

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

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Lyle W. Cayce
Clerk

No. 20-70022

GARLAND BERNELL HARPER,

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 No. 4:16-CV-762

ON PETITION FOR REHEARING AND REHEARING EN BANC
Before WILLETT, HO, and DUNCAN, *Circuit Judges.*

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED. The opinion is WITHDRAWN, and the following opinion is SUBSTITUTED:

A Texas jury convicted Garland Bernell Harper of murder and sentenced him to death. After his direct appeal and habeas petitions were

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both denied in state court, Harper raised 31 claims in a federal habeas petition. The district court denied all his claims and also denied a certificate of appealability (COA). Harper asks us to issue a COA on eight of those claims which he presents as posing five distinct legal issues. We DENY Harper a COA on all of his claims for the reasons explained below.

I

Harper was convicted of murdering his girlfriend, Triska Rose, and her two daughters: Mya, aged seven, and Briana, aged sixteen. The jury sentenced Harper to death in a separate punishment phase.

Harper filed a direct appeal raising eight claims. The Texas Court of Criminal Appeals (TCCA) found no error and affirmed Harper's conviction. Harper later filed an application for a writ of habeas corpus in state court. The trial court drafted proposed findings of fact and conclusions of law, recommending that Harper's application be denied. The TCCA adopted these findings of fact and conclusions of law with a few minor adjustments and denied Harper's application. Harper then filed a petition for a writ of habeas corpus in federal court, which was 291 pages long and contained 31 claims.

The district court denied each of Harper's claims in a sixteen-page opinion and did not certify any issue for review on appeal. Harper asks us to issue a certificate of appealability on eight of the thirty-one claims. Some claims overlap and, as a result, Harper presents them as five issues: (1) a Confrontation Clause claim (claim 2 of Harper's habeas petition); (2) a *Strickland* claim premised on ineffective assistance of counsel during voir dire (claim 11); (3) a *Batson* claim (claims 12, 13, and 28); (4) a second *Strickland* claim premised on counsel's failure to argue that Harper's mental illness rendered his confession involuntary (claims 15 and 16); and (5) a third

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Strickland claim premised on counsel’s failure to object on reliability grounds to the government’s expert on future dangerousness, Dr. Moeller (claim 7).

II

We may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court has decided a claim on the merits, this showing requires the applicant to demonstrate that jurists of reason “could disagree with the district court’s resolution of [the] constitutional claims” or “could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). On the other hand, “[f]or claims denied on procedural grounds,” the applicant must show that jurists of reason could debate both “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.” *Nelson v. Davis*, 952 F.3d 651, 658 (5th Cir. 2020) (quoting *Segundo v. Davis*, 831 F.3d 345, 350 (5th Cir. 2016)). In a capital case, “any doubts as to whether a COA should issue must be resolved in the petitioner’s favor.” *Id.* (internal quotation marks omitted).

Where, as here, “a state court has reviewed a petitioner’s claim on the merits, our review is constrained by the deferential standards of review found in the Antiterrorism and Effective Death Penalty Act (‘AEDPA’).” *Id.* (citing 28 U.S.C. § 2254). “Under these circumstances, we may not issue a COA unless reasonable jurists could debate that the state court’s decision was either ‘contrary to, or involved an unreasonable application of, clearly established Federal law,’ or ‘was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” *Id.* (internal citations omitted) (quoting 28 U.S.C. § 2254(d)(1)–(2)). “For claims that are not adjudicated on the merits in the state court, however, we

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do not apply the deferential scheme laid out in § 2254(d) and instead apply a de novo standard of review.” *Id.* (internal quotation marks omitted).

A

Harper’s first issue-presented is that the district court erred by failing to consider his Confrontation Clause claim (whether on the merits or as part of a separate ineffective-assistance argument). The district court cited procedural grounds for declining to consider this issue. A COA will issue, then, only if jurists of reason (1) “would find it debatable whether the petition states a valid claim of the denial of a constitutional right” and (2) “would find it debatable whether the district court was correct in its procedural ruling.” *Segundo*, 831 F.3d at 350 (quoting *Slack*, 529 U.S. at 484). We find the second element dispositive and therefore do not address the first.

The Confrontation Clause claim received only a single footnote in Harper’s state and federal habeas petitions. That fact places the district court’s decision beyond reasonable debate, for two independent reasons.

First, it is beyond debate that Harper failed to exhaust this claim in state court. Instead, he presented the claim to the state court in a single footnote that he nested deep in the body of a 232-page petition that separately presented 24 distinct claims. “The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court.” *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019) (quoting *Soffar v. Dretke*, 368 F.3d 441, 465 (5th Cir. 2004)). A fair opportunity requires that “all the facts necessary to support the federal claim were before the state courts” and “the habeas petitioner must have ‘fairly presented’ to the state courts the ‘substance’ of his federal habeas corpus claim.” *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 277–78 (1971)). “Arguments raised in a perfunctory manner, such as in a footnote, are waived” because they do not give the state

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court a fair opportunity to consider the claim. *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003) (quoting *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002)).

Second, it is also beyond debate that Harper also failed to exhaust this claim in the district court. Federal habeas petitions must “specify all the grounds for relief available to the petitioner” and “state the facts supporting each ground.” *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (quoting Rule 2(c), RULES GOVERNING § 2254 CASES). “[C]onclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding.” *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)). For the same reasons that Harper did not fairly present this issue to the state courts, it is beyond debate that Harper did not fairly present his Confrontation Clause claim to the district court. A single conclusory footnote in a 291-page federal habeas petition is not enough to put a district court on notice of a claim.

Harper argues that it doesn’t matter that he put his Confrontation Clause claim in a footnote because that footnote cited a transcript in which his trial counsel made the essence of a Confrontation Clause objection. Harper bases this argument on *Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam). That case and its progeny hold that a claim properly presented in an earlier proceeding can be incorporated by reference into a federal habeas petition. *Ramey v. Davis*, 942 F.3d 241, 248–49 (5th Cir. 2019) (citing *Dye*, 546 U.S. at 4). But *Dye* and *Ramey* involved claims that were properly raised in prior *briefs*—not exhibits. *See id.* (claim properly raised in direct appeal brief and state habeas petition, but insufficiently briefed in federal habeas petition, was incorporated by reference); *Dye*, 546 U.S. at 3–4 (claim properly raised in a state habeas brief was incorporated by reference in federal habeas petition).

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But Harper's footnote did not incorporate *any* claim or argument by reference. Instead, Harper cited the transcript only to support a factual assertion: "The medical examiner who conducted the autopsy was available to testify two days later, but defense counsel declined to call him to the stand." That factual assertion may be a predicate for an argument that Harper might have made, but it is not an argument by itself. It is beyond debate that claims cannot be hidden inside of voluminous exhibits cited in footnotes hidden inside of habeas petitions that are hundreds of pages long. *See* RULES GOVERNING § 2254 CASES 2 advisory committee's note to Rule 2(c) (noting that Rule 2 does not require judges to grope through "two thousand pages of irrational, prolix and redundant pleadings" (quoting *Passic v. Michigan*, 98 F. Supp. 1015, 1016 (E.D. Mich. 1951)); *Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990) ("[I]t would be unwise to saddle district judges with the burden of reading through voluminous records and transcripts in every case." (quoting *Williams v. Kullman*, 722 F.2d 1048, 1051 (2d Cir. 1983)). *Dye* didn't turn habeas petitions into matryoshka dolls.

After the district court dismissed his habeas petition, Harper filed a Rule 59(e) motion to alter or amend the judgment, arguing that the district court had improperly overlooked his claim. The district court denied this motion, finding that the argument had not been fairly placed before the court. Harper challenges that denial, and he also argues that the district court should have construed his reply brief, which did raise a Confrontation Clause argument, as a Rule 15 motion to amend his habeas petition. We need not address these arguments. Even if they are sound, it is beyond debate that Harper's claim would still be unexhausted for failing to fairly present the Confrontation Clause claim to the state habeas court.

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B

Harper's second claim is that his counsel's performance was ineffective for failing to strike or challenge for cause three jurors—Dowlin, Basey-Higgs, and Williams. The state habeas court adjudicated this claim on the merits. Accordingly, “we may not issue a COA unless reasonable jurists could debate that the state court’s decision was . . . ‘contrary to, or involved an unreasonable application of, clearly established Federal law.’” *Nelson*, 952 F.3d at 658 (quoting 28 U.S.C. § 2254(d)(1)).

Harper's ineffective-assistance claim requires him to show “(1) that his counsel’s performance was deficient, and (2) that the deficient performance prejudiced his defense.” *Hughes v. Dretke*, 412 F.3d 582, 589 (5th Cir. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 689–94 (1984)). “Regarding the first prong, to establish deficient performance, a petitioner must demonstrate that counsel’s representation fell below an objective standard of reasonableness.” *Id.* (alteration adopted) (internal quotation marks omitted). “Regarding the second prong, to establish prejudice, a defendant 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.* (internal quotation marks omitted).

On the first prong, Harper argues (1) that the death penalty cannot be mandatory, see *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Sumner v. Shuman*, 483 U.S. 66, 75–78 (1987); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality), and (2) that jurors must be willing and able to give effect to mitigating evidence when deciding whether to approve the death sentence, *Morgan v. Illinois*, 504 U.S. 719, 733–35 (1992); *Penry v. Lynaugh*, 492 U.S.

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302, 327–28 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982). But the state court rejected these arguments, reasoning that “none of the cited jurors indicated that they would automatically vote for the death penalty in every case[,] and all expressed the opinion that they could answer the special issues in such a way that either life or death would result based on the evidence and the law.” Accordingly, the state court concluded that Harper’s counsel was not ineffective for failing to use a peremptory strike against these jurors. Harper has not identified any clearly established federal law that would allow reasonable jurists to debate this conclusion.

Nor has Harper even argued that reasonable jurists could debate *Strickland*’s second prong. No COA will issue on this claim.

C

Harper’s third claim is that the prosecutor discriminated against prospective black jurors (Harper’s “*Batson*” claim). The Government argues that Harper’s *Batson* claim has evolved considerably since it was first presented on direct appeal, and as a result most of it is procedurally defaulted. We begin by considering whether jurists of reason could debate whether any component of this claim has survived procedural default. *See Nelson*, 952 F.3d at 658. For those components whose procedural viability is at least debatable, we conclude that it is nonetheless beyond debate that the state habeas court’s merits decision was neither “contrary to . . . clearly established Federal law” nor “based on an unreasonable determination of the facts.” *Nelson*, 952 F.3d at 658 (quotations omitted). We will not issue a COA on this claim.

1

Federal habeas review of a claim is procedurally barred if the highest available state court “dismissed the claim on a state-law procedural ground instead of deciding it on the merits.” *Rocha v. Thaler*, 626 F.3d 815, 820 (5th Cir. 2010) (citing *Harris v. Reed*, 489 U.S. 255, 262 (1989)). But to qualify,

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that state-law procedural ground must be both an “independent and adequate ground for dismissal.” *Id.* (quoting *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997)). Independent means “independent of the merits of the federal claim.” *Id.* at 821 (quoting *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001)). Adequate means that the rule is “strictly or regularly applied evenhandedly to the vast majority of similar claims.” *Id.* (quoting *Amos v. Scott*, 61 F.3d 333, 339 (5th Cir. 1995)).

The TCCA dismissed Harper’s *Batson* claim in part under its procedural rule that arguments that could have been raised on direct appeal but were not are procedurally defaulted. *See Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) (en banc) (“It is well-settled ‘that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal.’” (quoting *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1996) (en banc))). We have previously recognized this rule as an adequate state ground that bars federal habeas relief, *Aguilar v. Dretke*, 428 F.3d 526, 535 (5th Cir. 2005) (citing *Ex parte Gardner*, 959 S.W.2d at 199), and Harper does not argue that we should reconsider that decision. So, the first question we must answer is whether any of Harper’s *Batson* arguments have at least debatably survived procedural default.¹

The merits of Harper’s *Batson* claim take two forms. First, he says that the prosecution’s strikes followed a pattern that gave rise to an inference of discrimination. Second, he says that each of the prosecution’s five stated reasons for using a peremptory strike against juror Banks were pretextual.

¹ Petitioners can overcome procedural default if they demonstrate “cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Martinez v. Johnson*, 255 F.3d 229, 239 (5th Cir. 2001) (discussing *Coleman*). However, Harper does not argue this point, and we do not see any arguments that could debatably allow for excusing procedural default.

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We start with Harper’s “pattern of strikes” argument. Harper did make a version of this argument on direct appeal. But he didn’t present any evidence of the racial makeup of the jury pool as a whole. The TCCA held that the juror questionnaires, which would have provided evidence of the racial makeup of the jury pool, were essential to substantiate Harper’s claim that there was a racial disparity between the venire and the seated jury. In other words, by failing to introduce the juror questionnaires, Harper was effectively asking the TCCA to take his word that the seated jurors were more likely to be white than the venire was. Because the record lacked evidence of the racial makeup of the accepted members, Harper could not substantiate this claim. As a result, the TCCA dismissed his claim on direct appeal. When Harper tried to offer that evidence in his state habeas litigation, the TCCA held that Texas law barred him from relying on arguments or evidence that he could have but failed to raise on direct appeal.

Harper does not even argue that the TCCA misapplied Texas law by “dismiss[ing] the claim on a state-law procedural ground instead of deciding it on the merits.” *Rocha*, 626 F.3d at 820. Therefore, it is beyond debate that Harper has procedurally defaulted the “juror questionnaire” aspects of his “pattern of strikes” argument.² Harper has, however, exhausted the more limited “pattern of strikes” argument that he presented on direct appeal.

Next, we consider Harper’s argument that the State’s five proffered reasons for striking juror Banks were pretextual. We agree that he exhausted his objections to the State’s first and second proffered reasons.

² Because it is beyond debate that Texas’s abuse-of-the-writ doctrine prevents Harper from relying on evidence that was not in the record on direct appeal, we need not consider the Government’s alternative argument that *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011), compels the same result.

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The State's third proffered reason for striking Banks was her statement that "everybody is capable of rehabilitation." On direct appeal, Harper argued that this reason was pretextual because jurors Cotton and Basey also expressed that the chance for rehabilitation was the most important factor to them but were seated anyways. However, in his habeas petition, Harper relied on a comparison to five additional jurors—jurors Price, Moore, Pavlovich, Summer, and Vaughan—who, like Cotton, Basey, and Banks, expressed that rehabilitation is the most important goal of criminal punishment. Because Harper did not rely on a comparison to these additional jurors on direct appeal, it is beyond debate that he cannot do so now. However, Harper can rely on the comparison to the first two jurors.

The State's fourth proffered reason was that Banks failed to answer the question about whether life in prison is more effective than the death penalty. In his direct appeal, Harper's only objection to this proffered reason was that there was no evidence that Banks was being "deceptive, or untruthful, in failing to answer that question." In his two habeas petitions, Harper reshaped his argument, relying on evidence not presented on direct appeal. He now argues that this reason is pretextual, citing evidence that the prosecution failed to strike three other jurors who also failed to answer parts of the questionnaire. Harper did not make this comparative argument on direct appeal, so it is beyond debate that he cannot make it now. Still, he has exhausted the "deception" argument that he made on direct appeal.

Finally, Harper argues that the State's fifth proffered reason—Banks's strong belief in the importance of forgiveness based in part on her background in ministry—was pretextual. But Harper did not make any version of this argument on direct appeal. As a result, jurists of reason could conclude only that this argument is entirely procedurally defaulted.

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2

Having sorted through which arguments in support of Harper's *Batson* claim were at least debatably exhausted, we next consider whether reasonable jurists could debate the district court's denial of the non-defaulted *Batson* arguments. We conclude that no debate is possible.

Where, as here, the defendant has made out a *prima facie* case that race motivated the challenged strikes, and the prosecutor has provided a race-neutral explanation for the strike, the trial court must weigh the evidence and decide whether the prosecutor's explanation is credible or mere pretext for discrimination. *Batson v. Kentucky*, 476 U.S. 79, 96–98, 98 n.21 (1986). Because this question “largely will turn on evaluation of credibility,” *id.* at 98 n.21, and the best evidence of credibility is “the demeanor of the attorney who exercises the challenge,” *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion), the trial court's decision “is entitled to ‘great deference’ and ‘must be sustained unless it is clearly erroneous,’” *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (citation omitted) (quoting *Batson*, 476 U.S. at 98 n.21 and *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). “[T]he federal court's role is to ‘determine whether the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary.’” *Hoffman v. Cain*, 752 F.3d 430, 448–49 (5th Cir. 2014) (quoting *Murphy v. Dretke*, 416 F.3d 427, 432 (5th Cir. 2005)).

We start with Harper's pattern of strikes argument. For statistical evidence like this to be relevant, “data concerning the entire jury pool is necessary. The number of strikes used to excuse minority . . . jury pool members is irrelevant on its own.” *Medellin v. Dretke*, 371 F.3d 270, 278–79 (5th Cir. 2004) (per curiam). As noted above, Harper cannot use evidence

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that he did not present on direct appeal.³ Because he cannot rely on the juror questionnaires, and because his statistical claim fails without that evidence, the district court's dismissal of this argument is not debatable.

Next, we consider Harper's argument that each of the prosecutor's five stated reasons for striking Banks was pretextual.

The prosecutor's first reason was that Banks did not answer questions directly and tended to "ponder," out loud, and at length. Banks was indeed loquacious and noncommittal. At first, she seemed to say that she was categorically opposed to the death penalty, saying: "I mean, I'm pretty settled—I feel like I'm pretty settled on my thoughts concerning the death penalty. I don't like to see people die. [Prosecutor:] Right. [Banks:] Period. I mean, who does?" She then indicated that the death penalty *might* be appropriate for serial killers. When the prosecutor later asked if the death penalty should only be used for serial killers, she responded that "[t]hose are not the only cases" and indicated that the murderer's remorse or chance for rehabilitation were the most important factors to her. Three pages of the transcript are then taken up by Banks's extended discussion of the facts of an unrelated DUI homicide case, and why she felt that 30 years imprisonment was justified because the crash took the lives of five children. Even after dozens of pages of the transcript were taken up discussing the death penalty, Banks still said that she had made only an "initial response," and that if she had another "30 minutes to ponder on the question" she might change her mind on when the death penalty is appropriate. Given these facts, jurists of reason could not debate the trial court's conclusion that "clearly established" federal law supports the state court's decision denying this

³ Even if Harper had presented this evidence, we recently denied *Batson* claims based on similar statistics. See *Sheppard v. Davis*, 967 F.3d 458, 472 (5th Cir. 2020), *cert. denied sub nom. Sheppard v. Lumpkin*, 141 S. Ct. 2677 (2021).

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aspect of the *Batson* claim. *Nelson*, 952 F.3d at 658 (internal quotation marks omitted).

The prosecutor's second and third proffered reasons were that Banks was opposed to the death penalty, and that she believed strongly in giving people a chance to rehabilitate themselves in prison. True, Banks later walked back her statement that she was "pretty settled" in her opposition to the death penalty. But even then, she continually insisted on the importance of rehabilitation and tied her distaste for the death penalty to her religious beliefs. There is nothing wrong with expressing a distaste for the death penalty. Nor is it racially discriminatory for a prosecutor to use a peremptory strike because a juror expresses such distaste. As such, there is no room to debate the district court's conclusion that clearly established law supports the state court's decision on this part of Harper's *Batson* claim. *See id.*

Harper fares no better with his argument that the prosecutor's fourth proffered reason was pretextual. In his direct appeal, Harper argued that Banks was not being untruthful or deceptive by failing to respond to one of the items on the questionnaire. But this argument does nothing to demonstrate that the prosecutor's stated reason was pretextual. Both things can be true: Banks could have been fully truthful and forthcoming, and the prosecutor could have been concerned that she failed to respond to one of the most important items on the questionnaire. Therefore, it is beyond debate that the trial court properly treated the state court's rejection of this claim as dispositive and in accord with clearly established federal law. *See id.*

Finally, even if Harper had evidence tending to disprove some of the prosecutor's proffered reasons, that would not open the trial court's actual decision to debate. "[A] *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." *Sheppard*, 967 F.3d at 472 (citing *Fields v. Thaler*, 588 F.3d 270, 277 (5th Cir. 2009); *Stevens v.*

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Epps, 618 F.3d 489, 500 (5th Cir. 2010)). Harper failed to rebut the prosecution's fifth stated reason for striking Banks at all. Therefore, the district court's rejection of Harper's *Batson* claim is not debatable.

3

Harper next argues that his counsel on direct appeal rendered ineffective assistance by making an incomplete *Batson* claim. He faults his counsel on direct appeal for conducting only a limited comparative juror analysis, failing to rebut the prosecutor's fifth stated reason for striking Banks at all, and failing to include the questionnaires of the jurors in the record.

An ineffective assistance of appellate counsel claim "requires a showing that (1) counsel's performance was legally deficient, and (2) the deficiency prejudiced the defense." *United States v. Bernard*, 762 F.3d 467, 471 (5th Cir. 2014) (citing *Strickland*, 466 U.S. at 687). "Applying AEDPA deference to *Strickland*'s already deferential standard, we must deny relief if 'there is any reasonable argument that [appellate] counsel satisfied *Strickland*'s deferential standard' despite failing to make the argument [in question]. In other words, we must deny relief 'if there was a reasonable justification for the state court's decision.'" *Higgins v. Cain*, 720 F.3d 255, 265 (5th Cir. 2013) (first alteration in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 105, 109 (2011)).

The habeas court conducted an extensive argument-by-argument review of Harper's comparative juror analysis argument. It considered each argument that Harper said should have been raised. It found that each of these arguments was meritless and that, as a result, Harper's appellate counsel was not ineffective for failing to raise them.

But Harper does not take issue with *what* the habeas court concluded. Instead, he takes issue with *how* the habeas court reached that conclusion. He argues that the habeas court improperly relied on the prosecutor's

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subsequent affidavit which explained some of the inconsistencies in her proffered reasons for striking Banks. For example, the prosecutor averred that her inaccurate statement that Banks wanted to do away with the death penalty was an “honest mistake based on the prosecutor’s impression after Banks repeatedly emphasized her belief in forgiveness and rehabilitation.” The habeas court also relied on the prosecutor’s testimony that while other jurors mentioned rehabilitation, the prosecutor only struck Banks because those jurors “did not reach the intensity of Banks’ belief in rehabilitation and forgiveness.” Harper argues that by relying on this “post hoc” reasoning, the habeas court violated *Miller-El II*’s “stand or fall” rule. See *Miller-El v. Dretke*, 545 U.S. 231, 251–52 (2005) (*Miller-El II*).

Miller-El II’s “stand or fall” rule means that prosecutors and later reviewing courts cannot accept “either entirely different substituted reasons or post hoc reasons for strikes.” *Chamberlin v. Fisher*, 885 F.3d 832, 841 (5th Cir. 2018) (en banc). But *Miller-El II* “does not extend to preventing the prosecution from later supporting its originally proffered reasons with additional record evidence, especially if a defendant is allowed to raise objections to juror selection years after a conviction and to allege newly discovered comparisons to other prospective jurors.” *Id.* “Nothing in the ‘stand or fall’ statement means that the prosecutor would forfeit the opportunity to respond to such contentions.” *Id.*

If the prosecution was not able to explain why it did *not* strike certain jurors after the fact, it would have to foresee future *Batson* claims and explain why it was *not* striking each prospective juror during jury selection. See *Chamberlin v. Fisher*, 855 F.3d 657, 674 (5th Cir. 2017) (Clement, J., dissenting) (“[T]o avoid the result reached by the majority here, during jury selection the prosecution would not only have had to explain why it struck specific black jurors—as it did—but also why it did *not* strike all white prospective jurors as well. There is nothing in *Batson*, *Miller-El II*, or any

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other case that compels anything of the sort.”) (emphasis in original), *rev’d*, 885 F.3d 832 (5th Cir. 2018) (en banc) (adopting Judge Clement’s dissenting opinion on rehearing en banc). *Miller-El II* requires consistency, not prophecy. As such, jurists of reasons could not debate the district court’s conclusion rejecting the “ineffective assistance” aspect of Harper’s *Batson* claim. *See Nelson*, 952 F.3d at 658. We will not issue a COA this claim.

D

Harper next argues that his trial counsel was ineffective for failing to object to the introduction of Dr. Moeller’s testimony on the basis that it was unreliable under the standard set forth in *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (en banc).⁴

The Supreme Court has acknowledged that testimony from psychologists on likelihood of future dangerousness is rather shaky in general because studies have shown that such testimony is wrong more often than it is right. *See Barefoot v. Estelle*, 463 U.S. 880, 901 (1983) (considering a report from the American Psychiatric Association (APA) stating that psychiatric opinions regarding future dangerousness are wrong “most of the time”); *see also Coble v. State*, 330 S.W.3d 253, 275 n.53 (Tex. Crim. App. 2010) (noting that “[m]ore recent psychiatric and legal articles have reached a similar conclusion [to the APA’s amicus brief in *Barefoot*], although some conclude

⁴ In his habeas petition, Harper repeatedly states that his counsel should have objected to the introduction of Dr. Moeller’s testimony based on both *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kelly*. But as the State correctly notes, *Daubert* applies only to proceedings based on the Federal Rules of Evidence. *See Daubert*, 509 U.S. at 588 (discussing Rule 702 of the Federal Rules of Evidence). Harper’s trial occurred in a Texas court—not a federal court—so his trial counsel could not have made a *Daubert* challenge. Instead, *Kelly*’s three-element test, which resembles *Daubert*’s test, governs. *See Kelly*, 824 S.W.2d at 573. The rest of this opinion will discuss only whether Harper’s trial counsel erred in failing to object to the introduction of Dr. Moeller’s testimony under the Texas rules of evidence (a “*Kelly*” challenge).

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that the accuracy of clinicians' predictions may now be slightly better than chance when they also use risk assessment and actuarial tools"). Nevertheless, the Supreme Court in *Barefoot*, 463 U.S. at 901, and the Texas Court of Criminal Appeals in *Coble*, 330 S.W.3d at 275–77, each concluded that expert testimony on future dangerousness may be admissible in some cases if it is reliable.

Even if we assumed that Harper's counsel rendered ineffective assistance, it is beyond debate that Harper fails *Strickland*'s second prong—prejudice—for two reasons: (1) the record shows that the trial court would have denied a *Kelly* objection, and (2) there was ample evidence of future dangerousness in the record apart from Dr. Moeller's testimony.

First, a *Kelly* objection would have been futile. While Harper's counsel did not specifically make a *Kelly* objection, he did “object to [Dr. Moeller's] testimony as having any value if it's from a lay perspective.” Harper's counsel also told the court, as a part of his argument that Dr. Moeller should not be able to testify, that the prosecution was “not calling Dr. Moeller to explain his report . . . [t]hey're calling Dr. Moeller to disavow that report.” The court overruled those objections. It is exceedingly unlikely that the court would have changed its mind had Harper's counsel merely uttered the words “*Kelly*” or “*Daubert*.” See *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994) (no ineffective assistance of counsel for failing to make an objection that would have been overruled).

Second, there was ample evidence supporting the jury's finding on future dangerousness even without Dr. Moeller's testimony. First and foremost, there was the evidence of this crime: Harper brutally murdered four people, including two young girls. The jury also heard evidence that he raped and killed another woman back in 1989, put a knife to a woman's neck and robbed her, forced a different woman into his car and assaulted her,

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assaulted a cab driver and refused to pay his fare, stole a purse from a former co-worker and withdrew \$800 from her account before being arrested, stole a woman's purse and pushed her pregnant sister into a shopping cart before stealing a car and fleeing the scene, and took another woman's purse, knocked her down, and again fled in a car.

In light of this overwhelming evidence that Harper was dangerous, there is no room for jurists of reason to even debate whether Dr. Moeller's testimony caused prejudice. *See Coble*, 330 S.W.3d at 281 (erroneously admitted testimony from psychologist on likelihood of future dangerousness did not cause prejudice because there was "ample evidence" of such dangerousness "quite apart from [the psychologist's] testimony"); *see also Busby v. Davis*, 925 F.3d 699, 723 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 897 (2020) (no ineffective assistance of counsel because it was "highly likely" that the result would have been the same without the error).⁵

E

Harper's final argument on appeal is that his trial counsel was ineffective for not arguing that his mental illness rendered his confession involuntary. He argues that had counsel raised this argument, there is a reasonable probability that the trial court would have suppressed his confession, or that at least one juror would have voted to acquit.

We are not the first court to address this issue. The habeas court rejected Harper's claim. It found that trial counsel was not ineffective, as a matter of state law, because that court *did* consider whether Harper's claim

⁵ The State also argues that this entire line of argument is procedurally barred. Harper responds that we should excuse the default, citing the equitable exception set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012). *See also Trevino v. Thaler*, 569 U.S. 413 (2013). We need not address these points, because even if we were to both identify and excuse Harper's default, the prejudice prong is beyond debate and is therefore independently dispositive.

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was voluntary. The habeas court noted that the trial court watched the video of Harper's confession which showed that Harper was given his *Miranda* warnings, asked questions about the warnings, and did not appear intoxicated or otherwise impaired. Based on these facts, the trial court found that Harper was not coerced in any way, and it admitted the confession. Given the trial court's findings, the state habeas court concluded that the result would not have been any different had trial counsel made this additional argument. The habeas court also concluded that it was "speculative at best that at least one juror would have found the applicant's confession involuntary."

The habeas court's findings were not an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). The trial court and the jury were both able to watch Harper's confession and heard testimony about his mental health. Based on these facts, they were able to consider what probative value Harper's confession had even without a specific argument from Harper's trial counsel. Because it is beyond debate that the habeas court's decision was reasonable, no COA will issue on this claim.

III

We DENY Harper's application for a COA on all claims.

Cause No. 1272085-A

EX PARTE

§ IN THE 182ND DISTRICT COURT

§ OF

GARLAND BERNELL HARPER,
Applicant

§ HARRIS COUNTY, TEXAS

AFFIDAVIT

STATE OF TEXAS

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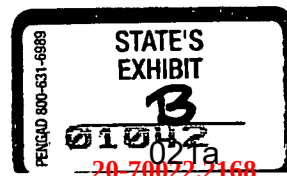
DATE: August 7, 2014

HARRIS COUNTY

von

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared Denise Bradley, who being by me duly sworn, upon her oath deposes and says:

"My name is Denise Bradley. I am presently licensed to practice law in the State of Texas and have been licensed since May 8, 1987. My Texas bar number is 06144050. While I was in law school, I was employed as an intern with the Harris County District Attorney's Office and was employed as a Harris County Assistant District Attorney on the date I was licensed. I am currently the Presiding Judge of the 262ND District Court of Harris County, Texas. While I was still a chief prosecutor with the Harris County District Attorney's Office, I, along with co-counsel Anna Emmons, represented the State of Texas in the 2010 capital murder trial of Garland Bernell Harper, cause no. 1272085. Prior to executing this affidavit, I reviewed the portion of Louis Jackson's testimony concerning his identification of Garland Harper from a photo array, Louis Jackson's postconviction affidavit in which he makes allegations concerning our visit with him and the identification procedure, the April 21, 2014 affidavit of co-counsel Anna Emmons, the *voir dire* examination of



prospective jurors Donna Banks, Deidra Broadnax, Kelvin Clark, and Martha Pugh, and James Stafford's July 23, 2010 email to Jim Leitner in which Stafford states he "was under the impression" that the District Attorney would approve a plea for life without parole if the State's expert agreed with the defense expert.

I agree and adopt the statements in Anna Emmons' April 21, 2014 affidavit concerning our interview with Louis Jackson prior to trial where Louis Jackson identified a photo of Garland Harper from a photo array. Neither Anna Emmons, the investigator present, nor I coerced Jackson to identify Harper; we did not tell him he had to identify someone; we did not tell Jackson that Harper killed his mother; we did not read portions of the offense report of Teasa Jackson's murder to Louis Jackson; we did not tell Jackson that the person he saw on the porch had to be Harper; and, we did not tell him about the DNA results before he identified Harper. As Anna Emmons states in her April 21, 2014 affidavit, we made it clear to Jackson that we wanted him to testify truthfully about what he remembered the night of his mother's murder.

I also agree and adopt the statements in Anna Emmons' April 21, 2014 affidavit concerning the lack of any deal with defense counsel for life. It was clear that defense counsel wanted the State to agree to plead to life but there was never a deal that we would agree to a plea to life if the State's expert agreed with the defense expert.

Further, I did not exercise a peremptory strike against prospective juror Donna Banks for racially-based reasons. As I stated on the record after defense counsel made a *Batson* challenge, I struck Banks for several reasons, one of which was that her entire *voir dire* seemed to be focused on her very strong belief in forgiveness and rehabilitation. I did not strike Banks because of being a member of any particular religion, I struck her because, based on her background in ministry, she was strongly in favor of forgiveness and rehabilitation to the point where it was

not overreaching to say that she seemed to think everyone could be rehabilitated. Although there were other prospective jurors who mentioned rehabilitation or thought that it was important, they did not reach the intensity of Banks' belief in rehabilitation and forgiveness. Also, as I stated on the record, Banks did not answer the questions directly and that was troublesome when considered along with her answers.

I now realize that I mistakenly said that Banks would do away with the death penalty; instead, she said at one point that she would keep it for someone who had no remorse or rehabilitation. My mistaken comment was not a "fantastic justification" to strike Banks; it was an honest mistake based on the impression I came away with after Banks repeatedly emphasized her belief in forgiveness and rehabilitation in her *voir dire*. Banks affirmed that she would always consider rehabilitation.

Also, I did not strike Banks because she left something blank on her questionnaire – something that other prospective jurors also did – and I didn't state on the record that I struck Banks because she left something blank on her juror questionnaire. Instead, I noted that she didn't answer on the questionnaire whether she thought life imprisonment was more effective than the death penalty, but she said during her *voir dire* that she believed life in prison was more effective. When discussing this during her *voir dire*, Banks made the statement about having thirty more minutes to "ponder" on the question.

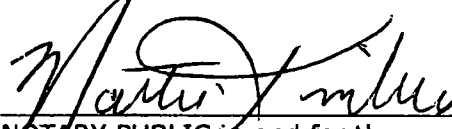
Finally, I did not strike Banks because of the number ratio she was given after filling out her juror questionnaire, even if other prospective jurors with the same ratio number were not struck. It is not uncommon to gain a different perspective of a juror after being able to question the juror during *voir dire*. As previously stated, Banks was struck for race-neutral reasons based on her *voir dire* examination.

I did not strike any of the prospective jurors, including Donna Banks, Deidra Broadnax (who even defense counsel acknowledged wasn't going to be able to do it), Kelvin Clark, and Martha Pugh, for racially-based reasons. I think the record is clear from their *voir dire* as to why the State chose to strike them.

I have read the above statement and find it to be true and correct to the best of my knowledge."


DENISE BRADLEY
Affiant

SWORN AND SUBSCRIBED before me, under oath, on this the 7th day of August, 2014.


NOTARY PUBLIC in and for the
State of Texas

My commission expires: 2-16-2015

United States District Court
Southern District of Texas

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

ENTERED
July 07, 2020

David J. Bradley, Clerk

Garland Bernell Harper,

Petitioner,

versus

Lorie Davis,

Respondent.

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Civil Action H-16-762

Opinion on Summary Judgment

1. *Introduction.*

Garland Bernell Harper brutally killed his girlfriend and her two daughters, aged seven and sixteen, after suspecting that she was having an affair. A jury convicted Harper of capital murder in 2010. In a separate punishment phase, the prosecution presented evidence of Harper's extensive lawlessness which included a previous murder. He was sentenced to death. After unsuccessfully seeking state appellate and habeas remedies, Harper now sues for federal habeas corpus relief.

Harper's federal habeas petition raises thirty-one claims. The state courts competently rejected most of Harper's federal claims. Harper has not shown that the remainder of his claims are properly raised or substantively meritorious. The court will deny him relief.

2. *Habeas Corpus Review.*

The writ of habeas corpus is an exceptional writ. Since the Magna Carta, the writ has protected individuals from wrongful punishment. The writ

allows individuals to challenge their custody on the grounds that their conviction and sentence violate federal law sufficient to be a gross miscarriage of justice.

Federal courts and Congress “adjust the scope of the writ in accordance with equitable and prudential considerations.”¹ Principles of comity, finality, and federalism demand that federal courts defer to state court judgments within reason. Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 to support the State’s interest in the integrity of criminal judgments. AEDPA limits what a federal court may consider and how it reviews a state court decision.

AEDPA gives state courts the first opportunity to correct constitutional violations and prevents federal courts from granting the writ based on claims, arguments, and evidence presented for the first time in a federal petition. Federal courts focus on “what a state court knew and did[.]”²

AEDPA requires significant federal deference when the state courts decide the merits of an inmate’s constitutional arguments. 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.”³ A decision is contrary to Supreme Court law when “it applies a rule that contradicts the governing law set forth in [Supreme Court] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [that] Court but reaches a different result.”⁴

¹ *Danforth v. Minnesota*, 552 U.S. 264, 279 (2008).

² *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

³ 28 U.S.C. § 2254(d)(1)(emphasis added).

⁴ *Brown v. Payton*, 544 U.S. 133, 141 (2005).

An unreasonable application of Supreme Court precedent is different from an incorrect one. AEDPA does not permit federal habeas relief for an erroneous decision, but only one that is objectively unreasonable. “[F]ocus[ing] on what a state court knew and did,”⁵ an inmate must show that the state ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”⁶ This deference confines habeas relief to “extreme malfunctions in the state criminal justice systems.”⁷ “If this standard is difficult to meet, that is because it was meant to be.”⁸

Harper has not met the AEDPA standard for granting the writ.

3. *Analysis of Exhausted Claims.*

Harper litigated most of his federal claims in state court. Harper must show that the state court’s rejection of those issues was contrary to Supreme Court law or unreasonable.

A. Juror Basey Higgs (claim 1).

During post-conviction review, Harper employed an investigator to interview the jurors who served at trial. One juror, Carolyn Basey Higgs, swore an affidavit saying that she decided to vote for a death sentence after finding Harper guilty. She said nothing would have changed her mind. Harper argues that her failure to consider mitigating evidence violated his constitutional rights.

⁵ *Pinholster*, 563 U.S. at 182.

⁶ *White v. Woodall*, 572 U.S. 415, 420 (2014) (quotation omitted); see also *Berghuis v. Thompson*, 560 U.S. 370, 380 (2010); *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

⁷ *Greene v. Fisher*, 565 U.S. 34, 38 (2011).

⁸ *Richter*, 562 U.S. at 102.

The state court denied this claim because: (1) Basey Higgs' affidavit was inadmissible; (2) her affidavit did not say she did not deliberate or consider mitigating evidence; (3) she never said she would automatically impose a death sentence; (4) she said in voir dire that she could follow the law; and (5) she was not challengeable for cause because of her views on the death penalty.

The state court's rejection of this claim was reasonable. Courts only consider affidavits about a jury's deliberations when there has been an outside influence. Other than Basey Higg's inadmissible affidavit, nothing in the record suggests that she was a biased juror or did not follow the law in deliberations. This claim has no merit.

B. Trial Counsel Ably Represented Harper

Harper says his attorneys gave him ineffective assistance.⁹ Under *Strickland v. Washington*,¹⁰ Harper must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. Surmounting *Strickland's* high bar is not easy. The reviewing court under *Strickland* must grant deference to the decisions of the defense attorneys. Review under § 2254(d) is all the more difficult because a court must grant deference to both the decisions of counsel and of the state court.

Harper says that his attorneys were ineffective because his trial attorneys did not

- challenge the State's manipulation of witness testimony about an extraneous murder;
- properly prepare an expert to testify;

⁹ Claims 2, 4, 5, 6, 8, 9, 10, 11, 14, 15, 16, 17, and 18.

¹⁰ 466 U.S. 668, 687 (1984).

- call lay witnesses to testify that he has mental illness;
- call witnesses to show he would not be a future danger;
- present testimony through a social historian;
- present available mitigating evidence;
- tell jurors how to consider mitigating evidence;
- remove prospective jurors who would automatically vote for death;
- preserve error;
- effectively bargain with the prosecution;
- present evidence of mental illness to show that his confession was involuntary.

The state habeas court extensively discussed each of these arguments. The state court found no error in trial counsel's handling of the trial of Harper's guilt. For instance, Harper says that trial counsel did not adequately question prospective jurors to remove those who would automatically vote for death. After reviewing the record, however, the state habeas court found that counsel's questioning was adequate. Also, Harper faults trial counsel for not making a timely objection to victim-impact testimony. The state habeas court, however, found that counsel did object. Even then, the state court found that any failure to object would not have harmed the defense.

Most of Harper's *Strickland* claims involve trial counsel's performance in the penalty phase of trial. Harper complains that defense counsel mishandled evidence about an extraneous murder. The State argued that Harper raped and killed Teasa Jackson in 1989. The State argued that Jackson's son (Louis Jackson) identified Harper as the man last seen with his mother, Harper's fingerprint was found by Jackson's body, Harper's DNA was found in Jackson's nude corpse, and Harper lied about having a sexual

relationship with Jackson. Harper argues that, decades after the crime, the State manipulated Louis Jackson's recollection of the offense and influenced him into identifying Harper as the man last seen with the victim. Also, Harper says that trial counsel should have objected when the State argued that he had raped Teasa Jackson.

As the Court will discuss at greater length below, Harper has not shown that his counsel was deficient in dealing with that evidence because Harper has not shown that the State manipulated the evidence or testimony. Still, the state habeas court found that trial counsel objected to the introduction of the extraneous crime and extensively cross-examined Louis Jackson. Trial counsel effectively challenged the DNA evidence relating to the murder. Also, Harper cannot show prejudice. Even if trial counsel had been able to prove that the State manipulated testimony, Harper's fingerprints and DNA still implicated him in Teasa Jackson's murder. The state habeas court reasonably found no deficient performance or prejudice regarding the extraneous murder.

Harper's claims extensively challenge how trial counsel put mitigating evidence before the jury. Harper claims that trial counsel did not prepare his expert or substantiate the expert's testimony through lay witnesses. Additionally, Harper says that counsel should have called other lay and expert witnesses. Harper presented all these arguments to the state courts, which extensively discussed them before finding each meritless.

Harper's arguments failed to acknowledge the case his trial attorneys put before jurors. As a common thread among all Harper's post-conviction arguments, the state habeas court found that Harper's new arguments would not have materially changed the case before the jury. Through extensive discussion, Harper argues that the defense should have packaged the mitigating case differently, or added factual nuances, but at its core, the

post-conviction was the same as that counsel presented. The state habeas court found that trial counsel presented fundamentally the case information on which Harper based his habeas application. To the extent that Harper made new allegations, rules of evidence and procedure would have prevented their introduction at trial.

Harper likewise faults counsel for various legal errors, such as failing to define mitigating evidence, tell jurors how to give effect to his mitigating evidence, and argue appropriately in closing. The state habeas court, however, concluded that trial counsel had, in effect, done each of those things. Harper's arguments fail to acknowledge trial counsel's efforts to assist jurors in assessing mitigating evidence.

Despite Harper's wide-ranging and long-winded complaints about trial counsel's efforts, he has not shown that the state court was unreasonable in finding no deficient performance or much less resultant prejudice. The court will deny Harper's ineffective-assistance claims.

C. Appellate Attorney (Claim 19).

Harper says that his appellate attorney was defective because he waived oral argument and did not file a reply brief. No federal law requires an attorney to file a reply brief or request argument. Harper has not shown that submission of his case on briefs harmed his appeal. The state court was reasonable to deny this claim.

D. Manipulation of Testimony (Claim 3).

Harper says that the State manipulated the testimony of Louis Jackson. The State argued that, years before trial, Harper had raped Teasa Jackson. Louis Jackson testified that he remembered seeing Harper with his mother immediately before her murder in 1989. On state habeas review,

Harper presented an affidavit in which Jackson said the prosecutors fed him information about the crime by reading parts of the police report, telling him that they recovered Harper's DNA at the crime scene, and saying that Harper had killed his mother.

A prosecutor may not obtain false testimony. An inmate must show that (1) the testimony was false, (2) prosecutors knew it was false, and (3) the testimony affected the jury's verdict.¹¹

The trial prosecutors submitted affidavits on state habeas review. The prosecutors said that, at the time of trial, Jackson was in prison. The prosecutors met with Jackson and asked if he remembered the circumstances of his mother's murder. Jackson said that he did. He also said he remembered what the man who was with his mother looked like. Jackson immediately identified Harper when shown a photo array. The prosecutors said that they did not tell Jackson that his DNA matched that from the rape kit, did not tell him that Harper killed his mother, and did not read to him from the offense report.

Based on the prosecutors' affidavits, the state habeas court found Jackson's post-conviction affidavit not credible. The state habeas court found that the State did not manipulate Jackson's testimony or present false testimony through him. AEDPA requires federal deference to the state court's findings. Harper has not shown that the state court's credibility determinations were not correct.

Further, trial counsel effectively challenged Jackson's ability to identify Harper after so many years. The jury knew of discrepancies between his statements to police in 1989 and his recollection years later.

¹¹ *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269-71 (1959).

Also, Jackson only saw Harper soon before his mother's murder. He never witnessed the killing. Even without Jackson's testimony, the State presented evidence connecting Harper to the murder. The State presented evidence that Harper's fingerprint was found in the bathroom where her body was found. Harper's DNA was found in her corpse. Harper lied about having had sex with her.

Moreover, the murder was only one feature in Harper's long history of violence, including the triple murder for which he was convicted. Without evidence of the extraneous murder, there is still no reasonable probability of a different outcome.¹² This claim will be denied.

E. Racial Discrimination in Jury Selection (claims 12, 13, 28).

Harper alleges that the State struck prospective juror Donna Banks for cause because of her race. Under *Batson v. Kentucky*,¹³ courts engage in a three-step burden-shifting framework to decide if the prosecution engaged in racial discrimination during jury selection. First, the defendant must make a *prima facie* showing that the State used peremptory strikes based on race. Second, the State must give race-neutral explanations for the strikes. Finally, the trial court must decide if the defendant has carried the burden of showing purposeful discrimination.

When the State exercised its peremptory strike against Banks, the defense noted that she was African-American and asked for a race-neutral explanation. The State provided several reasons for striking her: she did not answer questions directly, she said she would get rid of the death penalty in favor of life without parole, she believed that everyone is capable of

¹² *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining materiality in terms of a "reasonable probability" of a different outcome).

¹³ 476 U.S. 79 (1986).

rehabilitation, she believed that life in prison was more effective than the death penalty, and she believed strongly in forgiveness.

The defense responded that, of the eight peremptory strikes used by the State, four were against African-Americans. The defense argued that the jurors that the State struck answered the jury questionnaire similar to those it did not strike. The trial court found that the State's reasons for striking Banks were race-neutral.

When Harper raised this claim on appellate review the Court of Criminal Appeals found that the record supported the State's reasons for striking Banks.¹⁴ The Court of Criminal Appeals refused to accept Harper's invitation to compare Bank's questioning to other jurors because he had not provided jury questionnaires, provided information about the jury's racial composition, or explained why the State struck the other jurors.¹⁵

Harper renewed his claim on state habeas review. This time, however, the court had additional information. The prosecutor provided an affidavit giving more detail on why the State struck Banks. The state habeas court had information about the other jurors, but found that they did not exhibit the same or similar characteristics as those that caused the State to dismiss Banks.

Harper raises three related claims: (1) the State exercised peremptory strikes in a discriminatory manner (claim 12), (2) appellate counsel should have raised, and supported, a comparative juror analysis (claim 13), and (3) the State's discrimination extended to all African-American jurors (claim 28).

The Court easily rejects Harper's second and third arguments. Harper's state habeas attorney raised a comparative juror analysis. The

¹⁴ 2012 WL 4833834 at *3.

¹⁵ 2012 WL 4833834 at *3.

state habeas court found it meritless. Harper has not shown that the Court of Criminal Appeals would have adjudicated the claim any differently on direct appeal. And the Supreme Court has not held that a comparative juror analysis is necessary in the *Batson* framework.

Harper also summarily argues that the State used other strikes in a discriminatory manner but does not even provide enough detail to decide if he made a *prima facie* case for discrimination.

Harper has also not shown that the state courts were unreasonable in rejecting his *Batson* claim. The prosecutor provided several reasons for dismissing Banks, all unrelated to her race. The record supports the State's explanation, particularly because Banks gave long-winded answers and strongly favored rehabilitation. The state courts were not unreasonable because Banks' questioning could reasonably give prosecutors the impression that she would not be a good juror. As Harper has not met his burden of showing that the state court was unreasonable in finding that he did not demonstrate purposeful discrimination, the Court will deny these claims.

F. Mental Illness (claim 23).

Harper claims that a diagnosis of schizoaffective disorder should exempt him from the death penalty. Harper wants to apply the Supreme Court's exemption of intellectual disability from execution in *Atkins v. Virginia*¹⁶ to all mental illness. No law extends the *Atkins* holding to prohibit the execution of an inmate with mental illness. The Eighth Amendment does not bar the execution of a mentally ill but competent inmate. This claim will be denied.

¹⁶ 536 U.S. 304 (2002).

G. Sufficiency of the Evidence (claim 27).

Harper claims that insufficient evidence supports the jury's decision that he would be a future societal danger. A court may grant an insufficient evidence claim only if, after viewing all the evidence "in the light most favorable to the prosecution," it determines that no rational trier of fact could have reached the same decision as the jury.¹⁷

On direct appeal, the Court of Criminal Appeals found that the circumstance of this crime alone were sufficient to show that Harper would be dangerous. Also, the jury knew of Harper's two-decade history of crime, including violence toward family members and strangers. Importantly, Harper had killed before.¹⁸ Sufficient evidence supported the jury's verdict.

H. Voluntariness of his Confession (claim 29).

While incarcerated in 1995, police officers interviewed Harper about the killing of Teasa Jackson. Harper says that his statement was coerced because he was in prison and feared disciplinary action if he did not talk. The trial court held a hearing to decide if Harper voluntarily confessed. The testimony did not show any coercive pressure in the interview. A prison guard escorted Harper to the interview room but did not enter it. Harper was not handcuffed during the interview. Police officers testified that they delivered the *Miranda* warnings. Harper understood those warnings. The officers wore plainclothes and were armed. The police explained that they did not use coercive tactics. They talked to Harper for only about two hours. They told him that he could leave at any time.

¹⁷ *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¹⁸ *Harper*, 2012 WL 4833834, at *3-4.

On direct appeal the Court of Criminal Appeals found that this claim was procedurally barred because trial counsel did not make a proper objection to the 1995 statement's admission. That holding bars federal review. Alternatively, the state habeas court found that the government did not overwhelm Harper's will.¹⁹ Harper has not shown that he was threatened with prison disciplinary infractions if he did not talk to officers. Harper cites no federal case finding that Texas prison conditions rendered a confession, plea, or waiver involuntary. The record does not suggest that the police officers violated Harper's rights by taking the 1995 statement. If Harper had presented the claim in a procedurally proper manner, the Court would have denied relief.

I. Expert Witness (claims 30 and 31).

Harper says that the State violated his constitutional rights by allowing its expert to remain in the courtroom after the rule of sequestration had been invoked. The Court of Criminal Appeals found that Harper defaulted this claim because he did not object at trial.²⁰ The state-imposed procedural ruling bars federal review.

The claim is also without merit. The federal constitution did not create the rule of sequestration. The rule is a matter of procedure.²¹ A violation of the rule of sequestration is not of federal constitutional magnitude. Even if the expert's presence in the courtroom may have violated state law, that

¹⁹ FFCL, at p. 65 ¶ 65.

²⁰ 2012 WL 4833834, at *5.

²¹ Texas Rule of Evidence 614.

error did not make the proceeding fundamentally unfair.²² This claim is denied.

J. Routinely Denied Claims (Claims 20, 21, 24, 25).

Some of Harper's claims relate to Texas's method of assessing a death sentence. Other prisoners have repeatedly raised similar attacks to Texas's capital sentencing scheme. Courts have consistently denied each of those claims. As controlling authority has rejected his arguments, the state court's denial of those claims was not contrary to, or an unreasonable application of, federal law.

K. Cessation of Medication (Claim 22).

Harper says that he "likely" experienced symptoms of withdrawal and mental illness when he abruptly stopped taking medication during trial. This claim is speculative. Harper does not show any evidence that he was denied medication. An expert testified at trial that Harper was taking medication. Even if he was not medicated, Harper has not shown that made him incompetent. The state court found that Harper did not complain at trial about mental or physical issues that would prevent him from consulting with counsel. Harper also gave lucid answers when questioned on the record. This claim will be denied.

4. *Unexhausted Claims.*

Harper raises two claims that he did not put before the state courts. Harper says that trial counsel should have (1) objected to an expert's testimony (claim 7) and (2) objected to the suppression of hearsay testimony

²² *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (finding that a court may grant habeas relief only when the errors of the state courts make the underlying proceeding fundamentally unfair).

(claim 26). An inmate must exhaust all state remedies before federal habeas relief is available.²³ Unexhausted claims are procedurally barred by Texas abuse-of-the-writ rules.

Harper says that trial counsel should have objected to the State expert's testimony about his future dangerousness under *Daubert*.²⁴ *Daubert*, however, does not apply to expert evidence in a capital sentencing proceeding. Even without an objection, trial counsel engaged the expert in lengthy cross-examination that accentuated changes in his opinion. Trial counsel did not perform deficiently, and no prejudice resulted.

Harper also says that trial counsel should have objected when the trial court did not allow the defense to present mitigating evidence that was hearsay. Harper, however, does not show how the exclusion of that testimony harmed his defense. The claim fails for not showing *Strickland* prejudice.

5. *Argument and Hearing.*

Harper requests oral argument on his petition and wants the court to hold an evidentiary hearing. The court can decide this case on the papers.

6. *Certificate of Appealability.*

Although Harper has not yet requested a certificate of appealability for his claims, the issue of a certificate is likely to arise. This court may deny a certificate of appealability on its own motion. A certificate will issue only if the petitioner has made a "substantial showing of the denial of a

²³ 28 U.S.C. § 2254(b)(1).

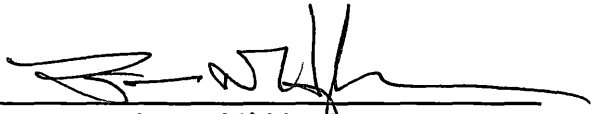
²⁴ *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

constitutional right.”²⁵ Precedent forecloses relief on all Harper’s claims. No certificate is necessary.

7. *Conclusion.*

“Though the penalty is great and our responsibility heavy, our duty is clear.”²⁶ The court grants respondent’s motion for summary judgment and denies Harper’s habeas petition. The court will dismiss his petition. The court will not certify any issue for review on appeal.

Signed on July 7, 2020, at Houston, Texas.


Lynn N. Hughes
United States District Judge

²⁵ 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

²⁶ *Rosenberg v. United States*, 346 U.S. 273, 296 (1953) (Clark, J.).



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-81,576-01

EX PARTE GARLAND BERNELL HARPER, Applicant

**ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE
NO. 1272085-A IN THE 182ND JUDICIAL DISTRICT COURT
HARRIS COUNTY**

Per curiam. ALCALA, J. dissents.

ORDER

This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

In October 2010, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Harper v. State*, No. AP-76,452, slip. op. (Tex. Crim. App. Oct. 10, 2012) (not designated for publication).

Harper–2

In his application, Applicant presents twenty-four grounds of error challenging the validity of his judgment and sentence. The trial court did not hold an evidentiary hearing. The trial court entered findings of fact and conclusions of law and recommended that the relief sought be denied.

This Court has reviewed the record regarding applicant’s allegations. We reject: finding number forty-four (44); the portion of finding number fifty-nine (59) which states that “trial counsel objected to the admission of Jackson’s oral statements to Binford and obtained a hearing on the admissibility of the oral statements about his mother’s murder (XIX R.R. at 123-54)”; the portion of finding number one hundred and sixty-six (166) which states that juror Sandra McHenry “agreed with her juror questionnaire statement that the death penalty is not necessary in modern civilization – it depends on what the person has done and the case”; finding number one hundred and eighty-nine (189); the portion of finding one hundred and ninety (190) which states that the State exercised “five [peremptory strikes] against Caucasians”; the portion of finding number one hundred and ninety-one (191) which follows the phrase, “The Court finds that the applicant exercised ten peremptory strikes”; and conclusion number five (5). We otherwise adopt the trial court’s findings and conclusions. We also note that grounds eleven, nineteen, twenty-two, twenty-three, and twenty-four are procedurally barred. *See Ex parte Jimenez*, 364 S.W.3d 866, 880 (Tex. Crim. App. 2012); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004).

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Therefore, based upon the trial court's findings and conclusions that we have adopted and our own review, we deny relief.

IT IS SO ORDERED THIS THE 24th DAY OF February, 2016.

Do Not Publish

Original

Cause No. 1272085-A

EX PARTE

53

IN THE 182ND DISTRICT COURT

§

OF

GARLAND BERNELL HARPER,
Applicant

§

HARRIS COUNTY, TEXAS






Chris Daniel
District Clerk

NOV. 25 2014

Time: 4:00
By: [Signature] Deputy
Harris County, Texas

**STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

The Court, having considered the applicant's application for writ of habeas corpus, the State's original answer, and official court records and documents in cause nos. 1272085 and 1272085-A, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Garland Bernell Harper, was indicted in cause no. 1272085 for the felony offense of the capital murder of Triska Rose, Briana Roberson, and Mya Love during the same criminal episode (XIV R.R. at 8-9).
2. The applicant was represented at trial by counsel Gerald Bourque and counsel James Stafford.
3. On October 18, 2010, after the jury affirmatively answered the first special issue on future danger and negatively answered the mitigation issue, the trial court assessed punishment at death by lethal injection (XXIV R.R. at 59-60).
4. On October 10, 2012, the Court of Criminal Appeals affirmed the applicant's conviction. *Harper v. State*, No. AP-76,452 (Tex. Crim. App. Oct. 10, 2012)(not designated for publication).

FACTS OF CAPITAL MURDER

5. On October 24, 2008, the applicant murdered his girlfriend Triska Rose and her daughters Briana Roberson and Mya Love during the same criminal episode.
6. Around 6:00 a.m. on October 24, 2008, the applicant, who began dating Triska

mitigating evidence into consideration if it was presented; and, that he would have to hear the life story (XI R.R. at 104-16).

173. The Court finds that none of the cited jurors – Basey Higgs, Dowlin, Cotton, Williams, Morris, McHenry, Garcia, and Hardgrave – indicated that they would automatically vote for the death penalty in every case; instead, they all expressed the opinion that they could answer the special issues in such a way that either life or death would result, based on the evidence and the law.

174. The Court finds that trial counsel conducted meaningful *voir dire* and substantively questioned the cited jurors; the Court finds that none of the cited were “substantially mitigation-impaired” or that they were “processed” so that they expected to reach the punishment phase.

175. The Court finds that prospective jurors commonly express different and/or more complete opinions during *voir dire* than on juror questionnaires after legal proceedings and the law are explained to them during *voir dire*.

176. The Court finds unpersuasive the postconviction affidavit of Colorado defense attorney David Wymore in light of Wymore basing his hindsight evaluation of trial counsels’ *voir dire* performance on his own opinion and his interpretation of ABA guidelines.

177. The Court finds that trial counsel are not ineffective for concentrating *voir dire* examination on the prospective jurors’ ability to answer the special issues – a common occurrence in capital cases.

178. The Court finds that trial counsel are not ineffective for not exercising a peremptory strike against the cited jurors or for not challenging the cited jurors for cause on the ground that the cited jurors would allegedly automatically vote for the death penalty in every case.

Eleventh and Twelfth Grounds: Batson/alleged ineffective assistance of appellate counsel

179. The applicant’s *Batson* claim regarding prospective juror Donna Banks was raised and rejected on direct appeal. *Harper*, slip op. at 6-7.

180. During the State's *voir dire*, prospective juror Donna Banks stated that she obtained a minister diploma that she used to lead Bible study groups; that she thought it was phenomenal that a close friend had forgiven her son's murderer; that her friend was at total peace with God because she forgave the murderer; that there is an opportunity for a person given life in prison to rehabilitate himself; that being strong in faith is having to forgive a person; and, that God looks at the heart and knows if someone is truly sorry (VII R.R. at 159-62).

181. When asked if she had thought about the death penalty more since filling out the juror questionnaire, Banks said that she was "pretty settled" on her thoughts on the death penalty: "I don't like to see people die" and she was not one to say that you die too if you killed somebody (VII R.R. at 164).

182. Banks stated that she would keep the death penalty for someone who had no remorse or respect for human life, such as serial killers without rehabilitation, but she thought life in prison was an opportunity to change, become educated, and become a role model; that she answered "absolutely" when asked if she felt strongly about people's potential to be rehabilitated; and, that she thought most people could be rehabilitated if given the opportunity and if the person chose to be (VII R.R. at 165-7, 171).

183. Banks stated that rehabilitation is an option where they can minister to others or mentor others in prison; that she felt strongly about rehabilitation and forgiveness; that rehabilitation should always be considered; and, that whether a person can be rehabilitated is most important (VII R.R. at 168-70, 177-8).

184. Banks stated that she would have to say that life imprisonment is more effective than the death penalty, and that would be her initial response unless she had thirty more minutes "to ponder on the question" (VII R.R. at 178-9).

185. At the conclusion of *voir dire*, the State exercised a peremptory strike against Banks, and trial counsel noted that Banks was African-American and asked for a race-neutral explanation for the Strike (VII R.R. at 181-2).

186. The prosecutor stated that Banks was unable to answer the questions directly; that she called it "pondering for the next thirty minutes;" that the prosecutor thought that was the way that Banks appeared to evaluate things; that Banks stated that she would do away with the death penalty in favor of life without parole; that she believed that rehabilitation is the most important thing and everybody is capable of rehabilitation; that a person can do better in prison for life; that she did not answer the question on the juror questionnaire about whether she thought life in prison was more effective than the death penalty; that, when asked, she stated that she believed life in prison was more effective; that she talked about her friend forgiving the person who murdered her own son; and, that based on Banks' background in ministry and the things she said during *voir dire* that forgiveness is something she is capable of and rehabilitation is something she feels very strongly about (VII R.R. at 182-3).

187. The trial court ruled the State's reason for striking Banks was race-neutral and denied trial counsel's *Batson* challenge (VII R.R. at 184-5).

188. On direct appeal of the applicant's conviction, appellate counsel presented a *Batson* claim concerning the State's strike of Banks and the Court of Criminal Appeals rejected the claim, noting that the record showed that Banks "gave long winded and non-committal answers to some questions while appearing opposed to the death penalty during others;" that she stated that she was pretty settled and did not like to see people die; and, that she expressed a strong belief in rehabilitation and forgiveness. *Harper*, slip op. at 6-7.

189. The Court finds that there were eight seated Caucasian jurors, two Hispanic seated jurors, and two African-American seated jurors in the applicant's trial.

190. The Court finds that State exercised nine peremptory strikes: five against Caucasians and four against African-Americans, including Donna Banks.

191. The Court finds that the applicant exercised ten peremptory strikes: eight against Caucasians, one against an Hispanic, and one against a "caucasian/Chinese."

192. The Court finds that the prosecutor was in the best position for determining that Banks did not answer the questions directly and the trial court was in the best position to render an opinion as to the genuineness of the prosecutor's statement.

193. The Court finds, based on the credible affidavit of former prosecutor Denise Bradley, the prosecutor's mistaken comment that Banks would do away with the death penalty was not an improper implausible or fantastic justification to strike Banks; it was an honest mistake based on the prosecutor's impression after Banks repeatedly emphasized her belief in forgiveness and rehabilitation. *See State's Writ Exhibit B, August 7, 2014 affidavit of prosecutor Bradley.*

194. The Court finds that the prosecutor's statement that Banks thought everyone was capable of rehabilitation and that a person could do better in prison for life than they could with the death penalty is a fair assessment of Banks' *voir dire* answers.

195. The Court finds, based on the credible affidavit of former prosecutor Bradley, that although she noted that Banks left something blank on her juror questionnaire - something that other prospective jurors also did - Bradley did not strike Banks because she left a blank on the questionnaire; she struck Banks because of her repeated, fervent, pervasive belief in rehabilitation. *See State's Writ Exhibit B, August 7, 2014 affidavit of prosecutor Bradley.*

196. The Court finds, based on the credible affidavit of former prosecutor Bradley, that although Banks was labeled a 3/3 on her juror questionnaire - the same number ratio given to other prospective jurors who were not struck - the prosecutor did not strike Banks because of her number ratio because it is not uncommon to gain a different perspective of a juror after *voir dire*. *Id.*

197. The Court finds, based on juror Royce Ann Smith's *voir dire*, that juror Smith did not exhibit the same or similar characteristics as Banks; that Smith did not talk about rehabilitation during *voir dire*; and, that Smith did not use rehabilitation as a reason for a life sentence (IX R.R. at 50-60).

198. The Court finds, based on juror Richard Cotton's *voir dire*, that juror Cotton did not exhibit the same or similar characteristics as Banks; that although Cotton marked on his juror questionnaire that rehabilitation is the most important objective of punishment, Cotton explained during *voir dire* that he read the question as which means more if someone can be rehabilitated; and, that Cotton did not proffer additional discourse on rehabilitation or emphasize rehabilitation throughout *voir dire* as did Banks (V R.R. at 8, 15, 21-2).

199. The Court finds, based on juror Randall Price's *voir dire*, that juror Price did not exhibit the same or similar characteristics as Banks; that Price did not mention rehabilitation during *voir dire*; that he thought the death penalty was unfortunate but necessary; and, that there are some crimes where it is a fitting punishment (V R.R. at 47-83).

200. The Court finds, based on alternate juror Thomas Moore's *voir dire*, that alternate juror Moore did not exhibit the same or similar characteristics as Banks; that Moore did not discuss rehabilitation during *voir dire*; that he stated he could be a juror on a death penalty case; and, that he was comfortable answering the special issues on the law and evidence, regardless of the result (XI R.R. at 206-17).

201. The Court finds, based on alternate juror Nita Pavlovich's *voir dire*, that Pavlovich did not exhibit the same or similar characteristics as Banks; that although Pavlovich thought everyone could be rehabilitated when she was younger, she realized as she got older that some people could not; and, that she acknowledged that the special issues do not ask if a defendant is capable of rehabilitation (XI R.R. at 127-8, 158).

202. The Court finds that the applicant exercised a peremptory strike against prospective juror Roberta Summer who referred to the theory of "pull yourself up by your bootstraps" when discussing the mitigation special issue and who did not mention the concept of rehabilitation during *voir dire* (IV R.R. at 252-3).

203. The Court finds that the applicant exercised a peremptory strike against prospective juror June Vaughan who did not discuss the concept of rehabilitation and who

would keep the death penalty if she had a choice, because there are some things that are so awful she did not think the people deserved a second chance (VIII R.R. at 29).

204. The court finds that the State's peremptory strike of Banks is not racially-based when compared with the State's acceptance of jurors Smith, Cotton, and Price and alternate jurors Moore and Pavlovich and to the State's willingness to accept prospective jurors Summer and Vaughan who were struck by the applicant.

205. The Court finds, based on the credible affidavit of former prosecutor Bradley, she struck Banks for several reasons, including her strong belief in forgiveness and rehabilitation, and that "although there were other prospective jurors who mentioned rehabilitation or thought it was important, they did not reach the intensity of Banks' belief in rehabilitation and forgiveness." *See State's Writ Exhibit B, August 7, 2014 affidavit of prosecutor Bradley.*

206. The Court finds that the State engaged in meaningful *voir dire* of Banks and that the State did not apply a group bias; the Court finds, based on the credible affidavit of former prosecutor Bradley, that Bradley did not strike Banks because she was a member of any particular religion; instead, she struck Banks, "because, based on her background in ministry, she was strongly in favor of forgiveness and rehabilitation to the point where it was not overreaching to say that she seemed to think everyone could be rehabilitated." *Id.*

207. The Court finds that the State provided facially race-neutral reasons for its peremptory strike of Banks out of a venire of 120 individuals; the Court finds that the State's reasons for the strike were not pretextual or implausible or fantastic justification.

208. The Court finds that appellate counsel is not ineffective for not raising on direct appeal the same meritless arguments that the applicant raises on habeas in connection with the *Batson* claim.

sources are only guides "because no set of detailed rules can completely dictate how best to represent a criminal defendant.").

Eleventh and Twelfth Grounds: Batson/alleged ineffective assistance of appellate counsel

19. The applicant's *Batson* claim concerning the State's peremptory strike of prospective juror Donna Banks was raised and rejected on direct appeal. *Harper*, slip op. at 6-7. As such, the claim need not be addressed in the instant habeas proceedings or in subsequent proceedings. See *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984)(holding that reviewing court need not address previously raised and rejected issues).

20. In the alternative, the applicant fails to show that the prosecutor's reasons for striking Banks were racially-based; the applicant fails to show that the prosecutor's reasons were implausible or fantastic justifications or had a discriminatory intent. See *Harper*, slip op. at 6-7 (holding that prosecutor's reasons for striking Banks were race-neutral and that Court cannot say that trial court's acceptance of such reasons as race-neutral was clearly erroneous on record before Court); see also *Gibson v. State*, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004)(holding "clearly erroneous" standard highly deferential because trial court is in best position to determine whether prosecutor's facially race-neutral reason for strike is genuinely race-neutral).

21. A comparative analysis of Banks to the cited jurors and prospective jurors shows that the applicant fails to establish purposeful discrimination. See and cf. *Reed v. Quatterman*, 555 F.3d 364 (5TH Cir. 2009)(employing type of comparative analysis of jurors used by Supreme Court in *Miller-El v. Dretke*, 545 U.S. 231 (2005)); see also *Watkins v. State*, 245 S.W.3d 444, 448 (Tex. Crim. App. 2008)(citing *Young v. State*, 826 S.W.2d 141 (Tex. Crim. App. 1991)(noting that reviewing court should consider entire record of *voir dire* when reviewing for clear error; reviewing court not limited to specific considerations stated by attorney)); see also *Young v. State*, 283 S.W.3d 854, 869 (Tex. Crim. App. 2009)(noting inconsequential whether prosecutor was accurate in assertion that sole purpose of Outreach

Ministries was rehabilitation; trial court not required to find *Batson* violation simply because proffered explanation proved to be incorrect).

22. The applicant fails to show that the State improperly applied group bias without questioning whether it applied specifically to Banks; the prosecutor questioned Banks extensively and Banks exhaustively gave her views on forgiveness and rehabilitation, interspersed with her religious views. *Williams v. State*, 804 S.W.2d 95, 101 (Tex. Crim. App. 1991)(noting that appellate court reviews evidence from *Batson* hearing in light most favorable to trial court's ruling); *Alexander v. State*, 866 S.W.2d 1, 8 (Tex. Crim. App. 1993)(holding trial court's decision re issue of purposeful discrimination is given great deference because determination requires assessment of credibility and content of striking party's explanation and all other relevant facts and circumstances).

23. The applicant fails to show ineffective assistance of appellate counsel for not raising on direct appeal the same meritless arguments concerning the *Batson* challenge that the applicant presents on habeas. See *Butler*, 884 S.W.2d at 783 (holding *Strickland* standard applies to appellate counsel as well as trial counsel).

Thirteenth Ground: alleged ineffective assistance of trial counsel/State's peremptory strikes of Clark, Broadnax, and Pugh

24. The applicant fails to show that the State's peremptory strikes of prospective jurors Deidra Broadnax, Kelvin Clark, and Martha Pugh were not race-neutral; a comparison of their *voir dire* examinations with those of sitting jurors shows that the cited prospective jurors were apparently unable or exhibited an overwhelming unwillingness to render a death sentence. Cf. *Reed v. Quarterman*, 555 F.3d 364, 372 (5TH 2009)(quoting *Miller-El II*, 545 U.S. 231, 241 (2005), that "more powerful than these bare statistics...are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve.").

25. The applicant fails to show that trial counsel are ineffective for not lodging meritless *Batson* challenges to the State's peremptory strikes of Broadnax, Clark, and Pugh

Cause No. 1272085-A

EX PARTE	§	IN THE 182 ND DISTRICT COURT
	§	OF
GARLAND BERNELL HARPER, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 1272085-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:

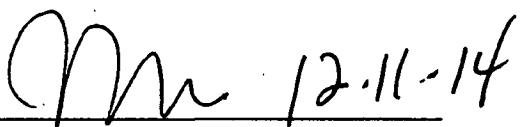
1. all of the applicant's pleadings filed in cause number 1272085-A, including his application for writ of habeas corpus;
2. all of the State's pleadings filed in cause number 1272085-A, including the State's Original Answer;
3. any affidavits filed in cause no. 1272085-A;
4. this court's findings of fact, conclusions of law and order denying relief in cause no. 1272085-A;
5. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or the State in cause no. 1272085-A; and,
6. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 1272085, 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: Brad Levenson, Director, Office of Capital Writs and Kate Sauer, Office of Capital Writs; 1700 N. Congress Avenue; Suite 460;

Austin, Texas 78711 and the State: Roe Wilson; Harris County District Attorney's Office;
1201 Franklin, Suite 600; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 1272085-A.

SIGNED this _____ day of _____, 20____.



JEANNINE BARR
Presiding Judge
182ND District Court
Harris County, Texas



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. AP-76,452

GARLAND B. HARPER, Appellant

v.

THE STATE OF TEXAS, Appellee

**ON DIRECT APPEAL
FROM THE 182ND JUDICIAL DISTRICT COURT,
HARRIS COUNTY**

Womack, J., delivered the opinion for a unanimous Court.

A jury convicted the appellant of capital murder for killing three people during one criminal transaction.¹ Pursuant to the jury's answers to the special issues, the trial court sentenced the appellant to death.² Appeal to this court was automatic.³ The appellant raises eight issues;

¹ See TEX. PENAL CODE § 19.03(a)(7)(A).

² See TEX. CODE CRIM. PROC. art. 37.071, § 2(g).

³ See TEX. CODE CRIM. PROC. art. 37.071, § 2(h).

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finding no error, we affirm.

I. Background

The appellant and Triska Rose began dating in the spring of 2008. Their relationship progressed quickly, and the appellant moved in with Rose and her two daughters: Mya, aged seven, and Briana, aged sixteen. The couple's relationship soon deteriorated as the appellant became convinced that Rose was having an affair. (It was undisputed at trial that Rose was not having an affair.) The appellant began following her, calling her obsessively, and dropping by her place of employment without warning.

On the evening of October 23, 2008, the appellant told Rose that he wanted to have sex. Rose responded that she was tired, which the appellant took as further evidence of her infidelities. Rose told him that she was sick of his accusations and wanted to end things. This led to a fight in which Rose and Briana were somehow cut with a knife. Believing that he would go to jail for domestic violence if the police were called, the appellant bound and gagged Rose and the girls. He questioned them one at a time in order to "get to the bottom of this." After several hours, Mya "admitted" that Rose had been cheating on him. This sent him into a jealous rage, he later claimed. He stabbed Rose repeatedly and then strangled Briana with his hands, telling her that she should not have sided with her mother. Finally, he strangled Mya with a phone charger. Afterwards he went out "to think." When he returned he thought that Briana and Rose still might be alive, so he slit their throats.

After the appellant cleaned up, he visited some friends. Later that morning, he called Chandra Parson, a friend of the family, to say that Mya was ill and would not be coming over before school as she usually did. When Parson asked about Rose, the appellant hung up. After

learning that Rose was not at work and Briana was not at school, Parson became worried. She went by the apartment, called repeatedly, and filed a missing-person report with the police. Finally, late in the afternoon, Parson and some other friends decided to enter Rose's apartment.

The friends broke in through the back door and found Rose, Briana, and Mya dead in the master bedroom. All three were tied up. An autopsy showed that Rose was stabbed approximately thirty-six times: her throat was slit, she had defensive wounds on her hands and arms, cuts on her chest, stomach, and face. Briana died from strangulation, but she also had cuts on her neck and chest, and three of her fingernails were broken. Mya had been strangled with the cord of a phone charger. The medical examiner said that it would have taken about three minutes for the children to die from asphyxiation.

While the police were processing the crime scene, the appellant approached and said he wanted to turn himself in. At the police station, the appellant confessed to the murders.

II. Future Dangerousness

In the appellant's first point of error, he argues that the evidence at trial was legally insufficient to support the jury's finding of a probability that he would commit future criminal acts of violence which would constitute a continuing threat to society.⁴ Finding ample evidence to support the jury's verdict, we overrule this point of error.

We assess the sufficiency of future-dangerousness evidence in the light most favorable to the jury's findings.⁵ We must determine whether any rational trier of fact could have found a

⁴ See TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).

⁵ *Coble v. State*, 330 S.W.3d 253, 265 (Tex. Cr. App. 2010) (citing *Berry v. State*, 233 S.W.3d 847, 860 (Tex. Cr. App. 2007)).

probability that the defendant would commit future criminal acts of violence which would constitute a continuing threat to society, and we will reverse only if a rational jury would necessarily have had a reasonable doubt about this probability.⁶

The special issue asks if “a defendant would constitute a continuing threat whether in or out of prison without regard to how long the defendant would actually spend in prison if sentenced to life.”⁷ In other words, the issue concentrates on “the character for violence of the particular individual, not merely the quantity or quality of the institutional restraints put on that person.”⁸ Some factors a jury may consider in determining future dangerousness include:

1. the circumstances of the capital offense, including the defendant’s state of mind and whether he or she was working alone or with other parties; 2. the calculated nature of the defendant’s acts; 3. the forethought and deliberateness exhibited by the crime’s execution; 4. the existence of a prior criminal record, and the severity of the prior crimes; 5. the defendant’s age and personal circumstances at the time of the offense; 6. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense; 7. psychiatric evidence; and 8. character evidence.⁹

This list is not exhaustive. The jury is entitled to consider all the evidence at both the guilt and punishment stages of trial.¹⁰

⁶ *Id.*

⁷ *Estrada v. State*, 313 S.W.3d 274, 281 (Tex. Cr. App. 2010). The appellant urges this court to abandon precedent and evaluate future dangerousness solely in terms of his likelihood to commit a crime within prison, stressing his mostly non-violent record while incarcerated. We decline to do this. *See Coble*, 313 S.W.3d, at 269 (“It is theoretically possible to devise a prison environment so confining, isolated, and highly structured that virtually no one could have the opportunity to commit an act of violence, but incapacitation is not the sole focus of the Legislature or of our death penalty precedents.”).

⁸ *Coble*, 313 S.W.3d, at 268.

⁹ *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Cr. App. 1987). *Accord, Coble*, 330 S.W.3d, at 269, n.24. (This list does not include characteristics of the prison system.).

¹⁰ TEX. CODE CRIM. PROC. art. 37.071, § 2(d)(1).

The circumstances of the offense and the events surrounding it can be sufficient to sustain a “yes” answer when the crime is “so heinous as to display a wanton and callous disregard for human life.”¹¹ This was such a crime. After stalking Rose for a month or more, the appellant stabbed her at least 36 times while her children were restrained nearby. The appellant then stabbed Briana repeatedly, slit her throat, and strangled her for three minutes. Finally, the appellant strangled Mya with a phone charger. This “infliction of multiple wounds at close range indicates a wanton and callous disregard for human life”¹² and is legally sufficient to support the jury’s finding.

Further, the jury could find that the appellant would commit future acts of violence because of his criminal history, which spans more than two decades.¹³ The appellant’s prior criminal acts of violence were severe and unpredictable, occurring after periods of nonviolence and apparent repentance. His victims included intimate partners and complete strangers. There was no evidence that his violent tendencies would change.

The evidence was legally sufficient to support a finding that the appellant would constitute a future danger to society, whether in or out of prison. The appellant’s first point of error is overruled.

¹¹ *Dinkins v. State*, 894 S.W.2d 330, 358 (Tex. Cr. App. 1995) (Evidence of the premeditated and brutal murders of two women, including multiple gunshot wounds at close range, was sufficient to support an affirmative answer to the future dangerousness special issue. “Character evidence uniformly favorable to” the defendant was alone insufficient to mitigate the premeditation and brutality of the offense.); *see also Fuller v. State*, 253 S.W.3d 220, 231-32 (Tex. Cr. App. 2008) (An unprovoked nighttime attack against a family in which the parents were killed and the children nearly killed was sufficient to sustain a future dangerousness finding.).

¹² *Dinkins*, 894 S.W.2d, at 360.

¹³ *See Martinez v. State*, 327 S.W.3d 727, 735 (Tex. Cr. App. 2010).

III. *Batson* Challenge

The appellant next argues that the State exercised a peremptory challenge in violation of the Equal Protection Clause of the United States Constitution.¹⁴ Finding no reversible error, we overrule the appellant's second issue.¹⁵

In *Batson v. Kentucky*, the United States Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race"¹⁶

The Supreme Court set out the procedure for bringing a *Batson* objection in *Purkett v. Elem*:

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a *prima facie* case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.¹⁷

The ultimate burden of persuasion rests with the opponent of the strike (here the appellant) to establish by a preponderance of the evidence that the strike was the product of the proponent's purposeful discrimination.¹⁸

The appellant's only evidence of discrimination is the similarity of the challenged venire-member's "jury questionnaire evaluation score" and those of the accepted members. He does not explain what this score represents or why it should be more important than the venire-members'

¹⁴ See U.S. CONST. amend. XIV, § 1.

¹⁵ *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (Deferential review is necessary for *Batson* challenges because the trial judge is better able to evaluate the striking attorney's credibility.); see also *Gibson v. State*, 144 S.W.3d 530, 533-34 (Tex. Cr. App. 2004).

¹⁶ 476 U.S. 79, 89 (1986).

¹⁷ 514 U.S. 765, 767 (1995).

¹⁸ *Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Cr. App. 2008).

oral statements. The appellant also failed to preserve the jury questionnaires (on which he seems to rely) which would tell us the racial composition of the venire and the racial composition of the seated jury.¹⁹

The State argues (and the record reflects) that the challenged venire-member gave long-winded and non-committal answers to some questions while appearing opposed to the death penalty during others. At one point she stated, "I'm pretty settled I don't like to see people die." Further, she expressed a strong belief in rehabilitation and the desirability of forgiveness. These are race-neutral reasons for a peremptory challenge.

The appellant has not met his burden. The trial court accepted the State's many race-neutral explanations for its peremptory challenge. On the record before us, we cannot say that this decision was clearly erroneous.

IV. The Appellant's Statement

In points of error three, four, and five, the appellant challenges the trial court's admission of a statement he made to police. Because his arguments do not comport with those made at trial, they were not properly preserved and are overruled.

To be preserved for appellate review, a specific and timely complaint must have been made on the record and ruled on by the trial judge.²⁰ The specificity requirement is met if the complaint made at trial was clear enough for the trial judge to understand what the complaining

¹⁹ The appellant made a record of the fact that when the State struck the contested venire-member, it had used half of its exercised-peremptory strikes against African-Americans. The record does not reflect the racial composition of the six accepted members (the races of two were not read into the record), the reasons for the other strikes against African-Americans, or the racial breakdown of the later seated jurors.

²⁰ TEX. R. APP. P. 33.1.

party wanted, why they were entitled to it, and to take corrective action.²¹ We will not address an objection on appeal if it varies from the objection raised at trial.²²

Before trial, the appellant filed six motions to suppress oral statements. Most were global and did not specifically identify the basis for the challenge or even which statement was being contested.²³ Nonetheless, the trial court held a hearing outside the presence of the jury to determine the admissibility of the statement. At that hearing, the appellant's trial counsel argued that the statement was inadmissible because it did not comply with the general requirements for custodial interrogations. His entire argument read:

Judge, I'm taking the position that none of the statement is admissible pursuant to Article 38.22 [of the Texas Code of Criminal Procedure]. It's an oral statement. My reading of *Herrera*²⁴ is whether or not the accused felt like he was being restrained or detained for purpose of the question on the case [*sic*]. My client stated there was a guard outside the door. He felt like he had to obey the command to talk with the officers. He was being restrained for the purpose of this interrogation and I would agree that he was given his *Miranda*²⁵ warning as required but, again, it does not satisfy the mandates of 38.22 and I'd request that the statement in total be suppressed.

Now, before this court, the appellant abandons the custody claim and argues that the trial

²¹ *Lovill v. State*, 319 S.W.3d 687, 691 (Tex. Cr. App. 2009); *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Cr. App. 2009).

²² *Lovill*, 319 S.W.3d, at 691; *Euziere v. State*, 648 S.W.2d 700, 703-04 (Tex. Cr. App. 1983).

²³ Only two motions identified by date the statement which the appellant sought to exclude, and they did not refer to the one questioned on appeal. None were ruled on. See TEX. R. APP. P. 33.1 (Complaints on appeal must have "sufficient specificity to make the trial court aware of the complaint" and must be ruled upon.); *Swain v. State*, 181 S.W.3d 359, 365 (Tex. Cr. App. 2005) ("Global" motions containing little more than citations to constitutional and statutory provisions are insufficient to preserve error on appeal.).

²⁴ *Herrera v. State*, 241 S.W.3d 520 (Tex. Cr. App. 2007) (Jail inmate did not meet his burden of showing he was "in custody" for purposes of *Miranda* and Texas Code of Criminal Procedure article 38.22 when questioned about an incident unrelated to the crime for which he was imprisoned.).

²⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

court erred in admitting his statement because it was coerced. Specifically, he claims that he did not voluntarily waive his right not to engage in self incrimination under the Fifth Amendment to the United States Constitution and that this made the statement inadmissible under articles 38.21,²⁶ 38.22 § 5,²⁷ and 38.23(a)²⁸ of the Texas Code of Criminal Procedure.

Although both the appellant's argument at trial and his brief on appeal cite to article 38.22, they are not the same complaint. At trial, he argued only that the appellant was in custody, and thus subject to the full protection of the statute. The only case discussed focused solely on that issue. On appeal, the appellant argues that because he felt he could suffer a loss for failing to answer questions, the statement was involuntary under federal law and inadmissible under both Texas and federal law. Consequently, the appellant's appellate points were not properly preserved. Points of error three, four, and five are overruled.

V. Violation of "the Rule"

In the appellant's final three points of error, he argues that the trial court erred by allowing the State's rebuttal witness to testify despite having been present in the courtroom in

²⁶ TEX. CODE CRIM. PROC. art 38.21 ("A statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion, under the rules hereafter prescribed.").

²⁷ TEX. CODE CRIM. PROC. art 38.22, § 5 ("Nothing in this article precludes the admission of a statement made by the accused in open court at his trial, before a grand jury, or at an examining trial in compliance with Articles 16.03 and 16.04 of this code, or of a statement that is the *res gestae* of the arrest or of the offense, or of a statement that does not stem from custodial interrogation, or of a voluntary statement, whether or not the result of custodial interrogation, that has a bearing upon the credibility of the accused as a witness, or of any other statement that may be admissible under law.") The appellant does not make clear how this statute relates to his claim.

²⁸ TEX. CODE CRIM. PROC. art 38.23(a) ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.).

violation of Texas Rule of Evidence 614 ("the Rule").²⁹ These points of error were not properly preserved.

Texas Rule of Appellate Procedure 33.1 requires that complaints at trial be timely made in order to be properly preserved for appeal.³⁰ The rationale of Rule 33.1 is that if objections are raised before the trial court as soon as error becomes foreseeable, they may be addressed and the error possibly corrected or avoided.³¹ This ensures that litigants and the judicial system are not burdened by appeal and retrial. When a party is excused from the requirement of objecting, the results are the opposite.³² The requirement of a proper objection extends to most types of errors, including evidentiary mistakes, the denial of due process, and prosecutorial misconduct.³³

In the instant case, the appellant invoked the Rule at the beginning of his trial. Before the punishment hearing began on October 8, 2010, the court inquired if there were any witnesses in the courtroom who needed to be placed under the Rule. Both parties answered that there were not. The first witness on October 13, 2010, was the defense's expert, Dr. Richard Dudley. During his testimony, Dr. Dudley discussed a report prepared by Dr. Moellar, the State's expert.³⁴ The appellant then offered into evidence, without objection, the hearsay report. During his testimony, Dr. Dudley discussed parts of Dr. Moellar's report that were especially harmful to the State's

²⁹ TEX. R. EVID. 614 ("At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion...").

³⁰ TEX. R. APP. P. 33.1.

³¹ *Moore v. State*, 295 S.W.3d 329, 333 (Tex. Cr. App. 2009).

³² *Young v. State*, 137 S.W.3d 65, 69 (Tex. Cr. App. 2004).

³³ *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Cr. App. 2012).

³⁴ The appellant had been served with notice that the State intended to call Dr. Moellar as a witness.

case. He also disagreed with Dr. Moellar's diagnosis of the appellant and opined that the appellant was not exaggerating or attempting to mislead anyone about his mental-health problems.

Over the course of the morning's testimony, the appellant's trial counsel noticed a man passing notes to the prosecutors. At a midday break, trial counsel approached this man, introduced himself, and inquired if he was Dr. Moellar. The man responded that he was. The appellant's counsel did nothing with this information and resumed his examination of Dr. Dudley. After the defense rested at the end of the next day, the State notified the court that it wished to call Dr. Moellar as a rebuttal witness. Only then, after not objecting to Dr. Moellar's presence in the courtroom for a full day and a half, did the appellant object that his testifying would violate the Rule.

During a discussion at the bench, the appellant's trial counsel conceded that he knew Dr. Moeller was in the courtroom, but he said he had assumed Dr. Moeller would not be testifying. The following exchange occurred:

The court: [The defense] knew who [Dr. Moeller] was because [they] referred to him during Dr. Dudley's testimony.

Defense counsel: But it's not our job. He wasn't excused from the Rule.

At the hearing, it was uncontested that local practice often allowed experts to listen to each other testify. After Dr. Dudley finished testifying, Dr. Moeller heard the testimony of three lay witnesses. The Court allowed Dr. Moeller to testify despite acknowledging the Rule had been violated.

We hold that objecting was indeed counsel's job. Having been served with a witness list

which named Dr. Moeller as a testifying expert,³⁵ the appellant was on notice that a possible error was occurring as soon as he discovered Dr. Moeller's presence. Had the appellant objected at that point, when Dr. Moeller had heard only part of Dr. Dudley's testimony, the trial court could have ruled on whether or not Dr. Moeller was essential to the State's case or instructed him to wait outside. By failing to object, the appellant slept on his rights and prevented the system's curative process. Points of error six, seven, and eight are overruled as untimely and not preserved.

The trial court's judgment is affirmed.

Delivered October 10, 2012.
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³⁵ *Pope v. State*, 207 S.W.3d 352, 360 (Tex. Cr. App. 2006) ("[O]nce a party designates a particular person as an expert that he may use as a witness at trial, that person is no longer a 'consulting' expert, he is a 'testifying' expert[.]").