclusion of the state habeas proceedings, with another one-year limitations period. (Doc. 128.)

Jones contends the above orders violate 18 U.S.C. § 3599, *McFarland*, and *Martinez/ Trevino*. Jones appears to have abandoned the argument that Ms. Brandt's appointment was limited to equitable *665 tolling matters. (Doc. 149, p. 46.) Indeed, this argument had been flatly refuted by the order appointing Ms. Brandt, which authorized her to pursue “whatever legal avenues” were available to Jones in federal court. (Doc. 31.) It was also refuted by the fact that, in 2009, Ms. Brandt filed a reply to Respondent's answer to the original petition, a stay and abeyance to return to state court and exhaust new claims, a proposed eighty-four page amended petition, which raised claims of actual innocence, claims

related to the absence of [mental impairment](#) evidence at guilt, and an ineffective-assistance claim against trial counsel for failing to timely investigate, develop, and present in all phases of trial, crucial information about Jones's [mental impairment](#) and life history. (Docs. 55, 53, 57.)

Instead, Jones now contends, for the first time in this Court, that Ms. Brandt has had the opportunity to conduct only a “due diligence inquiry” rather than an “investigation” in this case. (Doc. 149, p. 49.) This is so, he contends, because (1) he could not have obtained funding in federal court after the original petition was dismissed in 2007, (2) circuit precedent prior to *Martinez* precluded funding for claims that were unexhausted and procedurally defaulted, and (3) the Court denied his request for abeyance, so he could not have obtained funding in state court. (Doc. 149, p. 50-55.) Jones makes no showing, however, that he ever asked for funding in these various stages of the litigation.

Jones filed his first and only funding motion after the Court granted equitable tolling and reopened the case. (Doc. 124, “Opposed First Motion for Funding.”) In it, Jones claimed that, based on Ms. Brandt's “due diligence review,”¹⁶ funding was needed to investigate a *Wiggins* claim against trial counsel that was viable under *Martinez/Trevino*. Jones asserts that the Court's denial of his request for funds effectively required him to prove his claim before funding it, and therefore conflicts with § 3599 and *McFarland*, under which the right to counsel (and funding) attach prior to the formal filing of a federal habeas petition. He also contends the Court's ruling conflicts with *Martinez/Trevino* because it thwarts the investigation of claims against trial counsel that may satisfy the exception to procedural bar in *Martinez/Trevino*.

First, *Martinez* does not mandate pre-petition funding. See *Crutsinger v. Stephens*, 576 Fed.Appx. 422, 431 (5th Cir.2014). Second, Jones makes global arguments about the timing of and need for adequate funding of habeas petitions with which the Court does not necessarily disagree. But Jones sought well in excess of the statutory maximum amount to fund a 400-hour mitigation investigation, to be conducted in accordance with the 2008 American Bar Association Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. Even if the ABA Guidelines controlled ineffective assistance claims, which they do not, the 2008 Guidelines would not apply in this case because the trial was held in 2001. *Van Hook*, 558 U.S. at 8–9, 130 S.Ct. 13. Further, Jones's funding motion

simply identified so-called red flags in the record involving matters that were clearly investigated by trial counsel and presented at trial. Jones did not provide any information that exceeded what was known to counsel and did not demonstrate a reasonable necessity for the investigation that he *666 requested. He simply sought to re-investigate any and all aspects of trial counsel's 2001 performance under 2008 guidelines. He also failed to demonstrate that funds in excess of the statutory maximum were "necessary to provide fair compensation for services of an unusual character or duration." See 18 U.S.C. § 3599(g)(2).

Ms. Brandt has represented Jones since 2008. Mr. Mowla was appointed on February 13, 2014. Both counsel had the time between February 13, 2014, to June 23, 2014, to file the amended petition, request reasonably necessary funding, or make a reasonable request for additional time. Instead, counsel creatively sought to expand the Court's equitable-tolling ruling to include an additional one-year limitations period and requested \$30,000 to conduct a full-blown mitigation investigation under standards that do not

govern this case. The Court remains convinced that it ruled correctly on the motions for continuance and for funding.

CONCLUSION

Based on the foregoing, the Court **DENIES** Jones's petition for a writ of habeas corpus. In accordance with [Federal Rule of Appellate Procedure 22\(b\)](#) and 28 U.S.C. § 2253(c), the Court **DENIES** Jones a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. See *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483–84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); 28 U.S.C. § 2253(c)(2). If Jones files a notice of appeal, he may proceed in forma pauperis on appeal. 18 U.S.C. § 3006A(7).

All Citations

157 F.Supp.3d 623

Footnotes

- 1 The bound, state-court paper record is cited as follows:
RR: 39 volumes of the trial court reporter's record, preceded by volume number, followed by page number.
CR: 3 volumes of the trial court clerk's record, preceded by volume number, followed by page number.
SHR: unnumbered volume of habeas court clerk's record, followed by page number.
SHR Supp.: 2 supplemental volumes of habeas court clerk's record, preceded by volume number, followed by page number.
- 2 The electronic record is cited by CM/ECF number and .pdf page number (rather than any page numbers on the original document).
- 3 All subsequent citations to § 2254 are to 28 U.S.C. § 2254.
- 4 Trial court exhibits are cited as follows:
SX, DX: State and defense trial exhibits (in 37 RR, 38 RR, 39 RR)
SPX, DPX: State and defense pretrial exhibits (in 4 RR)
- 5 On the back, in Jones's handwriting, it states: "Road Dogs Killa, Li'l GQ, Red" and the words "Higher then a bitch." (SPX 13; 4 RR 166-68.)
- 6 One charge appears to relate to the syringe found at the time of arrest, and the other appears to relate to an arrest the previous June while Jones and Roosa were at a gas station. (35 RR 17; 36 RR 25-29.)
- 7 The overruling of *Jackson* does not affect the rule regarding when adversary judicial proceedings begin. See *Rothgery v. Gillespie Co.*, 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008).
- 8 Jones's asserted facts on this point are incorrect. He contends that, when Detective Gates sought Jones at Freeman's home, Jones was not there but Freeman was present and interviewed by Detective Gates. (Doc. 149, p. 15.) Actually, nobody answered the door at Freeman's home, and Gates left her business card. Gates was able to interview Freeman later that day because Freeman willingly followed the police to the station after they had stopped her and arrested Jones, who was hiding in the back of her car. (4 RR 69, 161-62, 180-82.)
- 9 The Court includes the blood evidence in this analysis because Jones's clothes, containing visible blood and tissue, were seized from Freeman's house with her consent. (30 RR 13, 18, 32; 4 RR 83, 165.) The uncounseled blood draw that Jones complains about in this claim only tied him to his own bloodstain on a washcloth found in Freeman's home, with no obvious connection to the murder. (30 RR 51, 161, 193.)

- 10 Some of these exhibits are in the record. The rest are considered under the Court's power to review the merits of an unexhausted claim under § 2254(b)(2) and under the Supreme Court's directive that procedurally defaulted claims may be excused under *Martinez* only if they have "some merit."
- 11 The record indicates that Jones's mother was present in the courtroom, supporting him during the trial. (35 RR 85.)
- 12 Dr. Price subsequently agreed with the prosecutor on re-direct examination that, given enough resources, anybody can be managed, but he did not think the prison had the resources to prevent Jones from "ever" committing another act of violence. (36 RR 153.)
- 13 During cross-examination of Keisha, the prosecutor mitigated some of the negative testimony about their mother and aunts and the sexual activity between Keisha and Jones. (35 RR 85-88, 103-04.)
- 14 In his Reply, Jones asserts that settled insanity is not a defense but a "straight up denial" of the *mens rea* element of the offense. (Doc. 149, p. 60.) He appears to confuse the discussion in *Evers* about **temporary** insanity caused by intoxication (which, at the time, could determine the degree of murder depending on how it affected *mens rea*) with the later discussion in *Evers* of *settled or fixed* insanity, which *Evers* clearly refers to as "a complete defense to crime" "from the earliest of times." *Evers*, 20 S.W. at 748; see also *Thomas v. State*, 147 Tex.Crim. 45, 177 S.W.2d 777, 779 (1944) (stating that a settled insanity produced by long-continued use of ardent spirits is a full defense.) In any event, the characterization of settled insanity as a defense or as the denial of *mens rea* does not affect the outcome of this case since, as discussed later, there is no factual support for it.
- 15 As do the parties, the Court uses the terms "**antisocial personality**," "**psychopathic personality**," "sociopathy," and "psychopathy" interchangeably, as referring to a personality disorder characterized by a lack of conscience.
- 16 According to the motion, counsel's due-diligence review included attempted interviews of Paula Freeman and Michael and Brandi Jones. It also included requests for school records, medical records, incarceration records, and "numerous other documents," and attempts to locate Dr. Finn's files. (Doc. 124, p. 24-25.)