

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

PETE RUSSELL,
Petitioner

v.

BOBBY LUMPKIN,
Director of Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

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

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18 U.S.C. §3006A(d)(6)

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EXHIBIT 1

**United States Court of Appeals' Opinion,
September 4, 2020**

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 4, 2020

Lyle W. Cayce
Clerk

No. 19-70015

PETE RUSSELL,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC Case. No. 4:13-CV-3636

Before GRAVES, WILLETT, and ENGELHARDT, *Circuit Judges.*

JAMES E. GRAVES, JR., *Circuit Judge:**

Pete Russell was convicted of capital murder and sentenced to death in Harris County, Texas for the 2001 killing of Tanjala Brewer. He seeks a certificate of appealability (COA) from the district court's denial of his petition for writ of habeas corpus. Because reasonable jurists would neither

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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find that the district court's assessment of the constitutional claims was debatable or wrong nor that the district court erred in its procedural rulings, we deny the application.

FACTS AND PROCEDURAL HISTORY

Tanjala Brewer was a paid confidential informant for the Houston Police Department under narcotics officer D.K. Bush. Brewer and Pete Russell dated for about a year-and-a-half. After the romantic relationship between Russell and Brewer ended, she took an undercover officer, Bush, to Russell's house and introduced him to Russell as her nephew.¹ Believing Brewer, Russell agreed to sell the undercover officer several ounces of crack cocaine. After the transaction, Russell was arrested. On August 9, 2001, Russell pleaded guilty to delivery of a controlled substance and received a ten-year sentence. However, Russell successfully requested that the court delay the date for execution of his sentence until September 7.

Around 11 p.m. on August 12, Brewer's neighbor saw Brewer and Russell walking down the street together near Brewer's house. About 1 a.m., the neighbor heard Brewer's screen-door close and saw Russell walking and then running down Brewer's driveway toward the street.

Before noon on August 13, 2001, family members discovered Brewer's body lying on her kitchen floor. Brewer's throat had been slit and she had been stabbed multiple times with a kitchen knife. There was also evidence of asphyxiation and shoe imprints indicating someone had stomped on her legs and stomach. Bloody drag marks indicated she had been dragged from her bedroom to the kitchen, where she was posed in a spread-eagle position with her skirt raised and a crack pipe in her hand. Someone had written on a

¹ Bush said Brewer received \$240 for setting Russell up.

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mirror and wall with blood. Natural gas valves were turned on in the home and candles were left burning. The toxicology report pursuant to Brewer's autopsy revealed the presence of a significant amount of cocaine in her system.

Based on the neighbor's account and evidence at the scene, Russell became a suspect. Authorities located Russell a few days later, sitting in a motel room bathtub, fully clothed and foaming at the mouth from ingesting poison in an apparent suicide attempt. Russell was taken to the hospital and his stomach was pumped. Authorities discovered a diamond ring in Russell's pocket.

Russell subsequently gave two recorded statements, one at the hospital and one at the jail the following day, admitting guilt. The recordings were introduced at trial and transcripts were provided for reference. The preceding facts are largely undisputed. Russell admits that he killed Brewer. However, he disputes why he killed her. This goes to whether he committed capital murder. Here, that is murder in the course of committing or attempting to commit another crime, i.e., retaliation, under Texas law.

During Russell's first recorded statement at the hospital, Houston Police Department Sergeant Hal Kennedy asked him, "[i]n your own words tell me what happened and why you did what you did." Russell replied that, "[Brewer]. . . She set—she set me up—she set me up with the police." When asked how Brewer set him up, Russell said:

She brought an undercover to my house saying it was her nephew that her nephew wanted to buy some drugs . . . and about fifteen or thirty minutes later her nephew which is the undercover, call me and I met him up there at Family Dollar – McDonald's and that's when I got busted.

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Russell later said, “[a]nd then you know what I’m saying we broke up and that’s when she set me up with the laws.” *Id.* When Kennedy asked how it is that Brewer got killed, Russell responded:

Basically, ah I went over her house and you know since she let me in and she was smoking some drugs whatever and you know we were just talking whatever you know about the things we used to do and I was basically asking her “Why did you set me up?” “Why did you set me up?” and she kept on denying it talking bout “I ain’t set you up.” “I ain’t set you up.” Saying “if you would have stayed with me none of this would have happened” whatever. And, basically, you know what I’m saying I just . . . I just went off. I just snapped.

Russell also stated:

It just . . . It just happened all the while she was smokin’ you know what I’m saying and the last thing she said, “If you would have stayed with me it would have never happened.” And the next thing I know I just snapped like that you know there was a knife on the lit dresser right there and I just grabbed it and jumped on her right there.

Officers went to the jail the following day to take photographs of a cut on Russell’s hand and he gave a second recorded statement. During that second statement, Russell said that he did not mean to kill Brewer and that “I really like to say though that I’m sorry and that I really loved [Brewer] and if ah I could do it all over again, it wouldn’t have happened.” When asked if he just lost his temper, Brewer replied:

Yes sir, I just snapped and like a say I loved her, I loved the family you know that I’m saying, the son and everything and if I had the chance to do it over again, I wouldn’t have done it. I want her family to know that I’m sorry and her friends you know that I’m sorry and that ah I would always love her and everything.

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The state charged Russell with capital murder in the course of committing or attempting to commit retaliation based on Brewer informing the police of Russell's drug dealing. *See* Tex. Penal Code § 19.03(a)(2); *see also* Tex. Penal Code § 36.06(a). Russell went to trial in 2003, and multiple witnesses testified.

Andre Wilson lived across the street from Brewer and knew both Brewer and Russell. Wilson also knew that Russell was jealous over Brewer. The evening before Brewer was murdered, Wilson said he saw Brewer and Russell walking down the street together away from Brewer's house. Wilson said Brewer acted normal and asked him for a cigarette. Wilson also testified that he thought Russell and Brewer were still dating at the time. Some hours later, around 11 p.m., Wilson saw Russell and Brewer walking back toward Brewer's house. At approximately 1 a.m., Wilson was on the porch at his grandmother's house, which was next door to Brewer's, and heard a screen door slam. Wilson then saw Russell walking and then running away from Brewer's house.

At the time of her death, Brewer was also involved in a relationship with Wilbert Reed, Jr. Reed said he last saw Brewer alive at approximately 12:15 a.m. on August 13, 2001. Reed said he had talked to Brewer on the telephone and she wanted him to come by to see her and drop her off some money before he went to work driving a truck. Reed went by Brewer's house around 11:30 p.m. and testified that Brewer was happy and in a very good mood during the forty-five minutes he was there. Upon leaving Brewer's house, Reed said he called Brewer on his cell phone and they talked a few different times. When Reed called Brewer back between 12:45 and 1 a.m., he received a busy signal. Reed said he attempted to call Brewer multiple times throughout the remainder of the night but kept getting a busy signal and never talked to her again.

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Reed testified that he and Brewer had plans for him to pick her up when he got off work. After Reed got off work, he went by Brewer's house a couple of times, but nobody answered the door. Reed said that he was angry, so, he wrote a note and slid it under the door. In the note, Reed essentially accused Brewer of using him and stated, "I guess Pete is the best man for you." Reed testified that he did not know Russell but knew Brewer and Russell had been in a relationship. Reed also said that Brewer was afraid of Russell.

Kennedy's probable cause affidavit stated that Reed told him Russell had been harassing Brewer, and that Brewer told him on the night of the murder that Russell had come over to her house and tried to force entry.

Deborah Calhoun, Brewer's best friend for about six years, also testified at trial regarding the relationship between Russell and Brewer, who she said were in love with each other. Calhoun said she was friends with both Brewer and Russell and talked to them both daily during the last two weeks of Brewer's life. Calhoun testified that Russell had left a handwritten letter at Brewer's house around August 3, 2001. The letter, which was introduced as an exhibit at trial, stated:

Tanjala, you are a good person. At the same time you have a dope-smoking habit. You have lied, stole and cheated all in the name of crack. I cannot trust you [no] more. You are evil and out to hurt me. You mean well, but the drugs keep on calling you. I don't need you [no] more. So go back to your X X X X.

When asked about Brewer's demeanor when she read the letter, Calhoun answered, "We never thought nothing of the letter. We just laughed it off." However, Calhoun also testified that Brewer was afraid and scared of Russell during the last two weeks of her life. Calhoun also recounted incidents of jealousy on the parts of both Russell and Brewer.

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Calhoun testified that Russell had taken Karen Foster to Brewer's house once when she was there and indicated Foster was his girlfriend.

Calhoun said she did not know Brewer was working as an informant. More importantly, Calhoun said that Russell never gave her the impression he knew Brewer was an informant. Following that statement, the court took a short recess. After the break, the prosecutor asked Calhoun whether Russell had ever indicated to her that he knew Brewer set him up. Calhoun responded affirmatively and said Russell was angry about it around the beginning of July 2001.

On cross-examination, Calhoun said Russell was not sure whether Brewer had set him up, but that he had said "a lot of people in the neighborhood told him that she done it." Calhoun indicated Russell's uncertainty stemmed from him still loving Brewer, and that he had never told her anything about wanting to retaliate against Brewer. Further, Calhoun said that toward the end of July or the beginning of August, Russell had shown her the ring that was in his possession at the time of his arrest and indicated it was for Brewer. Calhoun testified that she told Russell that Brewer was not going to accept the ring.

Bush, who was the undercover officer Brewer introduced to Russell as her nephew, testified that he saw Russell twice after the drug sting in which Russell and Foster were arrested. The first time Bush saw Russell was just a few weeks after Russell's arrest in May 2001. Russell was walking out of the jail as Bush was going into the jail. The second time, Brewer brought Russell with her on July 20, 2001 to pick up payment for informant work on another case. However, Bush said Russell did not exit the car, which was about 100 yards away, and neither saw him nor Brewer getting in his car. Bush also testified he questioned Brewer about bringing Russell and she said it was not

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Russell but that it was an older man who lived near her neighborhood and gave her a ride.

Russell testified at trial that he and Brewer had dated for about a year-and-a-half. He said their relationship broke down after he got arrested. Russell also said Foster was not his girlfriend, but rather a woman he worked with at the retirement home. Russell said that, after he bonded out on the drug charge, he contacted Brewer and the following exchange occurred: "When I called her and asked her what happened she said, 'Baby, don't get mad. I heard what happened. I'm trying to get in touch with my nephew right now.'" Russell said he believed her. Russell said Brewer told him about Reed, and he was suspicious, but she said Reed was just a friend.

Russell said that he knew Brewer used drugs and that she had asked him for drugs. He also said she would get drugs from Donald Ray Hawkins. Russell said he was jealous of Brewer's relationship with Hawkins because he once caught her laying across his bed in the motel where Hawkins lived.

Russell testified that he had purchased the wedding ring for Brewer around August 1 and planned to give it to her the night she was murdered. Russell said Brewer had called him and asked him to give her some money for drugs. He said he took the ring when he went to her house with the intention of proposing to her. Russell said he arrived close to 1 a.m. He testified that, as Brewer was sitting on the bed smoking crack, he inquired as to where she was going to get drugs and she said: "I'm going to get it down the street from Donald Ray [Hawkins]." Russell said he told Brewer, "no," and the couple got into a very heated argument. Russell testified that the following then transpired:

And I just told her, You act like you fucking Donald Ray, like that.

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Then she had picked up a knife a kitchen knife that she had on the table. She picked up a kitchen knife. She said, I am fucking him Pete. I been fucking him.

That's when I picked up a knife off the table and I called her a bitch. I called her a bitch.

And she said, Fuck you, Pete. Fuck you, Pete.

She came at me with a knife and, and I pulled my hand up. She cut me across my hand. I began just to out of anger and rage, I just began to stab her and stuff.

Russell said that he felt like he "had been played, you know what I am saying, messed over after all I did."

Russell said that he fainted after he stabbed Brewer, and when he came to, a voice in his head that he believed to be God was telling him, "Tell them who I am." So, he wrote on the wall and mirror in blood. He further said that the body and house were staged to represent the five elements of the universe: Earth, wind, fire, water and air. Russell said that he put the crack pipe back in Brewer's hand to represent "the hurt" and "her habit. This was her hell."

Russell said, after murdering Brewer, he first went home, then to hide out at a bayou behind his childhood elementary school, and then to the motel, where he stayed a couple of days before being arrested. He said he took the rat poison because the voice told him to "come home."

Russell claimed he did not know Brewer had set him up until Kennedy told him at the hospital, "I know all about it. I know your girl set you up with the law." Russell said Kennedy also told him that he knew Brewer was "messing" with Hawkins. Russell testified that he did not stab Brewer because she informed on him; he stabbed her because she told him she was having sex with Hawkins and then cut his hand.

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Officer Richard Moreno accompanied Russell in the ambulance after his arrest. Moreno testified on rebuttal that Russell told him the diamond ring in his watch pocket was for his girlfriend, Foster, who was in jail on the same drug case in which Brewer had set up Russell. Further, Russell said he and Foster were going to be married when she made bond. However, Moreno did not include any of that in his report, and Kennedy testified that Moreno refrained from conversation with Russell in the ambulance.

At the close of that portion of the trial, the jury convicted Russell of capital murder. During the penalty phase, jurors were responsible for answering two special issues:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Pete Russell, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

SPECIAL ISSUE NO. 2

Do you find from the evidence, 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, Pete Russell, Jr., 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 the first special issue submitted under Art. 37.071 of the Texas Code of Criminal Procedure Section 2(b)(1) affirmatively and answered the second special issue under Section 2(e)(1) negatively. *See* Tex. Code Crim. P. Art. 37.071 §§ 2(b)(1), (e)(1). Those answers required the imposition of the death penalty. *See* Tex. Code Crim. P. Art. 37.071 § 2(g). Accordingly, the trial court sentenced Russell to death.

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Russell appealed his conviction and sentence to the Texas Court of Criminal Appeals (TCCA), which affirmed. *Russell v. State (Russell I)*, 155 S.W.3d 176 (Tex. Crim. App. 2005). Russell then unsuccessfully sought state habeas relief, asserting that counsel: 1) Provided deficient performance in the investigation and presentation of punishment-phase evidence; 2) ineffectively selected a guilt/innocence defense, primarily by not presenting evidence that Russell killed in a jealous rage and had previously acted violently when a relationship ended; and 3) failing to object to the state's jury argument that lessened the burden of proof. Trial counsel provided an affidavit in response to Russell's claims of ineffectiveness, and both sides submitted proposed findings of fact and conclusions of law. The state court adopted the state's proposed findings and conclusions and recommended that the Court of Criminal Appeals deny relief, which it did. *Ex parte Russell (Russell II)*, No. WR-78,128-01, 2013 WL 6212211, *1 (Tex. Crim. App. Nov. 27, 2013).

Russell then filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, raising nine claims: 1) Insufficiency of the evidence to support capital murder; 2) ineffective assistance of trial counsel for failing to argue that the state did not prove retaliation; 3) ineffective assistance of appellate counsel for failing to challenge the sufficiency of the evidence; 4) ineffective assistance of trial counsel for failing to investigate and present evidence that Russell did not kill the victim in retaliation; 5) that the state violated *Brady v. Maryland* by failing to produce the ring seized by police; 6) that the prosecutor's arguments regarding mitigating evidence violated Russell's constitutional rights; 7) ineffective assistance of trial counsel for failing to investigate and present mitigating evidence; 8) ineffective assistance of trial counsel for failing to investigate and present evidence that Russell would not be a future danger to society; and 9) that the state habeas

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court violated Russell's rights by not holding a hearing. The district court stayed the action to allow Russell to exhaust claims in state court.

Russell sought permission to file a successive state habeas petition. The TCCA found that Russell did not satisfy the requirements of Article 11.071, §5(a) to file a successive habeas petition and dismissed the application as an abuse of the writ without considering the merits. *Ex parte Russell (Russell III)*, No. WR-78,128-02, 2017 WL 912158, *1 (Tex. Crim. App. March 8, 2017).

Russell returned to federal court and filed an amended petition. The state moved for summary judgment. The district court granted summary judgment, denied Russell's petition for habeas with prejudice, and denied a COA. *Russell v. Davis (Russell IV)*, 4:13-CV-3636, 2019 WL 3302719 (S.D. Tex. July 23, 2019). Russell subsequently filed this application for a COA raising six issues.

STANDARD OF REVIEW

Under AEDPA, a petitioner must obtain a COA as a jurisdictional prerequisite to appeal the denial of habeas relief. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA will be granted only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

When the district court rejects constitutional claims on the merits, this court conducts a threshold inquiry and issues a COA if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 336, 338. This threshold inquiry does not require full consideration of the factual or legal bases supporting the claims. *Id.* at 336.

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Where the district court rejects a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." *Id.* at 485.

In death penalty cases, any doubt about whether a COA should issue is resolved in the petitioner's favor. *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

DISCUSSION

I. Whether the evidence failed to show that Russell's murder of Brewer was in the course of committing the defined offense of retaliation.

Russell asserts that the evidence failed to show that he murdered Brewer in the course of committing the offense of retaliation. Russell argues that he's not making a typical insufficiency claim. Instead, he asserts that he is arguing a question of statutory interpretation as to Texas Penal Code section 19.03(a)(2).

At the time of the offense, the capital murder statute stated, in relevant part:

(a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and:

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(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation . . .;

Tex. Penal Code §19.03(a)(2).

Russell cites *Riles v. State*, 595 S.W.2d 858 (Tex. Crim. App. 1980), and *Griffin v. State*, 491 S.W.3d 771 (Tex. Crim. App. 2016), for the definition of “in the course of committing or attempting to commit.” In *Riles*, the defendant argued that the jury charge was fundamentally defective because the indictment alleged he committed capital murder while “in the course of committing the offense of robbery” while the charge instructed the jury that it must find he “was then and there in the course of committing or attempting to commit the offense of robbery.” The TCCA found no error, stating:

The phrase “in the course of committing or attempting to commit . . .” as used in Sec. 19.03(a)(2), *supra*, is not defined in the Penal Code. Section 29.01(1) of the code, however, does define “In the course of committing theft.” That phrase is given the definition of “conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.” We similarly construe the phrase of Sec. 19.03(a)(2) to mean conduct occurring in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the offense, i.e., in this case, of robbery.

Riles, 595 S.W.2d at 862. The TCCA reasserted that definition in *Griffin*, 491 S.W. 3d at 774-75 (“The parties agree that, as used in Texas Penal Code section 19.03(a)(2), ‘in the course of committing’ is defined as conduct occurring during an attempt to commit, during the commission of, or in immediate flight from, the forbidden behavior.”).

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The underlying offense here was retaliation. Texas Penal Code Section 36.06 sets out the offense of Obstruction or Retaliation and states, in relevant part:

(a) A person commits an offense if the person intentionally or knowingly harms or threatens to harm another by an unlawful act:

(1) in retaliation for or on account of the service or status of another as a:

(A) public servant, witness, prospective witness, or informant; . . .

Tex. Penal Code § 36.06(a)(1)(A).

Russell asserts that the evidence did not establish beyond a reasonable doubt that he was in the course of committing or attempting to commit the offense of retaliation; he asserts the evidence only supported murder, not capital murder. The state asserts that the district court properly found this claim to be procedurally barred and, alternatively, meritless.

As the district court found, Russell did not raise this claim on direct appeal or state habeas review; he raised it for the first time in his federal habeas petition. When Russell exhausted his claims in the successive state habeas proceedings, the TCCA found that he had failed to satisfy the requirements of Article 11.071 § 5(a) and dismissed the application as an abuse of the writ without considering the merits of this claim. *See Russell III*, 2017 WL 912158 at *1. The district court then determined that Russell did not meet his burden of overcoming the procedural bar and, alternatively, the claim was without merit. *See Russell IV*, 2019 WL 3302719 at *9-10.

Federal habeas courts lack the power to review a state court's decision not to address a petitioner's federal claims if the state court made that decision because the petitioner failed to meet a state procedural requirement

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and the state judgment is based on independent and adequate state procedural grounds. *See Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (citing *Maples v. Thomas*, 565 U.S. 266, 280 (2012)); *see also Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). However, “[a] federal court may consider the merits of a procedurally defaulted claim if the petitioner shows ‘cause for the default and prejudice from a violation of federal law.’” *Canales*, 765 F.3d at 562 (quoting *Martinez v. Ryan*, 566 U.S. 1, 10 (2012)).

Here, the state court dismissed Russell’s application as an abuse of the writ under Article 11.071. In *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), we reiterated: “This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.” *Id.* at 342. Thus, the district court lacked the power to review the state court’s decision.

Russell argues that the obstacle of a procedural bar could be avoided if this court certified a question to the TCCA under Rules 74.1 and 74.2 of the Texas Rules of Appellate Procedure. Russell’s brief is unclear as to whether he is asking this court to certify a question to the state court to interpret the meaning of “in the course of committing or attempting to commit” or to certify the insufficiency issue the state court previously declined as an abuse of the writ. Either way, we disagree.

This court has said that “absent genuinely unsettled matters of state law, we are reluctant to certify.” *Jefferson v. Lead Indus. Ass’n, Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997). Moreover, “the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification.” *Id.*

Russell acknowledges that the state court has already determined the meaning of “in the course of committing or attempting to commit.” *See*

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Riles, 595 S.W.2d at 862; *see also Griffin*, 491 S.W.3d at 774-75; and *Shuffield v. State*, 189 S.W.3d 782, 791 (Tex. Crim. App. 2006) (“Evidence is sufficient to support a capital murder conviction if it shows an intent . . . which was formed before *or contemporaneously with* the murder.”) (emphasis original). Rather than establish any unsettled question, Russell instead essentially asserts that, based on those cases, the facts of his case were not sufficient to prove he was in the course of committing or attempting to commit retaliation. Certification is not appropriate here.

As stated previously, to overcome the procedural bar, Russell must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. He is unable to do so. Further, assuming *arguendo* that Russell could overcome the procedural bar, he has failed to make a substantial showing of the denial of a constitutional right.

The district court alternatively concluded that there was evidence to support retaliation and rejected any notion of a requirement that Russell intended to kill Brewer in retaliation for informing on him when he went to her house.

A sufficiency of the evidence claim is evaluated under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979), which stated that “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 319 (emphasis original). The *Jackson* court also said, “[t]his familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Id.*

The Supreme Court has also said the following:

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We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. And second, on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.

Coleman v. Johnson, 566 U.S. 650, 651 (2012) (internal marks and citations omitted).

“Habeas relief under section 2254 on a claim of insufficient evidence is appropriate only if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *West v. Johnson*, 92 F.3d 1385, 1393 (5th Cir. 1996).

Russell asserts that the only evidence as to the facts of the killing fail to show that he was committing or attempting to commit retaliation when he killed Brewer. Further, he asserts there was no evidence he ever told officers “anything like ‘I was determined to get even’ or ‘I wanted to make an example out of her.’” However, Russell fails to cite any authority setting out such a requirement.

While there clearly is evidence to indicate that Russell and Brewer were still involved in some manner, that Russell had jealous tendencies, and that perhaps another man was a contributing factor to Russell's rage, the most damning evidence of retaliation comes from Russell's own words. Immediately after his arrest, Russell told authorities that he killed Brewer because she set him up. Other individuals also testified that Brewer was

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afraid of Russell. Additionally, there is evidence to indicate that Russell knew Brewer set him up. Russell was able to present his version of the facts. The jury had the responsibility to determine witness credibility, resolve conflicts in the testimony and weigh the evidence. *See Jackson*, 443 U.S. at 319.

We review the evidence in the light most favorable to the jury verdict. *United States v. Resio-Trejo*, 45 F.3d 907, 910 (5th Cir. 1995). Further, “it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. A jury is free to choose among reasonable constructions of the evidence.” *United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995) (internal marks omitted). Our review of the evidentiary record here shows that they did that in favor of the state.

Thus, we deny a COA on this issue.

II. Whether the failure to raise the sufficiency issue on appeal constituted ineffective assistance by appellate counsel.

Russell asserts that his appellate counsel was ineffective for failing to raise the sufficiency issue in his direct appeal. Russell raised this issue for the first time in his federal petition. As with the first issue, when Russell went back to state court to exhaust, the TCCA dismissed as an abuse of the writ without considering the merit. The district court found that Russell was unable to overcome the procedural bar.

To overcome the procedural bar, Russell must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. He is unable to do so. Additionally, even if we looked beyond the procedural bar, Russell’s claim has no merit.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner establishes ineffective assistance of counsel if he is able to show that his

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counsel's performance was deficient, i.e., the "representation fell below an objective standard of reasonableness," and "the deficient performance prejudiced the defense." *Id.* at 687-88. To establish prejudice, Russell "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697.

For the reasons discussed in issue one, Russell is unable to show actual prejudice. Thus, reasonable jurists could not debate the district court's determination that this claim is procedurally barred or its alternative denial on the merits. Accordingly, we deny a COA on this issue.

III. Whether the district court erred in holding that a claim concerning error in a prosecutor's punishment-stage argument, contrary to law regarding mitigation, was procedurally defaulted, and holding that the argument was acceptable.

Russell asserts that the prosecution improperly misstated the law under *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), in its closing argument during the punishment phase.

Russell did not raise this issue on direct appeal or in his initial state habeas. When he raised it in his successive state habeas, the TCCA deemed it barred. The district court concluded that Russell was unable to show cause or prejudice to overcome the procedural default.

Specifically, Russell takes issue with the following statements by the prosecutor during closing:

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I can't tell you what's mitigating. It's up to you. I suggest to you there is nothing mitigating in this case. Our Charge tells you that mitigating evidence is something that you believe may reduce the defendant's moral blameworthiness. In other words, something that might reduce or lessen his responsibility. Name one thing that you have heard during this trial that lessens his responsibility for brutally murdering that woman. One thing. There is none.

Also, "I suggest to you, ladies and gentlemen, that there is nothing here that honestly and truly lessens this man's responsibility, his blameworthiness, his fault."

Russell asserts that the use of "responsibility", "blameworthiness" and "fault" would imply to the jurors that evidence could only be considered mitigating if it reduced Russell's responsibility for the charged offense. Further, Russell says that argument was the repetition of an erroneous concept requiring a nexus between the mitigating evidence and the commission of the offense that has been repudiated by the Supreme Court.

Russell asserts that the prosecutor's statements were intended to limit the core principle of *Penry*, which requires that a jury be allowed to consider a wide range of potentially mitigating evidence and that the Supreme Court repudiated the faulty nexus concept in *Tennard* and prohibited jury arguments based on it in *Abdul-Kabir*.

Russell says he can overcome the procedural bar because this is new law. His trial and direct appeal briefing occurred before *Tennard* was decided, although the decision on direct appeal was not handed down until after *Tennard* was decided, and *Abdul-Kabir* was decided after the deadline for filing his state habeas application. But Russell concedes that *Tennard* and *Abdul-Kabir* derived from *Penry*, and that this is longstanding law. In fact, Russell quotes the following from *Abdul-Kabir*:

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A careful review of our jurisprudence in this area makes clear that well before our decision in *Penry I*, our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.

Id. 550 U.S. at 246. Russell does not pinpoint cite any other specific provision from *Abdul-Kabir*, *Penry* or *Tennard*. Regardless, these decisions did not create a new rule of law, but rather clarified the application existing precedent. *See Abdul-Kabir*, 550 U.S. at 263; *see also Tennard*, 542 U.S. at 285.

Here, the district court found that “Russell’s challenge to the State’s argument is not so novel that any of his earlier attorneys could not have raised the same claim, and that he was unable to show cause to overcome the procedural bar.” *Russell IV*, 2019 WL 3302719 at *18. The district court also found the claim to be without merit.

We agree that Russell is unable to show cause to overcome the procedural bar. He is also unable to show prejudice.

In between the two statements Russell takes issue with, the prosecutor said:

You might see it differently. If you do, I want you to understand what this question really asks you, the second question. Maybe you do [sic] something that’s mitigating. The issue is: Is it sufficiently mitigating? Does it rise to that level of sufficiency, whatever that is for you, that it warrants that he should get life instead of death?

Earlier in the argument, the prosecutor also explained, “[r]esponsibility is one thing. We have done that, but here in this part of the

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trial, we're focusing on his culpability." The prosecution also told the jurors they could decide what amounted to mitigating evidence.

Moreover, as the district court said, "[t]he trial court instructed jurors to consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness, including evidence of the defendants [sic] background, character, or the circumstances of the offense that mitigates against the imposition of the death penalty." *Russell IV*, 2019 WL 3302719 at *18 (internal marks omitted). The trial court repeatedly instructed the jury to consider all the evidence and said: "You shall consider all evidence submitted to you during the whole trial as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty."

Also, as Russell acknowledges, his counsel told the jury to take a broad view of mitigation and look at all of the mitigating evidence in deciding how to answer the mitigation special issue. There is no indication that the jury did not follow the instructions.

For these reasons, we deny a COA on this issue.

IV. Whether the district court erred in holding that trial counsel provided an adequate defense on the topic of mitigation.

Russell asserts that his trial counsel failed to provide an adequate defense on the issue of mitigation. Specifically, Russell asserts that counsel only presented anecdotal evidence from Russell's acquaintances but failed to present expert testimony to the put the anecdotal evidence in the context of the mitigation special issue. Russell also asserts that counsel missed some mitigating factors altogether.

Russell focuses on the lack of an expert such as forensic psychologist, Mark Cunningham, who provided a report for Russell's state habeas. To be clear, Russell says he "is not saying that Cunningham himself should have

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been called as a witness, since a particular expert witness might not be available at a given time, or the trial court might not provide enough funding.” Rather, he says counsel should have called “some competent witness” to “connect the dots.”

Russell points to a list of “adverse developmental factors” that Cunningham determined were present in Russell’s background: Generational family dysfunction; mother’s teenage status at outset of childbearing; father abandonment; learning disabilities, attention and concentration problems, and school failure; bullied by peers; child neglect; inadequate parental supervision and guidance, with mother’s acceptance of drug trafficking proceeds; corruptive influence of extended family; chronic poverty; alcoholism of stepfather; chronic emotional estrangement and hostility in relationship of mother and step-father; corruptive community influences; teen onset drug trafficking; community violence exposure with gunshot victimization and victimization of family; evidence of severe psychological disorder; and pathological relationship with Tanjala Brewer. Russell also cites Cunningham’s explanation of the significance of those factors as applied to Russell. In doing so, Russell asserts that counsel should have done more.

Russell exhausted this claim in state court, which found it to be without merit. The district court discussed the state habeas court’s findings at length before engaging in its own analysis under the “doubly deferential” standard created by *Strickland* and 28 U.S.C. § 2254(d) and finding no merit. *Russell IV*, 2019 WL 3302719 at *20 (citing *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

Under *Strickland*, as quoted above, Russell establishes ineffective assistance of counsel if he is able to show that counsel’s performance was deficient, and the deficient performance prejudiced the defense. *Id.* 466 U.S.

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at 687-88. Deficient performance is that which falls below an objective standard of reasonableness. “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690. “[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.” *Id.* at 690-91.

As to mitigation, this court has said: “In investigating potential mitigating evidence, counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary.” *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). Under *Strickland*, counsel cannot ignore “pertinent avenues of investigation.” *Id.* at 390.

Russell must demonstrate that it was necessarily unreasonable for the state habeas court to conclude that he did not overcome the strong presumption of counsel’s competence and that he failed to undermine confidence in the jury’s sentence of death. *See Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). Russell also must demonstrate that the state court’s decision was contrary to or involved an unreasonable application of *Strickland*. *See* 28 U.S.C. § 2254(d).

The record does not establish that Russell’s counsel failed to conduct a reasonable investigation. Counsel obtained a mitigation specialist, conducted numerous interviews with Russell, his family members and friends, and developed a strategy. The strategy was basically that Russell was a good person who had a rough life and killed Brewer in a jealous rage over another man. This court has refused to find *Strickland* error in a case where

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counsel employed a similar strategy, calling it a “coherent theory to support a life sentence.” *Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007).

While counsel here did not call an expert during the penalty phase, counsel did call ten witnesses, including Russell’s mother, sister, brother, three aunts, two uncles, and two friends. The testimony of these witnesses painted a picture of the defendant being raised in Houston’s Fifth Ward, where drug-dealing and violence were common; being abandoned by his father; living in poverty without proper parental supervision; having a mother who had to work two jobs and received food stamps; having family members who were involved in crime, tried to lead him astray, and in prison; and never having much of a chance.

In other words, these witnesses testified to most of the factors Russell cites from Cunningham. Of the factors that were not covered, trial counsel said, during discussions with witnesses, there was never any indication Russell was bullied or suffered from attention problems. Additionally, regarding the claim that Russell suffered from a psychological disorder or had reacted violently with a previous girlfriend, counsel said any such evidence would have been counter-productive to the theory that this was a one-time incident and Russell was not a future danger.

Moreover, a petitioner “who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.” *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010). “To prevail on an ineffective assistance claim based upon uncalled witnesses, an applicant must name the witness, demonstrate that the witness would have testified, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable.” *Id.*

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Russell fails to allege with specificity how additional investigation or testimony would have altered the outcome of the trial. He is also unable to demonstrate that Cunningham would have testified or how it would have been favorable. Instead, Russell acknowledges that he is not saying Cunningham himself should have been called, but rather that “some competent witness” could have been found to “connect the dots” and essentially expand on the evidence introduced by the ten witnesses the defense called.

Russell essentially asserts that counsel could have done more. But, the standard is not whether counsel could have done more. Further, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.” *Strickland*, 466 U.S. at 689.

Because Russell is unable to show that reasonable jurists would debate whether the state court’s denial of his claim was unreasonable, we deny a COA on this claim.

V. Whether trial counsel provided ineffective assistance by failing to develop evidence regarding future dangerousness which could have been persuasive at the punishment stage of trial.

Russell asserts that his trial counsel failed to present expert testimony or empirical evidence from a forensic psychologist on the issue of whether Russell would be a future danger to society. Again, Russell cites Cunningham’s report.

Russell exhausted this issue in state court. The district court discussed the state court’s findings and then found, as follows:

Russell does not acknowledge the state court findings to which this Court must defer, much less show by clear and

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convincing evidence that they are incorrect. At its heart, Russell's argument is simply that counsel should have adopted a different strategy at the penalty phase. A reasonably [sic] attorney could come to the conclusion that academic discussion about crime statistics could be less effective than lay testimony, and in fact could weaken that testimony. The Court finds that Russell has not shown that the state habeas court's rejection of this claim was contrary to, or an unreasonable application of, federal law.

Russell IV, 2019 WL 3302719 at *22.

During the penalty phase of Russell's trial, the state presented evidence and testimony that included the following: Russell was sentenced to nine years in prison for aggravated assault under a plea bargain in 1991 for shooting Devarick Williams six times after Williams had a minor altercation with Russell's brother; that same year, Russell was convicted of aggravated robbery which involved him holding a gun to a store manager's head and forcing him to open a safe; Russell was convicted of delivery of drugs in the conviction that resulted from Brewer informing on him; and other unadjudicated offenses and bad acts committed by Russell. The state also presented a pen packet and a stipulation of evidence in which Russell stipulated he was the same person who was convicted in the above-listed crimes.

As discussed in issue four above, the defense called ten witnesses who testified about Russell's difficult background. The strategy focused on Russell as a person, rather than expert testimony. Defense counsel also introduced disciplinary records from Russell's prior incarceration which indicated he had not had many serious infractions.

Russell takes issue with one finding by the state habeas court, but that was not the court's only finding as to this issue. The state court also found, based on trial counsel's affidavit, that counsel believed evidence of Russell's

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life and background was more effective than studies of convicted murderers. The gist of Russell's argument, as supported by Cunningham's report, is that counsel should have done more, i.e., should have called an expert to contextualize the evidence presented, and to provide statistics, scientific data and general information. We discussed such an argument in issue four, and we conclude the same here.

Because Russell is unable to show that reasonable jurists would debate whether the state court's denial of his claim was unreasonable, we deny a COA on this claim.

VI. Whether Russell was denied due process of law in the state habeas system.

Russell asserts that he raised this issue "but the courts ignored it."² Russell raised ineffective assistance of counsel for failure to develop evidence regarding future dangerousness, as discussed in issue five. But he failed to raise this issue regarding a denial of due process in his initial state habeas action. When he raised it in his successive state habeas, the TCCA deemed it barred. The district court concluded that Russell was unable to overcome the procedural bar. The district court also concluded that, even if it could reach the merits of the claim, Russell would not be entitled to federal habeas relief under *Morris v. Cain*, 186 F.3d 581, 585 n.6 (5th Cir. 1999) ("[E]rrors in state postconviction proceedings will not, in and of themselves, entitle a petitioner to federal habeas relief.").

Russell is unable to show that reasonable jurists would debate whether the petition states a valid claim of the denial of a constitutional right and that

² As with much of his argument, this issue is hard to follow in Russell's application. He also fails to provide adequate record citations or applicable authority.

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jurists of reason would find it debatable whether the district court was correct in its procedural ruling. So, we deny a COA on this claim.

CONCLUSION

For these reasons, Russell has not made the showing required to obtain a COA and his application is DENIED.

EXHIBIT 2

**United States District Court Memorandum and Order
Denying Petition for a Writ of Habeas Corpus**

ENTERED

July 23, 2019

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PETE RUSSELL,

Petitioner,

VS.

LORIE DAVIS,

Respondent.

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CIVIL ACTION NO. 4:13-CV-3636

**MEMORANDUM AND ORDER DENYING
PETITION FOR A WRIT OF HABEAS CORPUS**

Pete Russell, Jr., has been on Texas' death row since 2003 for the capital murder of Tanjala Brewer. After unsuccessfully challenging his conviction and sentence on state appellate and habeas review, Russell petitions for federal habeas corpus relief. (Docket Entry No. 37). Respondent Lorie Davis has filed an answer and moved for summary judgment. (Docket Entry No. 47). Traditional limitations on federal review of state court judgments guide adjudication of Russell's petition. In particular, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") defines both the scope and nature of this Court's review. Having reviewed the record, the pleadings, and the applicable law, the Court will deny Russell's federal petition. The Court will not certify any issue for appellate review.

FACTUAL BACKGROUND

On August 13, 2001, family members found the body of forty-year-old Tanjala Brewer lying on the floor of her kitchen. Her throat had been slit and blood pooled by her neck. Her body had been posed in a spread-eagle position with her skirt raised. A crack pipe had been placed in her hand.

When first responders entered they discovered the gas on and lit candles throughout the house. Bloody drag marks from the bedroom to the kitchen suggested that her body had been moved. Blood pooled in Ms. Brewer's bed and was spattered across the headboard. A machete was lying nearby. Someone had apparently written on the bedroom mirror with blood. The words: "She is a devil. I am God" had also been scrawled across the closet doors in blood.

An autopsy counted twenty-three sharp-force injuries on Ms. Brewer's hands, neck, and torso. One stab wound had penetrated at least seven inches into her left breast. Hemorrhaging in her eye suggested that she had suffered asphyxiation. Footprints indicated that the assailant had stomped on her legs and stomach.

I. The Prosecution

The police quickly identified Russell as a suspect. A witness, in fact, had seen Russell watching first responders from across the street as they investigated the grizzly scene. The police located Russell a few days later at a motel. When the police entered his room, a pornographic movie was playing on the television and the bathroom door was closed. The police opened the door to find Russell in the bathtub, foaming at the mouth and holding a bottle of rat poison.

The police subsequently recorded two oral statements, both of which served as the basis for charging Russell with capital murder. Under Texas law, "the gravamen of capital murder is intentionally (or knowingly) causing a death, plus any one of various different types of aggravating elements." *Gardner v. State*, 306 S.W.3d 274, 302 (Tex. Crim. App. 2009). In the subsequent trial, the defense did not dispute that Russell had murdered Ms. Brewer.¹ In fact, trial counsel told jurors in closing: "From day one, we have never tried to hide the ball from you. The

¹ Under Texas state law, "[a] person commits murder . . . if he intentionally or knowingly causes the death of an individual." Tex. Penal Code § 19.02(b)(1).

issue in this case is not who did it. It has never been who did it. It has always been why.” Tr. Vol. 18 at 17. The defense focused its efforts on disproving the aggravator that made the killing a capital crime.

The State of Texas charged Russell with capital murder “in the course of committing or attempting to commit . . . obstruction or retaliation” under Tex. Penal Code § 19.03(a)(2). To secure a conviction, the State had to prove that Russell murdered the victim in retaliation, that is, he “intentionally or knowingly harm[ed] or threaten[ed] to harm another . . . : (1) in retaliation for or on account of the service or status of another as a . . . person who has reported or who the actor knows intends to report the occurrence of a crime; or . . . to prevent or delay the service of another as a . . . person who has reported or who the actor knows intends to report the occurrence of a crime.” Tex. Penal Code § 36.06(a); Clerk’s Record at 350. The State of Texas argued that Russell killed Ms. Brewer because she had informed the police of his drug dealing; the defense argued that he slashed and stabbed her in a jealous rage. Both versions of the murder sprang from statements Russell made to the police in the hospital.

II. Russell’s Statements

Houston Police Department Sergeant Hal Kennedy arrested Russell after finding him in the motel. Tr. Vol. 17 at 11-14. Sergeant Kennedy obtained an audiotaped statement in the hospital emergency room. Russell waived his rights and agreed to speak with the police officers. Tr. Vol. 17 at 13-14. Sergeant Kennedy asked Russell to tell “[i]n [his] own words . . . what happened and why [he] did what [he] did.” Russell answered:

Russell: She . . . she set-she set me up -- she set me up with the police.

Sgt. Kennedy: Who is she?

Russell: Her name is [Tanjala] Bull.

Sgt. Kennedy: Okay and how did she set you up with the police?

Russell: She brought an undercover to my house saying it was her nephew, that her nephew wanted to buy some drugs, so she got out the truck, and I took her home, and about fifteen or thirty minutes later her nephew, which is the undercover, call me and I met him up there at Family Dollar -- McDonald's and that's when I got busted.

Sgt. Kennedy: Okay, but wasn't she doing some other things to you too? Wasn't she like . . .? Were y'all going together. Were y'all hanging out together?

Russell: Right. Right we use to go together.

...

Russell: We used to go together off of . . . I met her on the streets. I tried to take her off drugs. She was stealing from her. She had a lot of debts. I was paying them off and we were together about a year - year and a half. And then you know what I'm saying we broke up and that's when she set me up with the laws.

Sgt. Kennedy: But why did she set you up just to be mean? Or was there a purpose for it? Or . . .?

Russell: All I know cause I basically knows I left her alone and she basically had anywhere to go basically. You know.

Sgt. Kennedy: Okay ah now tell me how it is - how it is that she got killed whatever.

Russell: Basically ah I went over her house and you know since she let me in and she was smoking some drugs whatever and you know we were just talking whatever you know about the things we used to do and I was basically asking her "Why did you set me up?" "Why did you set me up?" and she kept on denying it talking bout I ain't set you up. I ain't set you up. Saying if you would have stayed with me, none of this would have happened whatever. And basically you know what I'm saying I just . . . I just went off. I just snapped.

Sgt. Kennedy: Had you been doing any drugs Pete?

Russell: No sir.

Sgt. Kennedy: Did you thing [sic] it would ever happen? Or you just . . . you just. . . why don't you tell me what happened.

Russell: It just . . . I just happened all the while she was smokin you know what I'm saying and the last thing she said "If you would have stayed with me it would have never happened. And the next thing I know I just snapped like that you know there was a knife on the lit dresser right there and I just grabbed it and jumped on her right there.

Sgt. Kennedy: What kind of knife was it Was it . . . ?

Russell: A lil . . . A lil kitchen knife.

Sgt. Kennedy: What color . . . what color was the handle?

Russell: Black.

Sgt. Kennedy: Was that (inaudible) machete (inaudible) . . . Anybody use the machete? Or was that your her machete or your machete (inaudible)?

Russell: That was her machete I remember it being in her house..

Sgt. Kennedy: But did it have anything to do with all this?

Russell: Naw.

Sgt. Kennedy: What happened after - after she got killed? What did you do?

Russell: I basically (ah) inaudible we tussled you know what I'm saying to the ah to the kitchen or whatever.

Sgt. Kennedy: Okay.

Russell: And Ah you know ah you know I was talking to her while she was still you know living or come dead whatever I don't know.

Sgt. Kennedy: What you say to her?

Russell: Know what I'm saying you know nobody didn't you know what I'm saying make me do it. Nobody to set me up and ah (inaudible) and ah I had ah turned on ah in the bedroom you know what I'm saying was lighting a cigarette . . .

Tr. Vol. 21, SX 1A at 2-4. The next morning Russell gave another brief statement to Sgt.

Kennedy after he had been transferred to jail:

Sgt. Kennedy: Okay. Now what else would you like to tell us about this thing?

Russell: I really like to say though that I'm sorry and that I really loved [the victim] and if ah I could do it all over again, It wouldn't have happened.

Sgt. Kennedy: You didn't mean to kill her?

Russell: No sir.

Sgt. Kennedy: You lost your temper didn't you?

Russell: Yes sir I just snapped and like a say I loved her, I loved the family you know what I'm saying the son and everything and If I had the chance to do it over again, I wouldn't have done it. I want her family to know that I'm sorry and her friends you know that I'm sorry and that ah I would always love her and everything.

Tr. Vol. 22, SX 175A. Russell's statements provided the basis for the case presented by both the prosecution and the defense.

III. The Prosecution's Case

The State placed Russell's statement into a broader story involving Ms. Brewer's role in his conviction for selling narcotics to a police officer. Ms. Brewer was a paid confidential informant for the Houston Police Department. Ms. Brewer and Russell dated for about a year but had ended their relationship in early 2001 when he met another woman, Karen Foster. Russell and Ms. Brewer, however, continued to see each other after their romantic relationship ended.

On May 2, 2001, Ms. Brewer introduced Russell to undercover narcotics officer D. K. Bush. She told Russell that Officer Bush was her nephew and that he wanted to buy crack cocaine. A few hours later, Officer Bush called Russell and arranged to buy drugs. When Russell and Ms. Foster made the delivery, the police arrested both for delivery of a controlled substance.

Russell faced serious prison time because he had prior felony convictions. The parties dispute at what point Russell became aware that Ms. Brewer set him up. The State argued that Russell knew that Ms. Brewer was a confidential informant well before he killed her. While out on bond, Russell accompanied her to pick up payment for her services in an unrelated case. Officer Bush was surprised to see Ms. Brewer with Russell; he had warned her to keep secret her status as a confidential informant. Russell told a friend that “a lot of people in the neighborhood told him” that Ms. Brewer had turned him in. Tr. Vol. 16 at 86.

As Russell’s sentencing approached, he displayed animosity toward his former girlfriend. On August 3, 2001, Ms. Brewer received a handwritten letter from Russell which stated, in part, “I cannot trust you no more. You are evil and out to hurt me. . . . I don’t need you no more. So go back to your X X X X X [sic].” Tr. Vol. 16 at 48. Ms. Brewer told a friend that Russell scared her.

Russell pleaded guilty on August 9, 2001, to delivery of a controlled substance. He received a ten-year sentence. The judge gave him until September 7, 2001, to report to serve his sentence. Ms. Foster, though, remained in custody. Tr. Vol. 16 at 174.

Around this same time, Ms. Brewer began dating Wilbert Reed. Shortly before midnight on August 12, 2001, Mr. Reed stopped by Ms. Brewer’s house on his way to work a night shift. They had sexual intercourse. Mr. Reed called Ms. Brewer repeatedly during his shift, but her phone was busy. Mr. Reed was angry and assumed that she had taken her phone off the hook.

Sometime after midnight, Russell came to Ms. Brewer’s house. According to the State’s version of events, Russell was not a jealous lover because of the victim’s relationship with other men, but an angry criminal convict because of the victim’s relationship with the police. The State relied on Russell’s statement to argue that, in a rage of anger for his narcotics conviction,

Russell repeatedly stabbed the victim. The prosecution premised its argument on how Russell had described the killing. Russell said that he confronted the victim with having “set him up,” and then he “just snapped” when she told him: “if you would have stayed with me, none of this would have happened”

Russell then dragged her body to the kitchen and placed it close to the stove. After posing the corpse, Russell turned on the gas and lit candles. The State argued that Russell hoped the house would catch on fire. The State argued that the evidence proved retaliation, not jealousy, drove Russell to kill.

IV. The Defense’s Case

Trial counsel² elected to proceed with a defense also based on Russell’s statement to the police. In doing so, trial counsel did not dispute Russell’s identity as the killer. Instead, counsel relied on ambiguity in Russell’s statement to argue that, because he did not attack Mr. Brewer in retaliation for turning him in, this was not a capital crime. Trial counsel summarized this theory in his state habeas affidavit:

In order to rebut the element of retaliation, the defense theory of the case was that the defendant and [Tanjala] Brewer had been in a relationship but that Brewer, who used cocaine, was also involved with other men. The night of the murder, the defendant and Brewer argued with each other and the defendant snapped when Brewer pulled a knife. As the defense said in our opening statement, this was not a case of retaliation, it was a case of jilted and unfaithful love. The defendant testified to this at guilt-innocence – that he snapped when Brewer told him she had sex with another man.

State Habeas Record at 510. As trial counsel told jurors in closing arguments: “The issue of this case is not who did it. It has never been who did it. It has always been why. . . . And I think when you bring it all down, it comes down to the issues of jealousy.” Tr. Vol. 18 at 17-18.

² The trial court appointed Floyd W. Freed, III, and Ronald N. Hayes to represent Russell at trial. The Court will refer to the attorneys collectively as “trial counsel” unless necessary to identify one of the attorneys individually.

The defense, however, faced a difficult challenge in convincing jurors that the murder was the impassioned act of a rejected lover. The strongest support for the defense's case came from Russell himself. In addition to relying on his statement to the police, the defense called Russell as a witness to describe why he killed Ms. Brewer.

Consistent with the defense's chosen strategy, Russell testified that he killed Ms. Brewer in a jealous rage for flaunting another relationship in his face as she attacked him with a knife. Russell explained that he and Ms. Brewer had been dating for a "a year, a year and a half" during which time he came to trust her "very much." Tr. Vol. 17 at 89. The relationship "broke down" after Russell "got busted" for narcotics. Tr. Vol. 17 at 90. Russell claimed that, before that night, he did not know that Ms. Brewer had set him up. Tr. Vol. 17 at 117.

Russell testified that he was jealous because he thought Ms. Brewer had a relationship with Donald Ray Hawkins, a man from whom she bought drugs. Tr. Vol. 17 at 93-94. Russell felt angry about their relationship, especially after he found her alone in a motel room with Mr. Hawkins. Tr. Vol. 17 at 95. Russell did not know that Ms. Brewer was also dating Wilbert Reed, but he was suspicious about their relationship. Tr. Vol. 17 at 100.

Russell said he went to Ms. Brewer's house because she wanted him to buy her some drugs. Russell took with him a diamond ring which he had purchased with the intent of proposing marriage to her. Tr. Vol. 17 at 96-98. Soon after Russell arrived, however, they began arguing when Ms. Brewer said she was going to purchase drugs from Mr. Hawkins. As the argument intensified, Russell said that Ms. Brewer picked up a knife and confessed to relations with Mr. Hawkins. Tr. Vol 17 at 104-06, 118-119. As she came toward him, Russell became enraged, picked up a knife, and began stabbing Ms. Brewer. Tr. Vol. 17 at 106.

Russell also explained some of the bizarre elements of the crime. Russell said that, after killing Ms. Brewer he fainted and, when he came to, heard a voice saying “Tell them who I am, tell whom I am.” Tr. Vol. 17 at 108, 110. He then wrote with the victim’s blood on the wall. Tr. Vol. 17 at 108, 110-111. He testified that he left symbols in the crime scene: he positioned the victim’s body and lit candles with the natural gas running to represent the elements of the universe. Tr. Vol. 17 at 111-13. Russell admitted that he stepped on Ms. Brewer after she was dead and placed a crack pipe in her hand, “representing the hurt . . . and her habit. This was her hell.” Tr. Vol. 17 at 112-13.

Trial counsel also adduced evidence and testimony to support the chosen defense. Trial counsel elicited testimony from witnesses that Russell felt jealous toward Ms. Brewer. Tr. Vol. 16 at 37-38, 41, 86. Another witness testified that Russell showed her a ring and she told him that Ms. Brewer “wasn’t going to accept it.” Tr. Vol. 16 at 90-91, 94.

The State, however, disputed Russell’s “long, drawn-out story about love and jealousy like this is some Shakespearean tragedy.” Tr. Vol. 18 at 28. The State argued that “Karen Foster was his girlfriend at the time of this offense and there was no reason for him to be in love with or jealous about Tanjala Brewer.” Tr. Vol. 18 at 30. The State rebutted testimony about the wedding ring with testimony from the officer who rode with Russell in the ambulance after his arrest. The officer testified that Russell told him: “the ring was an engagement ring and that he had bought it for [Karen Foster] and when she made bond, they were going to get married.” Tr. Vol. 17 at 171. The State also adduced evidence that Russell had a picture of Ms. Foster in his wallet, but not one of the victim. The State characterized the defense’s theory as twisting Russell’s statements into a jealousy defense that did not reflect their relationship or the reason for which Russell committed such a brutal murder.

The jury found Russell guilty of capital murder. Clerk's Record at 364.

V. The Penalty Phase

Texas law determined Russell's sentence based on the jury's answers to two special-issue questions:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Pete Russell, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

SPECIAL ISSUE NO. 2

Do you find from the evidence, 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, Pete Russell, Jr., that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Clerk's Record at 375-76; *see also* Tex. Code Crim. Pro. 37.071 § 2(b).

The State presented testimony and evidence showing Russell's long history of lawlessness. In 1991, Russell was sentenced to nine years in prison for aggravated assault after shooting a man who had been in an altercation with Russell's brother. That same year, Russell was convicted of aggravated robbery. The jury also heard testimony about the conviction that resulted from Ms. Brewer informing on Russell. Russell was arrested for delivering drugs to a police officer. A subsequent search of his room revealed 17.2 grams of cocaine. Witnesses also described other unadjudicated offenses and bad acts committed by Russell.

During punishment the defense called ten witnesses, including both friends and family members. The defense's case for mitigation focused on the Russell being raised in a poor neighborhood in which drugs and violence were common. Russell came from a difficult background. His father abandoned the family and his mother had to work two jobs. Russell was

raised in a culture of lawlessness where various family members were incarcerated. Witnesses described him as a good person who never had much of a chance.

The jury answered Texas' special issues in a manner requiring the imposition of a death sentence.

APPELLATE, POST-CONVICTION, AND FEDERAL REVIEW

Through appointed counsel, Russell appealed his conviction and sentence to the Texas Court of Criminal Appeals. Russell's appeal raised four issues, none of which he renews on federal habeas review.³ On February 2, 2005, the Court of Criminal Appeals affirmed Russell's conviction and sentence in a published opinion. *Russell v. State*, 155 S.W.3d 176 (Tex. Crim. App. 2005).

During the pendency of his direct appeal, Russell filed a forty-nine page state application for a writ of habeas corpus raising three grounds for relief based on the constitutional guarantee of effective legal representation.⁴ Specifically, Russell argued that defense counsel: (1) provided deficient performance in the investigation and presentation of punishment-phase evidence; (2) ineffectively selected a guilt/innocence defense, primarily by not presenting evidence that he

³ Specifically, Russell's direct appeal argued:

1. The trial court erred in allowing the jury to use transcripts of his recorded oral statements to assist them during deliberations.
2. The trial court abused its discretion by allowing a witness for the State to remain in the courtroom throughout the guilt stage of trial.
3. The trial court erred in permitting the State to cross-examine him during the guilt stage of trial regarding an extraneous drug offense.
4. The Texas death-penalty scheme is unconstitutional because it allows the application of the death penalty without providing meaningful appellate review of any of the special issues.

⁴ Russell also submitted a "Pro Se Motion for Amended Petition for State Writ of Habeas Corpus." State Habeas Record at 494. The claims in Russell's pro se application focused on arguing that trial counsel should have done more to counter the State's case for retaliation.

killed out of a sentence of rejection, and that he had previously acted violently when a relationship ended, and (3) failing to object to the State's jury argument that allegedly lessened his burden of proof. The trial court ordered trial counsel to provide an affidavit in response to Russell's claims. Trial counsel Hayes provided an affidavit responding to Russell's allegations of ineffective representation. State Habeas Record at 509-12.

The parties provided proposed findings of fact and conclusions of law addressing the issues raised by Russell's habeas application. The state court signed the State's proposed findings and conclusions without alteration and recommended that the Court of Criminal Appeals deny relief. State Habeas Record at 620-40. On November 27, 2013, the Court of Criminal Appeals "adopt[ed] the trial court's findings and conclusions," and "based upon the trial court's findings and conclusions and [its] own review, . . . den[ied] relief." *Ex parte Russell*, 2013 WL 6212211, at *1 (Tex. Crim. App. 2013).

Russell then moved for the appointment of counsel to represent him on federal habeas review. (Docket Entry No. 1). The Court appointed attorneys to represent Russell throughout the course of federal habeas review. (Docket Entry Nos. 3, 7). In 2014, Russell filed a federal petition for a writ of habeas corpus. Russell seeks habeas corpus relief based on nine claims:

- (1) Insufficient evidence supports Russell's conviction for capital murder.
- (2) Trial counsel provided ineffective representation by failing to argue that the State did not prove retaliation.
- (3) Appellate counsel provided ineffective assistance by failing to challenge the sufficiency of the evidence.
- (4) Trial counsel provided deficient performance by failing to investigate and present evidence that Russell did not kill the victim out of retaliation.
- (5) The State violated *Brady v. Maryland*, by failing to produce to the defense a ring seized by the police.

- (6) The prosecutor's arguments about mitigating evidence violated Russell's constitutional rights.
- (7) Trial counsel provided deficient representation in the investigation and presentation of mitigating evidence.
- (8) Trial counsel ineffectively investigated and presented evidence that Russell would not be a future danger to society.
- (9) The state habeas court violated Russell's rights by not holding a hearing.

(Docket Entry Nos. 17, 37).⁵ Russell sought leave to amend his federal petition, but before filing his amendment moved for a stay of the proceedings under *Rhines v. Weber*, 544 U.S. 269 (2005) to exhaust several claims. The Court stayed and administratively closed this action. (Docket Entry No. 29).

Russell subsequently filed a motion in the Texas Court of Criminal Appeals seeking permission to litigate a successive state habeas corpus action.⁶ Under Tex. Code Crim. Pro. 11.071 § 5, Texas strictly enforces an abuse-of-the-writ doctrine that generally prohibits the filing of successive habeas applications. While article 11.071 sanctions the filing of a successive

⁵ Russell's initial federal petition contained eleven grounds for relief. Russell waived two claims in his amended petition. (Docket Entry No. 37 at 4). The list of claims provided above only contains those claims from his amended petition.

⁶ The Court of Criminal Appeals described the claims Russell sought to litigate on successive review as follows:

[Russell] presents nine allegations in the instant application. He challenges the sufficiency of the evidence in Claims 1 and 2. He asserts in Claim 3 that the prosecutor improperly argued that "personal moral culpability was equivalent to responsibility for the crime." In Claims 4 and 5, he contends that trial counsel were ineffective for failing to argue, investigate, and prove that he did not kill the victim in the course of committing or attempting to commit retaliation. In Claim 6, [Russell] alleges that the State "might not" have disclosed an engagement ring that was seized from him at the time of his arrest. [Russell] asserts in Claim 7 that trial counsel were ineffective for failing "to investigate and present potential evidence" that he "did not pose a future threat of danger to society." In Claims 8 and 9, he contends that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence and the prosecutor's improper jury argument on direct appeal.

Ex parte Russell, 2017 WL 912158, at *1 (Tex. Crim. App. 2017).

state habeas application in limited circumstances, the Court of Criminal Appeals found that Russell “failed to satisfy the requirements of Article 11.071, § 5(a)” and, thus, the state court “dismiss[ed] the application as an abuse of the writ without considering the merits of the claims.” *Ex parte Russell*, 2017 WL 912158, at *1 (Tex. Crim. App. 2017).

Russell then returned to federal court. After the Court reopened this case, Russell amended his federal petition. (Docket Entry No. 37). Respondent has moved for summary judgment. (Docket Entry No. 47). Respondent argues that traditional habeas corpus jurisprudence and federal statutory law requires deference to the state court judgments in both substance and procedure. According to Respondent, Russell’s failure to litigate several claims in a procedurally proper manner bars them from federal review. Respondent argues that the heavy deference afforded state court judgments precludes federal relief on the remainder of Russell’s claims. Russell has filed a reply (Docket Entry No. 54) to which Respondent has filed a sur-reply (Docket Entry No. 57).

This matter is now ripe for adjudication. The Court will first discuss the procedural viability of Russell’s claims before discussing whether he has met the AEDPA standards for federal habeas relief.

PROCEDURAL REQUIREMENTS AND FEDERAL DEFERENCE

Respondent argues that federal procedural law precludes consideration of several claims. Russell raised claims one, two, three, five, six, and nine for the first time in his federal petition. This Court stayed adjudication of Russell’s action to allow the exhaustion of state court remedies on those claims. The Texas Court of Criminal Appeals, however, found that Texas’ abuse-of-the-writ doctrine, codified in Article 11.071 § 5(a) of the Texas Code of Criminal Appeals, barred Russell from litigating those issues in a successive state habeas application. Respondent

argues that the state-imposed procedural bar precludes federal consideration of any claim first raised in Russell's federal petition.

The procedural-bar doctrine requires inmates to litigate claims in compliance with state procedural law. *See Dretke v. Haley*, 541 U.S. 386, 392 (2004); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "A federal habeas court has no power to review a state court's decision not to address a prisoner's federal claims if the state court made that decision on the basis of independent and adequate state procedural grounds." *Moses v. Davis*, 673 F. App'x 364, 367 (5th Cir. 2016) (citing *Coleman*, 501 U.S. at 729-30); *see also Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2062 (2017) ("Federal habeas courts reviewing convictions from state courts will not consider claims that a state court refused to hear based on an adequate and independent state procedural ground."). "A dismissal pursuant to Article 11.071 'is an independent and adequate state ground for the purpose of imposing a procedural bar' in a subsequent federal habeas proceeding." *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008)); *see also Sorto v. Davis*, 672 F. App'x 342, 348 (5th Cir. 2016). Because Russell did not present those claims to the state court in a procedurally adequate manner, this Court likewise cannot reach the merits unless he can overcome the procedural bar.

A petitioner has the burden to overcome a procedural bar. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). A petitioner meets this burden by showing: (1) cause and actual prejudice or (2) that "a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent[.]'" *Haley*, 541 U.S. at 393 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Russell provides various arguments why this Court should reach the merits of his procedurally barred claims. The Court will discuss each argument in the relevant sections but

observes that Russell has not shown that federal review is available for any of his procedurally barred claims.

Russell exhausted claims four, seven, and eight on initial state habeas review. If an inmate has presented his federal constitutional claims to the state courts in a procedurally proper manner, and the state courts have adjudicated their merits, AEDPA provides for a deferential federal review. “[A] habeas petitioner has the burden under AEDPA to prove that he is entitled to relief.” *Montoya v. Johnson*, 226 F.3d 399, 404 (5th Cir. 2000); *see also DiLosa v. Cain*, 279 F.3d 259, 262 (5th Cir. 2002). “[T]ime and again,” the Supreme Court “has instructed that AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” *White v. Wheeler*, ___ U.S. ___, 136 S. Ct. 456, 460 (2015) (quotation omitted). Under AEDPA’s rigorous requirements, an inmate may only secure relief after showing that the state court’s rejection of his claim was either “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1),(2).

To merit relief under AEDPA, a petitioner may not merely show legal error in the state court’s decision. *See White v. Woodall*, 572 U.S. 415, 420 (2014) (stating being “merely wrong” or in “clear error” will not suffice federal relief under AEDPA). AEDPA review exist only to “guard against extreme malfunctions in the state criminal justice systems” *Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1376 (2015) (quotation omitted). “[F]ocus[ing] on what a state court knew and did,” *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), AEDPA requires inmates to “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.” *Woodall*, 572 U.S. at 420 (quoting *Richter*, 562 U.S. at 103); *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). “If this standard is difficult to meet, that is because it was meant to be.” *Richter*, 562 U.S. at 102.

A petitioner challenging the factual basis for a state decision must show that it was an “unreasonable determination of the facts in light of the evidence” 28 U.S.C. § 2254(d)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). “[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). A federal habeas court must also presume the underlying factual determinations of the state court to be correct, unless the inmate “rebut[s] the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *see also Miller-El*, 537 U.S. at 341; *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) (“As a federal habeas court, we are bound by the state habeas court’s factual findings, both implicit and explicit.”).

With those standards in mind, the Court turns to the issues presented in Russell’s federal petition.

RUSSELL’S FEDERAL HABEAS CLAIMS

I. Sufficiency of the Evidence

Russell’s first claim argues that the trial evidence was insufficient to support his conviction for capital murder in the course of committing retaliation. Under *Jackson v. Virginia*, 443 U.S. 307 (1979), a reviewing court affirms a jury’s conviction if, considering all the evidence in a light most favorable to the prosecution, any rational trier of fact could have

returned a verdict unfavorable to the defendant. Russell does not dispute that the jury correctly found him guilty of murder. He instead argues that the State did not present sufficient evidence proving that he killed in retaliation, the predicate crime that made his a capital offense. According to Russell, a correct understanding of Texas law outlining the crime of retaliation required the State “to show that [he] intentionally or knowingly harmed [the victim] as ‘payback’ for her action of identifying [him] to [an] undercover officer . . . as a potential seller of drugs.” (Docket Entry No. 37 at 26). Russell argues that “[t]here was no evidence that, at the time of the killing, Russell was acting with the intent to commit the underlying offense or knowledge that he was committing that offense.” (Docket Entry No. 37 at 26-27).

Russell did not litigate this claim during his initial round of appellate or habeas review in state court. Russell first raised this issue in his federal habeas petition. When he exhausted his claim during his successive state proceedings, the Court of Criminal Appeals refused to consider its merits under Texas’ abuse-of-the-writ doctrine. The state court ruling results in a procedural bar that forecloses federal review. *See Gutierrez v. Stephens*, 590 F. App’x 371, 384 (5th Cir. 2014) (“A dismissal pursuant to Article 11.071 is an independent and adequate state ground for the purpose of imposing a procedural bar in a subsequent federal habeas proceeding.”) (quotation omitted). As discussed below, the Court finds that Russell cannot overcome the procedural bar. Alternatively, Russell’s first claim does not merit federal habeas relief.

A. Russell’s Arguments to Overcome the Procedural Bar

Russell makes three arguments to allow federal review: (1) Texas law generally does not bar an otherwise-procedurally-inadequate claim when a sentence is illegal; (2) he is actually innocent of capital murder; and (3) his prior state-court attorneys provided deficient performance in failing to advance an insufficiency claim.

I. Illegal Sentence

In a somewhat convoluted argument, Russell asserts that the Court of Criminal Appeals held in *Ex parte McCuin*, 492 S.W.3d 33 (Tex. Crim. App. 2016) that “an illegal sentence may be challenged at any time,” and thus not subject to constraints such as the abuse-of-the-writ doctrine. (Docket Entry No. 37 at 30; Docket Entry No. 54 at 12). Russell argues that he received an illegal sentence because he did not commit the murder in retaliation, and thus the jury should not have convicted him for capital murder. In essence, Russell asks this Court not to honor the procedural bar because the Texas courts should not have imposed it in the first place. Russell’s argument, however, suffers from two fundamental deficiencies. First, a “basic tenet of federal habeas review is that a federal court does not have license to question a state court’s finding of procedural default, if based upon an adequate and independent state ground.” *Smith v. Johnson*, 216 F.3d 521, 523 (5th Cir. 2000) (quoting *Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995)); *see also Rowell v. Dretke*, 398 F.3d 370, 375 (5th Cir. 2005) (“It is not the role of the federal habeas court to reexamine state-court determinations of state-law questions.”). A “federal court may only inquire into whether cause and prejudice exist to excuse that default” but it may not ask “whether the state court properly applied its own law.” *Barnes*, 58 F.3d at 974. This Court cannot forgive the procedural bar by finding that the Texas courts should not have imposed it.

Second, Russell has not shown that the judgment in his case involves an illegal sentence. Russell is correct that “[t]here has never been anything in Texas law that prevented *any* court with jurisdiction over a criminal case from noticing and correcting an illegal sentence.” *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).⁷ But the heart of Russell’s argument, no

⁷ Despite that language, Texas has applied its abuse-of-the-writ jurisprudence to claims that involve an illegal sentence. *See Ex parte Lee*, 2011 WL 1135914, at *1 (Tex. Crim. App. 2011).

matter how he characterizes it, does not implicate an illegal sentence. “A ‘void’ or ‘illegal’ sentence is one that is not authorized by law.” *Ex parte Pena*, 71 S.W.3d 336, 336 n.2 (Tex. Crim. App. 2002); *see also Ex parte Seidel*, 39 S.W.3d 221, 225 n. 4 (Tex. Crim. App. 2001) (“[T]his Court has long held that a sentence is void when the punishment is unauthorized.”). Texas generally considers a sentence illegal when it “is outside the maximum or minimum range of punishment” *Mizell*, 119 S.W.3d at 806. In contrast, the heart of Russell’s illegal-sentence arguments are merely re-characterizations of his claim that the evidence did not satisfy the statutory requirements for his conviction. Russell has not shown that he is incarcerated under an illegal sentence.

2. *Actual Innocence*

Russell also argues that a “fundamental miscarriage of justice” requires this Court to overlook the state procedural bar. The fundamental-miscarriage-of-justice exception to the procedural bar doctrine requires an inmate to prove his actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 329 (1995). Russell makes his actual-innocence argument by rehashing the evidentiary picture that was before the jury and again arguing that the State did not prove retaliation. Russell, however, does not identify any new evidence that should have come before jurors. (Docket Entry No. 37 at 30). Simply, Russell merely recasts his insufficiency arguments as actual innocence.

Actual-innocence claims are distinct from claims of insufficient evidence. *See House v. Bell*, 547 U.S. 518, 538 (2006). An inmate claiming to be actually innocent must show that “new reliable evidence” exists which would have prevented a reasonable jury from finding him guilty. *See Schlup*, 513 U.S. at 329. This “gateway” to review of a procedurally barred claim “should open only when a petition presents ‘evidence of innocence so strong that a court cannot have

confidence in the outcome of the trial” *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup*, 513 U.S. at 316). Russell has not shown a miscarriage of justice because he has not provided any evidence that would support a “colorable showing of factual innocence.” *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). Russell cannot overcome the procedural bar by rearguing his insufficiency-of-the-evidence claim as a fundamental miscarriage of justice.

3. *Ineffective State Habeas Representation*

Finally, Russell argues that, “to the extent state habeas counsel should have raised this point, the failure of state habeas counsel to raise an issue . . . can constitute cause and prejudice.” (Docket Entry No. 37 at 32). In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court created a narrow exception to the procedural bar doctrine which “treats ineffective assistance by a prisoner’s state postconviction counsel as cause to overcome the default of a single claim.” *Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2062 (2017). This exception, however, only applies to defaulted ineffective-assistance-of-trial-counsel claims. *See id.* at 2064-75. The Court, therefore, finds that Russell’s arguments cannot overcome the state-imposed procedural bar of this claim. The Court cannot reach the merits of Russell’s first ground for relief.

B. *Alternative Review of the Merits*

Alternatively, the Court finds that Russell’s insufficiency-of-the-evidence claim lacks merit. In assessing the sufficiency of the evidence, “federal habeas courts should independently analyze the governing statute, the indictment, and the jury charge to measure the constitutional sufficiency of the evidence and determine what are the essential elements required by the *Jackson* sufficiency inquiry.” *Bledsue v. Johnson*, 188 F.3d 250, 260 (5th Cir. 1999). The federal constitutional issue in this case is “whether the evidence was constitutionally sufficient to convict [petitioner] of the crime charged.” *Id.* at 262 (quoting *Brown v. Collins*, 937 F.2d 175,

181 (5th Cir. 1991)). This demanding inquiry is highly deferential to, and resolves any conflicting evidence in favor of, the jury's verdict. *See United States v. Harris*, 293 F.3d 863, 869 (5th Cir. 2002); *United States v. Duncan*, 919 F.2d 981, 990 (5th Cir. 1990).

Here, the jury instructions provided for Russell's conviction if he killed in the course of retaliation. The jury instructions tracked Texas statutory law and defined the offense of retaliation: "if he 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 witness prospective witness or informant or a person who has reported or who the actor knows intends to report the occurrence of a crime." Clerk's Record at 350; *see also* Tex. Penal Code § 36.06(a)(1).⁸ The trial court cautioned jurors to only find Russell guilty if the State proved retaliation beyond a reasonable doubt:

Before you would be warranted in finding the defendant guilty of capital murder you must find from the evidence beyond a reasonable doubt not only that on the occasion in question the defendant was in the course of committing or attempting to commit the felony offense of retaliation against Tanjala Brewer as alleged in this charge but also that the defendant specifically intended to cause the death of Tanjala Brewer by stabbing Tanjala Brewer with a deadly weapon namely a knife and unless you so find then you cannot convict the defendant of the offense of capital murder.

Clerk's Record at 352.

Russell frames his insufficiency-of-the-evidence claim as "an issue of statutory construction." (Docket Entry No. 54 at 6). Specifically, Russell argues that his conviction rests on a flawed understanding of what it means to be "in the course of" committing a crime, for the purposes of the capital murder statute. According to Russell, a conviction for capital murder in the course of retaliation requires the State to prove that he "*set out to retaliate against* [the

⁸ Under the *Jackson* standard, a court must refer to "the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n. 16.

victim].” (Docket Entry No. 54 at 10) (emphasis in original). Russell states that the murder “was a crime of passion, not a retaliatory killing.” (Docket Entry No. 54 at 8). Russell seems to argue that, without some evidence that he “set out that night to commit Retaliation,” the jury could not find him guilty of capital murder. (Docket Entry No. 37 at 27).

Russell has not pointed to any Texas law requiring that the actor form an intent to commit the underlying crime well before the murder, in this case requiring that the State prove that he intended to kill the victim when he went to her house. Texas statutory law does not define the phrase “in the course of committing or attempting to commit” as used in Section 19.03(a)(2). The Court of Criminal Appeals has defined the phrase to mean “conduct occurring in an attempt to commit, during the commission, or in the immediate flight after the attempt or commission of the offense.” *Garrett v. State*, 851 S.W.2d 853, 856 (Tex. Crim. App. 1993); *see also Riles v. State*, 595 S.W.2d 858, 862 (Tex. Crim. App. 1980). The Texas courts have held that “[e]vidence is sufficient to support a capital murder conviction if it shows an intent” to commit the underlying offense “which was formed before or *contemporaneously* with the murder.” *Shuffield v. State*, 189 S.W.3d 782, 791 (Tex. Crim. App. 2006) (emphasis added); *see also Reed v. Quarterman*, 504 F.3d 465, 489 (5th Cir. 2007) (explaining Texas law); *Riles v. State*, 595 S.W.2d 858, 862 (Tex. Crim. App. 1982) (construing § 19.03(a)(2) “to mean conduct occurring in an attempt to commit, during the commission, or in immediate flight after the attempt or commission”).

Viewing the evidence “in the light most favorable to the jury’s verdict.” *Jackson*, 443 U.S. at 319, the State argued that Russell, who faced a lengthy prison sentence, killed the victim for turning him into the police. The State based its case on Russell’s statement in which he, as set out by the state habeas court, stated: “that he went to the [victim’s] house the night of the

murder where they talked and smoked some drugs that the [victim] denied setting up” Russell. State Habeas Record at 516-17. Russell explained to the police: “And I was basically asking her saying you know Why did you set me up? Why did you set me up and she kept on denying it talking about I ain’t set you up. I ain’t set you up. Saying if you would have stayed with me none of this would have happened whatever. And basically what I’m saying I . . . just went off. I just snapped . . .” Tr. Vol. 21, SX 1A at 2-4.⁹

True, the evidence did not unequivocally show that Russell went to the victim’s house with the intention of killing her for having informed on him.¹⁰ But Texas law only required the State to prove that Russell retaliated against the victim and that the intent to do so “was formed before or contemporaneously with the murder.” *Shuffield v. State*, 189 S.W.3d 782, 791 (Tex. Crim. App. 2006); *see also Tucker v. State*, 771 S.W.2d 523, 528 (Tex. Crim. App. 1988).

Ms. Brewer had been an informant against Russell. The State had to show that “he killed her *because* of her status as such.” *Angelo v. State*, 977 S.W.2d 169, 174 (Tex. App. Austin, 1998). “[A] plain reading of the statute requires the crime to have a retributory nature.” *Id.* Russell may have been jealous as the jilted lover. “[T]here may have been several reasons why [he] wanted to kill [the victim],” but this Court’s only concern is whether “the evidence viewed

⁹ Russell disputes that he intended to retaliate against Ms. Brewer by arguing that he “had nothing to gain by punishing Brewer for ‘setting up’ Russell.” (Docket Entry No. 37 at 27).

¹⁰ The State separated the question of Russell’s motive from his commission of retaliation:

Now, Mr. Freed has gone into a lot about motive and what we have to prove in regard to motive. In this particular case, retaliation is what we have to prove that it was committed in the course of. So, there is kind of a connection as to why the offense was committed, but we never have to actually prove a motive and in the charge of murder, you would not see any element that requires us to prove an element of motive. Okay? You are going to see that in the Charge.

So, if you find that a retaliation was being committed at the time that this complainant was murdered then you have found that a capital murder was committed by this defendant.

Tr. Vol. 18 at 26.

in the light most favorable to the verdict was sufficient for the jury to rationally conclude that [he] intentionally murdered [her] in the course of committing or attempting to commit . . . retaliation.” *Brown v. State*, 2015 WL 5453765, at *8 (Tex. Crim. App. 2015). Russell’s own words in his two police statements may provide context for deciding whether he killed in the course of retaliation. *See Stewart v. State*, 137 S.W.3d 184, 188 (Tex. App. Houston [1 Dist.], 2004) (“Retaliatory intent may be inferred from an accused’s acts, words, or conduct.”).

By the fact that both parties based their defense on differing interpretations of Russell’s statement to the police, jurors could have come to different conclusions about his intent. That does not mean, however, that a rational jury could not interpret Russell’s statements about how the victim informed on him as an indication of why he stabbed her seconds later. The Court cannot substitute any interpretation of the evidence witnesses in place of the fact finder. *See Weeks v. Scott*, 55 F.3d 1059, 1062 (5th Cir. 1995); *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985). Because “[a]ll credibility choices and conflicting inferences are to be resolved in favor of the verdict,” *Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005), jurors could find beyond a reasonable doubt that Russell intentionally killed the victim while harming her on account of her informing against him, even if he formed the intent to retaliate against her contemporaneous to killing her. With the “highly deferential” review required by *Jackson, United States v. Hager*, 879 F.3d 550, 553 (5th Cir. 2018), the Court finds that, if fully available for federal review, Russell’s insufficiency-of-the-evidence claim lacks merit.

II. Ineffective Assistance in Arguing that Russell Did Not Kill Out of Retaliation

Russell has raised various ineffective-assistance-of-counsel arguments in both state habeas court and in these proceedings. In his second ground for relief, Russell argues that counsel should have argued that “the State had categorically failed to prove that any killing

occurred ‘while in the course of committing or attempting to commit Retaliation.’” (Docket Entry No. 37 at 34). Russell essentially argues that trial counsel should have advanced the same argument as in his first ground for relief: that the State did not legally prove he killed the victim in the course of retaliation.

A. *Strickland* Standard

Courts evaluate an attorney’s efforts under the standard from *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a criminal defendant’s Sixth Amendment rights are “denied when a defense attorney’s *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense.” *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

A court’s review “of counsel’s performance must be highly deferential,” and made without “the distorting effects of hindsight.” *Id.* at 689. Courts assess counsel’s “challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct[,]” because otherwise “[i]t is all too tempting for a defendant to second-guess counsel’s assistance” *Id.* The law honors an attorney’s “conscious and informed decision on trial tactics and strategy,” allowing for federal relief only when “it is so ill chosen that it permeates the entire trial with obvious unfairness.” *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003). The prejudice element requires the movant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

B. Procedural Bar

Russell advanced his second claim for the first time in federal court, resulting in a procedural bar when he renewed it in his successive state habeas action. Russell argues that his initial habeas counsel's failure to advance the claim forgives the procedural bar under *Martinez v. Ryan*, 566 U.S. 1 (2012). The Fifth Circuit has summarized the rule announced in *Martinez* as follows:

To succeed in establishing cause to excuse the procedural default of his ineffective assistance of trial counsel claims, [petitioner] must show that (1) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim[s] ha[ve] some merit,"; and (2) his initial state habeas counsel was ineffective in failing to present those claims in his first state habeas application.

Preyor v. Stephens, 537 F. App'x 412, 421 (5th Cir. 2013) (quoting *Martinez*, 566 U.S. at 14).

Russell must show that habeas counsel should have advanced a *Strickland* claim based on counsel's failure to craft a defense challenging the retaliation element of capital murder on legal grounds.

But trial counsel formulated a defense based on proving that Russell did not kill in retaliation. Trial counsel explained the defense theory: "this was not a case of retaliation, it was a case of jilted and unfaithful love." State Habeas Record at 510. The defense made this theory a major and oft-repeated theme of trial. The defense supported this theory with Russell's own testimony that "he snapped when [the victim] told him that she had sex with another man." State Habeas Record at 510. Russell's proposed focus on the statutory language in an effort to show that the killing was not in the course of retaliation differs little in substance or effect from the defense his attorneys put before jurors. While Russell now wishes trial counsel had emphasized

other nuances, the basic argument he proposes is the same trial counsel presented at trial: there had been no retaliation.¹¹

Counsel's choice in how to present a defense theory before jurors is strategy for which reviewing courts afford great deference. *See Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (“[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage Judicial review of a defense attorney's summation is therefore highly deferential”) “[I]ndulg[ing] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,” *Strickland*, 466 U.S. at 689, the Court cannot say that trial counsel's strategy was so ill-chosen to merit habeas relief, much less serious examination on post-judgment review. Accordingly, the Court finds that Russell has not shown that he can overcome any procedural bar because his claim has some merit or that failure to raise it prejudiced the defense. The Court cannot reach the merits of Russell's second ground for relief.¹²

III. Ineffective Assistance of Appellate Counsel

In his third ground for relief, Russell claims that appellate counsel provided ineffective representation by failing to raise a claim challenging the sufficiency of the evidence proving retaliation. Specifically, Russell argues that appellate counsel should have raised an argument similar to the first ground for relief he raises in his federal petition. Russell, however, raised this claim for the first time in his initial federal petition, resulting in a procedural bar.

¹¹ Trial counsel told jurors: “But the burden of proof is beyond a reasonable doubt for them to prove to you retaliation. They have to prove it to you at that level.” Tr. Vol.18 at 24.

¹² For the same reasons that he cannot show that his claim warrants review under *Martinez*, the Court finds that, if the merits were fully available for federal review, he has not shown *Strickland* error.

Russell argues that he can overcome the procedural bar by showing that the structure of Texas state habeas proceedings discourages inmates from advancing ineffective-assistance-of-appellate-counsel claims on state habeas review. According to Russell, because state appellate and habeas review proceed concurrently, attorneys appointed for each proceeding “[i]n theory . . . work together, each taking the issues properly assigned either to direct appeal or habeas review, although that is often not the case in practice.” (Docket Entry No. 37 at 41). Russell argues that state habeas counsel’s responsibility to advance *Strickland* claims against appellate counsel may damage that relationship and, effectively, discourage habeas counsel from advancing such claims.

Russell, however, has not provided any law or evidence supporting his argument that appellate and habeas attorneys must carry on a working relationship comparable to a defense team, that the structure of Texas review impedes *Strickland* claims because attorneys do not want to jeopardize that relationship, or that any concern about challenging another attorney’s actions chilled the habeas representation in his case. Russell’s arguments for cause only recognize the discomfort cause by *Strickland* claims in general, when one attorney may have to question the performance of a peer. Russell has not shown that he has cause to forgive raising his third ground for relief.

Nor can he show actual prejudice. The Court has considered the alternative merits of his first two grounds for relief, both of which traveled similar paths as this one. The Court found them to be without merit. Russell cannot show actual prejudice for counsel’s failure to raise similar issues on direct appeal. The Court, therefore, finds that his third claim is procedurally barred.¹³

¹³ Alternatively, for the reasons discussed in his first two grounds for relief, claim three is without merit.

IV. Ineffective Assistance of Assistance in Failing to Investigate and Present Evidence

Russell's trial attorneys' strategy relied on his statement to the police as the centerpiece for the jealous-rage defense. Trial counsel placed it into context with Russell's own testimony. Russell explained that the victim had a relationship with Donald Ray Hawkins. Tr. Vol. 17 at 94. Russell testified that he had previously discovered the victim in a motel room with Hawkins. Tr. Vol. 17 at 94-95. Russell said that, on the night of the murder, he began arguing with the victim because she was using drugs she had obtained from Hawkins. Tr. Vol. 17 at 97-98. With that testimony, the defense tried to convince jurors that, when Russell arrived with a wedding ring at the victim's house, her relationship with Hawkins caused him to erupt in jealous fury. As trial counsel argued in closing, "at that moment, that absolute storm, she's killed. And it is tragic. It is terribly tragic. But the murder does not happen because she is a snitch. It happens out of jealousy and rage and anger and emotions that are common." Tr. Vol. 18 at 21. Russell claims that trial counsel provided ineffective assistance because they did not bolster this argument by interviewing Hawkins before trial.

The defense knew about Hawkins, who was then incarcerated, well before trial. The trial investigator's notes indicate that Russell "admits that [the victim] was having an affair with Donald Ray Hawkins and that she was prostituting herself for drugs. . . . He frequently found [the victim] at Donald Ray's motel room and people used to tell him they saw the two hanging out on the street." State Habeas Record at 368. Russell told the investigator that "the testimony of Donald Ray Hawkins," among others, "was crucial." State Habeas Record at 368. Trial counsel ran a criminal history to learn information about Hawkins. State Habeas Record at 211, 378. Trial counsel's note included an entry "Donald Ray Hawkins – may need to bench warrant." State Habeas Record at 31. The defense, however, did not call Hawkins as a witness.

Russell raised a claim on state habeas review faulting trial counsel's efforts to support the jealousy defense. In doing so, Russell provided affidavits from people who could have described his jealous nature and otherwise supported his defense. The state habeas application, however, did not include an affidavit from Hawkins, or even specifically argue that trial counsel should have called him as a witness. State habeas counsel's proposed findings of fact and conclusions of law did not mention Hawkins specifically.

After the State responded to the habeas application, Russell filed a "Pro Se Motion for Amended Petition for State Writ of Habeas Corpus." State Habeas Record at 488. For the first time, Russell specifically argued that counsel provide ineffective assistance "for failing to call Donald Ray Hawkins as a witness at the time of trial" because "[h]is testimony was mandatory . . . to show [Russell's] relationship with [the victim] was the catalyst that resulted in this Crime of Passion." State Habeas Record at 488. Russell supported this putative claim with an affidavit from Hawkins. Hawkins described his "ongoing sexual relationship" with the victim "while [she] was still having sexual relations with" Russell. Hawkins would have expressed that he "would not have been having sexual relations with [the victim]" had he known that they were "still in a romantic relationship" because Russell "was a jealous person." Hawkins said: "Had I known that his jealousy would have led to her death, I would have stopped our own sexual relations with each other." State Habeas Record at 492.

The state habeas court made explicit findings regarding the claim in the state habeas application filed by counsel:

61. The Court finds based on the credible affidavit of trial counsel Hayes that the defense theory of the case was to rebut the element of retaliation by showing that [Russell] and [Brewer] were involved in a relationship, but [Brewer] saw other men; that [Brewer] and [Russell] argued on the night of the offense, and [Russell] snapped when [Brewer] pulled a knife.

62. The Court finds that counsels' defensive theory was reasonable and was apparent at guilt-innocence, beginning with the opening statement, where trial counsel informed the jury that the evidence at trial would show that [Brewer] abused cocaine, and was involved with different men, including [Russell]; that the evidence would show that [Brewer] and [Russell] argued on the night of the offense; that [Brewer] pulled a knife and cut [Russell]; that [Russell] stabbed [Brewer] in return; and that [Russell] attempted suicide afterwards.

63. The Court finds that trial counsel continued the defense's consistent reasonable defensive theory by informing the jury during opening statement that "the evidence will show you that this is not a case of retaliation, that it is a case of jilted and unfaithful love."

64. The Court finds that the consistent reasonable defensive theory was present during the cross-examination of witnesses during guilt-innocence to elicit information concerning [Russell] and [Brewer's] relationship, [Russell's] alleged lack of knowledge that [Brewer] was a police informant, and the alleged circumstances of his statements to the police.

65. The Court finds that during the defense case-in-chief at guilt-innocence, trial counsel enlarged upon the consistent defensive theory by presenting the lengthy testimony of [Russell] avowing that he killed [Brewer] when he "snapped" after she told him that she had sex with another man.

66. The Court finds that the consistent defensive theory of counsel was apparent when trial counsel specifically informed the trial court during a bench discussion that counsel wanted to elicit evidence that [Brewer] evoked the same emotions and anger in other men as she did in [Russell].

State Habeas Record at 632-34 (citations omitted). The state court, however, did not rule on, or even discuss, the *pro se* application.

Russell's federal petition argues that trial counsel provided deficient representation by not interviewing Hawkins before trial. Russell faults counsel for not developing Hawkins' testimony, particularly that the killing was the result of "jealousy rage." State Habeas Record at 492. Respondent urges the Court not to consider the information in Hawkins' affidavit because Russell did not properly put it before the state courts. Further, Respondent argues that the Court should find this claim procedurally barred because Russell did not properly exhaust the

underlying basis for the claim. (Docket Entry No. 47 at 52).¹⁴ The Court, however, does not reach those issues because Russell has not shown *Strickland* prejudice.

Trial counsel championed the jealousy defense on which Russell bases his fourth ground for relief. The state habeas court considered whether trial counsel had adequately supported that defense, although it did not consider Hawkins' affidavit in doing so. Hawkins' affidavit, however, does not contain any allegation that differs fundamentally from the trial defense. Hawkins' affidavit confirms that he was having a relationship with the victim and that Russell had a propensity toward jealousy. The trial testimony, however, did not seriously dispute the fact that Hawkins and the victim had a relationship. In his affidavit, Hawkins opines that Russell killed out of jealousy, but Hawkins was not there when Russell attacked the victim. Hawkins' opinion of what motivated Russell in the moment he killed would likely not be admissible.

The jury, however, already had Russell's own explanation about why he killed. While other witnesses could describe Russell's character and why he might have killed, only he could describe whether he did it out of retaliation or jealousy. Trial counsel considered calling Hawkins as a witness and, for some reason not apparent from the record, decided not to do so. Still, Hawkins' testimony would not alter the information before the jury in any way that could create a reasonable probability of a different result. Simply, Russell has not shown that trial counsel's failure to call Hawkins as a witness prejudiced the defense. The Court, therefore, will deny this claim.

¹⁴ Russell argues that "[t]he one missing piece of this puzzle" about why Hawkins did not testify at trial "is information from defense counsel as to *why* no investigation action was taken with respect to Hawkins." (Docket Entry No. 37 at 45). It is not correct to say that counsel did not make any investigation into Hawkins, but the record is unclear as to the extent of that investigation. The record does not divulge why counsel did not call him as a witness. Likely, the state habeas proceedings did not develop an answer to that question because Russell only raised it in an improper *pro se* pleading filed well after the State had answered his proper application.

V. *Brady*

Russell's fifth claim raises a procedurally barred argument that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by "fail[ing] to produce to defense counsel a ring, previously seized by the police, which might have reinforced both actual evidence and potential evidence indicating that [he] went to Brewer's house to make a romantic proposal, not for any retaliatory purpose" (Docket Entry No. 37 at 47). Russell's argument proceeds as if the defense was completely unaware of the ring at trial and that "the ring issue arose only after the state habeas review was complete" (Docket Entry No. 37 at 51). Russell's allegations have no merit.

Russell asks the Court to assume that the defense was unaware of the ring at trial, but the police seized that item from Russell himself. The ring was an important trial issue mentioned by both the prosecution and the defense. Trial counsel did not express any surprise at the ring but discussed it repeatedly before the jury. Respondent's summary judgment motion amply identifies that "Russell inexplicably argues that the State suppressed favorable evidence that was actually admitted as a State's exhibit at trial." (Docket Entry No. 47 at 61).

In response to the summary judgment motion, Russell transforms his argument into "fundamentally a discovery issue" because the ring was not turned over to the defense before trial. (Docket Entry No. 54 at 25). Russell does not identify any constitutional law requiring the prosecutor to turn over the possession of physical evidence, such as the ring, before trial. Russell does not show how physical access to the ring would have made any difference to the defense's case or the jury's consideration of trial evidence. Russell does not show that a *Brady* issue somehow exists because the ring before jurors as a State's exhibit.

Russell has not overcome the procedural bar of his *Brady* claim. Alternatively, his *Brady* claim is without merit.

VI. Prosecutorial Argument About Mitigating Evidence

Russell's sixth claim argues that the prosecutor violated Russell's constitutional rights during punishment-phase closing arguments by misguiding jurors on what evidence may be mitigating. Texas's special issues required jurors to answer whether "a sufficient mitigating circumstance or circumstances . . . warrant that a sentence of life imprisonment rather than a death sentence be imposed." Clerk's Record at 376. The trial court instructed jurors to "consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness including evidence of the defendants background character or the circumstances of the offense that mitigates against the imposition of the death penalty." Clerk's Record at 370-71. Russell complains because the trial prosecutor told the jury that mitigating evidence is "something that might reduce or lessen his responsibility," but also said that "there is nothing wrong here that honestly and truly lessens this man's responsibility, his blameworthiness, his fault." Tr. Vol. 20 at 45. Russell objects that the prosecutor's language caused jurors only to consider mitigating evidence that reduced his culpability for the offense.

Russell did not raise this issue on appeal or during the first round of habeas review. Russell argues that he can overcome the resultant procedural bar of this claim because he bases his claim on law that developed after the conclusion of state post-conviction review. For decades, however, defendants have challenged the extent to which Texas juries could consider mitigating evidence. Russell's challenge to the State's argument is not so novel that any of his earlier attorneys could not have raised the same claim. Russell has not shown cause to overcome the procedural bar.

He has also not shown actual prejudice. While Russell claims that the prosecution limited the jury's consideration only to mitigating evidence that bore a relationship with the crime, a broader look at the prosecutor's argument reveals no such limitation. The State argued:

I can't tell you what's mitigating. It's up to you. I suggest to you there is nothing mitigating in this case. Our Charge tells you that mitigating evidence is something that you believe may reduce the defendant's moral blameworthiness. In other words, something that might reduce or lessen his responsibility. Name one thing that you have heard during this trial that lessens his responsibility for brutally murdering that woman. One thing. There is none.

Tr. Vol. 20 at 45. The prosecutors told jurors that they could decide what amounted to mitigating evidence. The jury instructions likewise broadly allowed for the jury to exercise full discretion in applying any mitigating evidence. The Court finds that Russell has not shown cause or prejudice to overcome the procedural bar of his sixth ground for relief.¹⁵

VII. Ineffective Assistance in the Investigation and Presentation of Mitigating Evidence

Russell claims that his trial attorneys provided deficient performance in developing and presenting evidence for the jury to answer Texas' mitigation special issue. Russell exhausted this claim in state habeas court. The state habeas court's adjudication of this claim began by acknowledging that "the defense prepared and filed pre-trial motions interviewed witnesses, obtained discovery from the State, reviewed the State's file, talked to [Russell] numerous times about the offense and pending trial, retained a mitigation specialist, talked to [Russell's] family and talked [to Russell] about his background and life" State Habeas Record at 519. With that background, the defense formed a "reasonable, coherent theory of mitigation: [Russell] was essentially a good person who was adversely affected by his environment and influences on him and the instant offense was an aberration of [his] character." State Habeas Record at 524. This mitigation strategy "centered on the effects of [Russell] being raised among drug dealing and

¹⁵ Alternatively, the Court has reviewed the merits of his claim and, for similar reasons as discussed above, finds that it is without merit.

violence in the Fifth Ward, being abandoned by his father, having a family history of crime with relatives in prison, having a mother who had to work at two jobs and get food stamps, and [Russell] being a good person who did not have much of a chance.” State Habeas Record at 519-20. Trial counsel put that defense before jurors through the testimony of ten friends and family members including his mother, two siblings, two aunts, two uncles, and his friends. State Habeas Record at 520. The state habeas court extensively discussed the detailed testimony that filled in the outline drawn by the defense’s strategy. State Habeas Record at 520-24.

Russell, however, claimed in his state habeas application that counsel was deficient in preparing a punishment-phase case. State habeas counsel interviewed individuals who knew Russell, many of whom had testified at his trial, and obtained affidavits from them describing Russell’s background. State habeas counsel gave the affidavits to Dr. Mark Cunningham, a psychologist who often appears as an expert witness in capital cases. Dr. Cunningham reviewed the trial, the new affidavits, and record evidence. Dr. Cunningham prepared a report with the conclusions he derived from his review.

With that background, Russell claimed that trial counsel did not present an adequate punishment defense. Russell based his *Strickland* claim on a list of “adverse developmental factors” he experienced, as listed by Dr. Cunningham: generational family dysfunction, mother’s teenage status at outset of childbearing, father abandonment, learning disabilities attention and concentration problems and school failure, bullied by peers, child neglect, inadequate parental supervision and guidance with mother’s acceptance of drug trafficking proceeds, corruptive influence of extended family, chronic poverty, alcoholism of stepfather, chronic emotional estrangement and hostility in relationship of mother and stepfather, corruptive community influences, teen onset drug trafficking, community violence exposure with gunshot victimization

and victimization of family, evidence of severe psychological disorder, pathological relationship with Tanjala Brewer. State Habeas Record at 65-66.

Contrasting Russell's habeas evidence against that presented at trial, the state habeas court found that "trial counsel presented essentially the same evidence at punishment that [Russell] now contends should have been presented: generational family dysfunction, economic deprivation, [Russell's] mother's age of seventeen at the time of [his] birth, [his] father's abandonment, [his] teenage drug dealing, and community violence." State Habeas Record at 525. The state habeas court recognized that Dr. Cunningham's affidavit exceeded the scope of the trial evidence by alleging marital discord among Russell's parents, a home plagued by neglect, childhood hyperactivity, and a possible psychological disorder. The state habeas court, however, found Dr. Cunningham's affidavit "unpersuasive" and his conclusions "far-reaching" because the trial evidence directly contradicted many of his opinions. State Habeas Record at 525-26.¹⁶ Also, the state habeas court endorsed trial counsel's belief that "specific evidence of [Russell's] life and background, such as the evidence the defense presented to the jury, would be more effective than studies of convicted murderers." State Habeas Record at 526.

With that understanding, the state habeas court found that "counsel cannot be ineffective": (1) for "choosing to present mitigation evidence in a different manner than others"; (2) when "the presented evidence [is] essentially the same as the evidence [Russell] now complains should have been presented"; (3) for not presenting "a reasonable coherent theory of mitigation" when it actually presented a "apparent, predominate, and coherent" theme similar to that alleged on habeas review; (4) not presenting the "less-than authoritative and far-reaching" testimony of Dr. Cunningham; and (5) not "presenting evidence that undermines and is at odd

¹⁶ A federal court has reached similar conclusions about similar testimony by Dr. Cunningham, finding that "his testimony would seem hollow-and even unbelievable . . ." *United States v. Bourgeois*, 2011 WL 1930684, at *60 (S.D. Tex. 2011).

with the presented mitigation strategy.” State Habeas Record at 532-33. In sum, the state habeas court found that counsel was not deficient in the preparation or presentation of evidence.

In his federal petition, Russell relies on the same evidence he presented in state court to allege ineffectiveness in defending against a death sentence. Russell acknowledges that this Court must defer to the state court’s findings and conclusions. Federal consideration of ineffective-assistance claims that the state courts have resolved on the merits marries two forgiving standards: AEDPA deference to the integrity of state court judgments and *Strickland*’s deference to counsel’s decisions. While “[s]urmounting *Strickland*’s high bar is never an easy task,” a habeas petitioner’s duty to “[e]stablish[] that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). “The standards created by *Strickland* and § 2254(d) are both highly deferential, . . . and when the two apply in tandem, review is doubly so.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted); *see also Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Together, these standards create a “doubly” deferential review that allows a state decision to stand if there is “any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Richter*, 562 U.S. at 105.

Russell’s federal petition does not dispute the state habeas court’s findings and conclusions, other than to argue that counsel should have presented additional mitigating evidence because the prosecutor had urged jurors to find a nexus between the evidence and the charged offense. The essence of Russell’s argument is that trial counsel should have “beefed up” the mitigation defense. (Docket Entry No. 37 at 61). Courts, however, are disinclined to find *Strickland* error because counsel could have done more. Arguments such as that made by Russell “come down to a matter of degrees” which is particularly susceptible “to judicial second-

guessing.” *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000). The Fifth Circuit has refused to find *Strickland* error when trial counsel presented the jurors with similar mitigating evidence, even if another attorney would have done so differently or more fully. See *Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007); *Rodriguez v. Quarterman*, 204 F. App’x 489, 501 (5th Cir. 2006); *Alexander v. Quarterman*, 198 F. App’x 354, 359-60 (5th Cir. 2006); *Parr v. Quarterman*, 472 F.3d 245, 257–58 (5th Cir. 2006).

The state habeas court issued specific factual findings relating to Dr. Cunningham’s affidavit, stating that his opinions were not credible or believable. Russell has not overcome the presumption of correctness afforded those findings. 28 U.S.C. §2254(e)(1). Importantly, basing a claim on Dr. Cunningham’s affidavit and arguing that counsel should have presented “more accurate and stronger arguments” against a death sentence “is simply an argument for a different strategy . . .” *King v. Davis*, 703 F. App’x 320, 330 (5th Cir. 2017). Counsel developed a strategy to present a mitigating case that largely only differed in detail from that on which Russell bases his *Strickland* claim. Perhaps counsel could have presented a more-robust case, but “the test for ineffectiveness is not whether counsel could have done more; perfection is not required.” *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995). With the doubly deferential standard afforded the state court adjudication of *Strickland* claims, Russell has not shown that the state court’s rejection of his sixth claim was contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1). This claim is denied.

VIII. Ineffective Assistance Regarding Evidence of Russell’s Future Threat to Society

Russell’s eighth claim argues that trial counsel deficiently prepared a case for a favorable answer to Texas’ future-dangerousness special issue. On state habeas review, Russell claimed that trial counsel failed to present any evidence that would rebut the State’s argument that he

would be a future societal danger. Russell argued that counsel should have presented the jury with information similar to that contained in a report from Dr. Cunningham. Dr. Cunningham would have testified concerning factors that predict violence in prison and his research in capital sentencing. State Habeas Record at 52-117. Dr. Cunningham also would have provided testimony about the threat posed by capital inmates generally, and that posed by Russell given his background and discrete characteristics.

Russell raised this claim in conjunction with his claim involving mitigating evidence. Russell did not provide extensive briefing on this claim when he raised it in state court. On state habeas review, Russell primarily used Dr. Cunningham's report to support his claim that trial counsel ineffectually presented mitigating evidence. In a single paragraph under his general ineffectiveness-at-the-penalty-phase claim with the subheading entitled "The Case Against Future Danger," however, Russell stated that "the defense failed to rebut or describe how inaccurate past violence in the free world serves as a predictor of violence while incarcerated. Cunningham notes countless studies of little predictive value past conduct can serve. Finally, the defense failed to individualize Mr. Russell's violence risk from rates of violence among convicted murderers in Texas prisons." State Habeas Record at 22.

Russell now states that his state habeas application "raised, based on Cunningham's work regarding future dangerousness" a claim for which "[n]othing . . . appeared in the findings of fact and conclusions of law" (Docket Entry No. 37 at 66). To the contrary, the state habeas court's recommendation discusses the use of Dr. Cunningham's report, but follows the format of Russell's habeas application and does so in the context of his general *Strickland* claim. The state habeas court made specific findings about Dr. Cunningham's report:

The Court finds that studies of future dangerousness of convicted Texas murderers are not relevant to the question of [Russell's] future dangerousness as

they do not address [his] characteristics, circumstances, or individual propensity for committing future acts of violence as evaluated by the applicant's jury based on the evidence.

The Court finds based on the credible affidavit of trial counsel Hayes that counsel believes that specific evidence of [Russell's] life and background such as the evidence the defense presented to the jury would be more effective than studies of convicted murderers.

State Habeas Record at 631.¹⁷

Russell does not acknowledge the state court findings to which this Court must defer, much less show by clear and convincing evidence that they are incorrect. At its heart, Russell's argument is simply that counsel should have adopted a different strategy at the penalty phase. A reasonably attorney could come to the conclusion that academic discussion about crime statistics could be less effective than lay testimony, and in fact could weaken that testimony. The Court finds that Russell has not shown that the state habeas court's rejection of this claim was contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1). This claim is denied.

IX. Denial of a Hearing on State Habeas Review

In his ninth ground for relief, Russell argues that the state habeas court violated his constitutional rights by not holding a hearing in which his expert Dr. Cunningham could testify. Russell did not raise this claim in state court and has not overcome the resultant procedural bar. Even if the Court could reach the merits of his claim, however, "errors in state postconviction proceedings will not, in and of themselves, entitle a petitioner to federal habeas relief." *Morris v. Cain*, 186 F.3d 581, 585 n.6 (5th Cir. 1999); *see also Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995). The Court summarily denies claim nine.

¹⁷ Counsel opined that "specific evidence of the defendant's life and background, such as [was] presented to the jury, would have had more effect than studies of violence among convicted murderers." State Habeas Record at 510-11.

CERTIFICATE OF APPEALABILITY

Under AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a Certificate of Appealability ("COA"). *See* 28 U.S.C. § 2253(c). Russell has not yet requested that this Court grant him a COA, though this Court can consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). The Fifth Circuit anticipates that a court will resolve any questions about a COA in the death-row inmate's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *Miller-El I*, 537 U.S. at 336-38. On the other hand, a district court that has denied habeas relief on procedural grounds should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484; *Miller-El I*, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Having considered the merits of Russell's petition, and in light of AEDPA's standards and controlling precedent, this Court determines that a COA should not issue on any claim.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Respondent's motion for summary judgment (Docket. No. 47) and **DENIES** Petitioner Pete Russell, Jr.'s Petition for Writ of Habeas Corpus **WITH PREJUDICE**. All outstanding motions are otherwise **DENIED**. A Certificate of Appealability is **DENIED** with respect to all claims.

It is so ORDERED.

SIGNED on this 23rd day of July, 2019.

A handwritten signature in black ink, appearing to read "Kenneth M. Hoyt", written over a horizontal line.

Kenneth M. Hoyt
United States District Judge

EXHIBIT 3

**Court of Criminal Appeals Order Denying Relief,
November 27, 2013**



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-78,128-01

EX PARTE PETE RUSSELL, JR.

ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. 898795-A IN THE
262nd DISTRICT COURT OF HARRIS COUNTY

Per Curiam.

ORDER

This is an 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. *Russell v. State*, 155 S.W.3d 176 (Tex. Crim. App. 2005).

Applicant presents three allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing. The trial court adopted the State's proposed findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial court's findings and conclusions. Therefore, based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 27th DAY OF NOVEMBER, 2013.

Do Not Publish

EXHIBIT 4

**State's Proposed Findings of Fact, Conclusions of Law, and
Order, Adopted by District Court Judge, Entered May 9, 2013**

§ HARRIS COUNTY, TEXAS

FACTS OF THE OFFENSE

5. The Court finds that the State presented evidence that the applicant committed the capital murder of the complainant, Tanjala Brewer, on or about August 12, 2001.

6. Neighbor Andre Wilson saw the applicant and the complainant walking toward the complainant's house around 11:00 p.m. on August 12, 2001, and Wilson heard the complainant's screen door close around 1:00 a.m. and saw the applicant walk down the complainant's driveway (XVI R.R. at 19-31).

7. Wilbert Reed, who started dating the applicant after they met on August 5, 2001, testified the complainant wanted to change her drug lifestyle and that he talked with the complainant on the phone for about five minutes around 1:00 a.m. on August 13TH, but the complainant's phone was busy the remainder of the night when Reed tried to call her every thirty minutes (XV R.R. at 179-89).

8. Reed stopped by the complainant's house after work around 7:30 or 8:00 a.m., got no answer to his knock, went to a nearby restaurant for breakfast, and then returned to the complainant's house where he left a note under the front door (XV R.R. at 192-6).

9. The complainant's body was discovered after Pete Russell, the complainant's uncle who is not related to the applicant, and two other men smelled gas coming from the complainant's locked house and Russell crawled through a window and found the complainant's body in the kitchen (XV R.R. at 38-76).

10. The complainant's cause of death was multiple sharp force wounds; she suffered twenty-three sharp force injuries to her body; her left lung was lacerated; and, she had two deep stab wounds across her neck, a deep stab wound under her left breast, and defensive wounds on her hands (XVII R.R. at 45-67).

11. There was blood throughout the complainant's kitchen, blood on a kitchen towel, a bloody shoeprint on the floor, and a bloody steak knife on the

counter separating the kitchen and living room; the door of the second bedroom had been kicked in; a bloody hand towel and a machete were on the complainant's bed where blood dripped from the mattress to the carpet; "She is a devil. I am God" was written in blood on the closet doors; "SH" was written in blood on the mirror; the writing appeared to have been done using the bloody hand towel found on the complainant's bed (XV R.R. at 127-32, 143-50, 162-5).

12. There was a strong smell of gas in the house and burning candles were on the living room heater and the kitchen counter; the telephone was off the hook, and drag marks from the bedroom indicated that the complainant had been dragged into the kitchen (XV R.R. at 92-100, 106-08, 114-15, 134-5).

13. Deborah Calhoun, the complainant's best friend, testified that the complainant and the applicant stopped dating in May, 2001, but they continued to see each other; that the applicant was angry in July because he thought the complainant set him up for his May drug arrest; and, that the complainant was afraid of the applicant during the last two weeks of her life (XVI R.R. at 43-56, 62-3, 72-3)(XV R.R. at 204-5). *See Finding No. 23, infra.*

14. The applicant was arrested, pursuant to an arrest warrant, on August 16, 2001, at a local motel where he was found sitting in the bathtub with foam around his mouth and holding a bottle that appeared to contain Drano (XVI R.R. at 96-7, 104, 116-8)(XVII R.R. at 9-10).

15. The applicant had scratches on his neck, reddish marks on his right fist and palm, and a large cut that had started to heal on his left hand, a type of cut commonly received when stabbing another person (XVI R.R. at 129-32, 167, 177).

16. The applicant was taken to the hospital where his stomach was pumped, and he later gave two statements to police (XVI R.R. at 145-57)(XVII R.R. at 11-9).

17. In his August 16, 2001 statement, the applicant claimed that the complainant tried to set him up with "the laws;" that he went to the complainant's

24. Deborah Calhoun testified that the complainant pointed a gun at Bruce Moore's face when she, the complainant, the applicant, and Moore were at a bus stop; the applicant assaulted Eric Williams about a week before the complainant's murder, and the applicant was a drug dealer in the neighborhood (XIX R.R. at 29-34).

25. The State presented State's Exhibits 157 and 157A, a pen packet and stipulation of evidence in which the applicant stipulated that he is the same person who was convicted of aggravated robbery in cause no. 611959 in the 185TH District Court on November 27, 1991; that he is the same person who was convicted of aggravated assault in cause no. 602499 in the 185TH District Court on November 27, 1991; and, that he is the same person who was convicted of delivery of a controlled substance in cause no. 876183 in the 262ND District Court on August 9, 2001 (XIX R.R. at 67-9).

First Ground – alleged ineffective assistance of counsel/mitigation evidence

26. The Court finds, based on the credible affidavit of trial counsel Ron Hayes, that the defense prepared and filed pre-trial motions, interviewed witnesses, obtained discovery from the State, reviewed the State's file, talked to the applicant numerous times about the offense and pending trial, retained a mitigation specialist, talked to the applicant's family, and talked the applicant about his background and life. *State's Writ Exhibit A, September 12, 2012 affidavit of counsel Hayes.*

27. The Court finds, based on the credible affidavit of trial counsel Ron Hayes, that the defense mitigation strategy centered on the effects of the applicant being raised among drug dealing and violence in the Fifth Ward, being abandoned by his father, having a family history of crime with relatives in prison, having a mother who had to work at two jobs and get food stamps, and the applicant being a good person who did not have much of a chance. *State's Writ Exhibit A, September 12, 2012 affidavit of counsel Hayes.*

28. The Court finds that, during the punishment phase of the trial, the applicant presented the testimony of his mother Jevenia Russell, his younger brother Jewon Russell, his younger sister Robette Russell, his aunt Letha Robertson, his uncle Jermaine Willis, his aunt Jacqueline Gibson, his uncle Joel Brantley, his aunt Janet Payne, his friend Christian Lockhart, and his friend Cedric Young (XIX R.R. at 80-255).

29. The Court finds that Jevenia Russell, the applicant's mother, testified at punishment that she was seventeen years old when the applicant was born and the applicant's father was stationed in Okinawa with the Marines; that they divorced when the applicant was two or three; that the applicant's father only paid court-ordered child support twice; and, that the father was not involved in the applicant's life (XIX R.R. at 80-4).

30. The Court finds that Jevenia Russell further testified that she worked in food service for the Houston Independent School District and applied for food stamps; that she worked at night in the labor pool after her job at HISD; that her family lived in the Fifth Ward; that the applicant was a mild-mannered child who was no problem, kept to himself, and stayed close to home; and, that she helped the applicant with homework, cooked for him, and was both mother and father to him (XIX R.R. at 84-91).

31. The Court finds that Jevenia Russell further testified that the applicant acted as the man of the house, and his younger brother and sister minded him and looked up to him; that the applicant was close to his siblings and disciplined them by talking to them, not hitting them; that Russell married Guner Garrett when the applicant was about nine years old, and Garrett set rules for the applicant who abided by them during his teenage years; that the applicant played football in middle school, and Russell took the applicant to practice after school; that the applicant had a heart murmur as a child but his activities were not limited; that he attended Olivet

Baptist Church until he was sixteen or seventeen years and was active in the children's choir and other church youth events; and, that the applicant's step-father died when the applicant was about twenty-two years old (XIX R.R. at 84-102).

32. The Court finds that Jevenia Russell testified that she talked to the applicant when he began skipping school and had rules for him to follow; that she tried to keep him in school and enrolled him in trade school which he seemed to enjoy; and, that he did not finish high school (XIX R.R. at 88-91).

33. The Court finds that Jevenia Russell testified that the applicant helped the elderly and did errands for an elderly man in a neighborhood retirement home; that she was not aware of the applicant's criminal activity, including drugs, until he was sent to prison for aggravated robbery and aggravated assault when he was seventeen or eighteen years old; and, that she was aware of the incident between Shorty [Devarick Williams] and the applicant but claimed someone else fired a gun when the applicant was turning to leave (XIX R.R. at 90-9).

34. The Court finds that Jevenia Russell testified that the applicant stayed with her when he was released from prison; that the applicant's sister, her children, and the applicant's brother's children were also living with Russell at that time; that Russell became aware that the applicant and the complainant were dating about three months after the applicant's release from prison; that she and the complainant, a religious person, were close; that Russell called the complainant "Baby Girl," and the complainant called Russell "Mom;" and, that the applicant's and complainant's relationship lasted until the complainant's death (XIX R.R. at 101-4).

35. The Court finds that Jewon Russell, the applicant's younger brother, testified that he was presently confined to prison for burglary of a habitation, but that he would have finished high school and gone to college if he had listened to the applicant; that Jewon Russell's father was not present when Jewon was raised; that the applicant and their mother were close; that the applicant would clean house and

look after their mother if she were sick; that the applicant talked about the value of school when Jewon started skipping school; that the applicant disciplined him and their sister by talking with them, cutting their allowance, or sending them to their room, never by physical punishment; and, that Jewon never knew the applicant to be violent and never saw the applicant being violent in any relationship with women (XIX R.R. at 147-52).

36. The Court finds that Robette Russell, the applicant's younger sister, testified that she worked at Ben Taub Hospital; that her father, Robert Thomas, was not in the house when she was raised; that the applicant was like a father to her; that the applicant would tell her the right thing to do; that the applicant continued encouraging Robette after he went to prison when Robette was eleven or twelve years old; that Robette learned that the applicant was dealing drugs in the Fifth Ward when he was about seventeen or eighteen years old; but, that the applicant would not sell drugs to a neighborhood man who was like an uncle to them (XIX R.R. at 154-7).

37. The Court finds that Robette Russell also testified that the applicant played with and watched Robette Russell's children when he was released from prison; that the applicant guided and disciplined Karen Foster's little girl and encouraged her to go to school; that Robette had conversations with the applicant about him leaving the drug business; and, that the applicant tried to start a snack bar business but it did not succeed (XIX R.R. at 158-64).

38. The Court finds that Letha Robertson, the applicant's aunt, testified that she lived in the Fifth Ward until 1999; that the applicant's father was not involved in the applicant's life and was not present for the applicant's trial; that the applicant had a good relationship with his mother who did her best as a single mother; that the applicant was a nice, good quiet boy who was not angry, hostile, or violent; that

the applicant was close to Robertson's daughters; and that he applicant visited and helped his grandmother (XIX R.R. at 166-8).

39. The Court finds that Jermaine Willis, the applicant's uncle, testified that he was in prison for murder; that he was a drug dealer and tried to get the applicant, his neighbor in the Fifth Ward, to do drugs and skip school; that the applicant was quiet and mild-mannered and followed Willis' sometimes negative lead; that Willis never saw anything about the applicant that led Willis to believe that the applicant would be convicted of capital murder; and, that the applicant always kept his emotions in check (XIX R.R. at 174-9).

40. The Court finds that Jacqueline Gibson, the applicant's aunt, testified that she lived in the Fifth Ward while the applicant was growing up there; that her daughters were close to the applicant; that the applicant was closest to his great-grandmother and to Jermaine Willis, Gibson's younger brother; that the applicant had some problems with the law and the applicant's mother tried to tell the applicant what was right; and, that the applicant was a quiet, obedient child who was influenced by others (XIX R.R. at 186-91).

41. The Court finds that Joel Brantley, the applicant's uncle, testified that he saw the applicant on holidays and during family gatherings; that the applicant's mother was hard-working and provided for the applicant and her family; that the applicant was a good child; and, that Brantley was disappointed in the applicant's father because he never helped the applicant and only visited him once (XIX R.R. at 202-6).

42. The Court finds that Janet Payne, the applicant's aunt, testified that she spent a lot of time with the applicant when he was growing up in the Fifth Ward; that the applicant visited and played with her children; that the applicant was a regular, mild-mannered, normal child; that he attended Olivet Baptist and was on the church

usher board; and, that there were no warning signs in the applicant's life that led Payne to believe he would be convicted of capital murder (XIX R.R. at 211-5).

43. The Court finds that Cedric Young, the applicant's best friend while growing up in the Fifth Ward, testified that he knew the applicant sold drugs but that was something that occurred in the Fifth Ward where there were many negative influences, and that Young knew that the applicant shot Shorty [Devarick Williams] but Young saw Shorty and the applicant having a normal conversation after the applicant was released from prison (XIX R.R. at 233-45).

44. The Court finds that Christian Lockhart testified that she and the applicant read the Bible together; that the applicant encouraged her with her church choir singing; that the applicant always treated her with respect, never anger; that the applicant helped his grandmother; and, that Lockhart was never afraid of the applicant but stopped seeing him because of her parents (XIX R.R. at 220-3).

45. The Court finds that, during a bench conference, trial counsel stated that no one knew what the jury would consider mitigating; that "...the dynamics of the family itself, whether good or bad, is relevant to the jury to consider whether or not there is some evidence to mitigate against the taking of the person's life...;" that "...it goes to the raising and the guidance and the influence that that family had over" the applicant; and, that the applicant "grew up in an atmosphere that created" a family where members were sent to prison (XIX R.R. at 134-40).

46. The Court finds, based on the presented mitigation evidence, trial counsel's credible affidavit, and trial counsel's comments during the bench conference concerning mitigation, that counsel presented a reasonable, coherent theory of mitigation: the applicant was essentially a good person who was adversely affected by his environment and influences on him and the instant offense was an aberration of the applicant's character.

47. The Court finds that trial counsel presented essentially the same evidence at punishment that the applicant now contends should have been presented: generational family dysfunction, economic deprivation, the applicant's mother's age of seventeen at the time of the applicant's birth, the applicant's father's abandonment, the applicant's teenage drug dealing, and community violence. See *Findings Nos. 28 - 44, supra*.

48. The Court finds unpersuasive, speculative, and far-reaching Mark Cunningham's habeas construct of alleged emotional implications of alcoholism of the applicant's step-father that Cunningham derives from Susan Paige, the former girlfriend of the applicant's uncle, Jermaine Willis, reporting that the applicant's step-father "stayed in his room or out in the street drinking a beer" when he was home and Jewon Russell noting that their step-father "drank beer heavily." See *applicant's exhibit e, Cunningham's report at 34-5*.

49. The Court finds unpersuasive, speculative, and far-reaching Mark Cunningham's habeas construct of alleged marital discord that Cunningham derives from Susan Paige, the former girlfriend of the applicant's uncle, commenting that the applicant's mother and step-father "never spoke a civil word" and led separate lives. *Id.*

50. The Court finds unpersuasive Mark Cunningham's habeas construct of alleged "child neglect" that Cunningham derives from Susan Paige, the applicant's uncle's former girlfriend, reporting that the applicant's mother's house was "filthy," especially in light of extensive evidence that the applicant's mother nurtured the applicant, worked and attempted to provide for the applicant, and teach him what was right.

51. The Court finds far-reaching and unpersuasive Mark Cunningham's habeas construct of alleged hyperactivity (ADHD) based on the applicant's elementary school records that Cunningham admits do not reflect such diagnosis.

52. The Court finds that Mark Cunningham's habeas belief that the applicant suffers from a "significant psychological disorder" and defense expert's reports that the applicant is allegedly psychotic is at odds with and undermines the applicant's presented mitigation strategy that he was a non-violent, good person whose killing the complainant was a one-time aberration caused by his love and jealousy of the complainant (XVII R.R. at 93-108, 118-9).

53. The Court finds that evidence of the applicant's prison record of two assaults and eleven "trivial" offenses is not likely to be considered as mitigating evidence concerning the applicant's future dangerousness in prison.

54. The Court finds that studies of future dangerousness of convicted Texas murderers are not relevant to the question of the applicant's future dangerousness, as they do not address the applicant's characteristics, circumstances, or individual propensity for committing future acts of violence, as evaluated by the applicant's jury based on the evidence.

55. The Court finds, based on the credible affidavit of trial counsel Hayes, that counsel believes that specific evidence of the applicant's life and background, such as the evidence the defense presented to the jury, would be more effective than studies of convicted murderers: *State's Writ Exhibit A, September 12, 2012 affidavit of counsel Hayes*.

56. The Court finds, based on the credible affidavit of trial counsel Hayes, that there was no indication that the applicant suffered from ADHD or was bullied as a child, and that counsel did not consider postconviction reports of the applicant's step-father drinking beer or leading a separate life from the applicant's mother, or the applicant's mother's house being dirty as evidence that the jury would have considered more mitigating, or even as mitigating, as the evidence defense counsel presented. *State's Writ Exhibit A, September 12, 2012 affidavit of counsel Hayes*.

57. The Court finds that, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court found defense counsel ineffective for failing to investigate, based on counsel choosing not to file a social history, the prevailing norm in Maryland, although he was provided funds for its preparation and based on counsel stopping investigation with the presentence investigation report and the Baltimore social services records of Wiggins' foster care placement, where there was a reasonable probability that the outcome of the proceedings would have been different if Wiggins' background had been presented in light of the extent of Wiggins' abuse and his lack of prior violent conduct.

58. The Court finds that, in *Williams v. Taylor*, 529 U.S. 362, 369-73 (2000), the Supreme Court found defense counsel ineffective for failing to introduce evidence of Williams' childhood abuse, borderline mental retardation, and good behavior in prison even though counsel were aware of his juvenile and social records documenting his abuse and background but erroneously thought that state law did not permit the introduction of such records.

59. The Court finds, based on the thorough and extensive evidence presented by trial counsel during the punishment phase of the applicant's trial, that the Supreme Court's decisions in *Williams* and *Wiggins* are distinguishable from the applicant's case.

Second Ground – alleged ineffective assistance of counsel/guilt-innocence

60. The applicant was charged with the intentional murder of the complainant committed in the course of committing and attempting to commit the offense of retaliation (I C.R. at 2).

61. The Court finds, based on the credible affidavit of trial counsel Hayes, that the defense theory of the case was to rebut the element of retaliation by showing that the applicant and the complainant were involved in a relationship but the complainant saw other men; that the complainant and the applicant argued on the night of the

discussion that counsel wanted to elicit evidence that the complainant evoked the same emotions and anger in other men as she did in the applicant (XV R.R. at 217-18).

66. The Court finds, based on the credible affidavit of trial counsel Hayes, that reports of the applicant being psychotic would be counter-productive to the defensive theory that the applicant's murder of the complainant was a one-time occurrence prompted by their relationship, rather than retaliation. *State's Writ Exhibit A, September 12, 2012 affidavit of counsel Hayes.*

67. The Court finds, based on the credible affidavit of trial counsel, that counsel would not have presented evidence that the applicant allegedly held his former girlfriend hostage or threatened her, even if counsel had been aware of such evidence, because it would be counter-productive to the defensive theory that the applicant's murder of the complainant was a one-time occurrence prompted by their relationship, rather than retaliation. *State's Writ Exhibit A, September 12, 2012 affidavit of counsel Hayes.*

Third Ground - alleged ineffective assistance of trial and appellate counsel/jury argument

68. The Court finds that, at the conclusion of the guilt-innocence phase of the trial, the State argued that the jury charge sets out the offense of capital murder; that it is the State's burden to prove that the applicant intended to cause the death; and, that it was in conjunction with retaliation (XVII R.R. at 25).

69. The Court finds that, when continuing argument, the State then noted that defendant counsel had "gone into a lot about motive and what we have to prove in regards to a motive;" that retaliation was what the State had to prove; that the State was not required to prove motive; and, that if the jury found that a retaliation was being committed at the time of the murder, then it would have found that a capital

murder was committed regardless of whether there was also some element of jealousy or love (XVIII R.R. at 25-6).

70. The Court finds that trial counsel did not object to the State's cited argument about proving retaliation.

71. The Court finds that the trial court instructed the jury, in part, that a person commits capital murder if he intentionally murders in the course of committing or attempting to commit the offense of retaliation; that "a person commits the offense of retaliation if he 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 witness, prospective witness, or informant; or a person who has reported, or who the actor knows intends to report the occurrence of a crime;" and, that the jury will acquit the defendant of capital murder unless it finds so from the evidence beyond a reasonable doubt (I C.R. at 350-1).

72. The Court finds that the State is required to prove beyond a reasonable doubt that the accused intentionally killed another in the course of committing or attempting to commit one of the underlying felonies set out in TEX. PEN. CODE ANN. § 19.03 if an underlying felony is alleged, as retaliation was alleged in the applicant's case (I Cl.R. at 2).

73. The Court finds that, by its nature, the offense of retaliation implicitly incorporates a reason for the action i.e., "in retaliation for or on account of the service or status of another as a public servant, witness, prospective witness, or informant; or person who has reported or who the actor knows intends to report the occurrence of a crime." TEX. PEN. CODE ANN. § 36.06 (a)(1).

74. The Court finds that the State, during its argument, acknowledged that "there is kind of a connection as to why the offense [retaliation] was committed" and pointed out that the lesser-included offense of murder did not require "any element that requires us to prove an element of motive," i.e., retaliation (XVIII R.R. at 26).

75. The Court finds that the State's jury argument followed the law given to the jury in the trial court's charge.

76. The Court finds that the State's cited jury argument responded to trial counsel's earlier jury argument that the State had the burden of proof to "likewise, prove to you beyond a reasonable doubt that the cause of the murder, the motive was retaliation for acts performed by Ms. Brewer [complainant] as an informant" (XVIII R.R. at 17).

77. The Court finds, based on the credible affidavit of trial counsel Hayes, that trial counsel reviewed the cited State's argument and that the prosecutor correctly argued that the State is not required to prove motive but it does have to prove retaliation. *State's Writ Exhibit A, September 12, 2012 affidavit of counsel Hayes.*

78. The Court finds that appellate counsel did not claim on direct appeal that the State's cited jury argument was erroneous.

79. The Court finds that appellate counsel does not have a constitutional duty to raise every non-frivolous issue and cannot be considered ineffective for not presenting meritless claims.

CONCLUSIONS OF LAW

First Ground – alleged ineffective assistance of counsel/mitigation evidence

1. Counsel cannot be considered ineffective for choosing to present mitigation evidence in a different manner than others, i.e., Dr. Mark Cunningham, would have chosen, in light of the extensive evidence counsel presented at trial to mitigate against the death penalty and in light of the presented evidence being essentially the same as the evidence the applicant now complains should have been presented. *See and cf. Tucker v. Johnson*, 242 F.3d 617, 622 (5TH Cir. 2001), *cert. denied*, 533 U.S. 972, 122 S. Ct. 18 (distinguishing *Williams v. Taylor*; holding that counsel not ineffective, notwithstanding that counsel could have presented stronger mitigation case, where

counsel presented evidence of poor home life and substance abuse problems but did not present additional evidence of sexual and emotional abuse as child; finding that no showing of reasonable probability that results would have been different if additional evidence presented); *see also Harris v. Cockrell*, 313 F.3d 238 (5TH Cir. 2002), *cert. denied*, 494 U.S. 1090, 110 S. Ct. 1837 (holding counsel not ineffective for allegedly failing to investigate and present mitigation evidence in light of weakness of evidence defendant argues should have been presented).

2. Counsel cannot be considered ineffective for failure to present a reasonable, coherent theory of mitigation in light of the apparent, predominant, and coherent theme presented throughout trial, particularly at punishment: the applicant was essentially a good person who was adversely affected by the atmosphere in which he was raised and that the instant offense was an aberration of the applicant's character. *See Ex parte Ewing*, 570 S.W.2d 941 (Tex. Crim. App. 1978).

3. Counsel cannot be considered ineffective for not presenting less-than authoritative and far-reaching conclusions, such as Dr. Mark Cunningham's habeas scenarios of (a) alleged emotional implications of the step-father's purported alcoholism based on the applicant's uncle's former girlfriend's habeas statement that the applicant's step-father either was in his room or drinking a beer on the street and based on the applicant's half-brother's habeas statement that their step-father "drank beer heavily;" (b) alleged child neglect based on the applicant's uncle's former girl-friend's habeas statement that the applicant's mother's house was "filthy;" (c) alleged marital discord based on the applicant's uncle's former girlfriend's habeas statement that the applicant's mother and step-father led separate lives and "never spoke a civil word;" and, (d) alleged learning disabilities and hyperactivity (ADHD) based on the applicant's elementary school records that are lacking such diagnoses. *See Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App.

1993)(noting that counsel's strategic choices made after thorough investigation of relevant law and facts are "virtually unchallengeable").

4. Counsel cannot be considered ineffective for not presenting evidence that undermines and is at odd with the presented mitigation strategy that the applicant was a non-violent, good person who was raised in poor circumstances and whose killing the complainant was a one-time aberration caused by his love and jealousy of the complainant. See *Mooney v State*, 817 S.W.2d 693, 697 (Tex. Crim. App. 1991)(holding that defendant must show how more in-depth investigation would have benefited him in order to show harm in ineffective assistance claim).

5. The applicant fails to show ineffective assistance of counsel based on an alleged failure to investigate and present punishment evidence and/or to present punishment evidence in a particular manner. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984)(noting that competency of representation is not to be judged by hindsight or by facts unknown at time of trial).

Second Ground – alleged ineffective assistance of counsel/guilt-innocence

6. Counsel cannot be considered ineffective for presenting the reasonable defensive strategy that the applicant "snapped" and killed the complainant because of her involvement with other men, not in retaliation – an underlying element of the offense. See *Kunkle*, 852 S.W.2d at 505 (holding that counsel's strategic choices made after investigation of relevant law and facts are virtually unchallengeable and strategic choices made after less than complete investigation are reasonable to extent that "reasonable professional judgments support the limitations on investigations.")(citing *Strickland*, 466 U.S. at 668).

7. The applicant fails to show deficient performance, much less harm, based on counsel not presenting evidence that the applicant was a violent psychopath or that the applicant held a previous girlfriend hostage and threatened her when their relationship ended – evidence that, even if known, would have been counter-

productive to the defense's strategy. See *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000)(citing *Strickland*, 466 U.S. at 689)(holding that review of counsel's representation is highly deferential; counsel is afforded strong presumption that actions fall within wide range of reasonably effective assistance); see also *Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990)(reviewing court will not "second-guess through hindsight" the strategy of counsel, nor will fact that another attorney might have pursued different course support finding of ineffectiveness).

Third Ground - alleged ineffective assistance of trial and appellate counsel/jury argument

8. The applicant fails to show ineffective assistance of trial counsel based on a lack of objection to the State's proper jury argument that it had the burden to prove capital murder; that it was not required to prove motive to support a conviction for capital murder; and, that the State is required to prove the underlying offense of retaliation. See *Vuong v. State*, 830 S.W.2d 929, 934 (Tex. Crim. App. 1992)(citing *Garcia v. State*, 495 S.W.2d 257, 259 (Tex. Crim. App. 1973)); see also *Dunn v. State*, 819 S.W.2d 510, 513 (Tex. Crim. App. 1991)(noting that State had burden of proof to prove underlying felony in capital conviction); see and cf. *Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990)(holding counsel not ineffective for failing to request jury charge on lesser-included of murder when the evidence did not support such charge); TEX. PEN. CODE ANN. § 19.03.

9. Trial counsel are not ineffective for not objecting to the State's proper argument that did not lessen the State's burden of proof and properly recited the law in the jury charge. See *Tong v. State*, 25 S.W.3d 707, 712-3 (Tex. Crim. App. 2000)(holding counsel not ineffective for lack of objection to jury argument that was reiteration of law on which jury charged)(citing *Lagrone v. State*, 942 S.W.2d 602, 619 (Tex. Crim. App. 1997)).

10. Trial counsel are not ineffective for not objecting to the State's proper response to trial counsel's earlier jury argument that the State had the burden of proof to "likewise, prove to you beyond a reasonable doubt that the cause of the murder, the motive was retaliation for acts performed by Ms. Brewer [complainant] as an Informant" (XVIII R.R. at 17). See *Borjan v. State*, 787 S.W.2d 53, 55 (Tex. Crim. App. 1990)(holding summary of evidence, reasonable inference from evidence, response to opposing counsel's argument, and plea for law enforcement proper areas for jury argument).

11. In the alternative, the applicant fails to show that the results of the proceeding would have been different if counsel had objected to the cited argument. See and cf. *Dinkins v. State*, 894 S.W.2d 330, 356 (Tex. Crim. App. 1995)(holding instruction to disregard cured harm of State's argument commenting on defendant's failure to testify); *Orona v. State*, 791 S.W.2d 125, 130 (Tex. Crim. App. 1990)(holding any error in argument had no impact in light of other evidence). The applicant fails to meet the two-prong *Strickland* test to show ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984).

12. The applicant fails to show that the results of the proceeding would have been different, but for appellate counsel's not presenting on direct appeal the claim of ineffective assistance of trial counsel for not objecting to the cited jury argument. See *Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994)(*Strickland* standard applies to appellate counsel as well as trial counsel); see also *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983)(holding courts cannot second-guess an appellate attorney's professional judgment to brief only stronger points of error).

13. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

CAUSE NO. 898795-A

EX PARTE	§	IN THE 262 ND DISTRICT COURT
	§	OF
PETE RUSSELL, JR., APPLICANT	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 898795-A and 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. all of the applicant's pleadings filed in cause number 898795-A, including his application for writ of habeas corpus;
2. all of the State's/Respondent's pleadings filed in cause number 898795-A, including the State's/Respondent's Original Answer;
3. all affidavits and exhibits filed in cause no. 898795-A;
4. this court's findings of fact, conclusions of law and order denying relief in cause no. 898795-A;
5. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or State/Respondent in cause no. 898795-A; and
6. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 898795, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Jerome Godinich; 929 Preston St., Ste. 200; Houston, Texas 77002 and to State/Respondent: Roe Wilson,

EXHIBIT 5

**Court of Criminal Appeals Order Dismissing
Second Writ Application, March 8, 2017**



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,128-02

EX PARTE PETE RUSSELL, JR.

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 898795-A IN THE 262ND DISTRICT COURT
OF HARRIS COUNTY

Per curiam.

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.

On August 13, 2001, Applicant fatally stabbed Tanjala Brewer. Applicant believed that the victim had set him up on a delivery of a cocaine charge. Applicant was sentenced to ten years for the delivery of a controlled substance charge, but asked the court to delay the date for execution of the sentence. Applicant committed the instant offense while on bond from the court.

In February 2003, Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted under 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. *Russell v. State*, 155 S.W.3d 176 (Tex. Crim. App. 2005). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Russell*, No. WR-78,128-01 (Tex. Crim. App. Nov. 27, 2013). Applicant's instant post-conviction application for writ of habeas corpus was received in this Court on October 24, 2016.

The record reflects that Applicant is currently challenging his conviction in Cause No. 4:13-CV-03636, styled *Pete Russell v. William Stephens*, in the United States District Court for the Southern District of Texas, Houston Division. The record also reflects that the federal district court has entered an order staying its proceedings for Applicant to return to state court to consider his current unexhausted claims. Therefore, this Court may exercise jurisdiction to consider this subsequent state application. *See Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004).

Applicant presents nine allegations in the instant application. He challenges the sufficiency of the evidence in Claims 1 and 2. He asserts in Claim 3 that the prosecutor improperly argued that "personal moral culpability was equivalent to responsibility for the crime." In Claims 4 and 5, he contends that trial counsel were ineffective for failing to argue, investigate, and prove that he did not kill the victim in the course of committing or

attempting to commit retaliation. In Claim 6, Applicant alleges that the State “might not” have disclosed an engagement ring that was seized from him at the time of his arrest. Applicant asserts in Claim 7 that trial counsel were ineffective for failing “to investigate and present potential evidence” that he “did not pose a future threat of danger to society.” In Claims 8 and 9, he contends that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence and the prosecutor’s improper jury argument on direct appeal.

We have reviewed this application and find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS THE 8TH DAY OF MARCH, 2017.

Do Not Publish

EXHIBIT 6

**Excerpt Regarding Future Dangerousness,
Application for Writ, Filed October 7, 2004**

CAUSE NO. 898795-A

EX PARTE

PETE RUSSELL

X IN THE 262nd DISTRICT COURT
X
X IN AND FOR
X
X HARRIS COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now Pete Russell to urge the following arguments for his writ of habeas corpus:

I.

Mr. Russell was convicted of capital murder and sentence to death. His appeal is still pending.

II. Ineffective Assistance of Counsel at the Punishment Phase

A. Evidence at trial

Mr. Russell was represented by two counsel appointed by this Court: Floyd Freed and Ron Hayes. They hired John Castillo and Gena Vitale to conduct their investigation.

At trial, the prosecution elicited evidence of several of Mr. Russell's past crimes, including the attempted murder of DeVarick Williams, shot by Mr. Russell in 1991, (SF-XVIII-1-90), a robbery of an Apple Tree grocery store, SF-XVIII-91 et seq, XIX-6-18, and for delivery of cocaine, SF-XIX-15-28. After that the state rested.

The defense's punishment phase strategy was essentially one of establishing that Mr. Russell was a good child at one point in his life who started to commit crimes because he lived in one of Houston's worst neighborhoods, the Fifth Ward and because he had no father growing up. The strategy for mitigation can be summed up in Mr. Hayes' closing argument:

*Russell Application for Writ of Habeas Corpus
October 7, 2004 p. 1*

F I L E D
CHARLES BACARISSE
District Clerk
OCT 07 2004
Time: _____
Harris County, Texas
By: _____ Deputy
: 00002 1870015.4948

The children of an alcoholic parent figure are frequently compelled to assume roles of premature responsibility. For example, Pete in his mid-teens provided money to the household through his drug trafficking activities – while Guna's income was apparently being diverted, in part, for alcohol.

In summary, parent figure alcoholism is a broad social/psychological risk factor for relationship problems, self-control deficits and behavior disorders, feelings of defectiveness, psychological disorders, and criminal behavior.

Dr. Cunningham goes on to note the implications of the marital estrangement between Juvenia and Guna Garrett, the corruptive community influences of the Fifth Ward, the implications of teen drug trafficking, and the exposure to violence in the community. While these were factually discussed by counsel, in a cursory fashion, the psychological implications of this violence were never presented until now.

Finally, what was not presented to the jury was Mr. Russell's severe emotional disorder, noted by Drs Jennings and Friedman and ignored by counsel; Cunningham notes the implications in pages 42-50.

In sum, had the defense conducted an adequate investigation and presented it in conjunction with expert testimony, the state would not have been able to argue that no mitigation had been presented. Mr. Hayes would not have had to rely on his argument of a good kid in a bad neighborhood and at least one juror could have returned a verdict of a life sentence. See **Wiggins v Smith**, 529 U.S. 510 (2003).

D. The Case Against Future Danger

But mitigation was not all that the defense ignored; they presented no evidence to rebut the state's case for future danger, including presenting Mr. Russell's prison record in context (two assaults and 11 trivial offenses is below the average of prison inmates). Mr. Russell had a

track record of 8 years without serious violence. Further, the defense failed to rebut or describe how inaccurate past violence in the free world serves as a predictor of violence while incarcerated. Cunningham notes countless studies of little predictive value past conduct can serve. See Cunningham at pp. 53-62. Finally, the defense failed to individualize Mr. Russell's violence risk from rates of violence among convicted murderers in Texas prisons. See pp. 62-65. Counsel incorporates those allegations here.

E. Trial Counsel's Conduct

Wiggins v Smith supra makes it crystal clear that Counsel has a duty to investigate and present mitigating evidence, including evidence that rebuts the state's case for future danger. How do we know that there was an inadequate investigation? The following is a summary of both trial counsel's files; the relevant documents are attached as exhibits.

Pete Russell Jr. is arrested at room 103, Southwinds Motel, 5617 North Freeway, sitting in the bathtub, eating rat poison near 6:00 p.m. on August 16, 2001. **See testimony of Detectives Kennedy Moreno.** Attorney Floyd Freed is appointed to represent Mr. Russell a few days later. By October 2, 2001, attorney Freed has retained John Castillo, an investigator, to work on the pending murder case. In the initial meeting with Castillo, Mr. Freed advises that Mr. Russell has been charged with murder but the case may be "enhanced" to capital murder. On October 3, 2001, Mr. Castillo reviewed the court's file on the case and ran JIMS background checks on Mr. Russell. The case laid dormant until May of 2002.

On May 21, 2002, investigator Castillo interviewed Mr. Russell at the Harris County Jail

EXHIBIT 7

**Excerpt Regarding Future Dangerousness,
Report by Mark Cunningham, Ph.D,
Attached to Application for Writ**

MARK D. CUNNINGHAM, PH.D., ABPP

Clinical & Forensic Psychology
Board Certified in Forensic Psychology – American Board of Professional Psychology
417 Oak Bend, Suite 260 Lewisville, Texas 75067
972-459-0658 Fax 972-459-0958 mdc@markdcunningham.com

Affidavit of Mark D. Cunningham, Ph.D., ABPP

Re: Pete Russell, Jr.

I, Mark D. Cunningham, Ph.D., ABPP, hereby declare:

1. I am a clinical and forensic psychologist, licensed as a psychologist in the states of Arizona, Arkansas, Colorado, Connecticut, Idaho, Indiana, Illinois, Louisiana, New Mexico, Oregon, South Carolina, Tennessee, and Texas. I am over age 21, have personal knowledge of the facts contained in this affidavit, and am competent to testify about them. My curriculum vitae is attached.
2. I received a Bachelor's degree in Psychology from Abilene Christian College in 1973, a Master's degree in Psychology from Oklahoma State University in 1976, and a Ph.D. in Clinical Psychology from Oklahoma State University in 1977. I completed a one-year internship in clinical psychology at the National Naval Medical Center of Bethesda, Maryland. I subsequently served as an active duty Clinical Psychologist at the Naval Submarine Medical Center in Groton, Connecticut from 1978 to 1981. I was an assistant professor of psychology at Hardin-Simmons University in Abilene, Texas from 1981 to 1983. I have maintained a private practice in clinical and forensic psychology with offices in Texas since 1981.
3. I was board certified in Forensic Psychology in 1995 by the American Board of Forensic Psychology, a specialty board of the American Board of Professional Psychology (ABPP). This distinction follows a rigorous examination process and is held by approximately 200 psychologists in the United States. I have served as a work sample reviewer and oral examiner for the American Board of Forensic Psychology. I have provided forensic evaluation services in over 450 cases. I have participated in extensive continuing education in the area of forensic psychology. I have served as an ad hoc reviewer for three peer reviewed journals.
4. I have been recognized as a clinical and forensic psychology expert in testifying regarding sentencing determination issues including mitigation and future dangerousness in both state and federal courts. I have been qualified and testified as a clinical and forensic psychology expert regarding sentencing determination issues in approximately 30 federal capital cases and approximately 60 state capital cases in state and/or federal courts in

Re: Pete Russell, Jr.

Affidavit of Mark D. Cunningham, Ph.D., ABPP, 10-05-04

jurisdictions including Alabama, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Virginia, and West Virginia. I have provided declarations/affidavits and testimony in state postconviction and federal habeas proceedings.

5. I am a nationally recognized scholar regarding psychological evaluations at capital sentencing. I am the first author or co-author of over 15 scholarly papers related to forensic psychology published within the past six years or currently in press in peer reviewed journals, scholarly texts, and professional periodicals. I am first author of the chapter on capital sentencing evaluations in the 12 volume Handbook of Psychology. I have authored or co-authored a number of scholarly papers regarding capital sentencing determinations. These have analyzed case law and statutes relevant to mitigation and violence risk assessment considerations at capital sentencing, discussed routinely observed approaches to these issues by the State and the defense, reviewed methodology that increases the scientific foundation and reliability of capital sentencing evaluations, and/or examined empirical studies and correctional data that can best inform these considerations. My scholarly papers specific to capital sentencing considerations include the following:

Cunningham, M.D., & Reidy, T.J. (1998). Antisocial personality disorder and psychopathy: Diagnostic dilemmas in classifying patterns of antisocial behavior in sentencing evaluations. Behavioral Sciences & the Law, 16, 333-351.

Cunningham, M.D. & Reidy, T.J. (1998). Integrating base rate data in violence risk assessments at capital sentencing. Behavioral Sciences & the Law, 16, 71-95.

Cunningham, M.D., & Reidy, T.J. (1999). Don't confuse me with the facts: Common errors in violence risk assessment at capital sentencing. Criminal Justice and Behavior, 26, 20-43.

Cunningham, M.D. (2001). Bias in capital sentencing evaluations [invited opinion column]. American Psychology and Law Society News, 21, 2, 8-9.

Cunningham, M.D. & Reidy, T.J. (2001). A matter of life or death: Special considerations and heightened practice standards in capital sentencing evaluations. Behavioral Sciences & the Law, 19, 473-490.

Reidy, T.J., Cunningham, M.D. & Sorensen, J. (2001). From death to life: Prison behavior of former death row inmates in Indiana. Criminal Justice and Behavior, 28, 62-82.

Lady T, boy, boy, boy, enough is enough. I must be the biggest trick in town, but that's all good. I was actually buying all that bullshit you been feeding me for the last few days. All I can do is laugh to stop from crying. *I guess Pete is the best man for you.* [emphasis added] You fucked over this. I have so much to say, but I'm going to hold to in cause this would be just another trick you wrote off. You have enough to deal with. I'm out of here and your life. I actually fell in love with you. Will (at February 10, 2003; page 199:4-14)

Conclusion regarding mitigating factors: As outlined in this declaration, these damaging developmental could have been compellingly illustrated in anecdotal detail through family and expert testimony, and their relationship to adverse adult outcome – including their nexus to the capital offense could have been established through discussion of available scholarly literature and expert psychological perspectives.

Section 2: Violence Risk Assessment

Failure of the defense to accurately characterize Special Issue No. 1:

In closing argument, the defense imprecisely characterized the special issue: "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (see Article 37.071 of the Texas Code of Criminal Procedure). To illustrate, defense described in closing statements [emphasis added]:

Mr. Hayes: If you answer the first question: *There is a future danger*, then you don't have a burden of proof on either side of those issues. (at Volume 20, page 8:17-20)

Mr. Freed: So, the law gives you two questions for you to answer. And they're not questions that says live or die, thumb up, thumb down. They're questions of: *Is he a continuing threat to society* and do you find mitigation or some reason that the death penalty should not be assessed. (at Volume 20, page 17:15-19)

Mr. Freed: In answering these questions, the first one talks about him *being a continuing threat to society*. I believe most of you when we voir dired and spoke to you, we talked about society being more than a free world society. We talked about that society also encompassing prison society and how someone did with that confines of prison society. I'm sure many of you are thinking, he's crazy. Why is he talking to me about *a continuing threat* for a man who has committed an aggravated robbery? He's killed a woman and he deals dope. (at Volume 20, page 19:23 to 20:9)

Mr. Freed: ...I can only ask you to use your good common sense, your judgment, to determine if there is a *future danger*, or a *continuing threat* as it is now called,

Re: Pete Russell, Jr.

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and if there is no mitigation sufficient for a person to spend the rest of his life in prison. (at Volume 20, page 24:9-14)

The critical issue for the jury to determine, however, is not whether the defendant is a "future danger" or a "continuing threat." Rather, the jury is to determine if there is a "probability of criminal *acts* of violence" [emphasis added]. This is not an inconsequential differential. When the special issue is framed as "future danger" or "continuing threat," without specific reference to the "probability of criminal acts of violence," it ceases to be definable or measurable in a scientifically reliable and reasonably discriminating fashion. More problematically, when construed as "dangerousness" or "continuing threat," the issue loses any individualizing value. Arguably, the function of this Special Issue within the capital sentencing framework as drafted in the aftermath of *Furman v Georgia* is to narrow and particularize the class of offenders who are eligible for the death penalty (Cunningham, in press). All violent felons, and particularly all capital offenders, would be broadly considered to be "dangerous" and a "continuing threat." Their "dangerousness" (i.e. their "future danger" or "continuing threat") is a significant rationale for their long-term confinement in a highly secure correctional facility. The Special Issue, then, is not an assessment of a static characteristic of dangerousness. Rather it calls for an evaluation of the likelihood of violent acts. The failure of the defense to recognize or explain this differential to the jury created both significant risk for misunderstanding of the Special Issue and bias toward an affirmative answer to this Special Issue.

Failure of the defense to detail and contextualize Mr. Russell's conduct during his prior incarceration in TDCJ:

While the defense admitted the records of Mr. Russell's prior 8-year TDCJ incarceration (1991-1999) for the jury's consideration, this history was not described in detail. More importantly, no analysis or contextual explanation for his disciplinary experience in TDCJ was offered by the defense. The State in closing statements described Mr. Russell's conduct in prison as follows:

Ms. Magee: ...It also does contain disciplinary records from the Texas Department of Criminal Justice. And I submit to you, once again, that that shows you the course of eight years. He's in a situation now where he should be on his best behavior, folks. He's looking at wanting to be on his best behavior for parole purposes. He's in there with guards and stuff. And he still – does he commit murder? No, he doesn't commit a murder, but you told us that we don't have to prove to you that he is going to commit another murder. He's continuing to commit acts of criminal violence that constitute a continuing threat to society. (at Volume 20, page 29:20 to 30:7)

Mr. Windham: Even the pen packet [TDCJ records], they have mentioned to you, yes, it's [sic] suggests that he assaulted people. That's a criminal act of violence while he is in prison and it talks about other violations. You know, maybe they

are menial. Maybe they are trivial, but the point is, he can't even follow the simplest rules even when he is locked up in prison. He would be a threat to society in there (at Volume 20, page 48:3-10)

This is not a fair characterization. Review of Mr. Russell's 1991-1999 TDCJ records reveals 13 misconduct reports, or about 1.5 disciplinary tickets per year. This is not a particularly high frequency of misconduct reports for an offender entering prison at age 18. Indeed, state prison inmates nationwide between the ages of 18-24 averaged 2.7 misconduct reports per year (U.S. Bureau of Justice Statistics, 1989). Thus Mr. Russell would not be regarded as an unusually noncompliant inmate. It is also instructive to note that prison is characterized by a very high level of restrictiveness and supervision, and an associated ease of incurring misconduct reports. Far from being unable to "even follow the simplest rules," on more than 99.5% of the days Mr. Russell spent in TDCJ, he was fully compliant with innumerable rules.

The records additionally indicate that of the 13 misconduct reports Mr. Russell received, the only infractions involving interpersonal aggression were an incident of punching another inmate in the nose (reportedly for verbally harassing him) and a mutual fist fight – with these incidents occurring in 1993 and 1995. These misconducts are also not an unusual occurrence in a state prison context, particularly for inmates in their early twenties. Neither of these would be classified as serious assaults. It is questionable whether such isolated fist fights represent a "continuing threat to society" such that a preventive intervention of execution would seem a reasoned response.

In fact, Mr. Russell had an 8-year track record of adjustment to prison without serious violence. Such an extended pattern of adjustment without serious violence is a significant factor pointing to continuing non-violent adjustment to prison during a capital life term. The State's assertion that this non-violent adjustment was motivated by the potential for parole, and thus not applicable to his institutional adjustment during a capital life term, is not consistent with research of correctional experience. Inmates facing long sentences experience fewer misconduct reports than inmates who are serving short sentences (Flanagan, 1980).

Failure of the defense to describe the low predictive utility of past community violence or the capital offense for risk of violence in prison:

The primary emphasis of the State regarding Special Issue No. 1 was on Mr. Russell's past criminality/violence in the community, and the gore of the capital offense. Despite ample scholarly and correctional perspectives, the defense failed to put on evidence that these factors are *not* reliably predictive of serious violence in prison. There is, in fact, a marked difference between Mr. Russell's community conduct characterized by criminal activity and his generally good prison adjustment. Stated plainly, prison violence does not predictably follow from pre-confinement violence or the capital offense of conviction. To illustrate, summaries of research sponsored by the U.S. Justice Department (Alexander & Austin, 1992; National Institute of Corrections, 1992) have concluded:

1. Past community violence is not strongly or consistently associated with prison violence.
2. Current offense, prior convictions, and escape history are only weakly associated with prison misconduct.
3. Severity of offense is not a good predictor of prison adjustment.

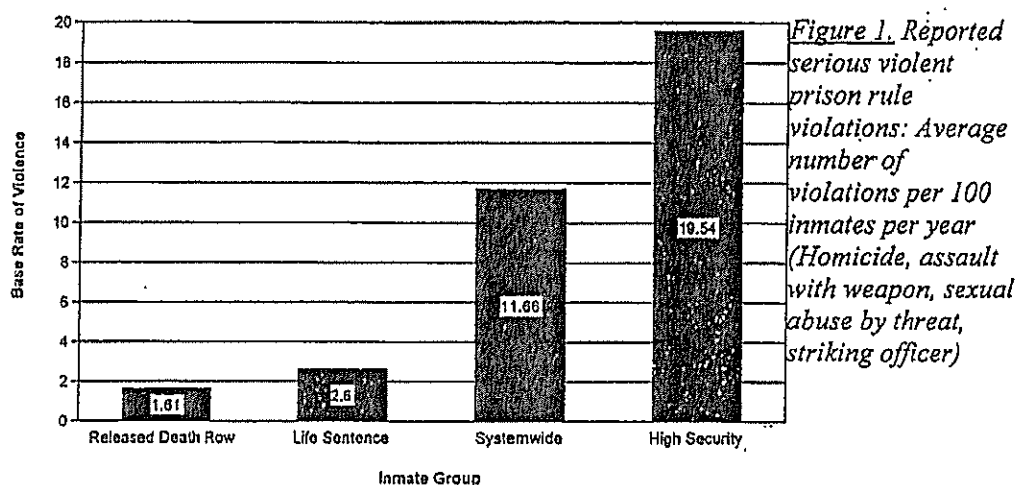
The explanation for this disconnect between community violence and prison violence is that much violence is a product of the interaction or convergence of situational factors, interpersonal relationships and other contributors, as well as individual violence proclivity (Shah, 1978; Monahan, 1981, 1996). Hall (1987) conceptualized the likelihood of violence as involving the interaction of the individual with environmental factors at a certain time, place and setting. Hall asserted: "Individual persons are never dangerous in toto" (p.10). The convergence of these factors that resulted in the capital offense may well not be replicated in prison. There is ample research to support this proposition.

To illustrate this research, Flanagan (1979) identified that inmates facing more than five years of confinement (47% of whom were murderers) had lower rates of disciplinary infractions than did short-term inmates. In other words, inmates convicted of more serious offenses and facing longer prison sentences displayed better prison adjustment than short-term, less serious offenders. Disciplinary offenses of any sort among long-term inmates in this study ranged from approximately .5 to 1.5 per inmate annually depending on the age of the inmate at initial incarceration. Only 11.8% of these infrequent disciplinary write-ups were for fighting or some form of physical assault. Flanagan hypothesized that long-term inmates adopt a perspective regarding doing time that promotes adaptation. Similar counter-intuitive findings were reported by the U.S. Bureau of Justice Statistics (1986), as inmates convicted of violent offenses had lower rates of prison disciplinary infractions than property offenders. Consistent with the above, Cooper & Werner (1990) found that severity of the offense of conviction did not predict violent infractions in the first six months of federal prison confinement, despite expectations of prison caseworkers and psychologists that this was an important predictive factor.

More specific to the comparative conduct of Texas capital offenders in prison, Marquart, Ekland-Olson, and Sorensen (1989) examined the institutional disciplinary records (1974-1988) of 92 Texas capital murderers convicted post 1973 (i.e. post *Jurek v Texas*) who were released from death row by commutation to life, retrial and sentence to prison, or case dismissal. The prison experience of these commuted death penalty inmates was compared to a group of Texas life sentence capital murderers, as well as the prison behavior of inmates "system wide" in the Texas Department of Corrections, and inmates at a Texas high security prison facility. The prior criminal histories and homicide characteristics of the capital

murderers reflected a broad range of past arrests and homicide contexts.

Of greatest comparative significance is the review of total infractions on a yearly average per 100 inmates. This represents an annual base rate or estimated experience per 100 inmates per year as displayed in Figure 1.



It will be noted that the "release from death row" base rate of 1.61 (i.e. 1.61 violent rule infractions per 100 inmates per year) is less than that of the "life sentence" inmates of 2.60, is 1/7 of the "systemwide" base rate of 11.66 and 1/12 that of the high security prison. These base rates provide both a specific and comparative framework for the risk of serious violent rule violations.

Marquart et al. noted that approximately 90% of both the former death row inmates and the life sentence control cohorts who were still incarcerated held trustee status. A minority of death row inmates exhibited persistent serious disciplinary problems. Marquart et al. indicated that 8 of the former death row prisoners and six of the control life sentence group were identified as prison gang members and confined indefinitely in administrative segregation.

It is notable that the above low rates of institutional violence were maintained in spite of many of these commuted capital offenders having histories of criminal and/or violent behavior that predated their capital offense. Specifically, 40% had had police contact for violent incidents, 18% had been convicted of prior UCR violent crimes (murder, aggravated assault, armed robbery, and rape), 46% had been convicted of prior UCR property crimes (burglary, auto theft, arson, and larceny), and 34% had prior adult incarcerations.

Failure of the defense to individualize Mr. Russell's risk of violence in prison in light of the low rates of serious violence in TDCJ:

Re: Pete Russell, Jr.
Affidavit of Mark D. Cunningham, Ph.D., ABPP, 10-05-04

A fundamental anchoring point for specifying and individualizing Mr. Russell's risk of serious violence in prison is the rate of such violence in TDCJ – particularly in light of the types of offenders and their prison recidivism histories confined in TDCJ. Because of the sensationalizing representation of popular media that serious violence in prison is routine, a capital jury is likely to profoundly over-estimate this rate. Statistical data that would accurately inform the jury regarding these rates is contained in monthly "Emergency Action Center Reports" compiled and published by the Executive Services Department of TDCJ and from the annual "TDCJ Fiscal Year Statistical Report." These reports would have detailed that approximately half of the inmates in TDCJ in 2002 were serving sentences for violent felonies, including approximately 10% (i.e. 14,000 inmates) for homicide. Approximately 20% of inmates in TDCJ were serving a sentence of 30 years to life. Additionally, approximately 35% of inmates in TDCJ in 2002 had had a prior period of confinement in prison.

Despite the community violence histories and recidivism of these inmates, the rate of serious violence in TDCJ in 2002 was quite low. More specifically, only half a percent of inmates perpetrated a serious assault (i.e. resulting in injury requiring more than first aid treatment) against another inmate during 2002. The rate of serious assault of staff in 2002 was only 3.6 per 10,000 inmates. The rate of inmate-on-inmate homicide in TDCJ in 2002 was 4.1 per 100,000 inmates. By comparison, the rate of homicide in the free community of the United States in 2001 was 5.6 per 100,000 community residents – higher than the rate in TDCJ despite the high concentration of serious violent offenders in that correctional setting. The rate of homicide in Houston in 2001 was 13.4 per 100,000 residents (Maguire & Pastore, 2002). The rate of inmate-on-staff homicide is extraordinarily low – approximately 1 per million state prison inmates per year. Such a tragedy has occurred only 1-2 times in TDCJ in the past 20 years.

There are two compelling conclusions from this data regarding serious violence in TDCJ. The obvious implication of these base rates in that prison works. The restrictions, structure, and supervision of prison are effective in limiting the incidence of serious violence within the institution. The critical factor in containing the violence of Mr. Russell or any violent felon in prison is not based on the inmate changing the attitudes that he displayed in the community. Rather, it is the security, structure, supervision, and sanctions of prison that keep serious violence at low levels – even among a group of individuals that exhibited serious violence in the community. This reality is an aspect of why a defendant like Mr. Russell's maternal uncle Jermaine was allowed to plead to a life sentence – even though he had been involved in the robbery/murder of two individuals and had a history of stabbing his stepfather-in-law in the head. TDCJ is able to reasonably contain the violence of thousands of violent offenders.

These data point to Mr. Russell's risk of serious assaults or homicide in prison ranging from quite low to extraordinarily low depending on the violent act being forecasted. Contrary to the State's assertion in closing statements, these data demonstrate the very high likelihood that being confined to prison would have been sufficient to provide for the "protection of society":

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Mr. Windham: The only way to protect society from this man and the only way to do justice here is to completely take him out of the society. The only way to do that, ladies and gentlemen, is to answer Special Issue No. 1 yes and Special Issue No. 2 no. (Volume 20, page 49:9-13)

Failure of the defense to individualize Mr. Russell's risk from group statistical data on capital offenders:

Rationale for the application of group statistical data in assessments of individual risk of violence:

Mr. Russell's likelihood of an adaptation to prison without serious violence could also have been projected in 2003 by particularizing group statistical data. A number of scholars have characterized group statistical or actuarial data as making an indispensable contribution to a scientifically informed violence risk assessment. Actuarial or group statistic methods have been repeatedly described as not just adjunct to, but rather superior to clinical methods in predicting the behavior of individuals (Dawes et al., 1989; Meehl, 1954; Monahan, 1981, 1996; Showalter & Bonnie, 1984; Tonry, 1987). As Poythress (1992) summarized,

In virtually every area of behavior that researchers have pitted clinical prediction against statistical prediction, clinical prediction has been shown to be inferior. This is true in the case of violence prediction studies also... (p. 142).

Thus, integration of actuarial (group statistical) data may reduce error associated with either under or over estimation of violent recidivism (Litwak et al., 1993). Dawes, Faust, and Meehl (1989) identified group statistics as quite relevant and applicable to individuals:

A common anti-actuarial argument, or misconception, is that group statistics do not apply to single individuals or events. The argument abuses basic principles of probability. Although individuals and events may exhibit unique features, they typically share common features with other persons or events that permit tallied observations or generalizations to achieve predictive power (p. 1642).

The fundamental group statistic in risk assessment is the base rate, which is the statistical prevalence of a particular behavior in a given group over a set period of time (usually one year). Monahan (1981) emphasized the importance of anchoring any estimate of the probability of violence in the individual case to the statistical base rate, describing: "knowledge of the appropriate base rate is the most important single piece of information necessary to make an accurate prediction" (p. 60). Prosecutors and juries at capital sentencing may err by inappropriately emphasizing predictive ramifications of the instant offense or limited case information while neglecting base rates. As Smith (1993) stated:

The most common significant error made by clinicians in the prediction of violent behavior relates to ignorance of information surrounding the statistical base rate of violence in the population in question. (p. 539)

Base rate data is incorporated in multiple risk assessment models described in the scholarly literature, with empirically validated factors being employed to cautiously individualize this base rate. The summary of various risk assessment models which follows is not intended to be exhaustive, but will serve to illustrate specific variations around a generally consistent theme of individualizing group base rates.

A. Monahan (1981) described approaching the risk assessment task with a combination of:

1. Actuarial methods,
2. Dispositional/Interactional/Contextual approaches.

Monahan recommended beginning with a base rate. This base rate or actuarial estimate would then be conservatively individualized by examining individually specific dispositional, interactional, and contextual information.

B. Morris and Miller (1985) described risk assessments of future violence as being of three types:

1. Actuarial (using how people like the defendant have behaved to estimate how the defendant will behave);
2. Anamnestic or past pattern (using how the individual behaved in the past to estimate behavior in similar circumstances);
3. Clinical (using life experience, training, knowledge of mental illness, observations, and diagnosis to estimate future behavior).

Actuarial techniques require relevantly applicable group outcome data. Anamnestic reliability is dependent on a sufficiently established pattern and a continuing close similarity of context. Clinical assessments rely on traditional methods of interview, testing, inference, and diagnosis. Morris and Miller asserted that actuarial and anamnestic approaches are more reliable than clinical approaches, which they described may add little to the accuracy of actuarial or anamnestic assessments.

C. Hall (1987) proposed varying formulas for risk assessment depending on whether long-range, short-term, or imminent forecasting of violence was being attempted:

1. Long-range violence is best estimated by the base rate of violence in the group to which the individual belongs.
2. Short-term (next several months) violence potential is a function of the interaction of historical variables (nature of violent exposure, experience, and behavior), current operating variables (long-term disposition and short-term triggers), opportunity variables, and inhibitory variables.

3. Imminent (next several days) violence is a function of perpetrator variables, contextual stimuli, victim characteristics, and inhibitory factors.

D. Serin and Amos (1995) proposed a decision tree for the assessment of dangerousness that consisted of four sequential steps:

1. Derive a group base rate estimate from relevant group demographic and dispositional factors.
2. Consider clinical information regarding past use of violence, disinhibitors, and persistence of antisocial behavior in conservatively revising the group base rate estimate to an individual base rate estimate.
3. Evaluate what risk management variables and what contextual factors might be modified to reduce the likelihood of violence.
4. Establish a final revised estimate of violence potential.

It should be noted that the fundamental reliance of violence risk assessment models on base rates is not restricted to capital sentencing. Actuarial violence risk assessment applications also include non-capital sentencing determinations, prison classification, parole eligibility, and civil commitment and release. In addition to violence risk assessment, use of actuarial techniques in evaluating risk of all types has had a longstanding role as the principal methodology in the insurance industry. Group statistical data also forms the fundamental scientific underpinning of the practice of medicine and pharmacology. For example, the prescription of an antibiotic for a given infection is based on the clinical trials with this drug (i.e. the statistical response of a group of patients with a similar infection to this medication). Actuarial methodology then has demonstrated reliability and validity in a broad arena of commercial and clinical applications.

Applicable group statistical studies of prison violence among capital offenders and murderers:

Studies of the post-commutation and/or general prison population behavior of capital offenders have had variable geographic samples and time periods of follow-up: national (1972-1987), Texas (1924-1971), Texas (1973-1988), Texas (1979-1987), New Jersey (1906-1960), and Indiana (1972-1999). An additional study has followed (1980-1995) samples of Missouri death row inmates as well as convicted murderers serving life with or life without parole. There are a number of factors, however, that indicate a reasonable basis to generalize the findings of other geographic samples and time periods to the evaluation of the 2003 violence risk of a Texas capital inmate facing a life term in TDCJ. These include:

1. The underlying capital offenses were sufficiently violent and aggravated that a death sentence was sought and returned.
2. The offense distribution of state prison inmates is quite similar from state to state.
3. Fundamental aspects of state prison incarceration have a high degree of similarity from state to state and over time, particularly over the past 30

- years.
4. There is no study, regardless of geographic region or time period sampled that controverts the other studies. Thus, despite the diversity of settings and time periods, the violence incidence of capital offenders and convicted murderers in the general prison population is broadly similar from study to study - reflecting a robust finding.
5. Much of this research has been done on samples in the Texas prison system.
6. Broad application of capital offender base rates to defendants in varied jurisdictions has passed peer review in multiple scholarly papers.

The relevant group statistical data or base rates of prison violence among commuted death row inmates will be summarized below.

The findings of Marquart, Ekland-Olson, and Sorensen (1989) have already been described in an earlier section. Quite similar base rate data emerge from other retrospective tracking studies of commuted capital offenders. Marquart and Sorensen (1989) reported on the institutional behavior of 533 capital offender former death row inmates nationwide who sentences were commuted following the 1972 *Furman v Georgia* decision, and whose disciplinary behavior was tracked across the following 15 years. The results of this study are depicted in Figure 2 below:

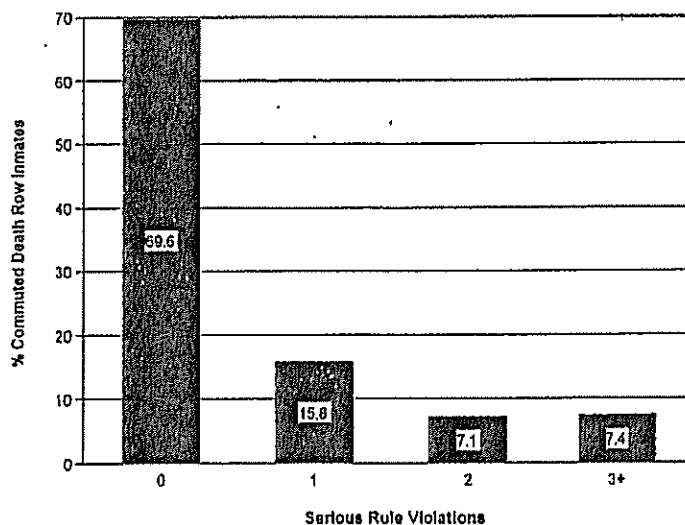


Figure 2. Serious prison rule violations committed by death row inmates over 15 years (Homicide, aggravated assault, sexual attack, escape, riot, work strike)

Inspection of the associated base rates in this study indicate that slightly less than 1/3 of the former death row inmates committed serious prison rule violations. Over half of those

inmates committing serious rule violations were involved in only one rule violation, and another fourth were involved in only two rule violations. The authors concluded: "These data demonstrate, at least among these violators, that most serious infractions were one time events or situations. In short, most of the *Furman* inmates were not violent menaces to the institutional order." The authors additionally observed that a small group of chronic offenders (7.4% of the total *Furman* inmates on whom disciplinary information was available) were involved in three or more serious rule violations, accounting for approximately half of the total serious rule violations. The authors concluded: "This finding supports previous studies which have shown that within the prison community, as in the free world, a small group of offenders accounts for the majority of offenses" (p. 20). Regarding the incidence of most serious violence, among the *Furman* group of commuted death sentence capital murders, 1.3% committed another homicide in the institutional setting. Of the other 59 serious acts of violence which were defined as weapons related aggravated assaults, 7% of the inmates were involved.

Reidy, Cunningham, and Sorensen (2001) studied the institutional disciplinary records of 39 former Indiana death row inmates who had been released to the general prison population between 1972 and 1999. Ten of the 39 inmates, or 25.6%, were involved in violent acts while on death row. The prevalence rate of violence fell to 20.5% following their transfers to the general prison population. The overall figures for the entire period of incarceration show that 14 (35.9%) inmates were involved in 24 violent acts (3.8 per 100 inmates per year). While our definition of violent acts included potentially harmful acts, the number of acts resulting in serious bodily injury was fewer in number. Of the 14 incidents occurring on death row, only 4 acts resulted in serious injuries, a rate of 1.5 per 100 inmates per year. Of the 10 incidents reported in the general population, only 3 acts resulted in serious injuries, a rate of 0.8 per 100 inmates per year. A total of 7 serious injuries, including a single inmate homicide, were inflicted by 6 inmates over an average confinement of 16 years, constituting a rate of 1.1 per 100 inmates per year and a prevalence of 15.4%. Two-thirds of the former death row inmates were never confined in administrative segregation following their transfers to the general prison population - almost identical to the experience of former Texas death row inmates reported by Marquart, Ekland-Olson, and Sorensen (1989). Twenty percent of the Indiana former death row inmates had no disciplinary write-ups whatsoever following their transfer to the general prison population, and 60% had four or fewer disciplinary infractions.

Marquart and Sorensen (1988) studied the institutional behavior of 47 capital offender former death row inmates in Texas whose sentences were commuted following *Furman v Georgia* in 1972. Across a 13-year period of confinement in a general prison population, these 47 former death row inmates committed 3 weapons related offenses. Additionally, there were two incidents of striking a guard. Among this Texas *Furman* group, 75% had no serious disciplinary infractions, and 93% committed no aggravated assaults or assaultive weapons offenses while incarcerated in the Texas Department of Corrections. An argument could be advanced that the low rate of serious violence among former death row inmates was secondary to the psychological impact of their death sentences and death row confinement. Comparison of these *Furman* commutes, though, with a matched set of 156

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life sentence inmates revealed quite similar institutional rates of serious disciplinary infractions or violent offenses (Marquart, Ekland-Olson, & Sorensen, 1994).

These data have remained consistent across decades, and thus are likely to remain robust into the foreseeable future. Wagner (1988) conducted an extensive analysis of the prison behavior of 100 commuted capital offenders who were followed between the years 1924 and 1971 in the Texas Department of Corrections. He found that 80 commutes (80%) did not commit any serious violent prison rule violations. Three of the commuted capital offenders (4%) killed 4 fellow inmates. Earlier, Bedau (1964) found no allegations of unmanageable behavior during incarceration among 55 New Jersey capital offenders who had been released from death row between 1907 and 1960 and were serving life imprisonment terms.

Another argument might be made that an inmate sentenced at age 30 to a 40-year minimum capital life term would be likely to behave violently because he had "nothing to lose." Research is again instructive. Sorensen and Wrinkle (1996) analyzed the institutional violence rates of 648 Missouri death row, life-without-parole, and life-with-parole convicted murderers, finding that 78.2% had no reported assaults across 15 years of follow-up. Of the assaults that did occur, 1/3 were classified as minor. The type of sentence did not significantly affect prison violence rates.

Repetitive serious prison violence was observed in these studies of former death row inmates, but tended to involve only a small minority of them. Corollary but unspecified base rate perspective of the prison behaviors of murderers in general was provided by Flanagan (1980) who identified murderers as being "settled" prisoners who are infrequently involved in violent behavior within the institution. Cumulative incidence of inmate-on-inmate homicide across multi-year follow-up in these studies ranged from .005 to .012.

Base rate data regarding capital offenders and their disciplinary outcome in the general prison population revealed that 20-30% committed acts of assaultive violence. Less than 10% were guilty of chronic violent rule infractions - and these inmates could be managed in administrative segregation.

Failure of the defense to individualize Mr. Russell's violence risk from rates of violence among convicted murderers in TDCJ:

Data from a very large sample of convicted murderers in TDCJ was available in 2003 from which to individualize Mr. Russell's risk of serious violence during a capital life term. Sorensen and Pilgrim (2000) examined a large number of variables in relationship to the occurrence of serious prison violence among 6,390 convicted murderers sentenced to the Texas Department of Criminal Justice from 1989-1999. Variables that were found to be significantly associated with serious violent misconduct in prison included multiple murder victims, contemporaneous attempted murder, burglary or robbery associated with the murder offense, prior prison sentence, prison gang membership, and age. From these variables Sorensen and Pilgrim constructed a risk scale reflecting the predicted proportional increase or decrease from the extrapolated 40-year rate of expected violence.

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Depending on the predictor variables applicable to a given inmate, the predicted 40-year violence risk would range from 2% to 54.6%. Applying this scale to factors present in Mr. Russell's history results in the following probabilities of violence during a capital life term: any serious violence = 14.5%; aggravated assault on staff = 1%; homicide of an inmate = .2%. His likelihood of any serious violence is just below the mean of the sample of 6,390 convicted murderers.

Failure of defense counsel to individualize Mr. Russell's risk of committing serious violence in prison in light of preventive interventions available in TDCJ:

Assessment of violence risk is not simply a static enterprise. It also involves consideration of what preventive measures can be undertaken that would modify or reduce the level of violence risk posed by a particular inmate (Serin & Amos, 1995, Rogers, 2000). Accordingly, Heilbrun (1997) identified two broad forensically relevant models of violence risk assessment (a) accurately forecasting the probability of violence, and (b) managing risk to reduce violence incidence. Heilbrun et al. (2000) described the importance of linking violence risk assessments to intervention planning. In a prison setting, violence risk reduction interventions include medication or treatment for psychological disorders, application of disciplinary contingencies, rehabilitation programming, isolation from co-defendants or fellow gang members, special management provisions, or modified confinement. All of these are relevant to a capital jury's consideration of the violence likelihood of a particular defendant.

Additionally, in their closing statements, the State asserted that Mr. Russell would "be a threat to society in there [prison]" (at Volume 20, page 48:10). Thus, the Special Issue as framed by the State is an assertion the defendant will commit acts of serious violence even though confined for a capital life term in TDCJ. Implicit in this allegation is the corollary that TDCJ is unable to safely contain this defendant, and thus a penalty of death is a reasonable preventive measure. This was rationale was overtly asserted by the State in closing statements:

Mr. Windham: The only way to protect society from this man and the only way to do justice here is to completely take him out of the society. The only way to do that, ladies and gentlemen, is to answer Special Issue No. 1 yes and Special Issue No. 2 no. (Volume 20, page 49:9-13)

Informing the jury of the capabilities of TDCJ to bring higher levels of security to bear would appear to be the only evidence that might illuminate this representation that TDCJ is incompetent or lacks the facilities/procedures to reasonably contain a particular inmate.

Included in the information that would illuminate this issue is the presence of over 10,000 administrative segregation beds/cells in TDCJ. Under an administrative segregation level of confinement in TDCJ, an inmate is single-celled and locked down 23 hours daily, with solitary exercise, and shackled movement under escort. Under such conditions of security, opportunities for serious violence toward others are greatly reduced. For

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example, extrapolating from annual rates of assault on staff, an inmate serving 40 years in administrative segregation would have a 2.4% likelihood of an assault on staff requiring more than first aid treatment. Although administrative segregation confinement is most typically in response to serious misconduct during prison confinement, such confinement may be ordered preemptively – before a TDCJ inmate exhibits serious institutional violence. Thus, should TDCJ determine that a defendant is a disproportionate risk of serious violence in prison, there are facilities where any opportunity a capital defendant would have to act out in a seriously violent way would be substantially minimized.

Failure of defense counsel to equip the jury to avoid predictable error:

In the absence of detailed testimony regarding group statistic methodology and data, ultimately particularized to Mr. Russell, the jury's considerations of this issue are subject to grave error (see Cunningham & Reidy, 2002). The basis for these errors include the following easily anticipated factors:

- a. Individuals undertaking violence risk assessment are likely to commit a number of fundamental errors unless guided by reliable scientific methodology and data (see Cunningham & Reidy, 1999; Dawes, Faust, & Meehl, 1989; Monahan, 1981; Morris & Miller, 1985; Shah, 1978). These errors more often result in an overestimation of violence risk source (Monahan 1981; McNeil & Binder, 1991; Serin & Barbaree, 1993). The jury is unlikely to have knowledge of this methodology and research data unless informed by expert testimony.
- b. A capital jury's familiarity with the heinousness of the capital offense and knowledge of other aggravating factors or acts are likely in many instances to result in a perception of high future violence risk in prison that is not justified by research (see Shah, 1979).
- c. The combination of these factors is likely to result in a capital sentencing jury that is strongly biased toward overestimation of violence risk when scientifically grounded expert testimony is not made available to them.
- d. In the absence of expert testimony, a capital jury has no mechanism to understand or incorporate base rate data, appreciate the importance of context, avoid illusory correlation, maintain skepticism of clinical methods, understand the implications of Antisocial Personality Disorder or related characterizations, incorporate the effects of aging, reliably evaluate patterns of behavior, factor in preventive measures, acquire the broad information relevant to violence risk considerations, appreciate the probabilistic nature of their task, or critically evaluate the arguments of the State or the defense.
- e. The scientific methodology and data relevant to violence risk assessment of capital offenders is based on multiple independent research studies, has been subjected to peer-review, articulates an error rate through the range of

probabilities expressed, and is generally accepted in the violence risk assessment scientific community.

- f. A Texas capital jury is at best almost certain to be ignorant of rates of prison violence, inmate demographics and criminal histories, and prison confinement options and security procedures. At worst a Texas capital jury comes to capital sentencing risk assessment holding assumptions regarding future dangerousness that are false. Such false assumptions spring from intuitive but erroneous beliefs. It must be emphasized that much of the research data on the violence risk assessment of prison inmates is counter-intuitive.

Avoidance of fundamental errors in violence risk assessment at capital sentencing requires the testimony of an expert to inform the jury of scientifically sound methodology and empirical data. Particularly when accompanied by demonstrative exhibits that assist the jury's understanding and retention, testimony detailing violence risk assessment methodology and empirical data could have been presented in a clear, organized, logical fashion that neither confuses nor misleads the jury.

EXHIBIT 8

**Excerpt, Punishment Argument at Trial
of *State v. Russell*, February 17, 2003**

Punishment Phase
February 17, 2003

APPELLATE NO. **74595**
REPORTER'S RECORD
VOLUME 20 OF 22 VOLUMES
TRIAL COURT CAUSE NO. 898795

THE STATE OF TEXAS) IN THE DISTRICT COURT
vs.) HARRIS COUNTY, TEXAS
PETE RUSSELL, JR.) 262ND JUDICIAL DISTRICT

FILED IN
COURT OF CRIMINAL APPEALS

PUNISHMENT PHASE SEP 9 2003

Troy C. Bennett, Jr., Clerk

On the 17th day of February, 2003, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Mike Anderson, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

Myrna Hargis, Texas CSR No. 772
Official Court Reporter - 262nd District Court
1201 Franklin
Houston, Texas 77002

ORIGINAL

19-70015.4445

*Closing Statement by Mr. Hayes
February 17, 2003*

1 the answer to that question yes and I would ask you
2 before you make a no answer to that question that
3 each one of you really believe that that's the answer
4 that should be given. Thank you.

5 THE COURT: Thank you, Mr. Hayes.

6 Mr. Freed, sir.

7 **CLOSING STATEMENT**

8 MR. FREED: Thank you, Your Honor.

9 Good morning, ladies and gentlemen.

10 If it pleases the Court, opposing
11 counsel.

12 Let me share a few thoughts with you
13 about not necessarily as factually driven as my --
14 first of all, I think there are three concepts the
15 jury needs to think about. The first one is
16 vengeance. Ms. Brewer's family wants vengeance and
17 that's the real concept. Anytime you lose a loved
18 one, whether you lose it to cancer, whether you lose
19 it by murder, whether you lose it in an auto
20 accident, you ask: Why? Why did God do this to me?
21 Why did that person do that to me? You have this
22 anger that wells up and as you want that to occur.
23 That is the very real and natural human response.
24 But it's not a response for the jury. Your concept
25 is to do justice. And justice is, I would suggest to

*Closing Statement by Mr. Freed
February 17, 2003*

1 you, the right thing at the right time to fit the
2 occasion for which you are looking at it.

3 As you saw in voir dire, there are
4 many kinds of cases that fit capital murder. And
5 murder in the course of retaliation, as you found
6 Pete Russell guilty of, is one of those cases that
7 fits within that definition. You have said so. But
8 that does not mean that every factual case that fits
9 in that hole requires the death penalty. And I think
10 that's important that you understand that because if
11 it was so, then the sentence would be automatic death
12 the minute you found the person guilty. I think you
13 can see there is more to this concept than that.

14 So, the law gives you two questions
15 for you to answer. And they're not questions that
16 says live or die, thumb up, thumb down. They're
17 questions of: Is he a continuing threat to society
18 and do you find mitigation or some reason that the
19 death penalty should not be assessed? But we all
20 know what the result of the answers are, clearly.

21 I think the third concept that you
22 need to look to is responsibility. The State is
23 going to argue that Pete Russell is responsible for
24 the death of Tanjala Brewer. And you have said so.
25 You have already got there. You found him

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February 17, 2003*

1 responsible for the death of Tanjala Brewer. But I
2 think that when you begin to answer these questions,
3 you need to look at the responsibility of all of the
4 parties that were involved in this case.

5 If you look at the facts that are
6 here, I think the facts that we don't dispute, that
7 both sides pretty much come to an agreement upon,
8 that Pete Russell was less than 29 years old when
9 this happened, that Ms. Brewer was about 10 or 11
10 years older than he was, that they dated, that they
11 had a relationship for whatever that is in the
12 culture in which they lived. And it was like many
13 relationships. It was a jealous relationship. He
14 was jealous of her. She was jealous of him. And
15 when that relationship begin to unravel and fall
16 apart, it was the jealousy between the two of them
17 that set the rest of this in motion.

18 One of the narcotics officers came and
19 testified, yes, he was aware that Ms. Brewer dated
20 Pete Russell. He was aware that she was mad and
21 wanted to get back at him. Was aware that that was
22 one of the motivating factors that caused her to
23 inform on Pete Russell. Did she think that she was
24 going to die for it? No.

25 Did she think maybe if Karen Foster

*Closing Statement by Mr. Freed
February 17, 2003*

1 got arrested, she gets Pete Russell back? I don't
2 know. But the bottom issue is is that she has some
3 responsibility for being a part of that. It is not
4 black and white. Life is filled with grays and it is
5 those grays that make our life colorful. It is her
6 responsibility and his responsibility that put all of
7 this into motion. But it is not just his burden
8 alone.

9 I ask you to at least take into
10 consideration all the circumstances that go into
11 this. She was not a woman who was calling in to
12 clean up her neighborhood from dope and was killed
13 because of it. She was killed because she was trying
14 to use the very system that was there to get back at
15 someone.

16 Now, does that fit within the
17 pigeonhole of death by retaliation and capital
18 murder? Yes. Does it justify taking his life? No.
19 It doesn't. There is some responsibility that goes
20 everywhere. It is a tragedy, but all death is a
21 tragedy. We value it way too much to give it away
22 cheaply.

23 In answering these questions, the
24 first one talks about him being a continuing threat
25 to society. I believe most of you when we voir dired

*Closing Statement by Mr. Freed
February 17, 2003*

1 and spoke to you, we talked about society being more
2 than a free world society. We talked about that
3 society also encompassing prison society and how
4 someone did within that confines of prison society.

5 I'm sure many of you are thinking,
6 he's crazy. Why is he talking to me about a
7 continuing threat for a man who has committed an
8 aggravated robbery? He's killed a woman and he deals
9 dope. But there was a significant lack of
10 information from that witness stand regarding Pete
11 Russell's capability to function within the Texas
12 Department of Corrections. If there was a witness
13 that was available to the State, I submit to you he
14 would have been on that stand telling you that he was
15 a horrible human being when he was incarcerated in
16 the Texas Department of Corrections. Now, I will
17 tell you that in the evidence admitted in this Court,
18 there is evidence of his ability in the Texas
19 Department of Corrections. And I'll show you exactly
20 where it is and it's State's Exhibit 157. And when
21 you go to the back of this, you will not only see the
22 judgments and sentences, but you will also see what
23 infractions and things he has done wrong, how he was
24 written up for them and how he was punished within
25 that system. It's all here for you to see.

*Closing Statement by Mr. Freed
February 17, 2003*

1 So, if you will define society as
2 being more than a free world society, you can see
3 that not only are there violations, but there are
4 tools available in prison to deal with those
5 violations and they actively work.

6 As you thumb through here, you will
7 see the fight, punch someone in the nose. You will
8 see having a pair of dice. You will see contraband,
9 which meant having some food in your cell. You will
10 see a human nature function of masturbation. You
11 will see all that in here. But this is it. Is this
12 enough to justify saying that he cannot function
13 within the Texas Department of Corrections? It's
14 not.

15 Mitigation is the responsibility that
16 I talked about with you. It is you looking and
17 saying: There is something that I find sufficiently
18 mitigates, lessens, that takes away from me having
19 this man put to death. That I think is replete
20 through this entire trial.

21 Ask yourself to ask the State of Texas
22 when they argue to you exactly what it is that
23 justifies having that man put to death? Is it the
24 robbery? Is it the dealing of the dope? Is it the
25 murder itself of Tanjala Brewer? Is it the combined

*Closing Statement by Mr. Freed
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1 effect of them? What does the State of Texas bring
2 to you that is so worthy that you will take it upon
3 your conscience to take another man's life? What is
4 it that's within all those papers in a five-day trial
5 that justifies it? If it was a dog on the street who
6 had bit someone, most people would have more concern
7 about putting that dog down than we do in putting a
8 man down. And I'm not saying you do, but it's saying
9 you have to look at this as the ultimate act, the
10 ultimate punishment of a society is to execute
11 another human being.

12 And the State of Texas has come to you
13 and said: This is what has to be done. Why? Tell
14 me why, State. Tell me exactly why. Tell me what
15 justifies this in the broad scheme of all our human
16 experience, all of our lives, everything we read
17 about in the newspapers, every horrific thing we
18 watch, what justifies this? Do you think killing
19 Pete Russell is going to stop murder? It's older
20 than Christ. It will not stop by killing him. Don't
21 delude yourselves with that. It will not happen. Is
22 it going to send a message to society? Yeah, in the
23 back side of a newspaper, they're going to have a
24 blurb about that case that says what you did. Send a
25 message to all the other dope dealers on the street?

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1 I think not. It will kill Pete Russell. Yes. You
2 will accomplish that if you answer this question yes.

3 MR. WINDHAM: Your Honor, the jury
4 doesn't accomplish anything by killing anyone.
5 That's improper argument. I will object to that and
6 ask that they be instructed to disregard that.

7 THE COURT: Overruled.

8 This is argument of counsel, ladies
9 and gentlemen. The law you will receive from me.
10 The evidence you will receive from the witness stand.

11 You may continue. You have five
12 minutes, Mr. Freed.

13 MR. FREED: Thank you, Your Honor.

14 Ladies and gentlemen, I can't -- there
15 are moments as a lawyer that you wish you were a
16 cross between Martin Luther King, William Jennings
17 Bryan and John F. Kennedy. Because you think that --
18 you pray that some words you are going to say are
19 going to be so good, so dramatic that it influences
20 12 people to do what you want them to do. But we
21 have given you probably the rottenest task we can ask
22 any 12 people to do. And that's a task that you will
23 live with for a long, long, long time and you will
24 either go home and forget about this or some bright
25 and sunny morning, you will pick up your local

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1 newspaper and find out that this person has been put
2 to death.

3 And you are not responsible for
4 putting Ms. Brewer here and Mr. Russell here. They
5 did that to themselves. But regretfully they asked
6 the rest of us to participate in it, to bless it in
7 one way or another. And I don't think the lawyers
8 like it any better than the jurors, but we're here
9 and this is what we do. This is why we're here. I
10 can only ask you to use your good common sense, your
11 judgment, to determine if there is a future danger,
12 or a continuing threat as it's now called, and if
13 there's no mitigation sufficient for a person to
14 spend the rest of his life in prison.

15 MR. WINDHAM: Again, I'll object.
16 That's a misstatement of the law about a person
17 spending the rest of their life in prison. If you
18 don't have life without parole, then it's a
19 misstatement.

20 THE COURT: Ladies and gentlemen, this
21 is argument of counsel. The law you will receive
22 from the Court in the form of the Charge. The
23 evidence you will receive from the witness stand.
24 These are arguments of counsel.

25 You may continue.

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1 MR. FREED: Ladies and gentlemen, you
2 know exactly what the law is. You have known it from
3 the beginning. No one is hiding the ball from you.
4 If anybody is, it's still in the Court's Charge. You
5 know the effects of what your votes are. I ask you
6 to answer them the appropriate way and I ask you so
7 that Pete Russell is sentenced to life in the Texas
8 Department of Corrections.

9 THE COURT: Thank you, Mr. Freed.
10 Ms. Magee.

11 MS. MAGEE: Thank you, Your Honor.
12 Judge, may I move those questions over here closer to
13 the jury?

14 THE COURT: Yes, ma'am.

15 **CLOSING STATEMENT**

16 MS. MAGEE: Ladies and gentlemen,
17 first I would like to thank you again for your
18 verdict. I know this was a long trial. I know that
19 you listened intently to all the evidence. You have
20 let that evidence lead you to the verdict that you
21 have returned last week and that is a guilty verdict
22 on capital murder. And we all went over this, I
23 know, individually. Judge Burdette went over it
24 numerous times during voir dire. What that means now
25 that before you now, since you have returned a