

EXHIBIT A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 31, 2023

Lyle W. Cayce
Clerk

No. 22-70002

MILTON DWAYNE GOBERT,

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 Western District of Texas
USDC No. 1:15-CV-42

Before JONES, DENNIS, and GRAVES, *Circuit Judges.*

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

Petitioner Milton Dwayne Gobert seeks a certificate of appealability (COA) to appeal the district court's denial of his federal habeas corpus action pursuant to 28 U.S.C. § 2254 and challenges the district court's denial of his motions to appoint substitute counsel. Because Gobert has failed to satisfy

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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the standards for the issuance of a COA, and has not pointed to an abuse of discretion, we deny his request and dismiss the matter.

During the mid-2000s, a Texas state jury found Gobert guilty of capital murder of Mel Cotton, a friend of his then girlfriend. He was sentenced to death. *Gobert v. State*, No. AP-76,345, 2011 WL 5881601, at *3 (Tex. Crim. App. Nov. 23, 2011). Following the denial of his request for post-conviction relief by the state courts, Gobert filed a § 2254 petition, wherein he asserted multiple claims of ineffective assistance of trial counsel during both the guilt/innocence and punishment phases of his trial. The district court, in a well-reasoned opinion, declined to grant relief and denied a COA.

The granting of a COA is a jurisdictional prerequisite to Gobert's appeal from the denial of his § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To be entitled to a COA, Gobert must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

To make the requisite showing, he must demonstrate "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (quotations omitted) (citation omitted).

Gobert seeks a COA on his claims that his trial counsel was ineffective by: (A) failing to thoroughly investigate Tasha Lass prior to calling her as a witness and (B) failing to investigate and present compelling mitigation evidence.

To prevail on a claim of ineffective assistance of counsel, Gobert must establish two key elements: (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one that falls "below an objective standard of reasonableness." *See id.* at 688. We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

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defendant must overcome the presumption that, under the circumstances, the challenged action might have been considered sound trial strategy.” *Id.* (internal quotation marks omitted). However, this “does not eliminate counsel’s duty to ‘make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Escamilla v. Stephens*, 749 F.3d 380, 388 (5th Cir. 2014) (citing *Strickland*, 466 U.S. at 690–91). To satisfy the prejudice prong of an ineffective assistance of counsel claim, a petitioner “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.” *Strickland*, 466 U.S. at 694.

A. Failure to Investigate Tasha Lass

First, Gobert argues that his trial counsel was ineffective for not thoroughly investigating Travis County Deputy Tasha Lass prior to calling her as a witness during the guilt/innocence phase. Lass provided brief testimony for the defense, highlighting the lack of privacy in jail cells and suggesting that Gobert’s cellmate may have learned details about the murder from reading case files rather than hearing a confession from Gobert. However, during the punishment phase, Lass testified for the State about her inappropriate relationship with Gobert, smuggling him a cell phone, and his attempt to involve her in an escape plan. Gobert contends that had his counsel conducted a proper investigation, they could have anticipated the risk of calling Lass as a witness and prevented her damaging testimony.

Gobert’s argument lacks force. This hindsight argument that counsel should have investigated Lass is utterly unconvincing, as there was no indication of an illicit relationship between the two at the time of Lass’s guilt/innocence testimony. It was Gobert *himself* who failed to disclose his relationship with Lass to counsel and who insisted on calling her as a witness. Our cases have established a steadfast principle—a defendant cannot direct

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their legal counsel to pursue a specific strategy and subsequently accuse them of providing inadequate representation for adhering to those instructions. *United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990) (“[A defendant cannot] avoid conviction on the ground that his lawyer did exactly what he asked him to do.”); *Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984) (“By no measure can [a defendant] block his lawyer’s efforts and later claim the resulting performance was constitutionally deficient.”); *see also Nixon v. Epps*, 405 F.3d 318, 325–26 (5th Cir. 2005) (finding that counsel was not ineffective for failing to present additional mitigating evidence over client’s objection). Thus, his claim is meritless.

Even if counsel had investigated Lass, Gobert has not proven that he was prejudiced. As observed by the district court, a significant body of evidence was presented to the jury regarding his propensity for future dangerousness, which included the killing of Mel Cotton and his lifelong inclination towards violence and incapacity to manage his anger. Thus, in cases such as this where “the evidence of [] future dangerousness was overwhelming . . . it is virtually impossible to establish prejudice.” *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (citing *Strickland*, 466 U.S. at 698).

Therefore, the district court was correct in concluding that Gobert failed to establish either prong of the *Strickland* inquiry. Reasonable jurists could not disagree with the court’s resolution of this issue.

B. Failure to Investigate and Present Mitigating Evidence

Gobert’s next argument fares no better. He argues that his trial counsel rendered ineffective assistance by failing to interview or present several family members and teachers who could have testified about his emotional difficulties and lack of impulse control during his school years, which were caused by a childhood accident where he was hit by a car.

“[C]omplaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of

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trial strategy and because allegations of what a witness would have stated are largely speculative.” *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). In order “to prevail on an ineffective assistance claim based on counsel’s failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.” *Id.*; *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (“In order for the appellant to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial.”).

In this case, the district court concluded that Gobert’s claim failed because he did not establish that his proposed witnesses testimony would have been favorable. We agree. Reasonable jurists could not debate whether failure to present this testimony was deficient or prejudicial.

It is well-settled that any ineffective assistance claim “must falter where the evidence to be discovered is so similar and cumulative that failure to find and present it would not prejudice the result.” *See Skinner v. Quarterman*, 528 F.3d 336, 345 n.11 (5th Cir. 2008) (citing *Strickland*, 466 U.S. at 694). As the district court noted, much of the information provided in the affidavits produced by the potential witnesses is not new and is similar to what was presented at trial. The mistreatment that Gobert’s mother endured while she was pregnant with him, the physical abuse he received from his mother, and the physical confrontations he had with bullies in his neighborhood during his childhood were extensively discussed during the trial. Any additional testimony would have been redundant as the origins of his aggressive tendencies had already been established. As a result, Gobert has not shown counsel’s performance was deficient.

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Even if counsel was deficient in not investigating further, Gobert fails to demonstrate prejudice under the second prong of *Strickland*. As stated above, it is “virtually impossible” to establish prejudice in cases where the evidence of future dangerousness is overwhelming. *Ladd*, 311 F.3d at 360. No reasonable jurist would conclude otherwise.

C. Motions for Substitute Counsel¹

With respect to Gobert’s remaining claim—that the district court erred in denying his motions for the appointment of new supplemental counsel—we conclude that it also fails. Gobert contends that the district court: (1) applied the wrong standard to his requests for new counsel; (2) failed to conduct a timely fact-specific inquiry into his complaint; and (3) based its order on erroneous facts. However, these arguments are unavailing.

When a habeas petitioner in a capital case moves for substitute counsel, a district court must decide the motion “in the interests of justice.” *Martel v. Clair*, 565 U.S. 648, 658 (2012) (internal quotation marks omitted). That standard “contemplates a peculiarly context-specific inquiry.” *Id.* at 663. Because the decision whether to substitute counsel “is so fact-specific,” a district court’s disposition of a substitution motion “deserves deference,” and “a reviewing court may overturn it only for an abuse of discretion.” *Id.* at 664. Among the factors a reviewing court may consider are “the timeliness of the motion; the adequacy of the district court’s inquiry into the defendant’s complaint; and the asserted cause for that complaint.” *Id.* at 663.

¹ Confronted with a similar request to appeal a denial of substitute counsel, this court recently held, in an unpublished, non-precedential opinion, that resolving the question of counsel substitution would be meaningless unless this court also granted relief on the underlying denial of COA in the petitioner’s § 2254 case. *See Gamboa v. Lumpkin*, 16-70023, 2023 WL 2536345 (5th Cir. Mar. 16, 2023) (unpublished). Refusing to take the latter step, this court denied the substitution appeal as moot. The same disposition would be appropriate in this case, but in any event, as shown above, petitioner’s request for new habeas counsel is meritless.

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A district court may deny a motion to substitute counsel “even without the usually appropriate inquiry” where the claims a petitioner seeks to pursue with the help of new counsel are futile. *Id.* at 666.

In order to prevail, Gobert must establish that the district court based its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *See United States v. Ebron*, 683 F.3d 105, 126 (5th Cir. 2012). He cannot do so.

First, Gobert claims that the district court applied the wrong legal standard by using a “good cause” standard instead of the “interests-of-justice” standard that applies to indigent capital petitioners. However, this argument fails for two reasons. First, this assertion is contradicted by the record as, the petitioner concedes, the district court cited the appropriate standard. Second, Gobert’s assertion that the standard announced in *Martel v. Clair*, 565 U.S. 648 (2012) differs from the standard for substitution requests arising during noncapital proceedings is incorrect. Indeed, in *Clair*, the U.S. Supreme Court explicitly stated that the standard of interests-of-justice that governs motions for new counsel in capital habeas proceedings under 18 U.S.C. § 3599 is identical to the standard that governs motions for new counsel in noncapital cases. *Clair*, 565 U.S. at 658 (“Clair argues, and the Ninth Circuit agreed, that district courts should decide substitution motions brought under § 3599 “in the interests of justice.” That standard derives from 18 U.S.C. § 3006A, which governs the appointment and substitution of counsel in federal *non-capital* litigation On this matter, we think Clair, not the State, gets it right.” (emphasis added)).

Thus, the district court correctly identified the interests-of-justice standard as controlling and looked to this court’s precedent applying the interest-of-justice standard for substitution of counsel to identify common circumstances in which good cause might exist for granting such a substitution. We find no abuse of discretion here.

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Second, Gobert argues that the district court did not adequately inquire into his reasons for wanting new counsel. The Supreme Court has stated that district court's must probe into why the defendant wants a new attorney. *Clair*, 565 U.S. at 664. However, the record shows that the district court had sufficient information to make a well-informed decision regarding Gobert's case. This information included Gobert's request to be heard and letters detailing allegations that were not raised by his legal counsel and expressing discontent with minor deficiencies in his federal petition. Hence, the district court had more than enough information about why Gobert wanted new counsel and concluded that he was merely "unhappy with the work of his current federal habeas counsel." Therefore, this argument fails.

Third, Gobert contends that the lower court made a factual error by concluding that he only made general assertions in his motions for substitution. However, Gobert has misinterpreted the district court's decision, as it did not state that he never made any specific claims. Instead, it determined that Gobert had not presented proof of a serious conflict or breakdown in communication, and that he only expressed general objections to certain aspects of the federal petition that his counsel filed. The record supports the district court's conclusion. Thus, we cannot say that the district court abused its discretion in denying Gobert's motions to substitute counsel.

Accordingly, the request for a COA is DENIED and the appeal is DISMISSED. The district court's denial of substitute counsel is AFFIRMED.

EXHIBIT B

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

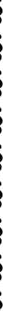
MILTON DWAYNE GOBERT,

Petitioner,

V.

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

Respondent.



Civil No. 1:15-CV-42-RP

*** DEATH PENALTY CASE ***

MEMORANDUM OPINION AND ORDER

Petitioner Milton Dwayne Gobert initiated this federal habeas corpus action pursuant to 28 U.S.C. § 2254 to challenge the constitutionality of his 2010 state capital murder conviction and sentence of death. Currently before the Court is Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 22), as well as Respondent Bobby Lumpkin's Answer (ECF No. 32) and Petitioner's Reply thereto (ECF No. 42). Having carefully considered the record and pleadings submitted by both parties, the Court concludes Petitioner is not entitled to federal habeas corpus relief or a certificate of appealability.

I. Background

A. The Offense

In February 2006, Petitioner was indicted in Travis County for the 2003 stabbing death of Mel Cotton committed during the course of a robbery or kidnapping. 1 CR 3-6.¹ Following protracted litigation concerning the suppression of a statement Petitioner gave to authorities,

¹ Throughout this opinion, “CR” refers to the Clerk’s Record of Petitioner’s trial while “RR” refers to the Reporter’s Record. Both are preceded by volume number and followed by the relevant page numbers, and can be found on this Court’s docket sheet at ECF Nos. 17-2 to 17-19.

Petitioner's trial commenced in February 2010. After hearing testimony and arguments for seven days, a jury found Petitioner guilty of capital murder as charged in the indictment. 3 CR 565-67; 32 RR 131-32. The Texas Court of Criminal Appeals (TCCA) accurately summarized the evidence presented at Petitioner's trial:

In the early hours of October 6, 2003, five-year-old Dem[i]trius Cotton was awakened by the sound of his mother, Mel Cotton, screaming from her bedroom. He went into her room and saw a strange man there—"kind of tall, bald, and buff." He had a mustache and was wearing boots and boxers. He had gloves on his hands. Dem[i]trius saw his mom sitting on the edge of the bed with duct tape on her mouth; the man was standing in front of her, stabbing her in the arms with a sharp knife. She was trying to get away from him. She stood up, but then lost her balance and fell. The man kept stabbing, so Dem[i]trius "ran over and tried to pull him down by his leg." He said, "Stop," but the man pushed him off, turned on the bedside light and continued stabbing at his mom. The man told Dem[i]trius, "sit down and shut up," so Dem[i]trius sat down. He was scared.

Then the man put duct tape on Dem[i]trius's ankles and mouth. He told Dem[i]trius to get out of the room, so the child hopped out into the hallway. The man locked the door when Dem[i]trius tried to get back inside the bedroom. He heard his mom scream, "Leave me alone," but the man said, "Give me the money" and "Where is it at in your purse?" Dem[i]trius hopped into his room and sat on a pallet of blankets beside his bed. He heard the man take his mom's phone and "stomp on it" in the bathroom. The man also cut the telephone cord.

Dem[i]trius fell asleep, but he woke up when he heard the man come into his room. The man "choked" Dem[i]trius with both hands. Dem[i]trius tried to scream, but he couldn't. He blacked out. When he woke up later, he had a hole in his chest with blood coming out. He went to his mom's room. She was laying on the floor on her side. Dem[i]trius felt her neck. It was cold. "[S]he was gone." He touched her hand and talked to her for a while. Then he went to the bathroom for a washcloth to stop his chest from bleeding. He looked to see if anyone else was there in the apartment. The man was gone. Dem[i]trius ate a popsicle, then went back to his room, got his stuffed caterpillar, and waited for a long time for someone to come. He fell asleep again, but woke up early that Monday morning when he heard knocking on the door. He took his stool to the door to see out of the peephole, and when he saw his "Aunt Tweety," he opened the door.

Monica Salinas, who lived in the same Austin apartment complex as Mel Cotton and Dem[i]trius, heard a hysterical woman crying, "My sister is dead, my sister is dead, please help me." She ran up the stairs, saw Dem[i]trius with duct tape still around his neck and Mel Cotton's body in the master bedroom, so she called 911. She saw "blood everywhere and handprints of blood all over the room."

Paramedics rushed Dem[i]trius to the hospital. He had four stab wounds in his chest. They were so deep that a paramedic saw Dem[i]trius's lung inflating and deflating. Dem[i]trius said that he could hear the air coming out of the hole in his chest; it sounded like "a farting noise." Dem[i]trius lost twenty to thirty percent of his blood volume and had a pneumothorax (collapsed lung) and a pulmonary contusion. Doctors also determined that Dem[i]trius had been strangled. Although his wounds were life-threatening, Dem[i]trius recovered.

The medical examiner testified that Mel Cotton had a total of 107 stab wounds that were inflicted during a drawn-out attack. Thirty-eight of the wounds were centered around Ms. Cotton's left breast, indicating "some degree of [the victim's] incapacitation or lack of movement." Another group of wounds were in her back. She had approximately thirteen defensive wounds to her hands and arms. Twenty of the wounds reached her internal organs. She, like Dem[i]trius, had been strangled. The medical examiner said that Ms. Cotton had probably been conscious for about ten to twenty minutes after her jugular vein had been cut.

Christina Pocharasang, [Petitioner]'s former girlfriend, learned of Ms. Cotton's murder later that day. She immediately suspected [Petitioner]. She testified that Ms. Cotton had helped her move out of [Petitioner]'s apartment two weeks earlier by arranging for a man named Kenneth to haul her heavy furniture. [Petitioner] had been furious and accused Ms. Cotton and Kenneth of stealing his things, including his vacuum cleaner.² Christina called [Petitioner] to ask him about the murder. When he answered the phone, [Petitioner] was breathing heavily and said that he had been in a fight with Kenneth, who had stabbed him in the stomach, causing an injury that required sixteen stitches. Christina then called the Austin police to report her suspicions.

Austin police discovered that [Petitioner] had an outstanding parole-violation warrant and went to his apartment to arrest him. After peeking through his blinds, [Petitioner] refused to open the door, so the officers made a forced entry. [Petitioner] did not have a stab wound in his stomach, but he did have cuts on his right hand that looked like those made when an attacker loses his grip on a knife shaft and cuts his own hand.

Officers obtained a search warrant for [Petitioner]'s apartment and car. They found stain remover, bleach, and vinegar containers; a glove on top of the washing machine; and a glove, tennis shoes, and a striped shirt inside the washing machine. DNA consistent with that of Ms. Cotton's DNA was found on the left tennis shoe, and DNA consistent with that of [Petitioner], Ms. Cotton, and an

² [Petitioner] left numerous threatening voicemails for Christina, saying such things as "Yeah, ho, you go on and do what you like. I don't give a f— no more. But I bet you this one thing. You still got my shit, you keep that. That's yours. Since you distributed my shit to all this different mother f— and shit. And gave my shit to these niggers. You gave my shit to these niggers. But bitch, one day you're going to look up, and you're going to see me. Bet that."

unknown male³ was found on the glove on top of the washing machine. A latent fingerprint, matching [Petitioner]’s fingerprint, was found on Ms. Cotton’s bedroom window blind.

While in jail, [Petitioner] bragged to his cellmate about stabbing Ms. Cotton and Dem[i]trius. He recounted details of the crime, including wrapping Ms. Cotton in an extension cord, washing his bloody clothes, and throwing the knife that he used in a lake.⁴

[Petitioner] called a jail guard, Deputy Tasha Lass, to testify that the inmates did not have much privacy in their jail cells, thus suggesting that perhaps the cellmate could have learned details about the murder from reading [Petitioner]’s case files in his jail cell.

[Petitioner] also made numerous phone calls from the jail to family members, suggesting to one brother that he might remember that [Petitioner] and Mel Cotton had a sexual relationship. [Petitioner]’s older brother told [Petitioner] to stop asking him, his brother, and their mother to lie for him. These calls were recorded and played at trial.⁵ In them, [Petitioner] told various versions of the events.

One of [Petitioner]’s brothers testified at trial to the version of events that [Petitioner] told him. According to [Petitioner], he and Mel Cotton had had sex that night, and then he went to sleep in her bed. She later woke him up, and they began arguing. She came at him with a knife, saying that she was going to shoot him with a gun. They struggled over the knife. He got the knife, but when he tried to get dressed and leave, she attacked him again. Dem[i]trius came into the room and “fell” on the knife that his mother was holding. [Petitioner] told his brother that he had stayed with the little boy, giving him pain pills, until Dem[i]trius’s aunt arrived the next morning. [Petitioner] told his family members that “wasn’t nothing wrong with [Demitrius], he was—he’s alive and he wasn’t seriously hurt . . . He wasn’t hurt bad at all. He went to school the next day.”

The jury found [Petitioner] guilty of capital murder.

Gobert v. State, No. 76,345, 2011 WL 5881601, at *1-3 (Tex. Crim. App. Nov. 23, 2011).

³ When the DNA analysis was made, the technician did not have Dem[i]trius’s DNA.

⁴ During his punishment-stage testimony, [Petitioner] confirmed that he threw the knife into the lake.

⁵ In one of them, [Petitioner] told his brother that a jury would surely sentence him to death if they heard that he had attacked and stabbed his mother when he was nineteen, so he wanted his mother to lie about that event. “I can’t have her up there. That’s, that’s suicide . . . What am I going to look like in these folks’ eyes? . . . I mean it’s not about telling the truth, get up there and tell the truth, that’s suicide, man . . . How can you say if you love somebody that you’re gonna sit up there and, and, and get up there and, and help go to the death chamber? That’s suicide for me, man.”

B. The Punishment Phase

The punishment phase of Petitioner's trial began March 3, 2010. 33 RR 4. The State gave a brief opening statement summarizing the evidence it intended to present, while defense counsel reserved their opening statement for later. Over the course of the next week, the jury heard testimony from twenty-six witnesses presented by the prosecution and seven witnesses presented on behalf of the defense, including Petitioner himself.

1. Evidence Presented by the State

At punishment, the State presented several witnesses to testify about Petitioner's history of violence. The jury heard Petitioner had previously been convicted of several offenses, including burglary of a habitation, robbery, false imprisonment, and two counts of assault. 33 RR 82-92. The jury also heard from three of Petitioner's victims. Christina Pocharasang, Petitioner's former girlfriend who testified at the guilt-innocence phase, testified again and described three different violent episodes in which Petitioner repeatedly punched her, bit her, strangled her, and threatened to kill her. *Id.* at 32-63. Another of Petitioner's former girlfriends, Marinda Davis, testified that she ended the relationship because Petitioner was often jealous and began hitting her. On one occasion, she was forced to jump out of a moving car to get away from Petitioner, who then came after her and started hitting her in the face. 34 RR 218-227. Kresa Rogers, Petitioner's on-and-off girlfriend from high school, also recounted several incidents where Petitioner punched, strangled, and threatened to kill her. On at least three different occasions, Petitioner kidnapped Davis and would not let her leave. *Id.* at 230-58.

The State also presented extensive evidence regarding Petitioner's behavior while he has been incarcerated. Petitioner had numerous disciplinary incidents during the seven years he was incarcerated at the Travis County Jail, including assaulting his new cellmate, Thomas Swarnes,

within hours of Swarnes being placed in his cell. 33 RR 94-104; 34 RR 19-25, 70-74, 91-95. During the instant trial, Petitioner had wedged a piece of plastic into the security leg brace he was required to wear during the trial that prevented the brace from locking. 35 RR 76-98. Testimony was also heard regarding Petitioner's "fraternizing" with two female jail guards, including Deputy Tasha Lass, who testified briefly for the defense at the guilt/innocence phase. 34 RR 46-68. Lass admitted she had been in an inappropriate relationship with Petitioner while he was incarcerated and had given him a cell phone so they could talk without being recorded. Lass also admitted Petitioner still had the cell phone and that she talked to him every day during the trial.

Following her testimony and the discovery of the cell phone in Petitioner's cell, Lass was arrested and charged with the felony of bringing a prohibited item into a correctional facility. 35 RR 35-65. She was later recalled by the State after revealing to authorities Petitioner's plan to escape custody. 36 RR 145-94; 37 RR 10-36. Lass testified she first met Petitioner in December 2009 and soon became interested in Petitioner and his upcoming trial. Petitioner made her feel "needed," and the two began talking daily after she brought him the cell phone and charger. In early February 2010—after voir dire had already commenced in Petitioner's trial—Petitioner began asking Lass to bring him a .45 pistol with a silencer and four magazines so that he "could shoot people and locks to get out." Petitioner also asked Lass to buy a storage shed and stock it with food so that he could hide out until he escaped to Dubai, where he believed he would be safe from extradition.

According to Lass, Petitioner's detailed plan would allow him to avoid being observed by the jail's security cameras and involved targeting a particular corrections officer, Martin Fernandes. The TCCA accurately described Petitioner's escape plan:

[Petitioner] told Deputy Lass that he planned to call Deputy Fernandes over to his cell at 2:30 a.m., shoot him, drag the deputy's body into the cell, change into

his clothes, grab his car keys,⁶ shoot any other inmates who saw him, kill the control-room operator,⁷ take the keys to the fire closet, grab the bag inside that closet that contained a rope, then go to the top floor fire closet for another rope, go out the roof door, tie the two ropes together and attach one end to the building, toss the rope over the edge and climb down, run over to the parking garage and drive off in Deputy Fernandes's car. [Petitioner] would "knock out" Deputy Lass and put her in the fire closet, but she did not believe that he would leave her alive. She said that she did not want to aid in this escape plan but [Petitioner] kept asking her every day.

Gobert, 2011 WL 5881601, at *5.

Finally, the State presented expert testimony concerning the probability that Petitioner would commit future acts of violence. A. P. Merillat, an investigator with the Special Prosecution Unit of the Texas Department of Criminal Justice (TDCJ), testified generally regarding the opportunity inmates have to commit violent crimes while in prison. Dr. Richard Coons, a forensic psychologist, rebutted certain claims blaming Petitioner's violent behavior on a childhood head injury and testified that, in his opinion, a hypothetical person with Petitioner's history, conduct, and character would likely pose a danger of violence in the future.

2. Evidence Presented by the Defense

The first witness presented by the defense was Larry Fitzgerald, a former public information officer with TDCJ. 35 RR 147-207. Fitzgerald discussed the procedures in place to ensure the safety of the inmates and employees of a maximum-security facility, although he acknowledged that, with over 158,000 inmates in Texas, someone could act violently if they wanted. Nevertheless, Fitzgerald testified that the probability of violence is extremely low—in 2009, there were only 1,262 serious assaults reported, 1 homicide, and only 4 escape attempts.

⁶ [Petitioner] told Ms. Lass that he had seen [from his cell window] Deputy Fernandes drive in and out of the parking garage so he knew which car was his and where it was parked.

⁷ [Petitioner] wanted Ms. Lass to be in the control room so she could give him the keys.

Talecia Gobert, Petitioner's niece, testified that she was six or seven years old when she started to visit Petitioner in prison with her grandmother. 35 RR 230-40. They would also write each other weekly, and Petitioner always encouraged her to do her best and pursue her faith.

The defense then presented the testimony of Petitioner's older sister, older brother, and cousin to discuss an incident that happened during Petitioner's childhood. 35 RR 207-29; 36 RR 5-70. When Petitioner was five years old, he rode his big wheel into the street and was struck by a passing car. Petitioner was hospitalized for several months and eventually came home in a full body cast. Following this incident, each noticed a startling change in Petitioner's disposition, as he developed a quick temper and became easily agitated. Petitioner's brother, Michael Gobert, further testified that Petitioner had trouble controlling his temper but is only aggressive when he feels physically threatened. He admitted that Petitioner once hit him over the head with a trophy that required stitches.

Petitioner's mother, Alice Gobert, testified that Petitioner's father was abusive but was no longer in her life when Petitioner was born. 36 RR 70-135. She often would tell Petitioner he needed discipline so that he would not end up like his father. Even before the accident, Petitioner was hyperactive and wasn't allowed to stay in nurseries because of his tantrums. After the accident, she thought demons had possessed her child because of the ugly things he would say to her. Petitioner's inability to control his anger got worse with age, and by the third grade his teachers believed he should be in alternative school. Ms. Gobert eventually became afraid of Petitioner, and he was sent to a juvenile facility on several occasions for being aggressive with her. On one occasion, Petitioner hit his mother with a broomstick, requiring stitches. On another

occasion, he cut her with a knife following a physical altercation.⁸ She believes her son has calmed down while in prison and that it was better for him to be incarcerated.

Petitioner was the last witness to testify at the punishment phase. 38 RR 41-209. Although his defense counsel disagreed with this decision, Petitioner wanted to address the jury and make a plea to save his life. Petitioner stated that he never knew his father growing up, and that he was treated differently than his siblings because they had a different father. He hated his mother until he taught himself how to love while in prison. Before that, he looked to “pimps and players on the street” regarding how to deal with women because he wasn’t taught how to love. Since he has been incarcerated, he has attempted to better himself by attending college courses, including 1,800 hours of computer, maintenance, and plumbing training. He has also taken literature courses and attempted to get anger counseling.

According to Petitioner, he never started trouble, but his anger sometimes built up to where he could not control it. He admitted to previously behaving violently while incarcerated—striking a man with a garden hoe, threatening guards, and participating in close to ten altercations—but stated those actions were in self-defense and that he is no longer a violent person. Although prison is still a violent place, he believes he can do some good by talking and sharing his experiences with younger people.

During direct examination and again on cross-examination, Petitioner admitted to assaulting Kresa Miller, Marinda Davis, and Christina Pocharasang, but blamed his actions on anger issues and the fact these women all reminded him of his mother. Petitioner also claimed that each woman lied about the extent of the assaults and the injuries they sustained. Similarly, Petitioner accused Thomas Swarnes and Deputy Lass of lying during their testimony, and stated

⁸ Petitioner’s mother and brother both testified that Petitioner called them prior to trial and asked them not to testify about these incidents.

his belief that Demetrius Cotton's testimony was "coached" because he neither stabbed nor choked Demetrius. To the contrary, Demetrius would have died if Petitioner hadn't helped him.

While Petitioner admitted to murdering Mel Cotton and acknowledged the crime was horrible, he stood by his assertion that it was self-defense. Petitioner stated he was attacked by Ms. Cotton as he got out of the shower and that he tied her up only to prevent her from reaching a .357 revolver in her closet. One was never found. Although he had remorse for killing Ms. Cotton, he is not the "deranged killer" the prosecution makes him out to be. If he were, Petitioner argued, he would have just cut both Mel and Demetrius Cotton's throats while they slept. Nevertheless, Petitioner admitted to taking Ms. Cotton's purse and some other items and also to disposing of the murder weapon, his shirt, and a bloody comforter. He claimed to have had a long-standing affair with Ms. Cotton, but that he lied to police because they didn't respect his request for counsel.

Petitioner asked the jury to spare his life after impartially considering his upbringing and his eventual redemption while in prison.

3. Closing and Allocution

Following this testimony, on March 10, 2010, the jury was instructed on the punishment special issues and heard closing argument by counsel. After closing arguments, the jury deliberated and returned its verdict, finding unanimously (1) beyond a reasonable doubt there was a probability Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, and (2) taking into consideration all of the evidence, including the circumstances of the offense, the Petitioner's character, background, and personal moral culpability, there were insufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. 38 RR 280-81. The trial court accordingly sentenced Petitioner to death. *Id.*

Once the verdict was read, the victim's family was given the opportunity to make an allocution statement. After hearing a statement from Mel Cotton's sister, Ethel McPherson, Petitioner shouted: "That bitch wasn't no angel. That was a bitch, a motherfucking bitch. Fuck all y'all. That was a bitch, a ho bitch." When the trial court attempted to intervene, Petitioner replied, "No, fuck you. Fuck your allocution. Fuck all you motherfuckers."

C. Post-conviction Proceedings

Petitioner appealed his conviction and sentence, raising seven points of error in his direct appeal brief. In an opinion issued November 23, 2011, the TCCA affirmed Petitioner's conviction and sentence. *Gobert*, 2011 WL 5881601. The United States Supreme Court later denied Petitioner's petition for writ of certiorari. *Gobert v. Texas*, 568 U.S. 827 (2012).

While his direct appeal was still pending, Petitioner was appointed counsel—attorney John Stickels—to represent him in pursuing state habeas corpus relief. Mr. Stickels filed a lengthy state habeas application on Petitioner's behalf in the state trial court raising a total of twelve multi-faceted claims for relief. 2 SHCR at 261-476.⁹ Following a response in opposition from the State, the trial court issued findings of fact and conclusions of law recommending that state habeas corpus relief be denied. Supp. SHCR at 155-69. In an order dated January 14, 2015, the TCCA adopted the trial court's findings of fact and conclusions of law and denied Petitioner state habeas corpus relief. *Ex parte Gobert*, No. 77,090-01 (Tex. Crim. App. 2015).

One year following the denial of state habeas relief, Petitioner filed his initial federal habeas corpus petition in this Court (ECF No. 21) and amended the petition two months later (ECF No. 22). Thereafter, Respondent filed an answer to the amended petition (ECF No. 32) to which Petitioner responded (ECF No. 42). The case is now ripe for adjudication.

⁹ "SHCR" refers to the State Habeas Clerk's Record while "Supp. SHCR" refers to the Supplemental State Habeas Clerk's Record. Both are preceded by volume number and followed by the relevant page numbers.

II. Claims for Relief

As raised in his amended federal petition (ECF No. 22), the following sixteen allegations are now before the Court:

1. Petitioner received ineffective assistance of trial counsel by counsel's failure to investigate and present Jason Gibson as a witness to establish the existence of a prior relationship between the victim and Petitioner;
2. Gibson's affidavit establishes that Petitioner is actually innocent of capital murder;
3. Trial counsel were ineffective for failing to investigate, develop, and present compelling mitigation evidence at the punishment phase;
4. Petitioner received ineffective assistance of appellate counsel by counsel's failure to raise viable claims on direct appeal;
5. Trial counsel were ineffective for failing to thoroughly investigate the testimony of Tasha Lass prior to calling her as a witness during the guilt/innocence phase of trial;
6. Trial counsel were ineffective for failing to timely pursue an investigation and file a motion for new trial alleging they rendered ineffective assistance;
7. Special Issue Number One, the future dangerousness special issue, is unconstitutionally vague, fails to narrow the class of defendants sentenced to death, and limits the jury's ability to consider mitigating evidence;
8. Special Issue Number Two, the mitigation special issue, is unconstitutional because it places the burden of proof on the defendant rather than the State;
9. The mitigation special issue violates the Eighth Amendment because it lacks minimal standards for a jury to make its determination;
10. The mitigation special issue is unconstitutional because it sends "mixed signals" to the jury and restricts their consideration of evidence;
11. Texas's "12-10" rule is unconstitutional because it misleads jurors about their individual ability to give effect to their beliefs regarding mitigation;
12. The trial court erred in admitting the testimony of A.P. Merillat at the punishment phase because it violated Petitioner's right to an individualized assessment of his future dangerousness;
13. The trial court erred in admitting the future-dangerousness prediction of Dr. Richard Coons at the punishment phase;

14. The Texas capital sentencing process is unconstitutional because it allows unfettered prosecutorial discretion, does not require future dangerousness factors to be set forth in the indictment, and permits the use of unreliable evidence;
15. Trial counsel rendered ineffective assistance by revealing to the jury their disagreement with Petitioner's decision to testify; and
16. The search and seizure of evidence from his car, home, and person violated his Fourth Amendment rights.

III. Standard of Review

Petitions for federal habeas corpus relief are governed by the heightened standard of review provided by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254. But the standard of review a federal court applies to such petitions will differ depending on the state court's treatment of the federal claims. If the claims raised in the federal petition were adjudicated on the merits in state court, federal courts should apply the deferential standard of review provided by § 2254(d). With respect to claims that have not been adjudicated on the merits by the state courts, however, a federal court does not conduct review pursuant to § 2254(d). Instead, the court applies a *de novo* standard of review. *See Hoffman v. Cain*, 752 F.3d 430, 437 (5th Cir. 2014).

A. Claims Adjudicated in State Court

The AEDPA "imposes a highly deferential standard of review for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam). Under the heightened standard of § 2254(d), a petitioner may not obtain federal habeas corpus relief on any claim that was adjudicated on the merits in a state court proceeding unless the state court's adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based

on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005). This intentionally difficult standard stops just short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

A federal habeas court's inquiry into unreasonableness should always be objective rather than subjective, with a focus on whether the state court's application of clearly established federal law was "objectively unreasonable" and not whether it was incorrect or erroneous. *McDaniel v. Brown*, 558 U.S. 120 (2010); *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003). Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable, regardless of whether the federal habeas court would have reached a different conclusion itself. *Richter*, 562 U.S. at 102. Instead, a petitioner must show that the decision was objectively unreasonable, which is a "substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

So long as "fairminded jurists could disagree" on the correctness of the state court's decision, a state court's determination that a claim lacks merit precludes federal habeas relief. *Richter*, 562 U.S. at 101 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In other words, to obtain federal habeas relief on a claim previously adjudicated on the merits in state court, Petitioner must show that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *see also Bobby v. Dixon*, 565 U.S. 23, 24 (2011).

B. Claims Not Adjudicated in State Court

For claims that have not been adjudicated on the merits in state court, the deferential scheme laid out in § 2254(d) will not apply and a reviewing court must instead “apply a *de novo* standard of review.” *Ward v. Stephens*, 777 F.3d 250, 256 (5th Cir. 2015); *Hoffman*, 752 F.3d at 437. But a petitioner may not escape § 2254(d)’s deferential review simply by “using evidence that is introduced for the first time” in federal court. *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir. 2011). To the contrary, except for the narrow exceptions contained in § 2254(e)(2), a habeas petitioner is precluded from further factual development in federal court and must rely on the evidence presented to the state court when challenging a state court finding. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011) (explaining that § 2254(d)(1) “requires an examination of the state-court decision at the time it was made” and that review “is limited to the record that was before the state court.”).

Similarly, § 2254(e)(2) also restricts the discretion of a district court to consider new evidence when deciding claims entirely without a state court merits adjudication. *Pinholster*, 563 U.S. at 185-86. As such, a petitioner must be diligent to develop the record in state court first and present, if possible, all claims of constitutional error. (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 430 (2000). “If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute’s other stringent requirements are met.” *Id.* at 437. Even if the petitioner exercised diligence in state court, a district court nevertheless retains discretion to deny a hearing and may do so if the federal record is sufficiently developed to make an informed decision. *Schriro*, 550 U.S. at 468; *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998).

IV. Analysis

A. Actual Innocence (Claim 2)

Petitioner first contends he is “actually innocent” of capital murder because he did not “commit or attempt to commit a robbery.” According to Petitioner, the affidavit of Jason Gibson—presented for the first time during Petitioner’s state habeas proceedings—establishes a prior relationship between Petitioner and Mel Cotton that proves she was not killed during the course of a robbery. In response, Respondent argues that Petitioner’s assertion of actual innocence fails to state a claim upon which federal habeas relief may be granted and is alternatively without merit. Because the Court agrees that Petitioner’s claim of actual innocence is not a cognizable federal habeas claim, the merits of the allegation need not be reached.

“Freestanding” claims of actual innocence, such as the allegation now before the Court, do not provide a valid basis for federal habeas relief. *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)). “This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.” *Herrera*, 506 U.S. at 399. Although the *Herrera* court left open the question of whether, in a capital case, “a truly persuasive demonstration of ‘actual innocence’ made after trial would . . . warrant habeas relief if there were no state avenue open to process such a claim,” 506 U.S. at 417, the Fifth Circuit has consistently rejected this theory.¹⁰ See *Cantu v. Thaler*, 632 F.3d 157, 167 (5th Cir. 2011); *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) (collecting cases). Because the Fifth Circuit does not recognize freestanding claims of actual innocence on federal

¹⁰ In later revisiting the issue of actual innocence, the Supreme Court declined to resolve the question of whether freestanding actual-innocence claims are to be recognized in federal habeas proceedings. *House v. Bell*, 547 U.S. 518, 555 (2006).

habeas review, Petitioner's allegation must be rejected.¹¹

Even assuming Petitioner's actual-innocence claim could be the basis for federal relief, it would only be cognizable if there were no state procedure available for making the claim. *Herrera*, 506 U.S. at 417; *Graves*, 351 F.3d at 151. Such is not the situation in Texas, where state procedures are available to raise actual-innocence claims in clemency proceedings or a state habeas petition. See Tex. Crim. Proc. Code art. 48.01 (West 2019); *Lucas v. Johnson*, 132 F.3d 1069, 1075 (5th Cir. 1998). Indeed, Petitioner unsuccessfully raised this actual-innocence allegation during his state habeas corpus proceedings. Supp. SHCR at 158-59. Thus, Petitioner's freestanding claim of actual innocence must be denied.

B. Trial Counsel (Claims 1, 3, 5, 6, and 15)

Petitioner next raises several claims alleging he received ineffective assistance of trial counsel (IATC) at both the guilt/innocence and punishment phases of trial. Specifically, Petitioner faults counsel for: failing to investigate and present Jason Gibson as a witness to establish the existence of a prior relationship (Claim 1); failing to investigate and present compelling mitigation evidence (Claim 3); failing to thoroughly investigate Tasha Lass prior to calling her as a witness (Claim 5); failing to investigate and file a timely motion for new trial (Claim 6); and revealing to the jury that counsel advised Petitioner not to testify (Claim 15).

¹¹ Perhaps for this reason, Petitioner suggests that the Court consider this claim a "*Schlup*-type claim." In *Schlup v. Delo*, the Supreme Court distinguished freestanding, substantive innocence claims—in which a petitioner asserts that his innocence entitles him to habeas relief—from procedural innocence claims in which a petitioner seeks to "have his otherwise barred constitutional claim considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera*, 506 U.S. at 404). This distinction makes it clear that the instant claim is substantive rather than procedural. Although Petitioner's actual-innocence claim is similar to his first ineffective-assistance claim (in that it relies on the Gibson affidavit), he is not using it to obtain review of that ineffective-assistance claim. Indeed, he has no reason to do so—in the following section, the Court can and will consider the merits of the ineffective-assistance claim, which is not subject to a procedural bar. The Court thus declines Petitioner's invitation to consider this claim under *Schlup*. See *Coleman v. Thaler*, 716 F.3d 895, 908-09 (5th Cir. 2013).

Four of these five allegations—Claims 1, 3, 5, and 15—were raised and rejected in state court during either Petitioner’s direct appeal or state habeas proceedings. As discussed below, Petitioner fails to demonstrate the state court’s rejection of the claims was contrary to, or an unreasonable application of, Supreme Court precedent. The remaining IATC claim concerning counsels’ failure to file a motion for new trial (Claim 6) was not exhausted in state court and is therefore procedurally barred from federal habeas review. The claim also lacks merit even when reviewed under a *de novo* standard. Thus, relief is denied on each of Petitioner’s IATC claims.

1. The *Strickland* Standard of Review

In the habeas context, IATC allegations are reviewed under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, Petitioner must demonstrate (1) counsels’ performance was deficient, and (2) this deficiency prejudiced his defense. *Id.* at 687-88, 690. According to the Supreme Court, “[s]urmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

Strickland’s first prong “sets a high bar.” *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). “To demonstrate deficient performance, the defendant must show that, in light of the circumstances as they appeared at the time of the conduct, ‘counsel’s representation fell below an objective standard of reasonableness’ as measured by ‘prevailing professional norms.’” *Rhoades v. Davis*, 852 F.3d 422, 431-32 (5th Cir. 2017) (quoting *Strickland*, 466 U.S. at 687-88). This requires the Court to “affirmatively entertain the range of possible ‘reasons . . . counsel may have had for proceeding as they did.’” *Cullen v. Pinholster*, 563 U.S. at 196. “A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.” *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003). As such, counsel is “strongly presumed to have rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Burt v. Titlow*, 571 U.S. 12, 17 (2013) (quoting *Strickland*, 466 U.S. at 690).

To satisfy *Strickland*’s second prong, the 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. In conducting a *Strickland*’s prejudice analysis, a court must “consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path.” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). However, the question “is *not* whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently.” *Harrington v. Richter*, 562 U.S. at 111-12 (emphasis added) (citing *Wong*, 558 U.S. at 27). Rather, the “likelihood of a different result must be substantial, not just conceivable.” *Id.*

Finally, where the IATC claims raised by Petitioner were adjudicated on the merits by the state court, this Court must review these claims under the “doubly deferential” standards of both *Strickland* and 28 U.S.C. § 2254(d). *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (citing *Pinholster*, 563 U.S. at 190); *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009) (same). Such claims are considered mixed questions of law and fact and are analyzed under the “unreasonable application” standard of § 2254(d)(1). *Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010). In reviewing these claims, the “pivotal question” is not “whether defense counsel’s performance fell below *Strickland*’s standards, but whether “the state court’s application of the *Strickland* standard was unreasonable.” *Richter*, 562 U.S. at 101. That is to say, the question to be asked in this case is not whether counsels’ actions were reasonable, but whether “there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.* at 105.

2. Jason Gibson (Claim 1)

Petitioner's first IATC claim alleges counsel were ineffective for failing to interview and present Jason Gibson as a witness at the guilt/innocence phase of trial. During Petitioner's state habeas proceedings, Gibson provided an affidavit claiming to have seen Petitioner with the victim, Mel Cotton, on more than one occasion around 2002-2003. While he did not actually meet Petitioner until they were both incarcerated at the Travis County Jail in 2003 or 2004, Gibson stated that he had seen both Petitioner and the victim, separately and together, at an apartment complex he frequently visited in north Austin. Petitioner argues Gibson's testimony, had counsel discovered and presented it, would have established a prior relationship between the victim and Petitioner and rebutted the assertion that Petitioner murdered the victim during the course of a robbery. This argument is unconvincing for several reasons.

To start, despite Petitioner's claims to the contrary, counsel did conduct a reasonable investigation into the existence of an ongoing relationship between Petitioner and the victim. *Strickland*, 466 U.S. at 690-91 (requiring counsel to undertake a reasonable investigation). To be reasonable, counsel must, at minimum, interview potential witnesses and make an independent investigation of the facts and circumstances of the case. *Kately v. Cain*, 704 F.3d 356, 361 (5th Cir. 2013). But in assessing the reasonableness of counsel's investigation, a heavy measure of deference is applied to counsel's judgments, and is weighed in light of the defendant's own statements and actions. *Strickland*, 466 U.S. at 691.

During Petitioner's state habeas proceedings, counsel submitted affidavits addressing, in part, Petitioner's allegation regarding Jason Gibson. Lead counsel for the defense, Leonard Martinez, refuted the notion that counsel did not adequately investigate the robbery angle. Supp. SHCR at 6. According to Martinez, the defense team—which included himself, two other “very

able lawyers,” a mitigation specialist, and an investigator—“investigated every fact that made up the elements of robbery and kidnaping” but had never heard of Gibson before. *Id.* Martinez’s co-counsel, Kent Anschutz, elaborated by stating Petitioner never mentioned Gibson despite specifically being asked “for names of witnesses that could substantiate the existence of an ongoing relationship between [Petitioner] and the victim.” II SCHR at 534.

Because Petitioner failed to mention Gibson throughout the pendency of his case, trial counsel can hardly be deemed deficient for failing to interview Gibson about his alleged knowledge of Petitioner’s prior relationship with the victim. *See Ransom v. Johnson*, 126 F.3d 716, 723 (5th Cir. 1997) (holding whether counsel’s investigation is reasonable may critically depend on the information provided by the defendant). Indeed, the state habeas trial court explicitly credited counsels’ statements and concluded counsels’ performance was not deficient. Supp. SHCR at 155-57. This determination, including the trial court’s credibility findings, is entitled to a presumption of correctness which Petitioner has not overcome. *Richards v. Quarterman*, 566 F.3d 553, 563-64 (5th Cir. 2009).

Furthermore, even assuming counsel was deficient, Petitioner fails to demonstrate that the results of his trial would have been different had counsel discovered and investigated Gibson as a witness. *Strickland*, 466 U.S. at 694. Petitioner claims Gibson would have provided the jury with evidence of Petitioner’s existing relationship with the victim that would, in turn, negate the robbery charge. But the alleged existence of any relationship between the two would not necessarily have impacted the jury’s decision regarding whether Petitioner murdered Ms. Cotton during the course

of a robbery because it is possible to commit a robbery against someone known by the perpetrator. *See* Tex. Penal Code § 29.02.¹²

Indeed, the jury heard argument from counsel and testimony from several witnesses suggesting there may have been a previous relationship between the two. 26 RR 22 (opening argument by counsel suggesting an ongoing relationship); 29 RR 28-29 (testimony from Petitioner's former cellmate that Petitioner admitted to stabbing his girlfriend), 47-49 (cross-examination of Petitioner's brother regarding whether he knew of a relationship between Petitioner and Ms. Cotton); 30 RR 47-48 (testimony from Petitioner's brother suggesting on ongoing relationship); 32 RR 63 (closing argument suggesting ongoing relationship). Thus, any testimony Gibson could provide on the subject would have been cumulative of evidence already presented at trial. *See Trottie v. Stephens*, 720 F.3d 231, 246-47 (5th Cir. 2013) (finding IATC claim for failing to call a witness fails if the proposed testimony was cumulative of evidence already in the record); *Skinner v. Quarterman*, 528 F.3d 336, 345 n. 11 (5th Cir. 2008) (same).

Finally, it is unlikely that counsels's alleged error was prejudicial because the evidence that Petitioner committed a robbery in addition to murdering Ms. Cotton was substantial. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (noting the weight of the evidence of guilt in finding alleged deficient performance of counsel not prejudicial); *Pondexter v. Quarterman*, 537 F.3d 511, 525 (5th Cir. 2008) (same). In assessing prejudice, this Court must consider "the totality of the evidence before the judge or jury." *Mejia v. Davis*, 906 F.3d 307, 315 (5th Cir. 2018) (quoting *Strickland*, 466 U.S. at 696) (internal quotation marks omitted). In this case, the evidence established that Petitioner committed robbery in addition to murder. 26 RR 157 (testimony from

¹² Under § 29.02, a person commits robbery if, "in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death."

Detective De Los Santos that, when speaking to Demitrius Cotton at the hospital, Demitrius told him Petitioner “took my mama’s purse and money”); 28 RR 202, 222-25 (testimony from Demitrius that Petitioner demanded money from his mother and that her purse was missing from the apartment); 38 RR 180 (testimony from Petitioner during the punishment phase admitting to taking Ms. Cotton’s purse and cell phone).

Consequently, Petitioner has demonstrated neither deficient performance nor prejudice, much less that the state court’s denial of this claim was an unreasonable application of *Strickland*. As such, under the “doubly” deferential review encompassed by *Strickland* and the AEDPA, Petitioner’s claim fails. *Richter*, 562 U.S. at 105.

3. The Mitigation Investigation (Claim 3)

Petitioner next claims his trial counsel were ineffective for failing to adequately investigate and present mitigating evidence to the jury at the punishment phase. Specifically, Petitioner faults counsel for not interviewing or presenting testimony from three of his former teachers to help support the defense’s mitigation theory that Petitioner lacked impulse control due to being hit by a car as a child. Petitioner also contends counsel, had they conducted an adequate investigation, could have better utilized the testimonies of his mother and brother to include readily available mitigating evidence concerning Petitioner’s background and upbringing. This allegation was raised and rejected during Petitioner’s state habeas corpus proceedings. Petitioner fails to demonstrate that this adjudication was contrary to, or an unreasonable application of, clearly established federal law.

In preparing for the penalty phase of a death penalty trial, “counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary.” *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). However,

lawyers generally need not go “looking for a needle in a haystack,” especially when they have “reason to doubt there is any needle there.” *Maryland v. Kulbicki*, 136 S. Ct. 2, 4-5 (2015) (per curiam) (quoting *Rompilla v. Beard*, 545 U.S. 374, 389 (2005)). Instead, counsel’s decision not to investigate a particular matter “must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). When the omission alleged is failing to investigate something in particular, a court must look at “the known evidence” and whether it “would lead a reasonable attorney to investigate further.” *Id.* at 527. There is always a strong presumption that an alleged deficiency “falls within the wide range of reasonable professional assistance.” *Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012) (quoting *Strickland*, 466 U.S. at 689)).

The record in this case supports the state court’s conclusion that Petitioner’s trial counsel “were well-informed about [Petitioner’s] background and made reasonable decisions based on trial strategy.” Supp. SHCR at 160. Petitioner’s defense team consisted of three experienced attorneys, a mitigation specialist, and an investigator. *Id.* at 6. The defense team obtained and reviewed a significant amount of records as part of their investigation and conducted interviews, either by phone or in person, with Petitioner, his family, and former schoolteachers. II SHCR at 487-91. Counsel also obtained the services of Larry Fitzgerald, an expert on prison society within TDCJ, to rebut the anticipated testimony of A. P. Merillat at trial.

As a result of their investigation, counsel presented a substantial mitigating case during the punishment phase of Petitioner’s trial, including testimony from Petitioner’s mother, sister, brother, and cousin concerning the following: (1) Petitioner’s temper and lack of impulse control following his being hit by an automobile at age five, (2) Petitioner was disciplined physically by his mother and fought often with his siblings and neighborhood kids, (3) Petitioner’s biological

father, who was gone by the time Petitioner was born, was an alcoholic and physically abused Petitioner's mother well into her eighth month of pregnancy with Petitioner, (4) Petitioner was born a month early, and his mother attempted an abortion in her third month of pregnancy, (5) Petitioner had emotional problems at school and teachers thought he should go to alternative school by the third grade, and (6) Petitioner's mother thought demons had possessed her child after his accident, could not control him, and eventually became scared of him. All this evidence supported counsels' stated intention to demonstrate Petitioner's lack of impulse control was the product of his father's legacy of violence, prenatal abuse, and the injuries he sustained when hit by a car at age five.

Petitioner does not contend this strategy was deficient; rather, he argues counsel were deficient in implementing it by conducting an unreasonably limited investigation. According to Petitioner, at least three of Petitioner's former schoolteachers could have testified about Petitioner's emotional problems and lack of impulse control in a school setting. Petitioner also contends his mother and brother could have been better utilized to provide further details about Petitioner's background and upbringing.¹³ However, complaints of uncalled witnesses are disfavored as means of establishing an IATC claim, in part because allegations of what a witness would have testified are largely speculative. *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). To prevail on an IATC claim based on counsel's failure to call a witness, the petitioner must name the witness, demonstrate the witness was available to testify, delineate the content of the witness's proposed testimony, and show the testimony would have been favorable to the defense. *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010); *Day*, 566 F.3d at 538.

¹³ This evidence included: (1) Petitioner's mental and emotional instability, substance abuse, and suicide attempt, (2) Petitioner's lifelong fear that demons were after him, (3) Petitioner's academic problems and lack of impulse control at school, (4) a family history of substance abuse, (5) physical abuse meted out as discipline by his mother, brother, and uncles, and (6) abuse suffered by Petitioner's mother before Petitioner was born.

Assuming the first three requirements are satisfied by the affidavits submitted by Petitioner's family and former schoolteachers during his state habeas proceedings, Petitioner still fails to demonstrate the fourth—that the proposed testimony would be favorable. In fact, much of what is contained in these affidavits is not even new, but is of the same nature as that already presented to the jury. For instance, evidence that Petitioner lacked impulse control, had difficulty in school and exhibited mental and emotional instability was presented at length by Petitioner's mother, brother, and sister, as well as through the testimony of Petitioner himself. *See* Background, Section I(B)(2), *supra*. The severe abuse Petitioner's mother suffered at the hands of Petitioner's father, his father's alcoholism, and the physical altercations Petitioner had with his family members and neighbors was also discussed extensively by Petitioner's family at trial. While the affidavits presented by Petitioner undoubtedly provide more details in hindsight, any additional testimony regarding Petitioner's upbringing and lack of impulse control would have been largely redundant of evidence already presented at trial. *See Trottie*, 720 F.3d at 246-47 (finding IATC claim for failing to call a witness fails if the proposed testimony was cumulative of evidence already in the record); *Skinner*, 528 F.3d at 345 n. 11) (same).

Regardless, even assuming counsel were deficient in not investigating further, Petitioner fails to demonstrate prejudice under the second prong of *Strickland*. For mitigation-investigation claims such as these, a federal habeas court must “reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Trevino v. Davis*, 861 F.3d 545, 549 (5th Cir. 2017) (citing *Wiggins*, 539 U.S. at 534). *Strickland* does not require the State to “rule out” or negate a sentence of life in prison to prevail; rather, it places the burden on the defendant to show a “reasonable probability” that, but for counsels’ deficient investigation, the result of the punishment phase of a trial would have been different. *Wong*, 558 U.S. at 27 (citing *Strickland*, 466 U.S. at

694). But “[t]he likelihood of a different result must be substantial, not just conceivable.” *Brown v. Thaler*, 684 F.3d 482, 491 (5th Cir. 2012) (citing *Richter*, 562 U.S. at 112). And it is virtually impossible to establish *Strickland* prejudice in cases such as this where the evidence of future dangerousness is overwhelming. *Busby v. Davis*, 925 F.3d 699, 726 (5th Cir. 2019) (citing *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002)).

As noted by Respondent, the punishment evidence against Petitioner was “exceedingly strong.” The jury had already heard an abundance of evidence concerning the brutality of Mel Cotton’s murder, including the fact that she was stabbed 107 times, as well as the fact that her five-year-old son, Demetrius, was repeatedly stabbed but nonetheless lived to testify against Petitioner.¹⁴ At the punishment phase, the jury then heard evidence Petitioner had previous convictions for burglary, robbery, false imprisonment, and two counts of assault. The jury also heard from three of Petitioner’s former girlfriends who testified Petitioner repeatedly abused them by punching, biting, strangling, and threatening their lives. Petitioner was also a less-than-model prisoner while incarcerated at the Travis County Jail, having assaulted his cellmate and committing numerous disciplinary infractions, including “fraternizing” with two female jail guards. One of these jail guards, Tasha Lass, admitted to smuggling in a cell phone for Petitioner, who then attempted to recruit her in an elaborate escape plan that involved her smuggling a weapon into the jail so he could shoot everyone who stood in his way. Petitioner also tampered with his security leg brace on two occasions, negating its disabling effect. *See* Background, Section I(B)(1), *supra*.

¹⁴ While, by their nature, all capital murder cases involve terrible circumstances, Supreme Court precedent plainly anticipates that the severity of the crime is a relevant factor in *Strickland* prejudice. *See Smith v. Spisak*, 558 U.S. 139, 154-55 (2010); *Strickland*, 466 U.S. at 699; *see also Carty v. Thaler*, 583 F.3d 244, 263 (5th Cir. 2009) (“In this re-weighting, the brutality of the crime is relevant but does not automatically trump additional mitigating evidence.”); *Vasquez v. Thaler*, 389 F. App’x 419, 428 (5th Cir. 2010) (unpublished) (“Naturally, the power of the newly amplified case to mitigate a jury’s selected punishment will be contingent on other factors in the case, such as the circumstances of the crime.”).

Additionally, Petitioner then took the stand and admitted to assaulting his mother, brother, and each of the women who testified against him. However, he claimed his actions were the result of anger issues or the fact the women all reminded him of his mother. He also admitted to killing Mel Cotton, although he stood by his argument that his actions were self-defense. And he claimed his assault on an inmate with a garden hoe, his threatening of several guards, and his participation in around ten prison fights were also the results of his acting in self-defense. *See* Background, Section I(B)(2), *supra*.

Given Petitioner's testimony and the strength of the overwhelming evidence establishing Petitioner's future dangerousness, Petitioner fails to establish the result would have been different had counsel discovered the evidence in question. *See Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989) (finding no ineffective assistance "[g]iven the weakness of such testimony when juxtaposed with the overwhelming evidence of guilt, the horrifying nature of the crime, and the abundant impeachment material available to the State"). Petitioner was therefore not prejudiced by counsels' allegedly deficient mitigation investigation.

In summary, Petitioner contends that counsel deficiently implemented their own strategy of showing that Petitioner's lack of impulse control was not his fault but rather the result of an unstable and unfortunate upbringing. But "[t]he defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources." *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992). Although it is possible, in hindsight, to speculate that counsel could have investigated more, hired different experts, or presented more mitigating witnesses, this Court is "particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-

guessing.” *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009) (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000)) (internal quotation marks omitted).

Here, the objective evidence present in the record demonstrates counsel conducted a broad investigation into Petitioner’s background and presented a thorough case for mitigation. Petitioner provides little persuasive evidence to the contrary, and the evidence he has presented is, for the most part, cumulative of the evidence already adduced at trial. Moreover, Petitioner’s evidence does not come close to outweighing the substantial evidence presented by the State regarding the brutal murder of Mel Cotton and Petitioner’s history of violence. *See Busby*, 925 F.3d at 726 (finding evidence “of the same genre as that presented to the jury at trial” could not outweigh the State’s “overwhelming” evidence of future dangerousness) (citing *Newbury v. Stephens*, 756 F.3d 850, 873-74 (5th Cir. 2014)). Petitioner thus fails to demonstrate either deficient performance or prejudice as required under *Strickland*, rendering Petitioner’s allegation without merit.

4. Tasha Lass (Claim 5)

In his fifth claim for relief, Petitioner faults counsel for failing to thoroughly investigate Travis County Deputy Tasha Lass prior to calling her as a witness during the guilt/innocence phase. Lass testified briefly for the defense for the limited purpose of showing that inmates did not have much privacy in their jail cells, thus suggesting Petitioner’s cellmate could have learned details about the murder from reading Petitioner’s case files as opposed to hearing him confess. Later, Lass testified for the State at the punishment phase regarding her inappropriate relationship with Petitioner, smuggling Petitioner a cell phone, and Petitioner’s attempt to involve her in an elaborate plan to escape jail by shooting his way out. Had counsel conducted a proper investigation, Petitioner argues, they could have foreseen the risk of calling Lass as a witness and apparently prevented her damaging punishment-phase testimony.

Rather unexpectedly, Petitioner urges this Court to find that the claim is “essentially” unexhausted and thus procedurally defaulted even though it was raised both on direct appeal and during Petitioner’s state habeas proceeding. Citing certain factual allegations¹⁵ that were not included in his state court briefing, Petitioner contends the claim is now fundamentally different than the claim presented to the state courts and should not be evaluated under the AEDPA’s deferential standard. Instead, the claim should be reviewed *de novo* because of state habeas counsel’s failure to fully develop the claim, which Petitioner contends should constitute cause to excuse the procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012). After reviewing Petitioner’s new allegations, however, it is clear they do not “fundamentally alter” his claim, but “merely provide[] additional evidentiary support for his claim that was already presented and adjudicated in the state court proceedings.” *Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014). Thus, *Martinez* is inapplicable, and Petitioner must overcome the deference afforded to state court decisions. He fails to make this showing.¹⁶

For example, Petitioner has not demonstrated counsel were deficient in their performance. “[C]ounsel has a duty to make a reasonable investigation of defendant’s case or to make a reasonable decision that a particular investigation is unnecessary.” *Ransom*, 126 F.3d at 723 (citing *Strickland*, 466 U.S. at 691). But in reviewing such claims, it is important to remember that counsel’s performance need not be optimal to be reasonable. *Richter*, 562 U.S. at 104; *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam) (finding a defendant is entitled to

¹⁵ Specifically, these allegations assert that (1) Lass’s testimony at guilt/innocence was unnecessary and could have been developed simply by cross-examining Petitioner’s former cellmate, (2) Lass was not even a guard at the Del Valle Jail where Petitioner and his cellmate were held; and (3) counsel should have been suspicious given Petitioner’s past history of inappropriate relationships with jailers.

¹⁶ Even assuming the claim is procedurally defaulted, Petitioner cannot establish cause to excuse the default because Petitioner’s allegation is insubstantial. See *Martinez*, 566 U.S. at 14 (finding an IATC claim must be “a substantial one” in order to excuse a procedural default).

“reasonable competence, not perfect advocacy.”). “Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Richter*, 562 U.S. at 110. For this reason, every effort must be made to eliminate the “distorting effects of hindsight.” *Strickland*, 466 U.S. at 689.

Petitioner’s allegation that counsel should have thoroughly investigated Deputy Lass only makes sense through the benefit of hindsight. At the time of Lass’s guilt/innocence testimony, counsel had no reason to investigate a law enforcement officer or suspect there was an illicit relationship between the two. While Petitioner cites as “red flags” a previous affair with another jailer, in addition to the fact that Lass testified in civilian clothing without a subpoena, none of these facts—individually or taken as a whole—would indicate Petitioner was carrying on an improper relationship with Lass and trying to involve her in a potentially violent escape plan. In fact, given that the only two people who ever knew about the affair were Petitioner and Lass, discovering evidence of this relationship was the remotest of possibilities. This was confirmed at the punishment phase when, after being granted a short continuance to investigate these matters, counsel failed to discover anything in Lass’s background as a decorated law enforcement officer that would have warranted hesitation in calling her as a witness. II SCHR at 487-91 (affidavits of Kent Anschutz and Paul Quinzi).

Moreover, whether an investigation is reasonable depends, in part, on the information provided by the defendant. *See Sonnier v. Quarterman*, 476 F.3d 349, 362 (5th Cir. 2007) (holding that a criminal defendant cannot block his attorney’s efforts and later claim that the resulting performance was constitutionally deficient); *Ransom*, 126 F.3d at 723 (holding that whether or not counsel’s investigation is reasonable may critically depend on the information provided by the

defendant and the defendant's own strategic choices concerning his representation). Here, the only person with knowledge of the risks involved in calling Lass as a witness was Petitioner himself. Despite this fact, Petitioner not only failed to disclose his relationship with Lass to counsel, he *insisted* on calling her as a witness against counsels' advice. Supp. SHCR at 6-7 (affidavit of Leonard Martinez); II SCHR at 487-91 (affidavits of Kent Anschutz and Paul Quinzi).

As a result, trial counsel cannot be deemed ineffective for not discovering information that Petitioner could have, but did not, disclose. *See Blanton v. Quarterman*, 543 F.3d 230, 239 (5th Cir. 2008) (trial counsel could not have uncovered evidence where neither petitioner nor his family mentioned it); *Soria v. Johnson*, 207 F.3d 232, 250-51 (5th Cir. 2000) (no deficient performance where, despite encouragement, petitioner and family failed to reveal evidence of past behavior and family). Indeed, it appears this Court is being asked to find counsel deficient "on the ground that his lawyer[s] did exactly what he asked [them] to do. That argument answers itself." *United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990).

Aside from deficient performance, Petitioner also fails to demonstrate prejudice under *Strickland*. The record indicates that, even if counsel had pursued an investigation into Lass, Petitioner cannot show that the results of such an investigation would have been fruitful. As counsel stated in their affidavits to the state habeas court, they were unable to find anything suspicious in Lass's background even after her punishment phase testimony admitting to a relationship with Petitioner. II SCHR at 487-91. Further, it was not counsels' lack of preparation or even their presentation of Lass as a witness at the guilt/innocent phase that led to the eventual discovery of a relationship—it was Lass's repeated appearance at the trial "just to see what was going on." *Id.* at 488. As such, it was likely the State would have discovered the relationship even if Lass did not testify at guilt/innocence.

Regardless, Petitioner does not demonstrate a “reasonable probability” that the result of the punishment phase of a trial would have been different had counsel somehow prevented Lass’s secrets from being discovered. *Wong*, 558 U.S. at 27. “[A] court assessing prejudice must consider the totality of the evidence before the judge or jury.” *Mejia*, 906 F.3d at 315 (quoting *Strickland*, 466 U.S. at 696) (internal quotation marks omitted). While Lass’s testimony concerning Petitioner’s escape plan was undoubtably damaging, there was still a substantial amount of evidence presented to the jury concerning Petitioner’s potential for future danger, including the murder of Mel Cotton and Petitioner’s life-long tendency for violence and inability to control his anger. *See* Section IV(B)(3), *supra*. Where the evidence of future dangerousness is overwhelming, it is virtually impossible to establish *Strickland* prejudice. *Ladd*, 311 F.3d at 360. As such, Petitioner fails to establish either prong of the *Strickland* inquiry, and relief is denied.

5. Motion for New Trial (Claim 6)

Petitioner next contends trial counsel were ineffective for failing to investigate and pursue a motion for new trial. Had lead trial counsel not abandoned him at this critical stage, Petitioner argues, he could have investigated and presented the testimony of Jason Gibson that was the subject of his first and second claims for relief. In her answer, Respondent points out that this allegation was not exhausted in state court and is therefore procedurally barred from federal habeas review.¹⁷ Acknowledging this dilemma, Petitioner again cites *Martinez v. Ryan* and asks this Court to excuse the procedural bar due to ineffective assistance of state habeas counsel.

¹⁷ Respondent also contends the allegation is barred by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, federal courts are generally barred from applying “new” constitutional rules of criminal procedure retroactively on collateral review. According to Respondent, Petitioner seeks to apply a new rule because there is no clearly established right to counsel at the motion-for-new-trial phase. But as Petitioner correctly points out in his Reply, “every federal circuit to consider this issue, as well as the [TCCA], has relied on settled Supreme Court precedent in determining that the motion for new trial, during the post-trial, pre-appeal period, is a critical stage” warranting the right to counsel. *See McAfee v. Thaler*, 630 F.3d 383, 393 (5th Cir. 2011) (finding the right to the assistance of counsel at the motion-for-new-trial phase in Texas). Respondent’s argument is thus unpersuasive.

Petitioner fails to establish that *Martinez* should apply. Even when reviewed under a *de novo* standard, Petitioner's underlying IATC allegation lacks merit.

a. Procedural Default

The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition. *See* 28 U.S.C. § 2254(b)(1)(A) (stating that habeas corpus relief may not be granted “unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.”). The exhaustion requirement is satisfied if the substance of the federal habeas claim was presented to the highest state court in a procedurally proper manner. *Baldwin v. Reese*, 541 U.S. 27, 29-32 (2004); *Moore v. Cain*, 298 F.3d 361, 364 (5th Cir. 2002). In Texas, the highest state court for criminal matters is the TCCA. *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998).

Petitioner readily admits he did not raise the instant claim in the TCCA. As such, the claim is unexhausted. *Martinez v. Johnson*, 255 F.3d 229, 238 (5th Cir. 2001). But if Petitioner were to return to state court to satisfy the exhaustion requirement only to have the state court procedurally bar the claim under state law, the unexhausted claim would also be considered procedurally barred from federal habeas review. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992) (holding an unexhausted claim is procedurally defaulted for federal habeas purposes if the claim would now be procedurally barred by state court); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (same).

In this case, Petitioner is unable to return to state court to present his unexhausted claim because doing so would be barred by Texas' abuse of the writ doctrine codified in Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure. *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998). The Fifth Circuit has consistently held that Texas' abuse of the writ doctrine is an independent and adequate state procedural bar foreclosing federal habeas review of unexhausted

claims. *See Williams v. Thaler*, 602 F.3d 291, 305-06 (5th Cir. 2010) (holding a petitioner’s claims were procedurally defaulted because if the petitioner returned to state court, the court would not consider the merits under Article 11.071, § 5(a)); *Rocha v. Thaler*, 626 F.3d 815, 832 (5th Cir. 2010); *Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir. 2001). As a result, Petitioner’s unexhausted claim is procedurally defaulted in federal court. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004).

Federal habeas relief based on a procedurally defaulted claim is barred unless the petitioner can demonstrate cause for the default and actual prejudice arising from the default or demonstrate the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Barrientes v. Johnson*, 221 F.3d 741, 758 (5th Cir. 2000). Petitioner makes no attempt to show a “fundamental miscarriage of justice” will result from the Court’s dismissal of these claims. Instead, Petitioner contends the ineffectiveness of his post-conviction counsel constitutes cause to overcome the procedural bar under *Martinez*. As discussed below, Petitioner fails to make this showing.

b. *Martinez* Analysis

Prior to *Martinez*, an attorney’s negligence in a postconviction proceeding could not serve as “cause” to excuse the procedural default of claims in federal court. *Coleman*, 501 U.S. at 755. In *Martinez*, the Supreme Court carved out a “narrow” exception to the *Coleman* rule for IATC claims. *Trevino v. Thaler*, 569 U.S. 413, 422 (2013). Now, a petitioner may meet the cause element by showing (1) “that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding” and (2) “that his [IATC claim] is substantial—i.e., has some merit.” *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013). Neither of these prongs are satisfied in this case.

To start, Petitioner fails to establish that his state habeas counsel, John Stickels, rendered ineffective assistance during Petitioner's state habeas proceedings. Petitioner contends Stickels's inadequacies stem from his failure to raise an IATC claim concerning trial counsel's failure to file a motion for new trial. According to Petitioner, trial counsel should have investigated and presented the testimony of Jason Gibson in a motion for new trial but failed to do so due to bickering between trial counsel and Petitioner's counsel on direct appeal. But while Stickels did not specifically challenge trial counsel's performance at the motion-for-new-trial phase, he did raise an actual-innocence claim and a general IATC claim based on the affidavit provided by Gibson. Because both allegations were rejected by the state habeas court, Stickels can hardly be faulted for raising essentially the same allegation in another, slightly altered form. *See Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995) (finding "[c]ounsel cannot be deficient for failing to press a frivolous point."); *Barbee v. Davis*, 660 F. App'x. 293, 314 (5th Cir. 2016) (unpublished) (finding no prejudice if there is no "reasonable probability that [Petitioner] would have been granted state habeas relief had the claims been presented in the first state habeas application.").

Petitioner also fails to demonstrate that his underlying IATC claim "is a substantial one." *Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). "For a claim to be 'substantial,' a petitioner 'must demonstrate that the claim has some merit.'" *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014) (quoting *Martinez*, 566 U.S. at 14). "Conversely, an 'insubstantial' ineffective assistance claim is one that 'does not have any merit' or that is 'wholly without factual support.'" *Reed*, 739 F.3d at 774 (quoting *Martinez*, 566 U.S. at 15-16). Again, allegations of ineffective assistance are reviewed under *Strickland*'s familiar two-prong test requiring a demonstration of deficient performance and prejudice. 466 U.S. at 687-88, 690.

In order to demonstrate a substantial claim, Petitioner must show that counsel's decision not to move for a new trial was objectively unreasonable as a matter of strategy. *McAfee*, 630 F.3d at 394. But this Court's judicial scrutiny of counsel's performance under *Strickland* must be "highly deferential," indulging in a "strong presumption" that "trial counsel rendered adequate assistance and that the challenged conduct was the product of a reasoned trial strategy." *Id.* (citing *West v. Johnson*, 92 F.3d 1385, 1400, 1409 (5th Cir. 1996)). Indeed, trial counsel has broad discretion when it comes to deciding how best to proceed strategically. *See Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir. 2015) (the Supreme Court has emphasized counsel has "wide latitude in deciding how best to represent a client") (quoting *Yarbrough*, 540 U.S. at 5-6).

Here, the record suggests that trial counsel did not file a motion for new trial because of his belief that the habeas process was a better forum for challenging the conviction. I SHCR at 196 (indicating counsel consulted with capital litigation experts before making this decision). This strategy is reasonable, particularly given the Supreme Court's similar position on the matter. *See Trevino*, 569 U.S. at 424 (stating the motion-for-new-trial vehicle in Texas "is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point.") (citation omitted); *see also Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (finding that habeas proceedings, rather than a motion for new trial, are the preferred method for gathering facts necessary for an IATC challenge).

Furthermore, although no motion for new trial was filed on his behalf, Petitioner does not propose any claim that would have been successful had one been filed. In fact, the only claim Petitioner does mention is the general allegation concerning counsel's overall failure to discover Jason Gibson, a claim this Court has already found to lack merit. *See* Section IV(B)(2), *supra*. In order for Petitioner to prevail on the more specific claim that counsel should have presented

Gibson's affidavit in a motion for new trial, he must show a reasonable probability that, had counsel moved for a new trial, the trial court would have granted the motion. *McAfee*, 630 F.3d at 395. Given that the trial court later rejected Petitioner's general IATC claims concerning Gibson during Petitioner's state habeas proceeding, Petitioner cannot make this showing.

Consequently, Petitioner has neither established a substantial IATC allegation nor demonstrated that his state habeas counsel rendered ineffective assistance for failing to raise the claim during Petitioner's state habeas proceedings. For this reason, Petitioner fails to establish cause under *Martinez* that would excuse his unexhausted IATC claims from being procedurally defaulted. Petitioner is thus barred from receiving federal habeas relief on these allegations. Alternatively, even if the Court were to look past the procedural default and review the claim *de novo*, relief would be denied because the claim lacks merit.

6. Petitioner's Decision to Testify (Claim 15)

In his last IATC claim, Petitioner faults his lead counsel, Leonard Martinez, for expressing in front of the jury his disagreement with Petitioner's decision to testify. According to Petitioner, counsel's comment that he "doesn't necessarily agree" with Petitioner's choice served no purpose and undermined Petitioner's right to testify on his own behalf. The TCCA disagreed, finding on direct appeal that counsel's decision to inform the jury of his disagreement with Petitioner was a reasonable strategy designed to emphasize how strongly his client felt about testifying and making a sincere personal plea for mercy. *Gobert*, 2011 WL 5881601, at *11-12. This decision was not an unreasonable application of *Strickland*.

Toward the end of the punishment phase, counsel informed the trial court of Petitioner's insistence on exercising his right to testify. 38 RR 38-39. All three of Petitioner's attorneys strenuously disagreed with Petitioner's decision and registered their opposition on the record

outside the presence of the jury. *Id.* at 38-39, 113. Once Petitioner’s direct examination began, Martinez reiterated to the jury his disagreement with Petitioner’s decision and explained his concern about subjecting his client to a “dehumanizing” cross-examination:

Martinez: Mr. Gobert, you asked—you asked to address this jury, is that correct?

Petitioner: Yes, sir.

Martinez: Let me just go through some ground rules with you, okay, because you and I don’t necessarily agree with this, correct? Is that right?

Petitioner: Yes, sir, we don’t agree.

Martinez: And you know that I have concerns that because you are taking the witness stand they are going to be able to question you about everything and try to make you look bad. You saw what happens on that witness stand to witnesses. You know what happens to them, don’t you?

Petitioner: Yeah. It is not a concern, though, to me.

Martinez: Okay. But you wanted to address this jury and make a plea for your life, didn’t you?

Petitioner: Yes, sir.

Martinez: Even though in making that plea for your life, now they are going to put you under intense cross-examination to dehumanize you. Do you know that?

Petitioner: Well, they did—done a lot of dehumanizing, yes, sir. I’m not concerned with that.

Id. at 41-42.

Petitioner was the last person to testify at his trial. At closing argument, Martinez continued to emphasize Petitioner’s strong desire to take the stand to plead for mercy despite facing a brutal cross-examination. He began by reiterating that Petitioner “wanted his opportunity to come up here and basically ask each one of you, don’t take my life.” *Id.* at 246-47. Martinez then concluded his impassioned closing argument by asking the jury to spare Petitioner’s life:

I am pleading with you. He pleaded with you. He said, spare my life, spare my life. I am saying, please, spare his life if for no other reason than we should value life, affirm life, because he is not escaping punishment. He will be punished severely. That's all I'm asking. Just spare his life. Thank you.

Id. at 264.

Petitioner contends that Martinez's comment to the jury that he disagreed with Petitioner's choice to testify served no purpose and made Petitioner "look like a fool" for exercising his constitutional right. But counsel "has wide latitude in deciding how best to represent a client. . . ." *Yarborough*, 540 U.S. at 5-6, 8 ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect."). For this reason, "[a] conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness." *Cotton*, 343 F.3d at 752-53. This makes an attorney's choice of defense and his strategy in arguing that defense to a jury "virtually unchallengeable." *Strickland*, 466 U.S. at 690; *Trottie*, 720 F.3d at 243 (holding the failure to present a particular line of argument is presumed to be the result of strategic choice).

Here, the record clearly indicates Martinez's decision to inform the jury of his disagreement with Petitioner was strategic: "he was framing [Petitioner]'s decision to testify and plead for his life as something [Petitioner] felt so strongly about that he was willing to risk the consequences of a merciless cross-examination." *Gobert*, 2011 WL 5881601, at *12. In other words, counsel was simply emphasizing his client's strong desire to face the jury and make a plea for mercy. There is nothing objectively unreasonable with this strategy, and Petitioner fails to cite a single case where counsel, under similar facts, was found to be ineffective. Thus, because counsel's comment on Petitioner's decision testify was strategic and imminently reasonable, Petitioner fails to establish the deficient-performance prong of an ineffective assistance claim. *See*

Clark v. Thaler, 673 F.3d 410, 427 (5th Cir. 2012) (recognizing the broad deference to which counsel is entitled in making tactical decisions in closing argument).

With regard to prejudice, Petitioner makes only the single, cursory statement that there is “no doubt” counsel’s conduct had an adverse effect on the outcome of Petitioner’s trial. But such conclusory assertions of prejudice are insufficient to support a claim for ineffective assistance of counsel. *Woodfox v. Cain*, 609 F.3d 774, 809 n.17 (5th Cir. 2010); *Day*, 566 F.3d at 540. Moreover, given that counsel only briefly mentioned his disagreement with Petitioner at the beginning of Petitioner’s testimony and never mentioned it again, this Court is highly doubtful of any prejudicial impact the statement may have had. This is particularly so given the overwhelming evidence presented against Petitioner at the punishment phase. *See* Section IV(B)(3), *supra*.

This Court therefore concludes that Petitioner failed to show that counsel’s performance was deficient or prejudicial, much less that the state court’s denial of this claim was unreasonable application of *Strickland*. Accordingly, viewed through the “doubly” deferential lens of the AEDPA, relief is unavailable.

C. Appellate Counsel (Claim 4)

In his fourth claim for relief, Petitioner alleges that his direct appeal attorney was ineffective because she failed to challenge the admission of the following evidence: (1) testimony from a paramedic, Bryan Mason, that Demetrius Cotton’s wounds were consistent with someone trying to kill him; (2) testimony from Detective Eric De Los Santos that Demetrius told him the person who stabbed his mother “took all my mama’s purse and money;” and (3) a video showing Demetrius’s physical condition while in the hospital. These allegations concerning appellate counsel were rejected by the state court during Petitioner’s state habeas proceedings. Supp. SHCR

at 162-64. Petitioner has not shown this rejection on the merits to be contrary to, or an unreasonable application of, the relevant *Strickland* standard.

1. The *Strickland* Standard Governs

The same two-pronged standard set out in *Strickland* to prove that counsel rendered unconstitutionally ineffective assistance applies equally to both trial and appellate attorneys. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Dorsey v. Stephens*, 720 F.3d 309, 319 (5th Cir. 2013). Thus, the standard for evaluating the performance of counsel on appeal requires inquiry into (1) whether appellate counsel's conduct was objectively unreasonable under then-current legal standards, and (2) whether there is a reasonable probability that, but for appellate counsel's deficient performance, the outcome of Petitioner's appeal would have been different. *Robbins*, 528 U.S. at 285; *Higgins v. Cain*, 720 F.3d 255, 260-61 (5th Cir. 2015). Appellate counsel who files a merits brief need not, and should not, raise every non-frivolous claim. *Robbins*, 528 U.S. at 288; *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Only solid, meritorious arguments based on directly controlling precedent should be raised on direct appeal. *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir. 2003). Nonetheless, appellate counsel is obligated to research relevant facts and law or to make an informed decision that certain avenues will not prove fruitful. *See Busby v. Dretke*, 359 F.3d 708, 714 (5th Cir. 2004); *United States v. Reinhart*, 357 F.3d 521, 525 (5th Cir. 2004). The process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U.S. 527, 536 (1986); *Barnes*, 463 U.S. at 751–52.

2. Bryan Mason and the Video of Demitrius

Petitioner first contends his appellate counsel was ineffective for failing to challenge a portion of the testimony given by Bryan Mason, one of the paramedics who arrived first at the

scene of Mel Cotton’s murder. After determining Ms. Cotton was deceased, Mason turned his attention to five-year old Demetrius Cotton, who had sustained several deep stab wounds to his chest. 26 RR 70-89. Mason described Demetrius’s injuries and condition to the jury and explained how he treated Demetrius before sending him to the hospital. *Id.* At the end of his direct testimony, Mason was asked, “[b]ased on the injuries to this child that you observed, in your opinion, did it seem to be consistent with someone who was trying to kill him?” *Id.* at 87. Mason responded, “Absolutely.” *Id.* at 88.

Defense counsel objected on the basis that the question calls for speculation and is outside of Mason’s area of expertise, but the objection was overruled. *Id.* Petitioner now contends that this testimony was erroneously admitted in violation of Texas law and argues that his appellate counsel should have challenged the trial court’s ruling on direct appeal. This allegation was raised during Petitioner’s state habeas proceedings where it was determined that appellate counsel was not ineffective because the challenged testimony was admissible under the Texas Rules of Evidence. Supp. SHCR at 162. Because the state habeas court determined that Mason’s testimony was permissible under state law, this Court may not conclude otherwise. *See Charles v. Thaler*, 629 F.3d 494, 500-01 (5th Cir. 2011) (stating that “[a] federal court lacks authority to rule that a state court incorrectly interpreted its own law. When, as here, a state court’s legal conclusions are affirmed by the highest court in that state, those conclusions are state law.”); *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir. 2004) (declining to review the state habeas court’s determination of the validity of a Texas statute under the Texas constitution in the context of a *Strickland* claim). Indeed, it is not this Court’s function to review a state’s interpretation of its own law. *Bradshaw v. Richey*, 546 U.S. 74 (2005) (“We have repeatedly held that a state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus.”); *Schaetzle*, 343 F.3d at 448-49 (“It is not

our function as a federal appellate court in a habeas proceeding to review a state's interpretation of its own law, and we defer to the state courts' interpretation of the Texas . . . statute.") (citation omitted).

Petitioner's allegation concerning the video of Demetrius meets the same fate. At the guilt/innocence phase of trial, the State introduced a silent video showing Demetrius's physical condition when he was being interviewed at the hospital. 26 RR 159-61. Trial counsel objected to the video based on relevance and the potential for undue prejudice, but the objection was overruled after counsel waived the objection upon realizing the video had no sound. *Id.* Petitioner now alleges the admission of the video violated Rules 401 and 403 of the Texas Rules of Evidence and argues appellate counsel should have challenged the trial court's ruling on direct appeal. This allegation was also rejected during Petitioner's state habeas proceedings after the state court found the video admissible under Texas law as same transactional contextual evidence. Supp. SHCR at 163. Because the state habeas court held the video of Demetrius was admissible under Texas law, this Court simply "cannot review the correctness of the state habeas court's interpretation of state law." *Amador v. Quarterman*, 458 F.3d 397, 412 (5th Cir. 2006) (citing *Young*, 356 F.3d at 628).

3. Detective De Los Santos

Homicide detective Eric De Los Santos was the first to interview Demetrius when he was taken to the hospital. Prior to Detective De Los Santos testifying about what Demetrius told him, trial counsel objected to the testimony as violating the Confrontation Clause pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). The trial court overruled the objection after a lengthy discussion outside the presence of the jury. 26 RR 145-56. Following this ruling, Detective De Los Santos testified that Demetrius told him the man who stabbed his mother "took my mama's purse and money." *Id.* at 157.

Petitioner now contends the trial court’s ruling was erroneous and that his appellate counsel was ineffective for failing to challenge the ruling on direct appeal. According to Petitioner, out-of-court statements like Demitrius’s are “testimonial” and thus impermissible under *Crawford* as evidence against the accused. Indeed, a witness’s testimony against a defendant is inadmissible under *Crawford* “unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (citing *Crawford*, 541 U.S. at 54). As found by the state habeas court during Petitioner’s state habeas proceedings, however, no such Confrontation Clause issue existed in this case because Demitrius was available and indeed did testify at this trial. Supp. SHCR at 163; see 28 RR 179-234. As such, appellate counsel cannot be faulted for raising what would have amounted to a frivolous *Crawford* allegation. *Barnes*, 463 U.S. at 751-52 (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”); *Schaetzle*, 343 F.3d at 445 (holding that only solid, meritorious arguments based on directly controlling precedent should be raised on direct appeal).

In summary, Petitioner’s allegations concerning appellate counsel were rejected by the state court during his state habeas proceedings, and Petitioner has not shown this rejection on the merits to be contrary to, or an unreasonable application of, the *Strickland* standard. See *Richter*, 562 U.S. at 101. Federal habeas relief is therefore denied.

D. The Special Issues (Claims 7-11, 14)

Petitioner next raises several challenges to Texas’s death penalty system, arguing he was sentenced to death under an unconstitutional statutory scheme. As discussed below, each of these

allegations is either procedurally barred, foreclosed by clear Supreme Court and Fifth Circuit precedent, or foreclosed by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989).

1. Special Issue Number One (Claim 7)

Under Texas’s capital sentencing statute, the jury must answer two “special issues” before a sentence of death may be assessed. *See* Tex. Code. Crim. Proc. art. 37.071 § 2(b). Under the first special issue, the jury must decide “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” *Id.* Petitioner contends this first special issue—the future-dangerousness special issue—is unconstitutionally vague because it does not define such terms as “probability,” “criminal acts of violence,” and “continuing threat to society.” As a result, Petitioner argues, the statute neither adequately channels the jury’s discretion nor narrows the class of defendants sentenced to death. This allegation fails for two reasons.

First, Petitioner did not present this claim to the TCCA for review either on direct appeal or during his state habeas proceedings.¹⁸ Nor does he attempt to demonstrate cause and prejudice for his failure to raise these claims in state court or argue that a denial of the claim will result in a “fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. at 750-51. As such, Petitioner is procedurally barred from federal habeas relief on this claim. *See* Section IV(B)(5), *supra*.

Second, Petitioner’s allegation is “far from novel.” *Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). The Fifth Circuit has consistently upheld the future-dangerousness special issue against challenges to the phrases “probability,” “criminal acts of violence,” and “continuing threat

¹⁸ Although Petitioner contends the claim was presented as Claims 6 and 8 in his state habeas application, the record demonstrates that these allegations both concern the sufficiency of the evidence and not the future dangerousness special issue. Indeed, the instant allegation is wholly unrelated to the state habeas claims cited by Petitioner.

to society.” See *Sprouse v. Stephens*, 748 F.3d 609, 622 (5th Cir. 2014); *Turner v. Quarterman*, 481 F.3d 292, 299-300 (5th Cir. 2007); *Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005); *Hughes v. Johnson*, 191 F.3d 607, 615 (5th Cir. 1999). The terms “have a plain meaning of sufficient content that the discretion left to the jury is no more than that inherent in the jury system itself.” *Paredes v. Quarterman*, 574 F.3d 281, 294 (5th Cir. 2009). Because Petitioner’s allegation concerning the terms used in the future-dangerousness special issue lacks merit in light of clearly established federal law, relief is denied.

2. Special Issue Number Two (Claims 8-11)

Under Texas’s second special issue—the mitigation special issue—Petitioner’s jury was required to determine “[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment . . . rather than a death sentence be imposed.” Tex. Code. Crim. Proc. art. 37.071 § 2(e). Petitioner challenges the constitutionality of this special issue for three reasons: (1) the statute fails to require the jury to make its findings beyond a reasonable doubt and places the burden of proof onto Petitioner instead of the State, (2) the statute lacks minimal standards and sends “mixed signals” to the jury, and (3) the accompanying “12-10 Rule” that instructs the jury that ten or more jurors must agree to assess a life sentence is confusing and creates an unnecessary risk of jury coercion.

a. Procedural Default

Under the procedural default doctrine, this Court is precluded from reviewing “claims that the state court denied based on an adequate and independent state procedural rule.” *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017); *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (citing

Maples v. Thomas, 565 U.S. 266, 280 (2012)). The “independent” and “adequate” requirements are satisfied where the court clearly indicates that its dismissal of a particular claim rests upon a state ground that bars relief, and that bar is strictly and regularly followed by the state courts. *Roberts v. Thaler*, 681 F.3d 597, 604 (5th Cir. 2012) (citing *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001)). This doctrine ensures that federal courts give proper respect to state procedural rules. *Coleman*, 501 U.S. at 750-51. The application of an independent and adequate state procedural bar must be honored even if the state court has, in the alternative, reached the merits of the claim. *Harris v. Reed*, 489 U.S. 264 n.10 (1989).

During Petitioner’s state habeas proceedings, the state trial court rejected each of these allegations as procedurally barred because Petitioner could have raised the claims on direct appeal.¹⁹ Supp. SHCR at 167-68 (citing *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004)). The state court cited *Nelson*, a case which in turn relies on *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998). The rule from *Gardner*—which bars consideration of claims that could have been but were not raised on direct appeal—is “an adequate state ground capable of barring federal habeas review.” *Aguilar v. Dretke*, 428 F.3d 526, 535 (5th Cir. 2005) (citing *Busby v. Dretke*, 359 F.3d 708, 719 (5th Cir. 2004)). Consequently, Petitioner is precluded from federal habeas review of these claims unless he can show cause for the default and resulting prejudice, or demonstrate that the Court’s failure to consider his claim will result in a “fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750-51; *Busby v. Dretke*, 359 F.3d 708, 718 (5th Cir. 2004). Again, Petitioner fails to make this demonstration. Thus, circuit precedent compels the denial of the claims as procedurally defaulted.

¹⁹ The trial court also reviewed the claims alternatively on the merits and denied relief. *Id.*

b. The Burden of Proof (Claim 8)

Regardless of the procedural bar, Petitioner’s claims concerning the mitigation special issue are meritless. Petitioner first challenges the mitigation special issue because it does not require the jury to make its finding beyond a reasonable doubt. Citing *Ring v. Arizona*²⁰ and *Apprendi v. New Jersey*,²¹ Petitioner contends the mitigation special issue also encompasses aggravating circumstances that must be proven beyond a reasonable doubt. For this reason, Petitioner asserts the current statutory scheme is unconstitutional for not imposing a burden of proof on the State to prove these aggravating circumstances to the jury beyond a reasonable doubt. Petitioner’s allegation is contrary to clearly established Fifth Circuit precedent.

The Fifth Circuit has “specifically held that the Texas death penalty scheme did not violate either *Apprendi* or *Ring* by failing to require the state to prove beyond a reasonable doubt the absence of mitigating circumstances.” *Allen v. Stephens*, 805 F.3d 617, 627-28 (5th Cir. 2015), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (citing *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007)). Indeed, “No Supreme Court or Circuit precedent constitutionally requires that Texas’s mitigation special issue be assigned a burden of proof.” *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005); *see also Druery v. Thaler*, 647 F.3d 535, 546-47 (5th Cir. 2011); *Blue v. Thaler*, 665 F.3d 647, 668-69 (5th Cir. 2011); *Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009). Because the Fifth Circuit has repeatedly rejected Petitioner’s contention that the Constitution requires that the State be assigned the burden of proof on the mitigation special issue, federal habeas relief is foreclosed.

²⁰ 536 U.S. 584 (2002).

²¹ 530 U.S. 466 (2000).

c. “Mixed Signals” (Claims 9, 10)

Petitioner’s next two allegations allege that the mitigation special issue sends “mixed signals” to the jury by requiring the jury to consider all of the evidence presented while simultaneously limiting consideration to only evidence that reduces a defendant’s “moral blameworthiness.” *See* Tex. Code Crim. Proc. art 37.071, § 2(f)(4). According to Petitioner, the definition of mitigating evidence found in § 2(f)(4) is unconstitutionally restrictive because it impermissibly limits the jury’s discretion to consider other types of evidence—including background and character evidence—that may be mitigating but does not reduce a defendant’s “moral blameworthiness” for the crime.

The Fifth Circuit has repeatedly rejected similar arguments. *See, e.g., Rockwell v. Davis*, 853 F.3d 758, 763 (5th Cir. 2017); *Blue*, 665 F. 3d at 665-66; *Beazley v. Johnson*, 242 F.3d 248, 259 (5th Cir. 2001). In *Beazley*, the Court considered the exact allegation now raised by Petitioner and held that the post-1991 capital sentencing scheme as currently codified in article 37.071 “does *not* unconstitutionally ‘preclude the jury from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’” 242 F.3d at 260 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (emphasis in the original). Citing *Beazley* some sixteen years later, the Court bluntly stated that the statute “does not unconstitutionally restrict the mitigating evidence that Texas juries are allowed to consider.” *Rockwell*, 853 F.3d at 763. Fifth Circuit precedent thus clearly forecloses relief on Petitioner’s allegation.

d. The 12–10 Rule (Claim 11)

In his next allegation, Petitioner contends that Texas’s “12-10 Rule” violates the Eighth and Fourteenth Amendments by misleading jurors about their ability to give effect to mitigating

circumstances. The “12-10 Rule” requires the jury to be instructed that: (1) the jury shall return an answer of “yes” or “no”; and (2) the jury may not answer the issue “no” unless it unanimously agrees and may not answer the issue “yes” unless ten or more jurors agree. *See* Tex. Code. Crim. Proc. art. 37.071 § 2(f). Citing *Mills v. Maryland*,²² Petitioner contends that this rule confuses jurors as to the effect of a single negative vote on the special issues and creates a danger that confused jurors may think their individual beliefs are immaterial unless they can persuade nine other jurors to think similarly.

This issue has been foreclosed for some time by the Supreme Court’s decision in *Jones v. United States*, 527 U.S. 373, 381-82 (1999). In *Jones*, the Court explicitly rejected the idea that the trial court, by neglecting to inform a jury regarding the consequences of its failure to reach a verdict, “affirmatively mislead[s] [the jury] regarding its role in the sentencing process.” *Id.* The Court reasoned that an instruction informing the jury that a life sentence would be imposed if it could not reach a unanimous verdict had no bearing on the jury’s role in the sentencing process. *Id.* Rather, such an instruction “speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation.” *Id.*

Likewise, the Fifth Circuit has also rejected this claim. “*Mills* is not applicable to the capital sentencing scheme in Texas. We have concluded that ‘[u]nder the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance.’” *Miller v. Johnson*, 200 F.3d 274, 288–89 (5th Cir. 2000) (quoting *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir. 1994)). On that basis, the Fifth Circuit has regularly denied claims based on the 12–10 rule. *See, e.g., Young v. Davis*, 835 F.3d 520, 528 (5th

²² 486 U.S. 367 (1988).

Cir. 2016) ; *Allen*, 805 F.3d at 632; *Reed v. Stephens*, 739 F.3d 753, 779 (5th Cir. 2014); *Blue*, 665 F.3d at 669-70; *Druery*, 647 F.3d at 542-43. Petitioner’s claim is therefore foreclosed by clearly established federal law.

3. The special issues in general (Claim 14)

In his final allegation concerning the Texas special issues, Petitioner challenges the trial court’s denial of several motions regarding the constitutionality of Article 37.071 of the Texas Code of Criminal Procedure. In part, these motions argued that Article 37.071 was inadequate and unconstitutional because: (1) prosecutorial discretion in seeking the death penalty is too broad to guarantee fair application in all 254 Texas counties, (2) the future-dangerousness special issue is submitted to the jury but not set forth in the indictment, and (3) it permits the use of unreliable evidence in obtaining a sentence of death. Each of these allegations were raised and rejected during Petitioner’s direct appeal proceedings. *Gobert*, 2011 WL 5881601, at *8. As shown below, the state court’s rejection was neither contrary to, nor an unreasonable application of, clearly established federal law.

a. Prosecutorial Discretion

Petitioner first contends the unfettered discretion given to Texas prosecutors to decide whether to seek a death sentence is unconstitutional. Citing the vote-counting standards articulated in *Bush v. Gore*,²³ Petitioner argues the decision to seek the death penalty is arbitrary and capricious because there is no uniformity in the decision-making process throughout the 254 Texas counties. However, the Fifth Circuit has rejected similar challenges to prosecutorial discretion, specifically noting “*Bush v. Gore*’s utter lack of implication in the criminal procedure context.” *Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006) (citations omitted); *see also White v.*

²³ 531 U.S. 98 (2000).

Thaler, 522 F. App'x 226, 235 (5th Cir. 2013) (unpublished) (Equal protection claim based on *Bush v. Gore* “is not well taken.”); *Chi v. Quarterman*, 223 F. App'x 435, 439 (5th Cir. 2007) (unpublished) (rejecting disparate-treatment claim based on *Bush v. Gore* as foreclosed by *Coleman*).

b. Defect in the Indictment

Next, Petitioner contends that the aggravating factors that were later submitted to the jury in the punishment phase of his trial should have been included in the indictment and presented to the grand jury. Although Petitioner's briefing on this issue is sparse, he appears to rely on the Fifth Amendment's right to a grand jury indictment in support of this argument. *See United States v. Robinson*, 367 F.3d 278, 284 (5th Cir. 2004) (finding the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty).

Petitioner's allegation is meritless because the right to a grand jury indictment only extends in a *federal* death-penalty prosecution and was never imposed on the States through the Fourteenth Amendment. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (noting that the Fifth Amendment right to indictment was not among the Bill of Rights provisions incorporated into the Fourteenth Amendment); *Robinson*, 367 F.3d at 288 (addressing only the requirement of a grand jury indictment in a *federal* prosecution); *see also Kerr v. Thaler*, 384 F. App'x 400, 402-03 (5th Cir. 2010) (unpublished) (same). Because Petitioner was prosecuted in state court, the Fifth Amendment's indictment requirement is irrelevant in this case.

Moreover, Petitioner's allegation is based on a pure fallacy—that the future-dangerousness special issue is an aggravating factor that somehow increases the maximum penalty for capital murder and must therefore be presented in the indictment. In Texas, the aggravating factors that

could render a person death-eligible are found solely in Section 19.03 of the Texas Penal Code, and the eligibility determination is made at the guilt/innocence phase of trial according to the elements that are alleged in the indictment. *See Lowenfield v. Phelps*, 484 U.S. 231, 245-46 (1988) (noting that, in Texas, capital-murder aggravating factors are determined at the guilt/innocence phase of trial). The special issues addressed at the punishment phase have nothing to do with the eligibility determination, but instead are designed to narrow the jury's discretion in making the ultimate decision whether to impose a death sentence. *See Jurek v. Texas*, 428 U.S. 262, 279 (1976) (reviewing and upholding the Texas death-penalty statutory scheme). As such, the special issues are not elements of the offense that must be alleged in an indictment and proven beyond a reasonable doubt.

c. Unreliable Evidence

Petitioner's last argument contends that Article 37.071 is unconstitutional because it permits the use of unreliable evidence to obtain a sentence of death. Because prosecutors offer testimony by such witnesses as A. P. Merillat and Dr. Richard Coons, Petitioner argues "Article 37.071 invites nothing but unfairness in determining who gets the death penalty, how that issue is determined, and the type of evidence typically [relied] on to make that determination." But as the state court found on direct appeal, "the fact that some prosecutors, in some cases, have offered some evidence that might be improper does not render the statute unconstitutional in all of its applications." *Gobert*, 2011 WL 5881601, at *8. This determination is entitled to deference, and Petitioner fails to cite a single case in support of his assertion. Moreover, as discussed in more detail in Section IV(E), *infra*, Petitioner has not shown constitutional error in the admission of either Merillat's or Dr. Coons's testimony. Federal relief is thus unwarranted.

4. The *Teague* Bar

Finally, relief on each of the foregoing claims is barred by the anti-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, federal courts are generally barred from applying “new” constitutional rules of criminal procedure retroactively on collateral review. *Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994). A new rule for *Teague* purposes is one which was not “dictated by precedent existing at the time the defendant’s conviction became final.” *Felder v. Johnson*, 180 F.3d 206, 210 (5th Cir. 1999) (citing *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)). The only two exceptions to the *Teague* non-retroactivity doctrine are reserved for (1) rules that would place certain primary conduct beyond the government’s power to proscribe, and (2) bedrock rules of criminal procedure that are necessary to ensure a fundamentally fair trial. *O’Dell v. Netherland*, 521 U.S. 151, 157 (1997).

In this case, Petitioner’s conviction and sentence became final for *Teague* purposes on October 1, 2012, when the Supreme Court denied his petition for certiorari after his conviction was affirmed on direct review in state court. *Gobert v. Texas*, 568 U.S. 827 (2012). Petitioner has pointed to no precedent since that time mandating the new rules he now proposes. Nor do any of these new rules fall within either of the two noted exceptions to the *Teague* doctrine. Consequently, *Teague* bars relief on Petitioner’s allegations and precludes this Court from recognizing the new legal theories underlying his claims. *See Blue*, 665 F.3d at 670 (holding that any extension of *Mills v. Maryland* to Texas’s penalty-phase instructions would violate *Teague*); *Rowell*, 398 F.3d at 379 (finding a violation of *Teague* would occur if the court were to accept petitioner’s argument that the future-dangerousness special issue is unconstitutionally vague for failing to define the term “probability”); *see also White v. Thaler*, 522 F. App’x 226, 234 (5th Cir. 2013) (finding a petitioner’s “mixed-signals” claim and *Apprendi* claim to be barred by *Teague*”).

E. Trial Court Error (Claims 12, 13)

Petitioner's next two allegations contend the trial court committed error at the punishment phase of trial by allowing the future-dangerousness testimony of A. P. Merillat and Dr. Richard Coons. Both claims were raised and rejected during Petitioner's direct appeal proceedings. *Gobert*, 2011 WL 5881601, at *5-8. As discussed below, Petitioner fails to demonstrate the state court's rejection of the claims was contrary to, or an unreasonable application of, Supreme Court precedent.

1. A. P. Merillat

During the punishment phase, the State called A. P. Merillat, an investigator with TDCJ's Special Prosecution Unit, who testified generally about the prison classification system and the undeniable fact that inmates have many opportunities to commit violent acts while in prison. Petitioner contends the admission of Merillat's testimony was erroneous because it was neither scientific nor sufficiently reliable under Rule 702 of the Texas Rules of Evidence. In other words, Petitioner challenges the trial court's ruling on state law, namely, the rules embodied in the Texas Rules of Evidence.²⁴ Such claims are not cognizable in a federal habeas corpus proceeding, as this Court must defer to the state-court determination of Texas law. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (stating that the Court has repeatedly held that "federal habeas corpus relief does not lie for errors of state law.") (citations omitted); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (finding it is "not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

²⁴ Petitioner's citation to *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579 (1993), does not alter the fact that Petitioner is challenging a ruling on state law. *Daubert* does not establish a constitutional standard which is binding on the states, but rather is "an exegesis of Rule 702 of the Federal Rules of Civil Procedure and governs the admission of expert evidence in federal trials only." *Kinder v. Bowersox*, 272 F.3d 532, 545 n. 9 (8th Cir. 2001); *see also Norris v. Schotten*, 146 F.3d 314, 335 (6th Cir. 1998). As such, *Daubert* is inapplicable to these proceedings.

Petitioner also contends Merillat's testimony was inadmissible under the Eighth Amendment's "heightened reliability" requirement for capital murder prosecutions. According to Petitioner, the gist of Merillat's testimony was that TDCJ is a "death trap" and "totally ineffectual" at safeguarding the lives of those who live and work there. Because this has nothing to do with the "individualized sentence" he is entitled to under the Eighth Amendment, Petitioner argues, Merillat's testimony was unconstitutional. However, the Eighth Amendment's heightened reliability requirement does not concern the admissibility or reliability of evidence, but rather whether the sentencing scheme as a whole "guards against arbitrariness by streamlining discretion at the eligibility stage, and then allows for the exercise of wide-ranging discretion at the selection stage." *Coble v. Davis*, 728 F. App'x 297, 301-02 (5th Cir. 2018) (unpublished) (citing *United States v. Fields*, 483 F.3d 313, 336 (5th Cir. 2007)). For this reason, the Supreme Court has held that "it is not the role of the Eighth Amendment to establish a special 'federal code of evidence' governing 'the admissibility of evidence at capital sentencing proceedings.'" *Kansas v. Carr*, 136 S. Ct. 633, 644 (2016) (citation omitted). Instead, "it is the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair.'" *Id.* (citations omitted).

Petitioner does not argue that the admission of Merillat's testimony violated the Due Process Clause.²⁵ Nor has Petitioner cited to a single case in which a court found the admission of unreliable evidence to violate the Eighth Amendment. Accordingly, Petitioner's Eighth Amendment claim is not cognizable and does not establish a constitutional violation.

²⁵ Even if he had, such a claim was not raised in the state courts and would therefore be procedurally barred from relief in this Court.

2. Dr. Richard Coons

Petitioner also challenges the admission of Dr. Richard Coons's testimony at the punishment phase. Over the objection of defense counsel, Dr. Coons testified that, in his opinion, a hypothetical person with Petitioner's history, conduct, and character would likely pose a danger of violence in the future. On appeal, the TCCA determined the trial court abused its discretion in admitting Dr. Coons' opinion on future dangerousness, but concluded the error was harmless. Petitioner now contends this determination violated *Daubert* and his Eighth Amendment right to an individualized assessment of future dangerousness.

As stated in the previous section, the Eighth Amendment does not concern the admissibility or reliability of evidence. *Kansas v. Carr*, 136 S. Ct. at 644; *Coble v. Davis*, 728 F. App'x at 301-02. Even if it did, the Supreme Court has determined that psychiatric testimony predicting a capital defendant's future dangerousness is not *per se* improper. *Barefoot v. Estelle*, 463 U.S. 880, 898-99 (1983). Although Petitioner contends Dr. Coons's testimony failed to meet the *Daubert* reliability standard set forth by the Supreme Court ten years after its *Barefoot* opinion, Petitioner's reliance on *Daubert* is unpersuasive. The Fifth Circuit has repeatedly held that *Daubert* does not control the admission of expert mental health testimony regarding future dangerousness offered at the punishment phase of a capital murder trial. *See, e.g., Williams v. Stephens*, 761 F.3d 561, 571 (5th Cir. 2014) ("*Daubert* does not apply to the standards governing the admissibility of expert evidence at a capital sentencing hearing"); *Roberts v. Thaler*, 681 F.3d 597, 608-09 (5th Cir. 2012) ("*Barefoot* stands for the proposition that expert testimony predicting a defendant's future dangerousness is not *per se* inadmissible."); *Fields*, 483 F.3d at 341-43 (holding *Daubert* inapplicable to the admission of such testimony); *see also Gonzales v. Stephens*, 606 F. App'x 767, 774 (5th Cir. 2015) (unpublished) (stating the Fifth Circuit has "consistently held that *Daubert* did

not overrule *Barefoot* for the proposition that expert testimony regarding future dangerousness is permissible . . .”); *Holiday v. Stephens*, 587 F. App’x 767, 783 (5th Cir. 2014) (unpublished) (same).

Because expert evidence predicting a capital defendant’s future dangerousness is permissible under *Barefoot*, Petitioner has not shown constitutional error in the admission of Dr. Coons’s testimony. Thus, Petitioner has not shown that the state court’s decision regarding this claim was contrary to, or an unreasonable application of, federal law.

3. Harmless Error

Even assuming the trial court erred in admitting the testimonies of Merillat and Dr. Coons, Petitioner would still not be entitled to relief because the error was harmless. The Supreme Court has held that the test for harmless error on federal habeas review is “whether the error ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)); see also *Davis v. Ayala*, 135 S. Ct. 2187, 2197–2198 (2015) (outlining distinction between “actual prejudice” under *Brecht* and the requirements of the AEDPA). To determine whether the state court’s admission of the testimony was harmless, the Court will evaluate the following factors: (1) the importance of the testimony to the State’s case; (2) whether the testimony was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the testimony on material points; (4) the extent of cross-examination; and (5) the overall strength of the State’s case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

Petitioner fails to demonstrate that the testimony of either Merillat or Dr. Coons had a “substantial and injurious effect” on the jury’s determination of his future dangerousness. First, these witnesses were only a small part of the State’s case and were only briefly mentioned during

counsels' closing arguments. Further, the effect of their testimony was lessened by vigorous cross-examination by defense counsel. *See* 34 RR 181-210 (Merillat stating on cross-examination that his generalized knowledge is not subject to peer review or statistical analysis and admitting some inmates do make positive changes in prison); 36 RR 275-86 (Dr. Coons admitting that no research or case studies support the reliability of his methodology and that no professional organization has approved such future-dangerousness predictions). Merrillat's testimony was also effectively rebutted by the contradicting testimony given by the defense's expert, Larry Fitzgerald. 35 RR 147-205.

Thus, the impact of Merrillat's and Dr. Coons's testimony was limited and had little likely impact on the State's burden of showing Petitioner was a danger to society. That burden was instead met by: (1) the abundant evidence presented at the guilt/innocence phase concerning Mel Cotton's brutal murder, including the fact that she was stabbed a staggering 107 times, as well as the fact Petitioner attempted to murder her five-year-old son, Demetrius, (2) the abundant evidence presented at the punishment phase concerning Petitioner's lifelong tendency toward violence, including Petitioner's prior convictions, domestic assaults, violent behavior while incarcerated, and murderous plot to escape from jail during his trial, and (3) Petitioner's own admission to numerous assaults, including Mel Cotton's murder, and to violent behavior toward anyone—including his own mother—who angered him. *See* Background, Section I(B)(1) and (2), *supra*.

As a result, any error in admitting the testimony of Merrillat or Dr. Coons was rendered harmless by the overall strength of the State's case and the overwhelming evidence of Petitioner's potential for future danger. Because it is clear that the admission of their testimony simply had no prejudicial effect on the jury's ultimate verdict, relief is denied. *Brecht*, at 637.

F. Search and Seizure (Claim 16)

In his final claim for relief, Petitioner alleges a violation of his Fourth Amendment rights because the search warrants used to search his home and obtain DNA samples lacked sufficient probable cause. On direct appeal, Petitioner unsuccessfully challenged the trial court's denial of his motion to suppress evidence taken from his home, car, and person as authorized by four separate search warrants. He now argues that the state court's decision upholding the searches was an unreasonable.

Relief on Petitioner's Fourth Amendment allegation is barred pursuant to the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465, 494 (1976). Under *Stone*, if the State has provided "an opportunity for full and fair litigation of a Fourth Amendment claim," federal habeas corpus relief may not be granted to a state prisoner on that claim. *Id.* Indeed, if the State provides the necessary processes to raise a Fourth Amendment claim, *Stone* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes. *Register v. Thaler*, 681 F.3d 623, 628 (5th Cir. 2012); *ShisInday v. Quarterman*, 511 F.3d 514, 524 (5th Cir. 2007). The *Stone* bar "applies to all claims arising under the Fourth Amendment," including challenges to an arrest or the seizure of evidence. *Hughes v. Dretke*, 412 F.3d 582, 596 (5th Cir. 2005).

The State of Texas does have a process that allows defendants to litigate Fourth Amendment claims at the trial level and on direct appeal. *Register*, 681 F.3d at 628. In this case, Petitioner did both, raising his Fourth Amendment claims at the trial level through a motion to suppress and again on direct appeal. He makes no argument that his opportunity in the state courts to challenge the admissibility of evidence under the Fourth Amendment was circumscribed in any way, nor has he alleged "the processes provided by the state to fully and fairly litigate Fourth

Amendment claims are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims on their merits.” *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980). Consequently, his allegation is barred from federal habeas review.

V. Certificate of Appealability

The Court must now determine whether to issue a certificate of appealability (COA). *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (citing 28 U.S.C. § 2253(c)(1)). A district court may deny a COA *sua sponte* without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). But a COA may issue only if a petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires Petitioner to show that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing *Miller-El*, 537 U.S. at 327).

The Supreme Court has explained that the showing required under § 2253(c)(2) is straightforward when a district court has rejected a petitioner’s constitutional claims on the merits: The petitioner must demonstrate “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The issue becomes somewhat more complicated when the district court denies relief on procedural grounds. *Id.* In that case, the petitioner seeking COA must show both “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack*, 529 U.S. at 484). Whatever the basis for the denial, however, the court must bear in mind that “[w]here the petitioner faces the

death penalty, ‘any doubts as to whether a COA should issue must be resolved’ in the petitioner’s favor.” *Allen v. Stephens*, 805 F.3d 617, 625 (5th Cir. 2015) (quoting *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

In this case, Petitioner has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Nor could reasonable jurists debate the denial of federal habeas corpus relief on either substantive or procedural grounds, or find that the issues presented are adequate to deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). Accordingly, Petitioner is not entitled to a COA.

VI. Conclusion and Order

The Court has thoroughly reviewed the extensive record and pleadings submitted by both parties in this case. After careful consideration, the Court concludes Petitioner has failed to establish that the state court’s rejection of the aforementioned claims on the merits during his direct appeal or state habeas proceedings was either (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) based on an unreasonable determination of the facts in light of the evidence presented during Petitioner’s state trial, appellate, and habeas corpus proceedings.

With regard to Petitioner’s unexhausted claims, the Court concludes the claims are procedurally barred from federal habeas relief and that Petitioner fails to establish cause to excuse the procedural bar pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). Alternatively, even when evaluated under a *de novo* standard of review, the claims do not warrant federal habeas relief because they lack merit.

Accordingly, based on the foregoing reasons, **IT IS HEREBY ORDERED** that:

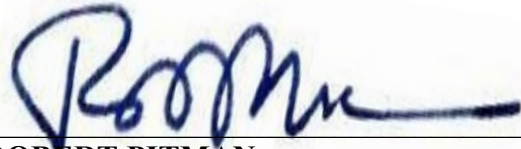
1. Federal habeas corpus relief is **DENIED** and Petitioner Milton Dwayne Gobert's Amended Petition for Writ of Habeas Corpus (ECF No. 22) is **DISMISSED WITH PREJUDICE**;

2. No Certificate of Appealability shall issue in this case; and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 30th day of March, 2022.



ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

EXHIBIT C

WR-77,090-01
No. D-1-DC-06-904006-A

EX PARTE	§	IN THE DISTRICT COURT
	§	
	§	331ST JUDICIAL DISTRICT
	§	
MILTON DWAYNE GOBERT	§	TRAVIS COUNTY, TEXAS

**COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER TO TRANSMIT HABEAS CORPUS RECORD
(ARTICLE 11.071 POST CONVICTION APPLICATION)**

ON THIS 3 day of November, 2014, came on to be considered the Application for Writ of Habeas Corpus in the above cause. The Court, having considered Applicant's application for writ of habeas corpus, the Respondent's Original Answer, the affidavit of trial counsel, official court documents and records, and/or personal recollection, makes the following findings of fact and conclusions of law:

Procedural Background:

- a) Applicant was convicted of capital murder and sentenced to death.
- b) Applicant received an automatic appeal to the Court of Criminal Appeals. The Court of Criminal Appeals affirmed his conviction and sentence on November 23, 2011. *Gobert v. State*, No. AP-76345, 2011 WL 5881601 (Tex. Crim. App. Nov. 23, 2011) (not designated for publication).
- c) Applicant filed his application for writ of habeas corpus pursuant to Texas Code of Criminal Procedure Article 11.071 on February 15, 2012. On August 13, 2012, the State filed its answer.
- d) Trial attorneys Kent Anschutz and Paul Quinzi prepared affidavits

responding to the writ allegations, which were filed on August 13, 2012.

- e) On May 23, 2013, the trial court entered an Order Designating Issues, finding that one issue needed to be resolved: whether Applicant received effective assistance of counsel. The trial court ordered Leonard Martinez to submit an affidavit.
- f) Mr. Martinez filed an affidavit on January 27, 2014.

Findings of Fact: Ground 1: Ineffective Assistance of Counsel

In ground 1, Applicant claims he received ineffective assistance of counsel as a result of his legal team's failure to adequately investigate both "the robbery allegation" and "the kidnapping allegation," which the applicant argues prevented him from presenting a defense to either issue.

- a) Applicant argues that his trial counsel failed to interview Jason Gibson, who would have provided evidence of the existence of a prior relationship between Applicant and Cotton, thereby allowing Applicant to rebut the claim that he killed Cotton during the course of "attempting to commit and committing robbery."
- b) In his affidavit, Gibson recounts that he met Applicant while in county jail. Gibson claims he had seen Applicant prior to his time in jail at the apartment complex off of I-35, although he was not friends with nor talked to Applicant at that time. Gibson claims he had seen Applicant and Cotton at this apartment complex on more than one occasion.
- c) Trial counsel, in their affidavits, attest that Gibson was never mentioned as a possible witness. Anschutz recounts that Applicant named other individuals, but not Gibson, despite requests for potential witnesses throughout the pendency of the case.
- d) This Court finds trial counsel credible.
- e) At trial, the jury heard testimony suggesting there may have been a previous relationship between Applicant and Cotton from other witnesses— Applicant's former girlfriend (Pocharasang), Applicant's former cellmate, and Applicant's brother.

Conclusions of Law: Ground 1

- a) To prevail on his ineffective assistance of counsel claims, “applicant must satisfy both prongs of the *Strickland* test. First, he must prove that his counsel's conduct was objectively deficient. In assessing this, we look to see if counsel was acting as ‘a reasonably competent attorney’ would under the circumstances. Applicant has the burden of proof and must overcome a ‘strong presumption that counsel's performance fell within the wide range of reasonable professional assistance.’ This highly deferential review is employed to avoid ‘the distorting effect of hindsight.’ Thus, applicant must show that his attorneys made ‘errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Ex parte McFarland*, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005), internal citations omitted.
- b) “Second, even if a habeas applicant can demonstrate that his counsel's actions were objectively deficient, he must still prove that their deficient performance prejudiced his defense. He must demonstrate that ‘there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’” *Id.* at 754.
- c) A person commits robbery if, “in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.” TEX. PENAL CODE § 29.02.
- d) The perpetrator's relationship to the victim is not an element of robbery, whether or not Applicant may have known or had a relationship with Cotton in the past could not have impacted the jury's decision about whether he killed her while attempting to commit or committing robbery.
- e) Likewise, the relationship between the perpetrator and the victim is not an element of kidnapping. A person commits the offense of kidnapping “if he intentionally or knowingly abducts another person.” TEX. PENAL CODE § 20.03(a).
- f) Trial counsel's performance was not deficient for failing to investigate and present testimony from Jason Gibson.
- g) Applicant was not prejudiced by counsel's conduct. The evidence of the applicant's guilt adduced at trial was overwhelming. And the

defense presented stronger evidence of a relationship between Applicant and Cotton from other witnesses than the evidence in Gibson's affidavit.

- h) Moreover, Gibson's testimony of a prior relationship would have had no impact on the jury's ability to find Applicant had committed robbery or kidnapping.
- i) Applicant cannot show that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different.

Findings of Fact: Ground2: Actual Innocence

Applicant makes claims of actual innocence under both the Herrera and Schlup standards.

- a) The "new" evidence Applicant provides in support of his claim of innocence consists of the affidavit of Jason Gibson, which he asserts proves he "did not kill Mel Cotton during the course of 'attempting to commit and committing robbery.'"
- b) The affidavit makes clear that Applicant was aware of the substance of Gibson's affidavit well before trial, while he and Gibson were in the Travis County Jail together. As such, this is not new evidence.
- c) The State's evidence that Applicant stabbed and killed Cotton is strong, including DNA evidence.
- d) Other evidence of the alleged prior relationship between Applicant and Cotton was adduced from several witnesses at trial.
- e) Gibson's affidavit adds little, if anything, to this evidence.

Conclusions of Law Ground 2

- a) The Court of Criminal Appeals recognizes two types of actual innocence claims: *Herrera*-type claims and *Schlup*-type claims. *Ex parte Spencer*, 337 S.W.3d 369, 877 (Tex. Crim. App. 2011) (citing *Schlup*, 513 U.S. 298 and *Herrera*, 506 U.S. 390).
- b) A *Herrera*-type claim "involves a substantive claim in which applicant asserts his bare claim of innocence based solely on newly discovered evidence." *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002).

- c) A *Schlup*-type claim is one in which the applicant's innocence claim does not provide a basis for relief in itself, but rather, "is tied to a showing of constitutional error at trial." *Ex parte Spencer*, 337 S.W.3d at 878
- d) Gibson's affidavit does not constitute "newly-discovered" or "newly-available" evidence under actual innocence jurisprudence.
- e) The affidavit makes clear that the applicant was aware of the substance of Gibson's affidavit well before trial, while he and Gibson were in the Travis County Jail together.
- f) Applicant's claim is not a proper actual innocence claim. It is more appropriately characterized as a claim challenging the sufficiency of the evidence, a claim which is not cognizable on an application for a writ of habeas corpus.
- g) Even under the *Schlup* standard, Applicant cannot show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." See *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008).
- h) Applicant has not met his burden to show that the evidence in Gibson's affidavit is "new" or that he is actually innocent under either recognized standard for actual innocence.

Findings of Fact: Ground 3: Ineffective Assistance of Counsel

Applicant claims he received ineffective assistance of counsel at punishment because his trial counsel should have contacted three of his teachers and elicited more information from his family members to more completely illustrate his lack of impulse control, the abuse his mother suffered, and the treatment he was subjected to during his childhood.

- a) Based on the affidavits provided with the writ application, these teachers would have testified about his lack of impulse control, his anger, and the fact that he struggled academically. See Aff. of Kay Robbins; Aff. of Phyllis Gilbreth; Aff. of Jane Allred-May (Writ Ex. 7, 4, and 3 respectively). Gilbreth's affidavit indicates she is also the registrar for the high school and remembers sending the applicant's school records to his attorneys before the trial. Aff. of Phyllis Gilbreth.
- b) The jury heard that Applicant attended an alternative school beginning in second or third grade from both the Applicant's

mother and the Applicant himself.

- c) Applicant's mother testified that Applicant was transferred to that school "[b]ecause he was so aggressive and the teacher said she couldn't handle him." 36 RR 82.
- d) The jury also heard that Applicant attended a private school in Abilene for one semester during his senior year of high school. Applicant's older brother Michael testified that Applicant came to live with him that year because his mother could no longer control him.
- e) Applicant presented evidence about his lack of impulse control and anger problems through several different witnesses. Applicant's sister, Applicant's brother, Applicant's mother, and Applicant himself.
- f) Applicant's defense team employed a mitigation expert who "contacted and interviewed [Applicant's] family members and former teachers, as well as many other people in his past." Aff. of Paul Quinzi, see also Aff. of Leonard Martinez.
- g) Trial attorney Anschutz recalled "that there was debate among the defense team as to whether evidence from the defendant's past in Abilene would be mitigating or in fact more likely aggravating to a jury due to a history dating from childhood of his incorrigible and violent behavior." Aff. of Kent Anschutz. He went on to point out that testimony from Applicant's high school teachers "would have revealed the defendant's violent behavior toward others as a high school senior." *Id.*
- h) Applicant's trial counsel were well-informed about his background and made reasonable decisions based on trial strategy. Anschutz made this awareness evident when he stated in his affidavit, "Unfortunately, none of the defendant's family was a particularly sympathetic witness or helpful because of their own victimization by the defendant and the nature and content of their many recorded conversations with the defendant over the years he waited for trial." Aff. of Kent Anschutz.
- i) Much of the information contained the affidavits now supplied by Applicant was testified to by other witnesses.
- j) Based on the credible affidavits of trial counsel, and this record, this Court finds that trial counsel's actions were reasonable.
- k) This Court finds that additional testimony would not have altered the outcome of this trial.

Conclusions of Law: Ground 3

- a) "While *Strickland* does not require defense counsel to investigate each and every potential lead, or present any mitigating evidence at all, it does require attorneys to put forth enough investigative efforts to base their decision not to present a mitigating case on a thorough understanding of the available evidence." *Ex parte Woods*, 176 S.W.3d 224, 226 (Tex. Crim. App. 2005).
- b) "When an attorney opens Pandora's box, he is not constitutionally required to examine each and every disease, sorrow, vice, and crime contained therein before quietly and firmly closing the cover... Reasonable judgment in determining a sentencing strategy is sufficient under the standard set forth by the Supreme Court in *Strickland* and refined in *Wiggins*[*v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)]." *Ex parte Woods*, 176 S.W.3d at 228.
- c) Applicant "must show there was a reasonable probability that, absent the errors, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.... We have adapted the Supreme Court's prejudice test to require a showing that there is a reasonable probability that, absent the errors, the jury would have answered the mitigation issue differently. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Ex parte Gonzales*, 204 S.W.3d 391, 393-394 (Tex. Crim. App. 2006).
- d) Applicant has failed to meet his burden of showing that trial counsel's performance was deficient.
- e) Nor has Applicant shown that counsel's performance was prejudicial. The defense presented substantial mitigation testimony from several witnesses. Moreover, had trial counsel presented all of Applicant's proposed mitigation evidence, the strategy could well have worked against the defense, as Mr. Anschutz outlines in his affidavit. Applicant cannot show, therefore, that he was prejudiced by counsel's allegedly deficient performance.

Findings of Fact: Ground 4: Appellate Counsel

Applicant claims he was deprived of the effective assistance of appellate counsel for counsel's alleged failure to raise three issues: failure to argue that the trial court erroneously allowed paramedic Bryan Mason's testimony that Demetrius Cotton's injuries were consistent with someone who was trying to kill him; failure to claim that the trial court erroneously overruled trial counsel's objection, under Crawford v. Washington, 541 U.S. 36 (2004), to a hearsay statement by Detective Eric de los Santos; and, failure to raise the trial court's admission of a videotape (SX-12), over a Rule 403 objection, showing Demetrius's physical condition as he was being interviewed in the hospital.

Failure to argue that the trial court erroneously allowed paramedic Bryan Mason's testimony that Demetrius Cotton's injuries were consistent with someone who was trying to kill him

- a)** Bryan Mason testified for the State as one of the paramedics at the scene who treated Demetrius.
- b)** Mason testified that Demetrius' injuries were consistent with someone trying to kill him.
- c)** This Court overruled the Applicant's objection that the testimony was speculate and outside his expertise.
- d)** Mason, as a person with specialized skills as well as personal knowledge of the injuries, could have testified about his opinion regarding the stab wounds pursuant to either Tex. R. Evid. Rule 701 or Rule 702. *See Ellison v. State*, 201 S.W.3d 714 (Tex. Crim. App. 2006).
- e)** Further, the trial court's ruling, even if erroneous was not harmful, and would not have resulted in reversible error since it did not affect Applicant's substantial rights to a fair trial. *See Tex. R. App. P. 44.2(b)*.

Failure to claim that the trial court erroneously overruled trial counsel's objection, under Crawford v. Washington, 541 U.S. 36 (2004), to a hearsay statement by Detective Eric de los Santos

- f) The statement at issue is a testimonial statement Demetrius made from his hospital bed to Detective de los Santos that the man who killed his mother "took all my mama's purse and money." 26 RR 157.
- g) The trial court ruled the hearsay statement was admissible as an excited utterance.
- h) The trial court further ruled that, because Demetrius was available and would be testifying at trial—and therefore subject to cross-examination regarding his out-of-court statement—no Confrontation issue existed.
- i) Demetrius testified at trial, as such, the ruling was not erroneous. See *Crawford v. Washington*, 541 U.S. 36, 71 n. 9 (2004).

Failure to raise the trial court's admission of a videotape (SX-12), over a Rule 403 objection, showing Demetrius's physical condition as he was being interviewed in the hospital

- j) Trial counsel waived the issue by acceding to the videotape's admission after realizing it contained no sound. Tex. R. App. P. Rule 33.1.
- k) This evidence was also admissible same transaction contextual evidence. See *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000).

Conclusions of Law: Ground 4

- a) "[T]o show that appellate counsel was ineffective for failing to assign a particular point of error on appeal, an applicant must meet the standard set out in *Strickland v. Washington*.... An applicant must demonstrate that counsel's decision not to raise a particular point of error was objectively unreasonable and that there is a reasonable probability that, but for counsel's failure to raise that issue, the applicant would have prevailed on appeal." *Ex parte Santana*, 227 S.W.3d 700 (Tex. Crim. App. 2007).
- b) Applicant has not shown that evidence was erroneously admitted

- or that he would have prevailed on direct appeal.
- c) Applicant has failed to meet his burden of proof and has not shown that appellate counsel rendered deficient representation.

Findings of Fact: Ground 5: Ineffective Assistance of Counsel

Applicant claims he was deprived of the effective assistance of counsel as a result of his trial legal team's failure to adequately investigate the facts of the punishment case. Specifically, he claims they were ineffective by failing to investigate their own witness, Tasha Lass, prior to putting her on the stand to testify about jail conditions and by failing to prepare Applicant to testify during the punishment phase of his trial.

- a) The claim regarding the investigation of Tasha Lass was raised and rejected on direct appeal.
- b) Applicant does not contend there is any additional information available at this time that was not available at the time of the direct appeal.
- c) According to Anschutz, Applicant provided Lass's name, along with several others, when counsel asked him for the names of Travis County Jail staff who may have positive things to say about him. Aff. of Kent Anschutz. Lass was the only person on the list whom counsel's investigator was able to reach, and she agreed to testify about jail procedures to rebut a witness for the State. *Id.*
- d) According to Anschutz, counsel had no reason to suspect any secret relationship between Applicant and Lass, and even after they conducted an investigation into her background during the day-long continuance, they discovered nothing in her background that would have raised any suspicions even if known before calling her as a witness. *Id.*
- e) Quinzi confirmed that it was Applicant's idea to call Lass as a witness, and they did so for the limited purpose of showing he did not have an expectation of privacy in his jail cell. Aff. of Paul Quinzi.
- f) Quinzi added that Lass's original testimony did not raise the suspicions of the prosecutors, but instead it was more likely to have been due to her appearance in the courtroom in civilian clothes and of her own volition several times during the trial. *Id.*
- g) He echoed Anschutz when he stated that his role in the

investigation during the day-long continuance produced only a small amount of information about her previous law enforcement job and an award she received in that position. *Id.* "In short, no matter what kind of investigation had been done, the only person who could have possibly known about the inherent risks of having Ms. Lass testify was Mr. Gobert himself, who insisted that we call her." *Id.*

- h)** Trial counsel Martinez agrees that Applicant insisted on calling Lass to the witness stand. *Aff'd of Martinez.* Martinez also believed that standby appellate counsel Karyl Krug was undermining his efforts and knew of a relationship between Lass and Applicant. *Aff. of Leonard Martinez.*
- i)** Martinez filed a post-conviction motion alerting the trial court to his opinion as to the appointment of Ms. Krug for appellate counsel, wherein he expressed his belief that Krug was undermining his efforts and knew of Lass. See *Id.* attachment at 4.
- j)** Ms. Krug filed a detailed response to this motion, on April 5, 2010. CR 591-679.
- k)** Krug recounted her involvement and her knowledge of Lass in this response. Krug denied knowing about Lass having a relationship with Applicant. CR 609.
- l)** Krug denied that she had any knowledge that would have helped the defense team. CR 608-09.
- m)** The evidence at trial further shows that the relationship Applicant engaged in with Lass was kept secret, and Lass was not forthcoming with the information.
- n)** The full extent of their plans was not revealed until later in trial, when Lass retained an attorney and was recalled to the stand and testified of the escape plan. She testified that she had not told anyone of this plan prior to telling her attorney. 36RR 144, 150, 187.
- o)** Applicant confirmed that he had told no one about the cell phone Lass had given him. 38RR 77. Applicant denied that he had asked Lass to bring him a gun and denied having an escape plan. 38RR 184, 201.
- p)** Applicant made the decision to call Lass and to testify at trial over lead counsel's objections.
- q)** Applicant does not explain how counsel could have helped him prepare for his testimony.

- r) This Court finds that Applicant's own conduct contributed to this situation by failing to keep his defense team informed.

Conclusions of Law: Ground 5

- a) The claim regarding Lass' testimony is barred since it was raised on direct appeal and Applicant offers no new evidence in support of his claim. Claims raised and rejected on direct appeal are generally not cognizable on habeas corpus. *Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004).
- b) Also, counsel's actions cannot be held as unreasonable given that Applicant failed to be forthcoming with counsel. *Strickland v. Washington*, 466 U.S. 668 (U.S. 1984); *see also McFarland v. State*, 845 S.W.2d 824, 848 (Tex. Crim. App. 1992) ("When a defendant preempts his attorney's strategy by insisting that . . . certain evidence be put on or kept out, no claim of ineffectiveness can be sustained."), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994).
- c) Applicant has not met his burden of showing that his attorney's performance was either deficient or prejudicial when he chose to testify despite counsel's advice.

Findings of Fact/Conclusion of Law: Ground 6 and 8: Future Dangerousness

Applicant claims his constitutional rights were violated because the evidence adduced at trial was legally insufficient to support the jury's answer to the future dangerousness issue.

- a) Applicant did not raise this issue on direct appeal and his claim is barred.
- b) Claims challenging the sufficiency of the evidence are not cognizable on an application for a writ of habeas corpus. *Ex parte Perales*, 215 S.W.3d 418, 419 (Tex. Crim. App. 2007).

Findings of Fact/Conclusion of Law: Ground 7: Apprendi

Applicant claims his due process rights as interpreted in Apprendi v. New Jersey were violated because the statute under which he was sentenced to death implicitly put the burden of proving the mitigation special issue on him and because the indictment did not give Applicant notice of the facts that the State intended to prove in order to establish his statutory qualification for the death penalty. Specifically he complains the indictment should have given notice of the mitigation special issue.

- a) The claim could have been but was not raised on direct appeal.
- b) The claim is barred from review. *See, e.g., Ex parte Nelson*, 137 S.W.3d 666 (Tex. Crim. App. 2004) (holding that applicant who could have but did not complain on appeal may not raise the issue for the first time on habeas corpus).
- c) Furthermore, the Court of Criminal Appeals has previously addressed and rejected both of these arguments. *See Blue v. State*, 125 S.W.3d 491, 501 (Tex. Crim. App. 2003); *see also Rousseau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005).

Findings of Fact/Conclusion of Law: Ground 9: Death Penalty

Applicant claims the Texas death penalty statute violates his constitutional rights because it allows the jury too much discretion to determine who should live and who should die, and because it lacks minimum standards and guidance necessary for the jury to avoid the arbitrary and capricious imposition of the death penalty.

- a) The claim could have been but was not raised on direct appeal.
- b) The claim is barred from review. *See, e.g., Ex parte Nelson*, 137 S.W.3d 666.
- c) Additionally, this attack on the death penalty statute has been repeatedly rejected by the Court of Criminal Appeals. *See, e.g., Coble v. State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010)

Findings of Fact/Conclusion of Law: Ground 10: Penry

Applicant claims his constitutional rights as interpreted in Penry v. Johnson were violated because the mitigation special issue set forth in the Texas death penalty statute sends "mixed signals" to the jury, thereby rendering any verdict reached in response to that special issue intolerably unreliable.

- a) The claim could have been but was not raised on direct appeal.
- b) The claim is barred from review. See, e.g., *Ex parte Nelson*, 137 S.W.3d 666.
- c) Furthermore, the Court of Criminal Appeals has previously addressed and rejected this claim. See, e.g., *Coble*, 330 S.W.3d at 296-97.

Findings of Fact/Conclusion of Law: Ground 11: 12-10 Rule

Applicant claims Article 37.071(e) & (g)'s prohibition against informing jurors that a single holdout juror could cause the imposition of a life sentence, also known as the 12-10 rule, violated his constitutional rights. He argues the failure to fully inform jurors as to what the results of their vote would be could have led to confusion and misunderstanding.

- a) The claim could have been but was not raised on direct appeal.
- b) The claim is barred from review. See, e.g., *Ex parte Nelson*.
- c) Additionally, the Court of Criminal Appeals has repeatedly rejected this particular attack on the constitutionality of the Texas death penalty scheme. See, e.g., *Gonzales v. State*, 353 S.W.3d 826, 837 (Tex. Crim. App. 2011).

Findings of Fact/Conclusion of Law: Ground 12: Lethal Injection

Applicant claims that the lethal injection protocol, as it is currently administered in Texas, produces unnecessary pain, torture, and lingering death, and therefore it violates the 8th Amendment proscription against cruel and unusual punishment.

- a) The claim could have been but was not raised on direct appeal.
- b) The claim is not proper for habeas review. See *Ex parte Alba*, 256

S.W.3d 682, 685 (Tex. Crim. App. 2008) ("An application for a writ of habeas corpus must state a claim that, if true, would entitle the applicant to habeas relief. And, the claim must challenge the judgment against the applicant or seek to change his sentence.")

On the basis of the above findings and conclusions the court recommends that relief be **DENIED**.

The court hereby **ORDERS** that the District Clerk of Travis County prepare and transmit the record herein to the **Court of Criminal Appeals**, including:

- (A) the application;
- (B) the answers and motions filed, all supplemental answers and motions, and all appendices and attachments thereto;
- (C) the documentary exhibits introduced into evidence;
- (D) the proposed findings of fact and conclusions of law;
- (E) the findings of fact and conclusions of law entered by the court; and
- (F) any other matters used by the convicting court in resolving issues of fact.

The court hereby **ORDERS** that the District Clerk of Travis County immediately prepare and transmit to counsel for Applicant, **Mr. John W. Stickles**, P.O.Box 121431, 770 North Fielder, Arlington, Texas 76012:

- (A) orders entered by the convicting court;
- (B) proposed findings of fact and conclusions of law; and
- (C) findings of fact and conclusions of law entered by the court.

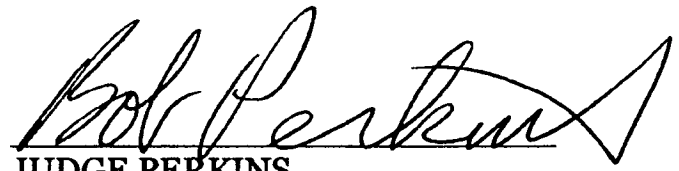

JUDGE PERKINS

EXHIBIT D



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

NO. WR-77,090-01

EX PARTE MILTON DWAYNE GOBERT

**ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-06-904006-A IN THE 331ST DISTRICT COURT
TRAVIS COUNTY**

Per curiam.

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.

Applicant was convicted in March 2010 of capital murder committed in October 2003. TEX. PENAL CODE § 19.03(a). Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure, Article 37.071, sections 2(b) and 2(e), the trial court

sentenced him to death. Art. 37.071, § 2(g).¹ This Court affirmed applicant's conviction and sentence on direct appeal. *Gobert v. State*, No. AP-76,345 (Tex. Crim. App. Nov. 23, 2011)(not designated for publication).

Applicant presented twelve allegations in his application in which he challenges the validity of his conviction and sentence. The trial court did not hold a live evidentiary hearing. As to all of these allegations, the trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by Applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 14TH DAY OF JANUARY, 2014.

Publish/Do Not Publish

¹ Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

EXHIBIT E

06-904006

331st

Filed in The District Court
of Travis County, Texas

STATE OF TEXAS

*

AUG 13 2012

*

At 4:19 P.M.
Amalia Rodriguez-Mendoza, Clerk

COUNTY OF TRAVIS

*

BEFORE ME, the undersigned authority, on this date personally appeared Kent C. Anschutz who stated under oath as follows:

My name is Kent C. Anschutz. I was court-appointed as second chair attorney to assist lead capital murder attorney Leonard Martinez in representing defendant Milton Gobert in the State of Texas v. Milton Gobert, Cause No. D1DC-06-904006. Counsel served as a Travis County Assistant District Attorney from 1985 through 1995, served as an Austin Associate Municipal Court Judge in 1996 and has practiced criminal defense law since 1997. Counsel is board certified in criminal law by the Texas Board of Legal Specialization. At the time of the defendant's trial, counsel had tried more than seventy five felony jury trials, including many murder, aggravated robbery, and aggravated sexual assault cases. Counsel was appointed for the first time in this case as a second chair attorney to assist a first chair capital murder qualified attorney.

In respect to defendant's Writ Ground Number One :

The first time Counsel has ever heard of a possible witness named Jason Gibson is upon reading the defendant's Application for Writ of Habeas Corpus. During his first meeting with the defendant on July 28, 2004, Counsel specifically asked him for names of witnesses that could substantiate the existence of an ongoing relationship between the defendant and the victim. The defendant did not mention a Jason Gibson. He did mention his brother, who was called as a witness, and others who the defense investigator was unable to locate. The defendant never informed Counsel of a Jason Gibson despite requests of the defendant throughout the pendency of his case to provide names of potential defense witnesses.

In respect to defendant's Writ Ground Number Three :

Counsel's assignment during the punishment phase of the trial was to make legal challenges to and conduct the cross examination of various State expert witnesses. Lead counsel assumed primary responsibility over the defense case at punishment. The mitigation expert assisting defense attorneys diligently worked to locate records and witnesses in Abilene. Counsel recalls that responses to subpoenas revealed that elementary public school records of the defendant (the time Jane Allred-May knew him) were unavailable because they

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had been destroyed. Hospital records of treatment received for a head injury as a child were also unavailable for the same reason. The mitigation expert diligently worked with the defendant's family to develop mitigating evidence. Unfortunately, none of the defendant's family was a particularly sympathetic witness or helpful because of their own victimization by the defendant and the nature and content of their many recorded conversations with the defendant over the years that he awaited trial. Counsel recalls that there was debate among the defense team as to whether evidence from the defendant's past in Abilene would be mitigating or in fact more likely aggravating to a jury due to a history dating from childhood of his incorrigible and violent behavior. Testimony from Phyllis Gilbreth or Kay Rogers would have revealed the defendant's violent behavior toward others as a high school senior.

In respect to defendant's Writ Ground Number Five :

As part of trial preparation, Counsel asked the defendant to provide names of Travis County Jail staff who might say positive things about him. The defendant provided several names including that of Deputy Tasha Lass. To rebut testimony from a State's witness, the defense needed a jail deputy with knowledge of Travis County Jail procedures. Out of the names provided by the defendant, Counsel's investigator could only reach Deputy Lass who agreed to testify on this relatively minor matter. Counsel of course had no reason to suspect any secret relationship between the defendant and this witness. The damaging testimony obtained by the State from this witness after she found herself the subject of an investigation and felony criminal charges were entirely due to the defendant's failure to inform his attorneys of his background with the witness (understandable since his attorneys would have been bound to reveal his purported plan to commit multiple additional felonies and escape from custody).

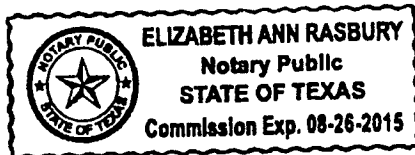
After the surprise testimony from this witness, defense attorneys obtained a daylong continuance to investigate said matters. Lead counsel Martinez assigned Counsel to research Deputy Lass while Martinez dealt with the defendant and jail logistics. Counsel did so and discovered nothing in Lass's background that would have raised any suspicions even if known before calling her as a witness. In fact, Counsel discovered that Lass had been a decorated law enforcement officer prior to her employment as a Travis County jail deputy.

In meetings with the defendant individually and with lead counsel, before and during trial, Counsel repeatedly advised the defendant against testifying. At least through the guilt/innocence phase of the trial, the defendant followed this

advice. The day before the defendant took the stand, Counsel was assigned specific duties by lead counsel and focused on those as related above. Counsel was not present at the jail with lead counsel and cannot attest to what was or was not done to prepare the defendant to testify at the punishment phase of the trial.


Kent C. Anschutz

SUBSCRIBED AND SWORN TO before me on this the 10 day of August, 2012, by the said KENT C. ANSCHUTZ, to which witness my hand and seal of office.




Notary Public, State of Texas
My commission expires: 8-26-15

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EXHIBIT F

#06-904006

3318

COUNTY OF TRAVIS

STATE OF TEXAS

AFFIDAVIT

Filed in The District Court
of Travis County, Texas

AUG 13 2012
At 4:19 P.M.
Amalia Rodriguez-Mendoza, Clerk

BEFORE ME, the undersigned Notary Public, personally appeared Paul Quinzi, on this 7th day of August and on his oath or affirmation states the following:

1. My name is Paul Quinzi. My date of birth is 7/11/1974. I currently reside at 5708 Avenue G, Austin, Texas 78752. My phone number is 512-461-6513. My Texas Bar Number is 24034640.
2. I was a member of Milton Dwayne Gobert's defense team at trial in a purely volunteer capacity. I was not retained or appointed by the court. I was simply trying to help out my neighbor, Leonard Martinez, with a difficult case. I began helping him about a month prior to trial, after the case had already been pending for about 5 years.
3. My role in assisting Mr. Martinez was basically to do legal research, assist with jury selection, and take notes during trial. While I visited several times with the team and Mr. Gobert, I did not have any decision-making authority or any input into any trial strategy decisions. In fact, when I would offer input, I was frequently ignored or overruled by Mr. Gobert.
4. At the time of trial, I was not made aware of anyone named Jason Gibson, and I do not know whether he was ever brought to the attention of my colleagues prior to my involvement in the case.
5. Regarding the mitigation evidence presented, Mr. Martinez retained a mitigation specialist by the name of Gerald Byington. It was my understanding that Mr. Byington contacted and interviewed Mr. Gobert's family members and former teachers, as well as many other people in his past. I did not have anything to do with the investigation of those people, or the decision whether or not to call any them as witnesses.
6. Regarding Tasha Lass, the idea that we did not thoroughly investigate her before calling her as a witness is ludicrous. The only reason she was called as a witness was at Mr. Gobert's insistence. Her testimony was intended to show only that Mr. Gobert did not have an expectation of privacy in his cell, and that any of his cellmates could have looked through his belongings and made up details they claim Mr. Gobert told them about the murder. This could have been accomplished through the testimony of literally any jailer, but Mr. Gobert insisted we call Ms. Lass, as he expected she would also testify that she had never had any problems with him as an inmate. As I recall, it was not Ms. Lass' testimony that

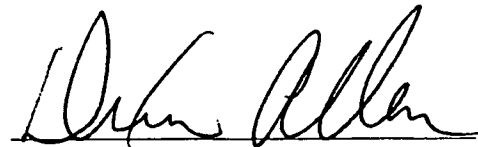
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raised the suspicions of the prosecutors in the case. Ms. Lass appeared at the courtroom several times during the trial, in civilian clothes and of her own volition, apparently just to see what was going on. On one of these occasions, Prosecutor Allison Wetzel commented to me something to the effect of "there's something not right about her." Within the next few days, the prosecutors presented Ms. Lass' testimony regarding giving Mr. Gobert a cell phone in jail, their sexual encounters, and his plans for escape. After she testified, our team spent the next day investigating Ms. Lass, and all I was personally able to find was some information about her previous law enforcement job, and I believe some sort of award she was granted in that job. In short, no matter what kind of investigation had been done, the only person who could have possibly known about the inherent risks of having Ms. Lass testify was Mr. Gobert himself, who insisted that we call her.



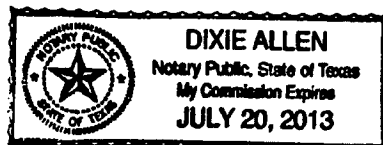
Paul Quinzi

SWORN TO AND SUBSCRIBED before me on this 7th day of August, 2012.



Notary Public

My commission expires: _____



000488

APPENDIX G

No. D-1-DC-06-904006

EX PARTE

*

IN THE DISTRICT COURT

*

331ST JUDICIAL DISTRICT

MILTON DWAYNE GOBERT

*

TRAVIS COUNTY, TEXAS

AFFIDAVIT OF TRIAL COUNSEL

My name is Leonard Martinez and I am competent to give this sworn statement. I was lead counsel in the capital murder case against Milton Gobert.

In this affidavit I address the three issues in the Court's supplemental order.

The first issue was whether the defense team, of which I was lead counsel, investigated evidence relating to the robbery and kidnaping allegations in the indictment particularly with regard to Jason Gibson. No one in the defense team had any clue that there was a Jason Gibson involved in this case. My team and I investigated every fact that made up the elements of robbery and kidnaping that would have constituted the aggravating element in this capital indictment. Our team was made up of a mitigation specialist, investigator, two very able lawyers, and myself. Our team consulted with other experienced lawyers and we consulted with experts to find an adequate defense in dispelling the capital aggravating element in this case. Even our voir dire took into account the aggravating elements. The question was whether the aggravating element was indeed part of the death causing event or something that happened after the fact.

As to the second issue, our team with the help of an experienced mitigation expert diligently searched for and did all that was possible to bring into evidence all the mitigation evidence we could find.

And as to the third issue as regards Tasha Lass, no one in the defense team wanted to put

Filed in The District Court
of Travis County, Texas

JAN 27 2014

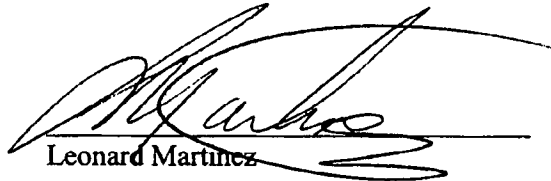
At 4:50 P.M.
Amalia Rodriguez-Mendoza, Clerk

CC: DA

Ms. Lass on the witness stand. It was Mr. Gobert who very insistently ordered us to put her on the witness stand saying she could dispel any so called jail snitch evidence. We totally did not agree with Mr. Gobert. We would find out that a lawyer, Karyl Krug, who had been assisting us as standby appellate counsel had been undermining our teams relationship with Mr. Gobert. We would learn only after Ms. Lass testified that Mr. Krug had known of the relationship between Ms. Lass and Mr. Gobert and failed to inform anyone on the defense team. Ms. Krug had been talking with Mr. Gobert and Ms. Lass trying to get them to employ her or someone else to defend Mr. Gobert and this interference by Ms. Krug undermined Mr. Gobert's cooperation with the defense team which ultimately, in my opinion, lead Mr. Gobert to make two decisions that significantly contributed to his death sentence. The decisions were putting Ms. Lash on the witness stand and his own taking the witness stand.

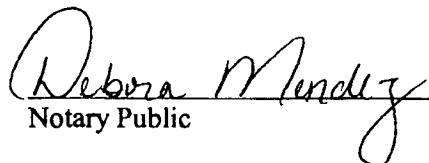
As to Ms. Krug, I filed a post conviction motion that Ms. Krug not be allowed to be appellate counsel as there was an inherent conflict because she may have to be a witness in a post conviction proceeding. See attached.

I swear that the above and foregoing statement by me is truthful and accurate to the best of my recollection.


Leonard Martinez

Before me the undersigned authority appeared Leonard Martinez who on this 27th Day of January, 2014 signed the foregoing document under oath stating that the above and foregoing statement was true and correct to the best of his recollection.




Notary Public

APPENDIX H

2011 WL 5881601

Only the Westlaw citation is currently available.

UNDER TX R RAP RULE 77.3, UNPUBLISHED
OPINIONS MAY NOT BE CITED AS AUTHORITY.

OPINION

Do Not Publish

Court of Criminal Appeals of Texas.

Milton Dwayne GOBERT, Appellant

v.

The STATE of Texas.

No. AP-76,345.

I

Nov. 23, 2011.

Synopsis

Background: After a suppression issue was resolved in his favor, [275 S.W.3d 888](#), defendant was convicted in the 331st Judicial District Court, Travis County, of capital murder and was sentenced to death. Defendant appealed.

Holdings: The Court of Criminal Appeals, [Cochran](#), J., held that:

investigator's expert testimony concerning prison conditions and opportunities for violence was reliable and relevant to future-dangerousness issue in penalty phase;

admission of investigator's testimony did not violate Eighth Amendment right to individualized sentencing;

error in admitting forensic psychiatrist's testimony concerning defendant's future dangerousness was harmless;

trial court acted within its discretion in declining a longer mid-trial continuance of sentencing proceeding so the defense could investigate its own witness;

trial counsel's failure to investigate witness before calling witness was not ineffective assistance;

trial counsel's punishment-phase closing argument expressing concern about defendant's decision to testify against advice was reasonable trial strategy; and

search warrant affidavits provided probable cause to search defendant's apartment and car and to obtain his DNA.

Affirmed.

On Direct appeal from Cause No. D-1-DC-06-904006, The 331st Judicial District Court Travis County.

Attorneys and Law Firms

[Karyl Krug](#), for Milton Dwayne Gobert.

OPINION

[COCHRAN](#), J., delivered the opinion of the unanimous Court.

*1 Appellant was convicted of the 2003 capital murder of Mel Cotton by stabbing her with a knife 107 times in the course of attempting to commit or committing kidnapping or robbery. Based upon the jury's answers to the special punishment issues, the trial judge sentenced him to death. Appellant raises seven points of error. Finding no reversible error, we affirm the judgment and sentence.

Factual Background

In the early hours of October 6, 2003, five-year-old Demetrius Cotton was awakened by the sound of his mother, Mel Cotton, screaming from her bedroom. He went into her room and saw a strange man there—"kind of tall, bald, and buff." He had a mustache and was wearing boots and boxers. He had gloves on his hands. Demetrius saw his mom sitting on the edge of the bed with duct tape on her mouth; the man was standing in front of her, stabbing her in the arms with a sharp knife. She was trying to get away from him. She stood up, but then lost her balance and fell. The man kept stabbing, so Demetrius "ran over and tried to pull him down by his leg." He said, "Stop," but the man pushed him off, turned on the bedside light and continued stabbing at his mom. The man told Demetrius, "sit down and shut up," so Demetrius sat down. He was scared.

Then the man put duct tape on Demetrius's ankles and mouth. He told Demetrius to get out of the room, so the child hopped out into the hallway. The man locked the door when Demetrius tried to get back inside the bedroom. He heard his

mom scream, “Leave me alone,” but the man said, “Give me the money” and “Where is it at in your purse?” Demetrius hopped into his room and sat on a pallet of blankets beside his bed. He heard the man take his mom's phone and “stomp on it” in the bathroom. The man also cut the telephone cord.

Demetrius fell asleep, but he woke up when he heard the man come into his room. The man “choked” Demetrius with both hands. Demetrius tried to scream, but he couldn't. He blacked out. When he woke up later, he had a hole in his chest with blood coming out. He went to his mom's room. She was laying on the floor on her side. Demetrius felt her neck. It was cold. “[S]he was gone.” He touched her hand and talked to her for a while. Then he went to the bathroom for a washcloth to stop his chest from bleeding. He looked to see if anyone else was there in the apartment. The man was gone. Demetrius ate a popsicle, then went back to his room, got his stuffed caterpillar, and waited for a long time for someone to come. He fell asleep again, but woke up early that Monday morning when he heard knocking on the door. He took his stool to the door to see out of the peephole, and when he saw his “Aunt Tweety,” he opened the door.

Monica Salinas, who lived in the same Austin apartment complex as Mel Cotton and Demetrius, heard a hysterical woman crying, “My sister is dead, my sister is dead, please help me.” She ran up the stairs, saw Demetrius with duct tape still around his neck and Mel Cotton's body in the master bedroom, so she called 911. She saw “blood everywhere and handprints of blood all over the room.”

*2 Paramedics rushed Demetrius to the hospital. He had four stab wounds in his chest. They were so deep that a paramedic saw Demetrius's lung inflating and deflating. Demetrius said that he could hear the air coming out of the hole in his chest; it sounded like “a farting noise.” Demetrius lost twenty to thirty percent of his blood volume and had a pneumothorax (collapsed lung) and a pulmonary contusion. Doctors also determined that Demetrius had been strangled. Although his wounds were life-threatening, Demetrius recovered.

The medical examiner testified that Mel Cotton had a total of 107 stab wounds that were inflicted during a drawn-out attack. Thirty-eight of the wounds were centered around Ms. Cotton's left breast, indicating “some degree of [the victim's] incapacitation or lack of movement.” Another group of wounds were in her back. She had approximately thirteen defensive wounds to her hands and arms. Twenty of the wounds reached her internal organs. She, like Demetrius, had

been strangled. The medical examiner said that Ms. Cotton had probably been conscious for about ten to twenty minutes after her jugular vein had been cut.

Christina Pocharasang, appellant's former girlfriend, learned of Ms. Cotton's murder later that day. She immediately suspected appellant. She testified that Ms. Cotton had helped her move out of appellant's apartment two weeks earlier by arranging for a man named Kenneth to haul her heavy furniture. Appellant had been furious and accused Ms. Cotton and Kenneth of stealing his things, including his vacuum cleaner.¹ Christina called appellant to ask him about the murder. When he answered the phone, appellant was breathing heavily and said that he had been in a fight with Kenneth, who had stabbed him in the stomach, causing an injury that required sixteen stitches. Christina then called the Austin police to report her suspicions.

Austin police discovered that appellant had an outstanding parole-violation warrant and went to his apartment to arrest him. After peeking through his blinds, appellant refused to open the door, so the officers made a forced entry. Appellant did not have a stab wound in his stomach, but he did have cuts on his right hand that looked like those made when an attacker loses his grip on a knife shaft and cuts his own hand.

Officers obtained a search warrant for appellant's apartment and car. They found stain remover, bleach, and vinegar containers; a glove on top of the washing machine; and a glove, tennis shoes, and a striped shirt inside the washing machine. DNA consistent with that of Ms. Cotton's DNA was found on the left tennis shoe, and DNA consistent with that of appellant, Ms. Cotton, and an unknown male² was found on the glove on top of the washing machine. A latent fingerprint, matching appellant's fingerprint, was found on Ms. Cotton's bedroom window blind.

While in jail, appellant bragged to his cellmate about stabbing Ms. Cotton and Demetrius. He recounted details of the crime, including wrapping Ms. Cotton in an extension cord, washing his bloody clothes, and throwing the knife that he used in a lake.³

*3 Appellant called a jail guard, Deputy Tasha Lass, to testify that the inmates did not have much privacy in their jail cells, thus suggesting that perhaps the cellmate could have learned details about the murder from reading appellant's case files in his jail cell.

Appellant also made numerous phone calls from the jail to family members, suggesting to one brother that he might remember that appellant and Mel Cotton had a sexual relationship. Appellant's older brother told appellant to stop asking him, his brother, and their mother to lie for him. These calls were recorded and played at trial.⁴ In them, appellant told various versions of the events.

One of appellant's brothers testified at trial to the version of events that appellant told him. According to appellant, he and Mel Cotton had had sex that night, and then he went to sleep in her bed. She later woke him up, and they began arguing. She came at him with a knife, saying that she was going to shoot him with a gun. They struggled over the knife. He got the knife, but when he tried to get dressed and leave, she attacked him again. Demetrius came into the room and “fell” on the knife that his mother was holding. Appellant told his brother that he had stayed with the little boy, giving him pain pills, until Demetrius's aunt arrived the next morning. Appellant told his family members that “wasn't nothing wrong with [Demetrius], he was—he's alive and he wasn't seriously hurt.... He wasn't hurt bad at all. He went to school the next day.”

The jury found appellant guilty of capital murder.

During the punishment phase, the State introduced appellant's prior convictions for burglary of a habitation, robbery, false imprisonment, assault, and dating-violence assault.

Christina Pocharasang testified again and recounted three different violent episodes. One time, several months before the murder, appellant punched her in her face because she did not want to cut her hair the way appellant wanted it cut. He chased her into the bathroom and kept hitting her for about thirty minutes. Then, about two weeks before the murder, appellant got angry when Christina asked him to go to his brother's church. He closed the bedroom door so Christina's son couldn't see him, and he choked Christina with both hands around her neck. Christina decided to move out of town, and she contacted her friend, Mel Cotton, who found Kenneth to help her move. But, in late September, Christina forgave appellant and came back to Austin. One night, appellant attacked her as she was driving. He punched her in the face five or six times, choked her neck, bit her on the shoulder,⁵ hit her in her lower back about fifteen times, and crushed her cell phone so she couldn't call for help. He told Christina he was going to kill her. Christina finally escaped, drove to a hospital,

and called the police. Nine days later, appellant killed Mel Cotton.

Another woman testified that she had dated appellant in 2002, but he got jealous and began hitting her and grabbing her by the neck when he was angry. She told him that she wanted nothing more to do with him. But one day he came over, and she got into his car to talk to him. Appellant became angry again and, after she jumped out of his moving car, he came after her and started hitting her in the face. Her father called the police and she filed assault charges against him.

***4** A third woman testified that she had dated appellant when they were both in high school. He was often verbally abusive to her, but one day he got jealous and hit her in the nose, then threatened to kill her as he forcibly took her back to his apartment. The next morning she escaped by grabbing her car keys. She drove off, speeding and running red lights when she saw appellant driving behind her. She stopped, got out of her car and started calling for help, but no one paid attention to her, so she raced back to her car. Appellant was on the roof of her car. She nevertheless drove to a friend's house, got out, and appellant drove off in her car. Several years later, appellant found her in Round Rock, burglarized her friend's home, stole a TV and purse, and kidnapped her. The police eventually found her at appellant's apartment, and he went to prison for burglary. She related another incident in which appellant choked her when he found out she was dating someone else. Even though appellant has been locked up in jail for years, she is still afraid that he will come back for her.

A former cellmate testified that appellant assaulted him while he was lying in his bunk. Appellant said that he was a Muslim and didn't want to be in a cell with a Catholic. Appellant accused the cellmate of farting while appellant was praying, and then he began hitting the man in the chest, saying that he would kill him. The cellmate, in fear of his life, asked to be moved. Appellant had numerous instances of disruptive conduct while in jail and, at one point, was assessed fifteen days of administrative segregation for his actions.

A former female jailer who had given appellant special privileges resigned when her superiors discovered that she had been “fraternizing” with appellant. Thereafter, she visited appellant in jail seventeen times in six months.

Tasha Lass, the female jailer whom appellant had called to testify during the guilt stage, was called by the prosecution during the punishment stage. She admitted that she, too, had

been fraternizing with appellant for several weeks. She said that she had brought appellant a cell phone so he could call her from the jail without their conversations being recorded. They talked on the phone every day, and appellant repeatedly told Deputy Lass that he loved her. She testified that he was still talking to her every day on the smuggled cell phone.

Another jailer testified that, after Deputy Lass's testimony, he had searched appellant's jail cell and found the cell phone stuffed into a bag of Cheetos inside appellant's commissary bag. A cell phone charger was also found. Deputy Lass was then arrested and charged with the felony of bringing a prohibited item into a correctional facility.

Yet another officer testified that a piece of plastic had been wedged into appellant's leg brace that he was required to wear as he was transported each day from the jail to the courtroom so that it would not lock. A different officer testified that appellant had tampered with his leg brace on a second occasion as well. That time appellant was walking around in the open courtroom with his leg brace unlocked.

*5 After the defense offered several mitigation witnesses and rested, the State then recalled Tasha Lass to testify about "an escape plan." This time, Deputy Lass testified that she had originally been a missionary in Romania, and then had traveled to Sri Lanka, Australia, and England for eight years. She then became a police officer in Chattanooga, Tennessee, and was named Patrol Officer of the Year in 2008. She moved to Austin, became a deputy in June 2009, and first met appellant around Christmas time. She listened to him talk about his case, his family, and his problems in jail. He made her feel "needed." He told her about his escape plan and wanted her to buy a storage shed so he could hide out "with food and stuff" until he escaped to Dubai. He chose Dubai because it is a Muslim country and he could not be extradited from there. He also wanted her to buy a .45 pistol with a silencer and four magazines and bring it into the jail "so he could shoot people and locks to get out."

Appellant told Deputy Lass that he planned to call Deputy Fernandes over to his cell at 2:30 a.m., shoot him, drag the deputy's body into the cell, change into his clothes, grab his car keys,⁶ shoot any other inmates who saw him, kill the control-room operator,⁷ take the keys to the fire closet, grab the bag inside that closet that contained a rope, then go to the top floor fire closet for another rope, go out the roof door, tie the two ropes together and attach one end to the building, toss the rope over the edge and climb down, run over to the parking

garage and drive off in Deputy Fernandes's car. Appellant would "knock out" Deputy Lass and put her in the fire closet, but she did not believe that he would leave her alive. She said that she did not want to aid in this escape plan, but appellant kept asking her every day.

The State also called Dr. Richard Coons who testified that, in his opinion, a hypothetical person with appellant's history, conduct, and character would likely pose a danger of violence in the future.

Finally, the defense called appellant to the witness stand. He admitted that he had hurt a lot of women. He said that he had hit his brother over the head with a statue and beaten his mother and the women that he loved. It was because of "anger issues and situations.... Maybe sometimes I go overboard."

Based on the jury's answers to the special issues, the trial judge sentenced appellant to death. After hearing a victim allocution statement by Mel Cotton's sister, appellant shouted, "That bitch wasn't no angel. That was a bitch, a motherf—— bitch. F—— all y'all. That was a bitch a ho bitch." When the trial judge attempted to interrupt, appellant said, "No, f—— you. F your allocution. F—— all you motherf——."

Thus ended the trial of Milton Dwayne Gobert.

The Admission of Evidence at the Punishment Phase

In two points of error, appellant complains of the admission of expert testimony offered at the punishment phase. In point of error one, appellant asserts that the trial court erred under *Daubert*,⁸ *Kelly*,⁹ *Coble*,¹⁰ and the Eighth Amendment in admitting testimony by A.P. Merillat, an investigator from the Special Prosecution Unit of the Texas Department of Criminal Justice (TDCJ), concerning prison conditions and the opportunities for violence in TCDJ. The trial judge barred the prosecution from asking "about specific cases that he knows about" or other anecdotal stories, but otherwise allowed the State to develop Mr. Merillat's testimony.

*6 We have upheld the admission of Mr. Merillat's educator-expertise testimony in several previous cases as reliable and relevant to the future-dangerousness issue concerning the opportunities for violence in prison society.¹¹ But in *Estrada v. State*,¹² we found that Mr. Merillat's unintentionally inaccurate testimony concerning reclassification of capital-

murder inmates was, in that particular case, reversible error.¹³ Mr. Merillat did not repeat that factual inaccuracy in the present case. We conclude that the trial judge did not abuse his discretion in overruling appellant's Rule 702 objections.

Appellant also argues that the trial court's admission of Mr. Merillat's testimony violated his Eighth Amendment right to individualized sentencing because what other prisoners did or did not do in prison was not relevant to appellant. It was in response to that argument that the trial judge barred the prosecutor from asking Mr. Merillat any questions concerning other inmates or their specific instances of conduct. But the judge concluded that generalized testimony concerning prison conditions, opportunities for violence, weapons used, and raw data concerning the number of violent acts in TDCJ did not violate the Eighth Amendment focus on individualized sentencing. Appellant asserts that Mr. Merillat's testimony "is that TDCJ is so grossly incompetent and so dangerous that the safety of all who enter there is in jeopardy."¹⁴ We do not read Mr. Merillat's testimony as implying that prison "is a relentless death trap" that imperils "the safety of all who enter there." His point was that TDCJ, like other prisons, cannot protect against all inmate violence.

We have previously upheld the admission of Mr. Merillat's background testimony over an Eighth Amendment claim in an unpublished opinion.¹⁵ While the probative value of Mr. Merillat's testimony pales in comparison to that concerning appellant's specific acts of violence while incarcerated, its admission did not violate appellant's Eighth Amendment right to an individualized sentencing procedure. The jurors could make an Eighth Amendment "individualized" assessment of appellant's likelihood to commit future acts of violence based upon his specific actions—some of which he testified to himself—while incarcerated.¹⁶

We overrule appellant's first point of error.

In his second point of error, appellant claims that the trial judge erred in admitting the opinion of Dr. Coons on the issue of future dangerousness. After a voir dire examination outside the presence of the jury appellant argued, *inter alia*, that Dr. Coons

does not have and has not propounded a sufficiently valid scientific technique or theory that has been accepted as valid by the scientific community.

Psychiatry is not the study of prediction of future danger; it is, as he has acknowledged, the study of mental disease and mental disorders. Future dangerousness is not one of these. Basically his qualifications do not relate to making such predictions.

*7 He has failed to identify any scientific literature or documentation that supports this technique, whatever technique he plans to use....

Basically his testimony does not rely upon principles that are involved in the field of psychiatry.

Appellant also filed a motion and brief outlining his reasons for excluding Dr. Coons's opinion testimony under Rules 702–703, as well as the federal and Texas Constitutions. We conclude that the trial judge abused his discretion in admitting Dr. Coons's opinion on future dangerousness¹⁷ in this case for the same reasons that we held it inadmissible in *Coble v. State*¹⁸ Here, as in that case, Dr. Coons provided no scientific, psychiatric, or psychological research or studies to support his idiosyncratic methodology for predicting whether a hypothetical person would commit future acts of violence.¹⁹

However, we conclude that the admission of Dr. Coons's testimony was harmless error.²⁰ Given the overwhelming evidence of appellant's life-long penchant for violence, the circumstances of the capital murder, the evidence of his conspiracy to commit capital murder to effectuate his escape from jail, his own testimony concerning his prior violence in prison and toward anyone—including his own mother—who angers him, we are confident that this error did not affect appellant's substantial rights to a fair sentencing trial.²¹

In this trial, unlike that in *Coble*, the jury was not considering the future dangerousness of a model prisoner. The evidence in this case showed that, during prior periods of incarceration, appellant had

- attacked a fellow prison inmate with a hoe, gashing him in the back;
- threatened to hit a prison guard with a hoe;
- threatened to fight other prison guards;
- gotten into "five or six" fights with fellow prison inmates;

- gotten into “four or five” fights with fellow jail inmates;
- developed inappropriate relationships with at least two female jail guards and manipulated them into providing him with contraband or special privileges;
- plotted to murder a jailer and steal his car keys and car to effectuate appellant's escape;
- plotted to kill any other inmates or jailers who might witness that planned escape; and
- manipulated his leg brace so that it could not lock and impede his mobility in the courtroom during his capital-murder trial.

Dr. Coons's opinion concerning a hypothetical person in appellant's position was, at most, superfluous to the specific testimonial evidence of appellant's proven dangerousness both in prison and in free society.

Furthermore, the State did not emphasize or rely upon Dr. Coons's opinion in closing argument. One prosecutor briefly mentioned Dr. Coons and his methodology:

Now, remember the analysis that Dr. Coons uses when he is deciding whether someone is going to be a future danger. If this is helpful to you, you can use it. It is one he has used for many years. If there is some other analysis that you want to use, of course, that's fine, too. Remember he looks at the facts of the capital murder, the person's history of violence, his attitude about the use of violence, his personality and behavioral characteristics, his conscience, and the society that he's going to be in.

*8 The other prosecutor did not even mention Dr. Coons during his closing argument, but the defense discounted Dr. Coons's methodology and the basis for his opinion: “Dr. Coons, no literature or scientific study basis for what he does. I mean, anybody could come in and give you that opinion.” The jury did not need any expert's opinion to determine

whether appellant would likely commit acts of violence in the future just as he had done in the past. They heard it from the horse's mouth. Because the admission of Dr. Coons's opinion testimony was harmless error, we overrule appellant's second point of error.

Challenges to the Constitutionality of Article 37.071

In his third point of error, appellant asserts that Article 37.071, the statute that sets out the Texas capital-murder sentencing procedure, is unconstitutional for myriad reasons. Appellant relies upon eleven different motions, memoranda, or written objections that he had filed before and during trial. This point of error, combining eleven different and distinct claims, is multifarious, and we could properly dismiss this entire point of error for that reason.²² Nevertheless, in the interest of justice, we will address the three legal theories that appellant briefed on appeal.

Appellant asserts that Article 37.071 is inadequate and unconstitutional because prosecutorial discretion is “too broad to guarantee that the death penalty will be fairly and evenly applied in all 254 counties.” We have repeatedly rejected this claim,²³ and appellant offers no persuasive reasons why those decisions should be overruled.

Appellant also claims that Article 37.071 is inadequate and unconstitutional because the future-dangerousness issue is submitted to the jury, but it is not alleged in the indictment. We have repeatedly rejected this claim as well,²⁴ and appellant's arguments do not persuade us that those decisions should be overruled.

Finally, appellant claims that the types of evidence currently used by prosecutors to prove death-worthiness are unreliable and therefore the statute is unconstitutional. He asserts that, because prosecutors offer testimony by such witnesses as Mr. Merillat and Dr. Coons, “Article 37.071 invites nothing but unfairness in determining who gets the death penalty, how that issue is determined, and the type of evidence typically [relied] on to make that determination.”²⁵ But the fact that some prosecutors, in some cases, have offered some evidence that might be improper does not render the statute unconstitutional in all of its applications.²⁶ And appellant has failed to show that Article 37.071 was unconstitutional as applied to him as we have already held that (1) the trial judge did not abuse his discretion in admitting Mr. Merillat's testimony, and (2)

the erroneous admission of Dr. Coons's opinion testimony in this case was harmless.²⁷ Appellant's third point of error is overruled.

The Mid-Trial Continuance to Investigate Tasha Lass

*9 In point of error four, appellant asserts that the trial judge erred in failing to grant a longer mid-trial continuance so the defense could investigate the background and testimony of its own witness, Deputy Tasha Lass. And, in point of error five, appellant asserts that his trial attorneys were ineffective in failing to investigate Deputy Lass before calling her as a witness in the defense case-in-chief.

As noted above, appellant called Deputy Lass in the guilt stage to testify to the lack of privacy in the Travis County jail cells. Her testimony could explain how appellant's cellmate might have learned about the details of the capital murder from a source other than appellant's confession to him. When the defense requested that Deputy Lass be allowed to remain in the courtroom after her short testimony was complete, however, the prosecutors' suspicion were aroused. They investigated and later called Deputy Lass during the punishment phase to testify to her improper relationship with appellant and to the fact that appellant had manipulated her into sneaking a cell phone into the jail for him. The State called her again when, at the suggestion of her own attorney, she admitted that appellant had tried to talk her into bringing him a .45 pistol, silencer, and four magazines of ammunition to help him implement his escape plan.

After hearing the testimony of the escape plan, appellant's counsel made an oral motion for continuance because Deputy Lass's testimony was "highly inflammatory" and "devastating, to say the least.... I mean, for all we know she may be psychotic." Counsel explained, "We need to have my investigator check her background, check some of the stuff she said, whether or not it's true, classic impeachment stuff that we're now being denied because all of a sudden this stuff just came up."

The trial judge told the prosecutors to give defense counsel any criminal record they could find on Deputy Lass, and he suggested that counsel take her on voir dire to "establish a baseline" for impeachment research. After completing that voir dire, the trial judge postponed cross-examination until the next day to give the defense time to research possible avenues of impeachment. The next day, defense counsel said that they

had not had enough time to make a thorough investigation, so the trial judge gave them a daylong continuance and ordered jailers to permit defense counsel to view appellant's cell and the jail layout.

When the court reconvened, defense counsel made another oral motion for continuance. At that point, the trial judge overruled the motion, stating that cross-examination was likely the best means of discovering information because he would not allow other witnesses to impeach Deputy Lass on collateral matters.

First, we hold that appellant failed to preserve error because he did not file a sworn written motion for continuance.²⁸ Although he might be excused from filing a written motion immediately after Deputy Lass's direct examination, he clearly had an opportunity to file a written motion the next day—when the trial judge granted a daylong continuance—or the day after that—when the trial judge denied any further continuance. Moreover, appellant did not file a motion for new trial on this basis, setting out what specific admissible impeachment evidence he would have discovered had a longer continuance been granted.²⁹

*10 Second, appellant has failed to show that the trial judge abused his discretion in declining to grant a lengthier continuance because he has not shown any prejudice. In *Gallo v. State*,³⁰ we held that "a bare assertion that counsel did not have adequate time to interview the State's potential witness does not alone establish prejudice."³¹ Here, appellant has failed to show what impeachment evidence he would have uncovered if he had been granted a longer continuance and how the inability to present that admissible evidence caused his trial to be unfair.³²

Finally, to establish reversible error based on the denial of a motion for continuance, "a defendant must demonstrate both that the trial court erred in denying the motion and that the lack of a continuance harmed him."³³ That is, appellant must offer evidence to satisfy three separate prongs: (1) the trial judge abused his discretion in failing to grant a continuance because he would have discovered admissible impeachment evidence about Deputy Lass; (2) his cross-examination of Deputy Lass was circumscribed as a result of that ruling; and (3) his inability to fully cross-examine Deputy Lass with admissible impeachment evidence was so critical that it caused his sentencing hearing to be unfair and the result

unreliable. Appellant has not satisfied any of those three prongs. We therefore overrule his fourth point of error.

In his fifth point of error, appellant asserts that his trial counsel were constitutionally ineffective because they failed to investigate Deputy Lass before calling her to the witness stand. As the State notes, it was appellant who suggested that his attorneys should call Deputy Lass. Nonetheless, Deputy Lass's testimony concerning her inappropriate relationship with appellant, her conduct in smuggling in a cell phone for him, and appellant's confiding his murderous "escape plan" to her is so unexpected that we cannot find that counsel's failure to independently investigate the potential for this type of relationship was deficient conduct.

Counsel has a duty to conduct an independent investigation into the facts of the case and "should not blindly rely on the veracity either of his client's version of the facts or witness statements in the State's file."³⁴ But counsel's duty to investigate his own witnesses and their relationship to the client is not absolute; he is obliged only to make a reasonable decision as to whether a particular investigation is necessary.³⁵ Reviewing courts "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment."³⁶ Thus, "[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities."³⁷

Appellant fails to explain why his counsel should have anticipated that Deputy Lass was carrying on an improper relationship with appellant and would testify to the cell-phone-smuggling incident or the "escape plan." Appellant himself knew these facts, of course, but they are so unusual and unlikely that an objectively reasonable attorney is not deficient for failing to investigate the possibility of such a relationship before calling a deputy to testify to the lack of privacy in jail cells.³⁸ We cannot conclude that counsel's conduct in this regard fell below prevailing professional norms, especially as the prosecutors and trial judge were clearly just as astounded by this evidence as appellant's counsel. The only two people who knew about this evidence were appellant and Deputy Lass; if appellant did not want this relationship exposed, he should not have suggested Deputy Lass as a witness.

*11 Appellant's counsel had no reason to suspect any secret relationship between appellant and a law-enforcement officer and thus no reason to investigate that relationship or the officer's background. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."³⁹ To hold otherwise, would require counsel to be prepared for "any contingency" regardless of how improbable or remote it may be and would require counsel to divert scarce resources to investigate minor law-enforcement witnesses whose veracity and integrity may normally be assumed.⁴⁰

Furthermore, we should not find that counsel's failure to investigate Deputy Lass's relationship with appellant before calling her as a minor witness was "so outrageous that no competent attorney would have engaged in it," without affording counsel the opportunity to explain.⁴¹ Because appellant has not shown constitutionally deficient performance by his counsel, we need not address the second, prejudice prong of *Strickland*.⁴² We overrule appellant's fifth point of error.

Trial Counsel's Statement that Appellant Was Testifying "Against the Advice of Counsel"

In his sixth point of error, appellant complains that his trial counsel provided ineffective assistance of counsel by telling the jury that appellant was testifying against the advice of counsel. He claims that trial counsel undermined his Fifth and Sixth Amendment right to testify by letting the jury know that counsel thought it was a bad idea.

At the end of the punishment phase, appellant's counsel informed the trial judge, outside the presence of the jury, that appellant insisted on exercising his right to testify. All three defense counsel were concerned and registered their opposition, on the record, to appellant's decision. When lead counsel began his direct examination of appellant before the jury, he acknowledged his disagreement with appellant's decision to testify and characterized appellant's decision to plead for his life as one that would subject him to "dehumanization" by the prosecutor.⁴³ This introductory colloquy—that appellant wanted to take the witness stand to make a plea for his life even though he knew the prosecutor would attempt to shred his story and dehumanize his actions—set the stage for the beginning of counsel's impassioned closing argument at punishment: "Milton Dwayne Gobert

wanted his opportunity to come up here and basically ask each one of you, don't take my life. And I know he did something very terrible and it's going to be hard for you to listen to his plea. All I can do is say, please, don't take his life." Then, at the end of his argument, counsel circled back again to the colloquy at the beginning of appellant's testimony and plea for his life: "I am pleading with you. He pleaded with you. He said, spare my life, spare my life."

Appellant cites no case law from any jurisdiction holding that counsel's introductory questions expressing concern about a defendant's decision to testify and subject himself to cross-examination are constitutionally deficient. As the State points out, the limited authority on this issue indicates that counsel's conduct was both reasonable and non-prejudicial. The State cites to *Noel v. Norris*,⁴⁴ in which the Eighth Circuit upheld the state court's finding that counsel's statement during direct examination that his client—a capital-murder defendant—was testifying against counsel's advice “was designed to impress the jury with [the defendant's] sincerity.”⁴⁵ The Eighth Circuit held that “[t]he trial strategy that counsel pursued was not professionally unreasonable. Our conclusion finds strong support in the fact that [the defendant] could not identify, nor could we find, a single case where counsel, under similar facts, was found to be ineffective.”⁴⁶

***12** The record in this case reflects that counsel's apparent strategy was a reasonable one: he was framing appellant's decision to testify and plead for his life as something he felt so strongly about that he was willing to risk the consequences of a merciless cross-examination. As the State notes, “Counsel used the opportunity to frame the State's subsequent cross-examination as dehumanizing not only of appellant but also of other witnesses.”⁴⁷

Appellant asserts that the colloquy concerning the advisability of testifying takes place outside the presence of the jury, but “[i]n this case the colloquy took place in front of the jury, and was of benefit only to trial counsel,” not appellant.⁴⁸ This is not entirely accurate. All three counsel expressed their disagreement with appellant's decision to testify on the record outside the presence of the jury. Counsel had no need to “benefit himself” by repeating that disagreement in front of the jury. The record supports the inference that this strategy was designed to benefit his client and emphasize how strongly appellant wanted to make a sincere personal plea to the jury for mercy.

We find that appellant has failed to establish that his counsel provided ineffective assistance of counsel in his strategy of framing appellant's choice to testify despite counsel's concerns about a “dehumanizing” cross-examination. Because we find that counsel's performance was not constitutionally deficient, we need not address the second, prejudice prong of *Strickland*.⁴⁹ We overrule appellant's sixth point of error.

The Search Warrant Affidavits

In his seventh and final point of error, appellant claims that the trial judge erred in failing to grant his motion to suppress evidence of his DNA and items taken from his apartment and car under four separate search warrants. He argues that the first two affidavits did not establish probable cause to search and the second two affidavits were based, in part, on his illegally obtained confession. He claims that, without the inclusion of those statements, the magistrate lacked a substantial basis for concluding that there was probable cause to search appellant's apartment or obtain his DNA. We conclude that all four affidavits contain sufficient, lawfully obtained, information to support a finding of probable cause to search.

At a pretrial hearing, the trial judge granted appellant's motion to suppress his confession. The judge found that, at the beginning of the interview, appellant had invoked his Fifth Amendment right to counsel, thus the detectives violated his *Miranda* rights in continuing to question him after that invocation.⁵⁰ Appellant then filed a motion to suppress evidence obtained from four separate search warrants.

At the suppression hearing, Officer Fuentes testified that he prepared affidavits on October 7, 2003, to search appellant's apartment and car. He drafted those affidavits and search warrants—State's Exhibit 5 & 6—at the time that appellant was being interviewed by others, and he did not rely upon any information from that ongoing interview. In his affidavit, Officer Fuentes relied upon information

***13** • from Demetrius that the murderer was “a male, not white, with a shaved head and mustache wearing a striped shirt and silver shorts,” and Demetrius's statement that the murderer put his mother's purse inside a black bag that the man brought with him;

- from Christina Pocharansang that she suspected appellant was the murderer and her report that appellant had assaulted her the previous month, so she called Ms. Cotton to help her secretly move out of appellant's apartment, that Ms. Cotton had several friends help her move out, but in the process “they stole some of Gobert's property”;
- that appellant had open arrest warrants for parole violations and assault;
- that when officers went to arrest appellant at his apartment, the manager showed them appellant's blue Taurus car;
- that when officers arrested appellant, they saw what appeared to be blood in several places on the living room carpet;
- that, after arresting appellant, one of the officers looked into appellant's blue Taurus and saw “what appeared to be blood on the steering column and on the driver's door lock”;
- that, after arresting appellant, the officers saw knife cuts on appellant's hands;
- from appellant's brother's girlfriend that appellant arrived at their apartment shortly after the murders to take a shower and when he arrived he was carrying a black duffel bag.

Officer Fuentes went through all of this information and verified that none of it came from appellant. The magistrate found probable cause to search both appellant's apartment and car based on this information and officers conducted those searches, under warrant, the next day. They seized numerous items of evidentiary value.

Detective Burgh then compiled a second search warrant for appellant's apartment on October 15, 2003. This affidavit includes the same information as that in the first two affidavits, but added some information from appellant's confession as well. The only evidence seized under this third warrant was a black and blue bag with toiletries in it. Det. Burgh also compiled a November 5, 2003, search warrant and affidavit to collect appellant's DNA. That affidavit included the same information that was in the October 7th affidavits as well as information from appellant's confession.

The trial judge overruled the motion to suppress evidence and entered findings that the first two search warrant affidavits contained sufficient facts to establish probable cause and the second two affidavits contained sufficient facts to establish probable cause, even after appellant's illegally obtained statements were excluded.

The Fourth Amendment expresses a strong preference for searches to be conducted pursuant to a search warrant based on probable cause.⁵¹ “Probable cause for a search warrant exists if, under the totality of the circumstances presented to the magistrate, there is at least a ‘fair probability’ or ‘substantial chance’ that contraband or evidence of a crime will be found at the specified location.”⁵² Our duty, and that of the trial judge, in reviewing the magistrate's finding of probable cause “is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.”⁵³ As appellant aptly noted, reviewing courts do not act as a “rubber stamp,” but “the magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review.”⁵⁴

***14** Appellant argues that, at the time the first two affidavits were drawn up, “there was a lot of circumstantial evidence included, but the crux of the affidavits” was Christina's “guess” that appellant was the murderer. We disagree. The magistrate had before him not only Christina's suspicion, but also her cogent reasons for that suspicion, as well as the evidence of bloodstains on appellant's carpet, bloodstains on his car steering column and driver's door lock, evidence of cuts—apparently superficial knife wounds—on appellant's hands, evidence that appellant had arrived at his brother's apartment shortly after the murders to take a quick shower and then leave, and Demetrius's description of the murderer—a description consistent with appellant's appearance.

Based on the totality of the information contained in the first two affidavits and giving “great deference” to the magistrate's finding, we agree that the magistrate had a “substantial basis” for concluding that the affidavits established probable cause to search appellant's car and apartment.⁵⁵ Thus, the trial judge did not err in denying appellant's motion to suppress evidence obtained as a result of the first two search warrants.

As for the second two search warrants, State's Exhibits 7 & 8, the affiant repeated, almost verbatim, all of the information contained in the first two affidavits and then added more

facts gleaned from appellant's illegally obtained confession. However, we agree with the trial judge's finding that, excising the additional information from that confession, there is still ample information in the affidavits to support the second search of appellant's apartment and the search to obtain his DNA.⁵⁶

We therefore overrule appellant's final point of error.

Finding no reversible error, we affirm the trial court's judgment and sentence.

All Citations

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Footnotes

- 1 Appellant left numerous threatening voicemails for Christina, saying such things as "Yeah, ho, you go on and do what you like. I don't give a f—— no more. But I bet you this one thing. You still got my shit, you keep that. That's yours. Since you distributed my shit to all this different mother f—— and shit. And gave my shit to these niggers. You gave my shit to these niggers. But bitch, one day you're going to look up, and you're going to see me. Bet that."
- 2 When the DNA analysis was made, the technician did not have Demetrius's DNA.
- 3 During his punishment-stage testimony, appellant confirmed that he threw the knife into the lake.
- 4 In one of them, appellant told his brother that a jury would surely sentence him to death if they heard that he had attacked and stabbed his mother when he was nineteen, so he wanted his mother to lie about that event. "I can't have her up there. That's, that's suicide.... What am I going to look like in these folks' eyes? ... I mean it's not about telling the truth, get up there and tell the truth, that's suicide, man.... How can you say if you love somebody that you're gonna sit up there and, and, and get up there and, and help go to the death chamber? That's suicide for me, man."
- 5 Six years later, Christina still had a scar from that bite.
- 6 Appellant told Ms. Lass that he had seen Deputy Fernandes drive in and out of the parking garage, so he knew which car was his and where it was parked.
- 7 Appellant wanted Ms. Lass to be in the control room so she could give him the keys.
- 8 *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
- 9 *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App.1992).
- 10 *Coble v. State*, 330 S.W.3d 253 (Tex.Crim.App.2010).
- 11 See *Coble*, 330 S.W.3d at 287–89 (Merillat's testimony about the Texas prison classification system and violence in prison, offered to show a capital-murder defendant's future dangerousness, was admissible as educator-expertise information designed to assist the jury; testimony was confined to specific information about operations of Texas prison system and inmates' opportunities for violence or productive behavior; the testimony was intended to educate the jury about an area in which it lacked a thorough understanding and to cast doubt upon the official prison data that the forensic psychologist who testified for defendant relied upon); *Threadgill v. State*, 146 S.W.3d 654, 670 (Tex.Crim.App.2004) (upholding admission of photographs of bombs and weapons made by inmates to illustrate Merrillat's testimony that violence was prevalent in TDCJ

prisons). See also *Sparks v. State*, No. AP–76099, 2010 WL 4132769, *24 (Tex.Crim.App. Oct.20, 2010) (not designated for publication) (“Merillat’s testimony was generalized educator-expertise information designed to ‘assist’ the jury under Rule 702. Therefore, the trial judge did not abuse his discretion in admitting it after determining that Merillat was qualified to testify as an expert regarding the prison classification system and opportunities for violence in prison” in punishment phase of capital-murder trial).

12 313 S.W.3d 274 (Tex.Crim.App.2010).

13 *Id.* at 286–87 (when jury sent out note during its deliberations referring to Merillat’s inaccurate testimony “that, after 10 years of G–3 status, a sentenced-to-life-without-parole capital murderer could achieve a lower (and less restrictive) G classification status than a G–3 status,” there was a reasonable probability that the jury relied upon that testimony in reaching its verdict).

14 Appellant’s Brief at 12. Appellant goes on to assert that Mr. Merillat’s “relentless message is that TDCJ is a death trap, and the only way to make sure that Appellant does not add to it is to kill him, since TDCJ is totally ineffectual in safeguarding any of the many, many potential victims who work and enter there.” This may be one way of characterizing Mr. Merillat’s testimony, but it is certainly not a necessary one.

15 *Espada v. State*, No. AP–75,219, 2008 WL 4809235, *9–10 (Tex.Crim.App. Nov.5, 2008) (not designated for publication) (upholding admission of Merillat’s testimony about violent acts and gangs in prison over defendant’s objection that the testimony was unfairly prejudicial and deprived him of the right to an individualized determination of his sentence).

16 Appellant testified and discussed his nine years in prison. He, like Mr. Merillat, talked about the opportunities for violence in prison: “So violence is a part of life in prison, not saying that you go inflict violence, because people that’s not part of a gang, like me, you don’t go looking for trouble.” Appellant testified at length about prison gangs and noted that security had been “beefed up” since the Texas Seven escape. He knowledgeably discussed “crash gates,” security guards, and the prison classification system. He talked about how he had gashed open the back of another inmate with a hoe when he was in minimum custody. He said that he had had five or six fights while in prison, and he “finished them all” but “ain’t nobody lost they life” in those fights. He stated that he told a female prison guard that he “would kick her bitch ass,” and he threatened to hit a prison guard with his hoe. Appellant also said that he had been in four or five fights while awaiting trial in the Travis County jail.

17 Some of Dr. Coons’s testimony, such as that relating to “conduct disorder” as “the juvenile version of antisocial personality disorder,” a mental disorder described in the DSM–IV that can cause a person to become violent, was relevant, sufficiently reliable, and admissible. Only his “future dangerousness” opinion based on the lengthy hypothetical posed by the State was insufficiently supported by a reliable methodology.

18 330 S.W.3d 253 (Tex.Crim.App.2010).

19 *Id.* at 277–80.

20 See TEX.R.APP. P. 44.2(b)

21 See *Coble*, 330 S.W.3d at 280.

22 *Aldrich v. State*, 928 S.W.2d 558, 559 n. 1 (Tex.Crim.App.1996); *Sterling v. State*, 800 S.W.2d 513, 518 (Tex.Crim.App.1990).

23 See, e.g., *Busby v. State*, 253 S.W.3d 661, 667 (Tex.Crim.App.2008); *Threadgill v. State*, 146 S.W.3d 654, 671–72 (Tex.Crim.App.2004).

- 24 See *Threadgill*, 146 S.W.3d at 672 (“A defendant indicted for capital murder is effectively put on notice that the special issues under Article 37.071 will be raised, so such procedural provisions need not be alleged in the indictment.”) (quoting *Moore v. State*, 969 S.W.2d 4, 13(1998)).
- 25 Appellant's Brief at 28.
- 26 See *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex.1995) (facial constitutional challenge requires a showing that a statute is unconstitutional in every application); *Gillenwaters v. State*, 205 S.W.3d 534, 536 n. 2 (Tex.Crim.App.2006).
- 27 See *Gillenwaters*, 205 S.W.3d at 537 n. 3 (“A claim that a statute is unconstitutional ‘as applied’ is a claim that the statute, although generally constitutional, operates unconstitutionally as to the claimant because of his particular circumstances.”).
- 28 *Dewberry v. State*, 4 S.W.3d 735, 755 (Tex.Crim.App.1999); see TEX.CODE CRIM. PROC. art. 29.03 (“A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown; which cause shall be fully set forth in the motion. A continuance may be only for as long as is necessary.”); *id.*, art. 29.08 (“All motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance.”).
- 29 See, e.g., *Varela v. State*, 561 S.W.2d 186, 191 (Tex.Crim.App.1978) (no error in denying motion for continuance when there is no motion for new trial alleging the failure of the trial court to grant a motion for continuance and no evidence showing what a missing witness would have testified to); *Love v. State*, 730 S.W.2d 385, 401 (Tex.App.-Fort Worth 1987, no pet.); *Chambliss v. State*, 633 S.W.2d 678, 682–83 (Tex.App.-El Paso 1982), *aff'd on other grounds*, 647 S.W.2d 257 (Tex.Crim.App.1983).
- 30 239 S.W.3d 757 (Tex.Crim.App.2007).
- 31 *Id.* at 764; see also *Janecka v. State*, 937 S.W.2d 456, 468 (Tex.Crim.App.1996) (capital-murder defendant who asserted that trial judge abused his discretion by refusing to grant a motion for continuance because he had not had sufficient time to interview witnesses failed to show any specific prejudice; thus, no error in denying motion). See also *Quinones v. State*, No. 13–10–00140–CR, 2011 WL 3841586, *3 (Tex.App.-Corpus Christi Aug. 25, 2011, n.p.h.) (not designated for publication) (trial judge did not abuse discretion in denying motion for continuance when defendant claimed that he did not have sufficient time to fully investigate State's witness and recently obtained medical records to conduct effective cross-examination because defendant failed to show specific prejudice); *Lutz v. State*, No. 04–04–00236–CR, 2005 WL 1551722, *1–3 (Tex.App.-San Antonio July 6, 2005, no pet.) (not designated for publication) (trial judge did not abuse his discretion in granting only a fifteen-minute recess to allow defense counsel to interview State's “surprise” eyewitness; defendant failed to demonstrate actual prejudice or show “what length of time would have been sufficient to allow him to adequately prepare” for witness's testimony).
- 32 See *Cooper v. State*, 509 S.W.2d 565, 567–68 (Tex.Crim.App.1974) (trial judge did not abuse his discretion in denying mid-trial motion for continuance when defendant claimed he was “surprised” by a State's witness identifying him as one of the robbers although, before trial, she had told defense counsel that she could not identify defendant; “Neither the motion for continuance nor any statement by appellant's counsel found in the record indicated to the trial court how counsel could have benefitted by a continuance, or that there was any expectation that a continuance would enable appellant to present any fact or facts contrary to the identification testimony given by [the surprise witness].”).
- 33 *Gonzales v. State*, 304 S.W.3d 838, 843 (Tex.Crim.App.2010).

- 34 *McFarland v. State*, 928 S.W.2d 482, 501 (Tex.Crim.App.1996).
- 35 *Strickland v. Washington*, 466 U.S. 668, 690–91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary.”) (emphasis added).
- 36 *Id.* at 689–90.
- 37 *Harrington v. Richter*, — U.S. —, —, 131 S.Ct. 770, 791, 178 L.Ed.2d 624 (2011).
- 38 See *id.* (counsel need not be prepared for “any contingency”; defense attorney was not ineffective for failing to retain forensic expert when he reasonably believed that State was not going to call its own forensic expert and State originally had not planned to call any expert).
- 39 See *id.* at 789.
- 40 See *id.* at 791 (holding that lower court had erred in suggesting that counsel must be prepared for “any contingency”); *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam) (stating that there is a “strong presumption” that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect”); *Bobby v. Van Hook*, 558 U.S. 4, —, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009) (per curiam) (counsel may avoid investigation likely to yield only cumulative evidence because it will “distract[] from more important duties”).
- 41 See *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex.Crim.App.2005) (“ ‘[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.’ Absent such an opportunity, an appellate court should not find deficient performance unless the challenged conduct was ‘so outrageous that no competent attorney would have engaged in it.’ ”) (citations and footnotes omitted).
- 42 *Strickland*, 466 U.S. at 694 (to establish prejudice, a defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).
- 43 The colloquy was as follows:

Q: Mr. Gobert, you asked—you asked to address this jury; is that correct?

A: Yes, sir.

Q: Let me just go through some ground rules with you, okay, because you and I don’t necessarily agree with this, correct? It that right?

A: Yes, sir, we don’t agree.

Q: And you know that I have concerns that because you are taking the witness stand they are going to be able to question you about everything and try to make you look bad. You saw what happens on that witness stand to witnesses. You know what happens to them, don’t you?

A: Yeah. It is not a concern, though, to me.

Q: Okay. But you wanted to address this jury and make a plea for you life, didn’t you?

A: Yes, sir.

Q: Even though in making that plea for your life, now they are going to put you under intense cross-examination to dehumanize you. Do you know that?

A: Well, they did—done a lot of dehumanizing, yes, sir. I'm not concerned with that.

44 322 F.3d 500 (8th Cir.2003).

45 *Id.* at 502. The colloquy in that described by the Arkansas Supreme Court, was as follows:

Q: All right. Now, Riley, you're taking the stand here because you want to tell the jury your story. Is that correct?

A: Yes, sir.

Q: And that's over my advice?

A: Yes, sir.

Q: Against my advice?

A: Yes, sir.

Noel v. State, 342 Ark. 35, 26 S.W.3d 123, 127 (Ark.2000).

46 322 F.3d at 502.

47 State's Brief at 59.

48 Appellant's Brief at 33.

49 466 U.S. at 694.

50 The State pursued a pretrial appeal of this ruling, but this Court ultimately upheld the trial judge's ruling excluding the confession. *State v. Gobert*, 275 S.W.3d 888, 889 (Tex.Crim.App.2009).

51 *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex.Crim.App.2007).

52 *Flores v. State*, 319 S.W.3d 697, 702 (Tex.Crim.App.2010) (citing *Gates*, 462 U.S. at 243 n. 13).

53 *Flores*, 319 S.W.3d at 702.

54 Appellant's Brief at 36 (quoting WAYNE LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(c) at 452 (4th ed. 2004 & Supp.2009–2010)).

55 *State v. Jordan*, 342 S.W.3d 565, 569 (Tex.Crim.App.2011); *Flores*, 319 S.W.3d at 702.

56 See *United States v. Karo*, 468 U.S. 705, 721, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) (search-warrant affidavit, after striking of facts about illegal beeper monitoring inside a residence, contained sufficient untainted information to establish probable cause for issuance of search warrant); *United States v. Restrepo*, 966 F.2d 964, 970–71 (5th Cir.1992) (in assessing whether search warrant contains sufficient untainted information to establish probable cause, court should excise illegally obtained information and then decide whether remaining information suffices); cf. *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (in deciding whether intentional misrepresentations in warrant affidavit require suppression of evidence obtained as a result of search, courts must excise the false information and decide

if sufficient, untainted information exists to establish probable cause in affidavit); *Klingenstein v. State*, 330 Md. 402, 624 A.2d 532, 538 (Md.1993) (the existence of tainted information in search-warrant affidavit does not necessarily render warrant invalid; remaining, untainted information should be examined to determine if it suffices to establish probable cause).

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