

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Chuong Duong Tong,
Petitioner,

-v-

Bobby Lumpkin,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix

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APPENDIX A

Tong v. Lumpkin, No. 19-70008, 90 F.4th 857 (5th Cir. 2024)

90 F.4th 857

United States Court of Appeals, Fifth Circuit.

Chuong Duong TONG, Petitioner—Appellant,

v.

Bobby LUMPKIN, Director, Texas Department of Criminal
Justice, Correctional Institutions Division, Respondent—Appellee.

No. 19-70008

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FILED January 16, 2024

Synopsis

Background: Following affirmance of his conviction and death sentence for capital murder, [25 S.W.3d 707](#), state inmate filed petition for writ of habeas corpus. The United States District Court for the Southern District of Texas, [Nancy F. Atlas](#), Senior District Judge, [2016 WL 5661698](#), denied petition in part, and granted certificate of appealability (COA) on one claim. Petitioner appealed and requested additional COAs. The Court of Appeals, [825 Fed.Appx. 181](#), granted one additional COA and remanded. On remand, the District Court, [Atlas](#), Senior District Judge, denied petitioner's stay request, entered final judgment, and terminated remand.

Holdings: The Court of Appeals, [Duncan](#), Circuit Judge, held that:

state habeas counsel's failure to raise ineffective assistance of trial counsel claim did not constitute good cause for not exhausting claim;

petitioner's ineffective assistance claim based on counsel's failure to present mitigating evidence was not potentially meritorious;

no reasonable jurist could debate that there was no cause to excuse petitioner's defaulted claim that he was denied effective assistance due to counsel's failure to present mitigating evidence;

petitioner procedurally defaulted claim that trial court's change in voir dire procedure denied him due process; and

petitioner failed to show cause to excuse procedural default.

Affirmed and additional COA request denied.

***859** Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:10-CV-2355, [Nancy F. Atlas](#), U.S. District Judge

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Austin, TX, [Ali Mustapha Nasser](#), [Matthew Dennis Ottoway](#), Assistant Attorney Generals, Office of the Attorney General, Criminal Appeals Division, Austin, TX, for Respondent—Appellee.

Before [Smith](#), [Higginson](#), and [Duncan](#), Circuit Judges.

Opinion

[Stuart Kyle Duncan](#), Circuit Judge:

Over 26 years ago, petitioner Chuong Duong Tong murdered an off-duty police officer in Houston, Texas by shooting him at point-blank range during a robbery. A Texas jury found Tong guilty of capital murder and sentenced him to death. Tong has since spent decades traversing state and federal courts, unsuccessfully seeking to overturn that sentence. Tong now raises three issues on appeal.

First, Tong argues the district court erred by not granting a stay under *[860 Rhines v. Weber](#), 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), to allow him to return to state court to exhaust a procedurally defaulted ineffective assistance of trial counsel (“IATC”) claim based on an alleged failure to present mitigating evidence under [Wiggins v. Smith](#), 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Second, Tong requests a Certificate of Appealability (“COA”) to appeal the district court's denial of that same IATC claim. And third, Tong seeks habeas corpus relief based on the state trial judge's purported due process violation arising from its management of *voir dire*, a claim for which he previously received a COA.

Addressing each issue in turn, we conclude the district court committed no error. Accordingly, the district court's order denying Tong's request for a [Rhines](#) stay is AFFIRMED. Tong's motion for an additional COA on his [Wiggins](#) claim is DENIED. The district court's judgment denying Tong a writ of habeas corpus on his *voir dire* claim is AFFIRMED.

I. Facts and Proceedings

A.

The jury heard the following evidence at trial. On April 6, 1997, off-duty Houston police officer Tony Trinh was working at his parents' convenience store. Tong approached Trinh with a semi-automatic handgun, demanding his wallet and jewelry. Trinh showed Tong his police badge and told Tong he “was not going to get away with this.” Tong then killed Trinh by shooting him in the head at close range, took Trinh's jewelry, and fled to a waiting car. Days later, Tong asked his roommate to sell Trinh's jewelry.

After Tong's arrest, he gave police a statement detailing the robbery and shooting. He also showed police where he disposed of the gun. Tong claimed he accidentally shot Trinh while jumping over the counter.

During pre-trial detention, a fellow inmate asked Tong how close he was when he shot Trinh. Tong responded by touching his finger to the inmate's forehead and saying “bang.” When asked if he felt bad about killing Trinh, Tong laughed and mockingly said that he felt terrible and cried himself to sleep. Later, when a police officer was preparing Tong's restraints for transport, Tong placed his fingers in the shape of a pistol, pointed them at the officer's head, and mouthed the word “bang.” The jury found Tong guilty of capital murder on alternative theories that he intentionally killed Trinh, a police officer performing his official duties, or that he intentionally killed Trinh during a robbery or attempted robbery.

At the penalty phase, the jury heard evidence of Tong's troubled past, including numerous disciplinary problems at school, theft, destruction of property, sexual harassment, and assault. The jury also heard that, about a month after Trinh's murder, Tong took part in a bank larceny involving \$400,000. Additionally, the State presented evidence that two days before the Trinh murder, Tong and an accomplice broke into the home of Vincent and Hannah Lee. Mrs. Lee was at home that day with her sick toddler. Tong tied Mrs. Lee up, put a gun to her head, and told her he was going to rob and kill her. When Mr. Lee came home during

the robbery, Tong shot him, though not fatally, dragged him into the room where Mrs. Lee and the toddler were, and threatened to kill him. Leaving the house, Tong said he would “kill all of [them]” and began firing toward the family, while laughing. He hit both the toddler and Mr. Lee but did not kill them.

The jury also heard mitigation evidence. For instance, it heard about Tong's challenges as a result of being abandoned by *861 his father and mother. Tong and his father moved to Germany, where Tong moved in and out of foster homes and orphanages. Tong's father abandoned him in Germany and moved to the United States. After Tong became a serious disciplinary problem, his German foster parents sent him to Houston to live with his father. After being abandoned again by his father in Houston, Tong lived intermittently with other family members until he was 21.

The jury determined it was probable that Tong would commit future acts of criminal violence posing a continuing threat to society and that the mitigating evidence did not warrant a life sentence. On March 11, 1998, the trial court sentenced Tong to death.

B.

On direct appeal, the Texas Court of Criminal Appeals (“TCCA”) affirmed Tong's conviction and sentence, rejecting his 18 points of error. *Tong v. State*, 25 S.W.3d 707 (Tex. Crim. App. 2000) (en banc), *cert. denied*, 532 U.S. 1053, 121 S.Ct. 2196, 149 L.Ed.2d 1027 (2001). Tong then filed a state habeas petition presenting 12 claims. The petition did not raise an IATC claim under *Wiggins* based on trial counsel's failure to investigate and present mitigating evidence at the punishment phase. *See Wiggins*, 539 U.S. 510, 123 S.Ct. 2527. In 2009, the TCCA denied Tong's habeas application. *Ex Parte Tong*, 2009 WL 1900372 (Tex. Crim. App. July 1, 2009) (per curiam).

Tong timely filed a federal habeas petition in 2010. A second amended petition, filed in 2014, presented, *inter alia*, (1) a *voir dire* claim, (2) two *Brady* claims, and (3) a *Wiggins* IATC claim. Tong also requested funding under 18 U.S.C. § 3599 to investigate and develop his *Wiggins* claim. That claim argued counsel should have discovered and presented more mitigating evidence—specifically, evidence of past sexual abuse by family members. Tong presented such evidence for the first time by attaching to his second amended petition affidavits from his two cousins, John Tran and Sang Tran. Although admitting this IATC claim was procedurally defaulted because it was raised for the first time in federal court, Tong argued he could overcome the default based on ineffective assistance of state habeas counsel (“IAHC”).

The district court denied Tong's habeas petition and funding request. It ruled that even if Tong's state habeas counsel was ineffective, Tong was not entitled to habeas relief because he failed to show that trial counsel was deficient under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That was so, the district court reasoned, because trial counsel “retained professional investigators, conducted interviews with Tong and members of his family, and retained appropriate experts to assist in the preparation of Tong's mitigation case.”

The district court granted Tong a COA on his *voir dire* claim but denied COAs on his *Wiggins* and *Brady* claims.

C.

Tong timely appealed and requested from our court additional COAs on the *Wiggins* and *Brady* claims. We denied a COA on the *Brady* claims but remanded for the district court to reconsider Tong's § 3599 funding request regarding his *Wiggins* claim under the new test from *Ayestas v. Davis*, — U.S. —, 138 S. Ct. 1080, 1093, 200 L.Ed.2d 376 (2018). *See Tong v. Lumpkin*, 825 F. App'x 181, 186 (5th Cir. 2020). On remand, the district court granted Tong's funding request. We then stayed proceedings on Tong's *Wiggins* COA application; vacated the district *862 court's denial of that application; retained jurisdiction over the remaining appellate issues; and remanded for factual development of the *Wiggins* claim.

The Supreme Court then decided *Shinn v. Ramirez*, 596 U.S. 366, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022). *Shinn* held that *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), does not permit federal courts “to dispense with [28 U.S.C.] § 2254(e)(2)’s narrow limits” on developing the state-court record “because a prisoner’s state postconviction counsel negligently failed to develop [that] record.” *Shinn*, 596 U.S. at 371, 142 S.Ct. 1718; see also *Mullis v. Lumpkin*, 70 F.4th 906, 910 (5th Cir. 2023) (noting *Shinn* addressed “the use of evidence ... to assess the defendant’s underlying merits claim of ineffective assistance of trial counsel”). Because Tong did not claim to satisfy § 2254(e)(2)’s stringent requirements, the State moved to terminate the remand because the remand’s purpose—developing Tong’s *Wiggins* claim—was now foreclosed by *Shinn*. In response, Tong asked the district court to grant a stay and abeyance under *Rhines* to permit him to exhaust his *Wiggins* claim in state court. The district court denied the stay request, entered final judgment in March 2023, and terminated remand on the grounds argued by the State. Tong timely appealed.

II. Standards of Review

We review the denial of a *Rhines* stay for abuse of discretion, *Young v. Stephens*, 795 F.3d 484, 495 (5th Cir. 2015), which occurs when a court “bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Perez v. Stephens*, 745 F.3d 174, 177 (5th Cir. 2014) (citation omitted).

A petitioner may appeal the denial of federal habeas relief only if he first obtains a COA under 28 U.S.C. § 2253(c)(1). *Gonzales v. Davis*, 924 F.3d 236, 241 (5th Cir. 2019) (per curiam).¹ To do so, he must make “a substantial showing of the denial of a constitutional right.” § 2253(c)(2); see also *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). When the petition was denied on substantive grounds, the petitioner must 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.” *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029. When the petition was denied on procedural grounds, the petitioner must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

¹ As noted in our prior opinion, Tong did not request COAs from the district court on any of his claims. *Tong*, 825 F. App’x at 184 n.1. We nonetheless have jurisdiction to consider his COA requests because the district court *sua sponte* granted and denied COAs on his *voir dire* and *Wiggins* claims, respectively. See *ibid.* (citing *Cardenas v. Thaler*, 651 F.3d 442, 443 (5th Cir. 2011)).

Once a COA has been granted on a habeas claim, we review the court’s “factual findings for clear error and its legal conclusions *de novo*.” *Mullis*, 70 F.4th at 909. We review mixed questions of law and fact *de novo* “by independently applying the law to the facts found by the district court, as long as the district court’s factual determinations are not clearly erroneous.” *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005).

*863 III. Discussion

We address three separate issues. First, Tong argues the district court erred in denying his motion for a *Rhines* stay. Second, Tong asks for an additional COA based on his unexhausted *Wiggins* claim. Third, Tong argues he was denied due process by the trial court’s allocation of preemptory strikes during *voir dire*.

A. *Rhines* stay

Tong argues the district court erred by denying a stay to allow him to exhaust his *Wiggins* IATC claim in state court.² See *Rhines*, 544 U.S. at 277–78, 125 S.Ct. 1528. Such a stay is granted “only in limited circumstances because staying a federal habeas petition frustrates” the objectives of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)—namely, to encourage “finality and streamlin[e] federal habeas proceedings.” *Young*, 795 F.3d at 494–95 (cleaned up) (quoting *Rhines*, 544 U.S. at 277, 125 S.Ct. 1528). A district court abuses its discretion in denying a *Rhines* stay only if (1) there was good cause for failing to exhaust the claim in state court, (2) the claim is potentially meritorious, and (3) “there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” *Rhines*, 544 U.S. at 278, 125 S.Ct. 1528.

² In connection with this argument, Tong contends he has a constitutional right to effective assistance of counsel in initial-review collateral proceedings. He is mistaken. The Supreme Court has long held “there is no right to counsel in state collateral proceedings.” *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). More recently, in *Shinn*, the Court stated it has “repeatedly reaffirmed that there is no constitutional right to counsel in state postconviction proceedings.” 596 U.S. at 386, 142 S.Ct. 1718; see also, e.g., *In re Hensley*, 836 F.3d 504, 507 (5th Cir. 2016) (per curiam) (holding *Martinez* did not establish a new constitutional right to effective assistance of counsel in collateral proceedings).

The State argues Tong's *Rhines* request failed all three prongs. Agreeing with the State as to the first and second prongs, we need not reach the third.

1.

Tong argues the “good cause” for not exhausting his *Wiggins* claim was his state habeas counsel's failure to raise it. The *Rhines* “good cause” standard, he contends, is more forgiving than the standard for “cause” for procedural default under *Martinez* and *Trevino v. Thaler* (*Trevino I*), 569 U.S. 413, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013). In the procedural default context, IAHC can constitute “cause” for defaulting an IATC claim. Tong contends IAHC should also serve as “good cause” under *Rhines* for failing to exhaust his *Wiggins* claim.

Our precedent forecloses Tong's argument. In *Williams v. Thaler*, we held that IAHC cannot serve as “good cause” for a *Rhines* stay. 602 F.3d 291, 309 (5th Cir. 2010), *abrogated on other grounds by Thomas v. Lumpkin*, 995 F.3d 432, 440 (5th Cir. 2021). Tong responds that *Williams* was abrogated by *Martinez* and *Trevino I*. In *Williams*, he points out, we tied our *Rhines* “good cause” holding to our finding no “cause” for procedural default. It is true that *Martinez* and *Trevino I* overruled our procedural default holding in *Williams* by permitting IAHC to serve as “cause.” See *Martinez*, 566 U.S. at 17, 132 S.Ct. 1309; *Trevino I*, 569 U.S. at 429, 133 S.Ct. 1911. But those cases said nothing about what constitutes “good cause” for failure to exhaust under *Rhines*. Therefore, *Williams* remains binding in this circuit as to the *Rhines* standard. We would violate our rule of orderliness by *864 extending *Martinez* to *Rhines*.³ See *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (explaining we have “specifically rejected the idea that later Supreme Court and other decisions that were not directly on point could alter the binding nature of our prior precedent”).

³ Cf. *Blake v. Baker*, 745 F.3d 977, 983–84 (9th Cir. 2014) (holding “good cause” showing under *Rhines* “cannot be any more demanding than” showing “cause” under *Martinez*).

2.

Tong next contends his *Wiggins* claim is potentially meritorious because it meets an exception to Texas's bar on second-or-successive habeas applications. See *Rhines*, 544 U.S. at 278, 125 S.Ct. 1528. Texas courts will not address the merits of unraised claims that could have been brought on initial habeas. But this bar does not apply if, “by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the

special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.” *Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(3)*. The district court ruled that no § 5(a) exception applied to Tong's case.⁴

⁴ Tong's counsel conceded at oral argument the first exception—that the factual or legal basis for his claim was unavailable on the date of his previous application, § 5(a)(1)—is no longer relevant to this case given our decision in *Sandoval Mendoza v. Lumpkin*, 81 F.4th 461 (5th Cir. 2023) (per curiam).

Tong nonetheless predicts that Texas courts may still consider his *Wiggins* claim because it meets the exception in § 5(a)(3) for actual innocence of the death penalty. According to the TCCA, § 5(a)(3) “more or less” adopted the Supreme Court's actual innocence of the death penalty rule in *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). *Ex parte Blue*, 230 S.W.3d 151, 159–60 (Tex. Crim. App. 2007). *Sawyer* limited this exception to situations where alleged constitutional errors only “affect[ed] the applicant's eligibility for the death penalty under state statutory law.” *Blue*, 230 S.W.3d at 161. Tong does not argue, however, that additional mitigating evidence would have made him *ineligible* for the death penalty; he contends only that it would have influenced the jury's decision to impose that penalty. So, under *Sawyer*, Tong could not avail himself of § 5(a)(3) because he was “unquestionably eligible” for the death penalty under Texas law. *Id.* at 160.

It is true, though, that the TCCA has “left open the possibility that a *Wiggins* claim might also be cognizable under Section 5(a)(3).” *Balentine v. Thaler*, 626 F.3d 842, 856 (5th Cir. 2010). A footnote in the TCCA's *Blue* decision “hesitate[d] to declare that” § 5(a)(3) “wholly codifies” the doctrine of ineligibility for the death penalty. 230 S.W.3d at 161 n.42. But the TCCA “express[ed] no ultimate opinion on this question.” *Ibid.* It is unclear, then, under Texas law whether a *Wiggins* claim can satisfy the § 5(a)(3) exception. *See ibid.*

We conclude that the TCCA's hesitance on this point, as expressed in the *Blue* footnote, does not make Tong's *Wiggins* claim potentially meritorious under *Rhines*. In essence, Tong asks us to find this claim potentially meritorious to allow the TCCA to revisit its precedent. We recently held, though, that permitting a state court to revisit its procedural default precedent is not sufficient grounds for a *Rhines* stay. *See Sandoval Mendoza*, 81 F.4th at 482. In *Sandoval Mendoza*, a Texas habeas petitioner argued for the first time in federal court that his trial counsel was ineffective. *Id.* at 467. We *865 refused his request for a *Rhines* stay to exhaust this procedurally defaulted claim because it was meritless under the second-or-successive bar. *Id.* at 482. Although addressing the § 5(a)(1) exception, we noted that “[t]he opportunity to reconsider state court precedent ... is not in itself enough to grant a *Rhines* stay.” *Ibid.* Similarly, we cannot approve a *Rhines* stay based solely on *dicta* that “left open the possibility that a *Wiggins* claim might also be cognizable under Section 5(a)(3).” *Balentine*, 626 F.3d at 856. Although *Blue*'s footnote *questioned* whether a *Wiggins* claim could meet § 5(a)(3), the TCCA has never held it does. The mere possibility that it might does not make Tong's claim potentially meritorious under *Rhines*.

Furthermore, even after *Blue*, we have held that a *Wiggins* claim is meritless under § 5(a)(3). *See Haynes v. Quarterman*, 526 F.3d 189, 197 (5th Cir. 2008). The *Haynes* petitioner argued that, while unpresented mitigating evidence would not have made him ineligible for the death penalty, it “could have influenced the jury's discretion” to impose it. *Ibid.* We declined to grant a *Rhines* stay because, under *Blue*, the petitioner had “no meritorious argument that the [TCCA] would allow him to file a successive application for post-conviction relief.” *Ibid.*; *cf. Balentine*, 626 F.3d at 856 (“We will not interpret that same perfunctory order as having reached the merits of [the *Wiggins*] issue the Texas court at most has identified it might one day reach.”); *Sandoval Mendoza*, 81 F.4th at 482 (“The opportunity to reconsider state court precedent ... is not in itself enough to grant a *Rhines* stay.”). Likewise, Tong does not argue that any mitigating evidence would have rendered him *ineligible* for the death penalty, only that it might have influenced the jury's decision.

In sum, we hold that the district court did not abuse its discretion in declining to grant a *Rhines* stay.

B. *Wiggins* claim

Tong next argues that he should be granted a COA to appeal the denial of his *Wiggins* IATC claim. Because no reasonable jurist could debate that there was no cause to excuse this defaulted claim, we deny Tong's COA request.

While conceding his *Wiggins* IATC claim is procedurally defaulted, Tong argues his state habeas counsel's ineffectiveness provides cause to excuse that default. *See Martinez*, 566 U.S. at 9, 132 S.Ct. 1309 (recognizing this “narrow exception” to usual rule that habeas counsel's error cannot excuse default); *see also Trevino I*, 569 U.S. at 428, 133 S.Ct. 1911 (holding the *Martinez* exception applies to Texas's post-conviction system). Accordingly, Tong must show state habeas counsel's deficient performance prejudiced him under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Martinez*, 566 U.S. at 14, 132 S.Ct. 1309. He must also show that the underlying IATC claim is “substantial,” meaning it “has some merit.” *Ibid.*; *Trevino I*, 569 U.S. at 423, 133 S.Ct. 1911. The district court denied a COA on this latter ground, ruling that Tong's IATC claim lacked merit. Tong's trial counsel, the court noted, “retained professional investigators, conducted interviews with Tong and members of his family, and retained appropriate experts to assist in the preparation of Tong's mitigation case.” So, any putative error by state habeas counsel could not excuse the default. *Cf. Trevino v. Davis (Trevino II)*, 861 F.3d 545, 549 (5th Cir. 2017) (“assum[ing], without deciding” that state habeas counsel was ineffective because the underlying *Wiggins* IATC claim lacked merit).

***866** Tong argues trial counsel should have discovered and presented mitigating evidence concerning “the continued cycle of abuse, abandonment, and sexual abuse that Tong suffered in the decade after he came to the United States as a child.” He contends counsel failed to follow the TCCA's admonition that reasonable counsel in capital cases should inquire into possible childhood abuse, and not rely solely on the defendant's own account. Although Tong gave no indication of sexual abuse in his biographical history to counsel, he now argues that a reasonable mitigation investigation would have uncovered the abuse. Trial counsel was inadequate, he argues, by interviewing only a few family members; by putting on a mitigation case at trial that lasted only half a day; and by requesting investigation funding only shortly before trial.

The State maintains trial counsel's mitigation investigation did not fall below professional standards. It highlights that counsel employed two investigators, who logged over a hundred hours in mitigation investigation, interviewing Tong, relatives, and acquaintances on numerous occasions. Counsel also had a complete report of Tong's educational history, neuropsychologic evaluation, and evaluation from a mitigation expert on the Vietnamese immigrant experience. Counsel then tactically decided which testimony to present based on whether it would support or hinder Tong's mitigation case.

We agree with the district court that Tong's IATC claim lacks merit. At a minimum, the claim fails because Tong has not shown he was prejudiced by counsel's allegedly inadequate mitigation investigation. *See Strickland*, 466 U.S. at 700, 104 S.Ct. 2052 (“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”). Tong must show that, “under Texas's capital sentencing statute, the additional mitigating evidence is so compelling that there is a reasonable probability that at least one juror could have determined that because of the defendant's reduced moral culpability, death is not an appropriate sentence.” *Canales v. Davis*, 966 F.3d 409, 412 (5th Cir. 2020) (cleaned up) (quoting *Kunkle v. Dretke*, 352 F.3d 980, 991 (5th Cir. 2003)). The likelihood of a different result must be substantial, not just conceivable. *Ibid.* (quoting *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). To assess prejudice, “we reweigh the evidence in aggravation against the totality of available mitigating evidence.” *Ibid.* (quoting *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527).

To show prejudice, Tong relies entirely on 2014 affidavits submitted by his cousins, John and Sang, describing sexual abuse. These affidavits are the only evidence that Tong was sexually abused as a child. We cannot consider them, however, because they are not part of the state-court record. The Supreme Court held in *Shinn* that, under 28 U.S.C. § 2254(e)(2), “a prisoner is ‘at fault’ ” for failing to develop the state-court record, “even when state postconviction counsel is negligent.” *Shinn*, 596 U.S. at 384, 142 S.Ct. 1718.⁵ We can expand the state-court record only if the petitioner satisfies § 2254(e)(2)'s stringent requirements.

*867 *Ibid.* Tong does not contend he meets any of those requirements, so we cannot consider his cousins' affidavits, or any evidence of sexual abuse contained therein. *See ibid.*

5 In *Mullis*, we explained that *Shinn* bars a petitioner from using “evidence developed in a *Martinez* hearing to assess the [petitioner's] underlying merits claim of [IATC].” *Mullis*, 70 F.4th at 910. In other words, a petitioner cannot factually develop an IAHC claim that is “little more than a Hail Mary pass to get evidence admitted as to the merits of an IATC claim.” *Ibid.* That is precisely what Tong tries to do here. He admits that he “only raises the ineffectiveness of his state post-conviction counsel as means to permit merits review of [his *Wiggins* IATC claim].” *Shinn* forecloses that attempt.

Accordingly, there can be no conceivable, let alone substantial, likelihood that a juror would have changed his mind with respect to Tong's capital sentence. *Cf. Canales*, 966 F.3d at 412. Without any additional mitigation evidence to tip the scales, we have nothing new to “reweigh.” *Ibid.*⁶ The district court was therefore correct that Tong's underlying *Wiggins* IATC claim was insubstantial, regardless of any deficient performance by his state habeas counsel. As a result, no reasonable jurist could debate that there was no cause justifying the procedural default.

6 Furthermore, even if there were additional mitigating evidence to consider, we would have to reweigh it against the extraordinary aggravating evidence presented to the jury about Tong's continued dangerousness. Most importantly, the jury heard that only two days before he murdered Trinh, Tong remorselessly shot a sick toddler and a father after breaking into a home and holding the mother at gunpoint.

In sum, we deny Tong's request for a COA on this claim.

C. *Voir dire* claim

Finally, we address Tong's claim that the state court *voir dire* violated his right to due process. Tong was granted a COA on this claim. We hold the claim is procedurally defaulted and Tong has shown no cause to excuse the default.

1.

At the beginning of jury selection, the trial judge informed defense counsel that Tong was allowed unlimited peremptory strikes. This decision contravened Texas law, which permits only 15 peremptory strikes. *See Tex. Code Crim. P. art. 35.15(a)*. After Tong used 25 peremptory strikes and 10 jurors were seated, the State objected and the judge changed course. It announced that Tong had used all available peremptory challenges and, going forward, would have to challenge potential jurors for cause. The judge overruled defense counsel's objection to this change in procedure. Tong wanted to use a peremptory strike on the eleventh juror—Venireperson Sullivan—but the judge ruled Tong was out of peremptory strikes. Tong admits there were no grounds to strike Sullivan for cause.

Tong now contends that the trial court's change in *voir dire* procedure denied him due process under the Fourteenth Amendment. He raised this *voir dire* claim on direct appeal at the TCCA, which rejected the claim as inadequately briefed under *Texas Rule of Appellate Procedure* 38.1(h). *Tong*, 25 S.W.3d at 710.

We cannot review a habeas claim if the last state court to consider it “expressly relied on a state ground for denial of relief that is both *independent* of the merits of the federal claim and an *adequate* basis for the court's decision.” *Roberts v. Thaler*, 681 F.3d 597, 604 (5th Cir. 2012) (citation omitted). If the state court relied on a procedural rule to deny relief, the rule must be “firmly established and regularly followed.” *Id.* at 604–05 (internal quotation marks and citation omitted). We have held that “Texas's rule regarding inadequate briefing in the capital context constitutes a valid procedural bar to federal habeas relief.” *Id.* at 607.⁷ That rule has been “regularly followed by [Texas] courts, and applied to the majority of *868 similar claims.” *Ibid.* (alteration adopted) (citation omitted). Therefore, Tong's *voir dire* claim is procedurally defaulted.

⁷ Tong admits *Roberts* controls on this point but “assert[s] this holding is incorrect” for preservation purposes.

Tong, however, argues the default is excused by his state appellate counsel's deficient performance on direct appeal. See *id.* at 605 (petitioner may overcome independent-and-adequate-state-ground default by showing cause and prejudice) (citations omitted). The Supreme Court acknowledges that ineffective assistance of appellate counsel (“IAAC”) for failing properly to preserve a constitutional claim for review in state court can provide cause to excuse procedural default. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 488–89, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Appellate counsel's performance, however, “must have been so ineffective as to violate the Federal Constitution”—that is, it violated the petitioner's right to effective assistance of counsel. *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (citing *Carrier*, 477 U.S. at 488–89, 106 S.Ct. 2639).⁸

⁸ Additionally, a claim of IAAC must first “be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.” *Carrier*, 477 U.S. at 489, 106 S.Ct. 2639. Tong did so by bringing the IAAC claim before the TCCA in his state habeas petition. Seeing no constitutional error in the trial court's *voir dire* ruling, the TCCA ruled that appellate counsel was not ineffective for failing to adequately brief this issue. Tong does not, however, independently appeal the denial of his IAAC claim. He instead addresses IAAC simply as a means to address the merits of his underlying *voir dire* claim. We therefore do not address the TCCA's ruling on his independent IAAC claim.

2.

We must determine, then, whether Tong's state appellate counsel performed deficiently and whether the deficiency prejudiced his defense. See *Coleman*, 501 U.S. at 752, 111 S.Ct. 2546 (citing *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052); *Moore v. Vannoy*, 968 F.3d 482, 488 (5th Cir. 2020). In other words, Tong must show “a reasonable probability that, but for” appellate counsel's inadequate briefing, “the result of [his appeal] would have been different.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The TCCA denied habeas relief on his IAAC claim because Tong did not “demonstrate that any of the jurors who served during his capital murder trial were not qualified” or could be “subject to a challenge for cause.” Moreover, Tong failed “to show that the trial court erred in its *voir dire* process or that the *voir dire* process harmed the applicant.” Tong argues, to the contrary, that he showed prejudice because an adequately briefed *voir dire* claim would have been a “dead-bang” winner on appeal.

We disagree. Criminal defendants have the right to trial by an impartial and competent jury, a right protected by the *voir dire* process. See U.S. Const. amend. VI; *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 220, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017). It is the trial judge's province to conduct jury selection and seat an impartial jury. *Skilling v. United States*, 561 U.S. 358, 386, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Because peremptory challenges “are not required by the Constitution,” it is “for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.” *Ross v. Oklahoma*, 487 U.S. 81, 89, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Absent a showing of juror bias, there is no federal constitutional concern regarding deprivation of peremptory challenges. See *869 *Rivera v. Illinois*, 556 U.S. 148, 157, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009). “[T]he mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution.” *Id.* at 158, 129 S.Ct. 1446. The Due Process Clause is concerned only with “the fundamental elements of fairness in a criminal trial,” not “meticulous observance of state procedural prescriptions.” *Ibid.* (citation omitted).

Tong fails to show that the *voir dire* in his state trial implicated any due process concerns. The Supreme Court's decisions in *Rivera* and *Skilling* show why this is so. In *Rivera*, even where the trial court seated a juror over the defendant's peremptory challenge—a decision which “was at odds with state law”—there was no constitutional violation because the defendant could not point to a single “biased juror” who sat. *Id.* at 159–60, 129 S.Ct. 1446 (citation omitted). The Court stated: “If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern.” *Id.* at 157, 129 S.Ct. 1446. Similarly, in *Skilling*, the defendant complained that he would have struck six more jurors “had he not already exhausted his peremptory challenges”

provided by the trial court. 561 U.S. at 397, 130 S.Ct. 2896. The Supreme Court found no grounds to reverse the guilty verdict because the defendant could not “establish that a presumption of prejudice arose or that actual bias infected the jury that tried him.” *Id.* at 398, 130 S.Ct. 2896.

Tong cannot overcome these precedents. He feebly argues that he was prejudiced because one cannot know how *voir dire* would have played out had the judge followed Texas's rules on peremptory strikes. That is pure speculation. Tong, moreover, ignores that the judge's error *benefited* him by giving him 10 extra peremptory strikes.

More importantly, Tong fails to identify any biased juror seated as a result of the change in procedure. *See Skilling*, 561 U.S. at 398, 130 S.Ct. 2896. The only juror on whom he wanted to use a peremptory strike—Sullivan—was by Tong's own admission neither biased nor subject to for-cause challenge. He argues only that defense counsel was concerned with some of her “troubling” *voir dire* responses. But he fails to explain why such concerns rise to the level of a due process violation.

In sum, Tong fails to show that, even if his *voir dire* claim had been properly briefed, the TCCA would likely have ruled in his favor on direct appeal. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Moore*, 968 F.3d at 489–90. As a result, Tong cannot show cause to excuse the procedural default of that claim.⁹

⁹ Tong also tries a last-ditch argument that his sentence should be vacated because the trial court's *voir dire* ruling was a structural error. We need not address this argument because, even assuming structural error (which we do not decide), Tong must still show cause to excuse his procedural default, which he fails to do. *See, e.g., McCoy v. United States*, 815 F.3d 292, 295–96 (7th Cir. 2016) (requiring § 2255 petitioner to demonstrate cause and prejudice to excuse procedural default of a claim of structural error); *Jones v. Bell*, 801 F.3d 556, 563 (6th Cir. 2015) (“Habeas petitioners must *additionally* show ‘actual prejudice’ to excuse their default—even if the error that served as the ‘cause’ is a structural one that would require a new trial.”); *Hatcher v. Hopkins*, 256 F.3d 761, 764 (8th Cir. 2001) (“The Supreme Court has recently detailed the circumstances necessary to bypass a state-law procedural default in a § 2254 petition, and ‘structural error’ is not listed among them.” (citing *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546)).

IV. Conclusion

The district court's order denying Tong's request for a *Rhines* stay is AFFIRMED. *870 Tong's motion for an additional COA on his *Wiggins* claim is DENIED. The district court's judgment denying Tong a writ of habeas corpus on his *voir dire* claim is AFFIRMED.

All Citations

90 F.4th 857

APPENDIX B

5th Circuit - Denial of Petition for Rehearing

United States Court of Appeals
for the Fifth Circuit

No. 19-70008

CHUONG DUONG TONG,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:10-CV-2355

ON PETITION FOR REHEARING EN BANC

Before SMITH, HIGGINSON, and DUNCAN, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX C

District Court Memorandum and Final Order

ENTERED

March 06, 2023

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHUONG DUONG TONG,

Petitioner,

VS.

RICK THALER, LORIE DAVIS and
BOBBY LUMPKIN, DIRECTOR, TDCJ,

Respondents.

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Civil Case No. 4:10-CV-02355

MEMORANDUM AND ORDER
GRANTING MOTION TO ENTER JUDGMENT

The Fifth Circuit remanded this case for further development on a procedurally defaulted claim that Tong's trial counsel failed to develop and present mitigating evidence during the punishment phase of Tong's trial. The Fifth Circuit found that a hearing was required under *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). In *Martinez*, the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel:

[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 . . . (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Id. at 14, 132 S.Ct. at 1381.

After the remand, the Supreme Court issued its decision in *Shinn v. Martinez Ramirez*, ___ U.S. ___, 142 S.Ct. 1718, 212 L.Ed.2d 713 (2022). In *Martinez Ramirez*, the Court held that lower courts interpreted the *Martinez* exception too broadly, and that a federal habeas court cannot receive new evidence on a defaulted claim if the petitioner failed to develop the factual record for his claim in state court. In other words, *Martinez* permits the presentation of new evidence only when the petitioner satisfies the stringent requirements of 28 U.S.C. § 2254(e)(2), requiring the petitioner to develop the factual record in state court, unless the claim relies on a new rule of constitutional law or on a factual predicate that could not have been discovered through the exercise of due diligence. The respondent now moves to enter judgment and terminate the remand (Dkt. No. 206) on the grounds that compliance with the remand is now barred by *Martinez Ramirez*.

I. THE SCOPE OF THE REMAND

The Fifth Circuit remanded the case for development of Tong’s claim that trial counsel failed to develop and present mitigating evidence about Tong’s background. Tong has acknowledged that this claim is procedurally defaulted. Under prior interpretations of *Martinez*, Tong would have been required to show that state habeas counsel was ineffective in failing to raise these claims, and that the underlying ineffective trial assistance claims are substantial.

A. THE EFFECT OF MARTINEZ RAMIREZ

Martinez Ramirez makes clear that this Court may only allow further development of Tong’s claim if Tong did not “fail to develop” the factual record in state court. Even if

Tong can show that his state habeas counsel rendered ineffective assistance, the failure to develop the record is attributable to Tong under agency principles. *Ramirez Martinez*, 142 S.Ct. at 1733. Thus, even if habeas counsel was ineffective, thereby providing cause for the default, the absence of a factual record prevents Tong from demonstrating prejudice, and this Court cannot consider any evidence that was not developed in state court.

B. MITIGATION EVIDENCE

Tong has previously argued that his state habeas counsel was ineffective for failing to discover and develop readily available evidence of Tong's difficult childhood. (Dkt. No. 195 at 9–10). Because Tong, through his counsel, failed to develop this record in state court, Section 2254(e)(2), as explicated by *Martinez Ramirez*, prohibits this Court from considering any new evidence in support of Tong's claim. Thus, even if Tong can show that state habeas counsel was ineffective, in the absence of new evidence supporting his claim, Tong cannot demonstrate any prejudice flowing from such ineffective assistance. There is therefore no basis for excusing Tong's procedural default.

Tong argues that this Court should not grant the respondent's motion because Tong anticipates requesting a stay to allow him to return to state court and exhaust his newly developed evidence. "Because granting a stay effectively excuses a petitioner's failure to present his claims first to state courts, stay and abeyance is only appropriate when the district court determines there is good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." *Rhines v. Weber*, 544 U.S. 269, 277, 125

S.Ct. 1528, 1535, 161 L.Ed.2d 440 (2005). A claim is plainly meritless if it is procedurally defaulted such that the state court will not consider the claim on the merits. *See Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005).

Tong speculates, citing various concurring and dissenting opinions, that the Texas Court of Criminal Appeals might find that ineffective assistance of state habeas counsel constitutes cause for the default, and will therefore address the merits of his claim. That Court has never held that ineffective assistance of habeas counsel constitutes cause, and this Court will not grant a stay based on Tong's hypothetical hope that the law will change.

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a). The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

- (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
- (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
- (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id. None of these exceptions applies to this case. Stay and abeyance would therefore be futile.

Tong also argues that dismissal at this point would violate the mandate rule because the Fifth Circuit remanded this case for development of the claim. An exception to the mandate rule occurs, however, when there is an intervening change of law by a controlling authority. *Ball v. LeBlanc*, 831 F.3d 346, 351 (5th Cir. 2018). *Martinez Ramirez* is such an intervening change of law. Moreover, *Martinez Ramirez* renders pointless any further development of the claim in this Court because any relief granted on the basis of new evidence would have to be reversed on appeal as a violation of 28 U.S.C. § 2254(e)(2) and *Martinez Ramirez*.

Finally, Tong argues that he had a constitutional right to effective assistance of counsel in his state habeas proceeding because it presented his only meaningful opportunity to raise his ineffective assistance of trial counsel claim. He acknowledges that there is no general right to counsel in a state habeas proceeding, but argues that case law allows for an exception in these circumstances. This is simply not the current state of the law and would run contrary to the entire reasoning of *Martinez Ramirez*.

II. CONCLUSION

While Tong presents a serious claim that he received ineffective assistance of counsel during the punishment phase of his trial, that claim is indisputably procedurally defaulted. Under the Supreme Court's recent decision in *Martinez Ramirez*, this Court cannot consider any new evidence in support of the claim. There is therefore no point in

proceeding further, and the respondent's motion to enter judgment and terminate the remand (Dkt. No. 206) is **GRANTED**.

Certificate of Appealability

Tong has not requested a certificate of appealability ("COA"), but this Court may determine whether he is entitled to this relief in light of the foregoing ruling. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court to deny COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are

suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213

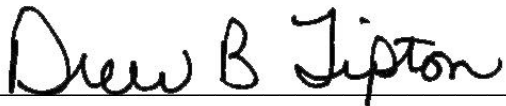
F.3d 243, 248 (5th Cir.). The Supreme Court has stated that:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). This Court has carefully considered Tong's argument in light of recent Supreme Court precedent. The Court finds that Tong's claim is foreclosed. Because, however, this decision is based on a very recent Supreme Court decision which has not yet had much application by lower courts, Tong's arguments deserve encouragement to proceed further. This Court concludes that Tong is entitled to a certificate of appealability.

It is SO ORDERED.

Signed on March 4, 2023.


DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

ENTERED

March 06, 2023

Nathan Ochsner, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CHUONG DUONG TONG,

Petitioner,

VS.

**RICK THALER, LORIE DAVIS and
BOBBY LUMPKIN, DIRECTOR, TDCJ,**

Respondents.

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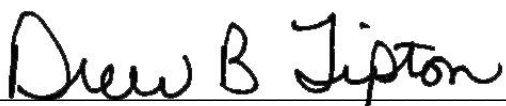
Civil Case No. 4:10-CV-02355

FINAL JUDGMENT

In accordance with the Memorandum and Order Granting Motion to Enter Judgment signed by the Court on March 4, 2023, the Court enters Final Judgment **DISMISSING WITH PREJUDICE** Plaintiff's claims in this case. Tong is granted a certificate of appealability. All pending motions are terminated.

This is a **FINAL JUDGMENT**.

Signed on March 6, 2023.



DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

APPENDIX D

Relevant pages from memorandum denying in part petition for writ of habeas corpus

adversely resolved by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness in 28 U.S.C. § 2254(e)(1) should not apply. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997).

III. ANALYSIS

Tong's petition raises sixteen categories of claims for relief, with some of those containing subclaims. They are addressed in turn below.

A. Jury Voir Dire

At the beginning of jury selection, the trial judge, over prosecution objection, informed defense counsel that he would allow the defense unlimited peremptory strikes. After jury selection began, and after Tong struck twenty five jurors and there were ten seated, the trial court changed course, and announced that Tong had used all his peremptory challenges and would have to challenge additional jurors for cause before the court would consider allowing another peremptory strike. Tong wanted to excuse one juror who ended up on the jury. He now contends that the trial court's change in procedure denied him due process and effective assistance of counsel. Respondent argues that this claim is procedurally defaulted.

1. Procedural Default

The procedural default doctrine may bar federal review of a claim. "When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state

procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment.” *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

[i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). “This doctrine ensures that federal courts give proper respect to state procedural rules.” *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be “grounded in concerns of comity and federalism”).

To be “adequate” to support the judgment, the state law ground must be both “firmly established and regularly followed.” *Ford v. Georgia*, 498 U.S. 411, 424 (1991). If the state law ground is not firmly established and regularly followed, there is no bar to federal review and a federal habeas court may consider the merits of the claim. *Barr v. Columbia*, 378 U.S. 146, 149 (1964). An important consideration in determining whether an “adequate” state law ground exists is the application of the state law ground to identical or similar claims. *Amos v. Scott*, 61 F.3d 333, 340-41 (5th Cir. 1995). The adequacy of a state law ground to preclude federal court review of federal constitutional claims is a federal question. *Howlett v. Rose*, 496 U.S. 356, 366 (1990). If the state court decision rests on federal law, then there is no bar to federal habeas corpus review.

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040–41 (1983); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (applying the presumption in the context of habeas).

Tong raised a claim concerning jury voir dire on direct appeal. The TCCA rejected the claim as inadequately briefed. *Tong*, 25 S.W.3d at 710. The Fifth Circuit recently made clear that a dismissal for inadequate briefing is an independent and adequate state procedural ground.

A survey of the TCCA’s capital sentencing jurisprudence reveals that it regularly rejects claims, both on direct and postconviction review, on the basis that these claims are inadequately briefed . . . [W]e hold now that under the prevailing standards, Texas’s rules have been regularly followed by its courts, and applied to the majority of similar claims. . . . Our sister courts of appeal, in addressing analogous provisions from other states, have likewise found them to act as independent and adequate state procedural bars. *See House v. Hatch*, 527 F.3d 1010, 1029–30 (10th Cir. 2008) (holding that New Mexico’s requirement of adequate briefing is an independent and adequate procedural bar to federal habeas relief); *Clay v. Hatch*, 485 F.3d 1037, 1040–41 (8th Cir. 2007) (holding that Arkansas’s proper abstracting rule is an independent and adequate procedural bar to federal habeas relief).

Roberts v. Thaler, 681 F.3d 597 (5th Cir. 2012). *Roberts* thus makes it clear that the TCCA’s dismissal of this claim as inadequately briefed constitutes a procedural default.

Tong argues that the TCCA did not regularly apply this bar at the time it decided Tong’s appeal. His argument, however, cites only one TCCA case in support, and cites only a dissent in that case. Tong’s argument on this issue is unconvincing. Therefore, this Court

can address the claim only if Tong demonstrates cause and prejudice, or that failure to address the claim will result in a fundamental miscarriage of justice.

“Cause” for a procedural default requires a showing that some objective factor external to the defense impeded counsel’s efforts to comply with the state procedural rule.

Cause can be shown, for example, by demonstrating that the evidence needed to properly raise a claim was suppressed by the State.

The fundamental-miscarriage-of-justice exception is limited to the following circumstances: (1) where the petitioner can show that “a constitutional violation has ‘probably resulted’ in the conviction of one who is ‘actually innocent’ of the substantive offense,” *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (quotation omitted); or (2) in the capital sentencing context, where the petitioner can show “‘by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.’” *Id.* (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)). Importantly, the fundamental-miscarriage-of-justice exception applies only where a petitioner supplements a constitutional claim with a colorable showing of factual, as opposed to legal, innocence. *See McCleskey v. Zant*, 499 U.S. at 495 (quoting *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986)); *accord Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Tong does not contend that he is factually innocent of capital murder, or that he is legally ineligible for the death penalty. He does argue that he received ineffective assistance of appellate counsel, and that this constitutes cause for his default. Ineffective assistance of

counsel can constitute cause for a procedural default only if the ineffective assistance of counsel claim is, itself, exhausted in state court. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Tong did raise a claim in his state habeas application that appellate counsel was ineffective for failing to adequately brief the voir dire issue. The state habeas court found that the trial court did not err, and that counsel was therefore not ineffective for failing to adequately brief the issue.

Tong raises a separate, freestanding, claim of ineffective assistance of appellate counsel. As discussed in more detail in the analysis of that claim, *see* § II. J., *infra*, Tong does not show that counsel was constitutionally ineffective. Because he fails to demonstrate ineffective assistance of counsel, he has no cause for his procedural default of the voir dire claim, and this Court cannot grant relief. In any event, as discussed below, Tong cannot show prejudice from his appellate counsel's allegedly deficient performance.

2. Prejudice Caused by the Change in Procedure

Tong argues that he relied on the trial court's promise of unlimited peremptory challenges in formulating his jury selection strategy, and that the change in procedure rendered the process unfair and handicapped counsel. The state habeas court found that Tong did not rely on any such promise, because he challenged four jurors for cause during the time he believed he had unlimited peremptory challenges. SH at 552. Moreover, Tong fails to identify any peremptory challenge he would not have used had he known that he had a limited number of such challenges available to him. Finally, the state habeas court found that the one juror Tong wanted, but was unable, to excuse, was not challengeable for cause.

Id. The state habeas court found insufficient evidence that the juror was prejudiced or otherwise unfit to serve as a juror. SH at 552.

“‘A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly conducted.’” *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000) (quoting *Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992)). Tong does not demonstrate such reasonable probability.

Specifically, Tong fails to demonstrate: (1) that he would have conducted voir dire differently had he known he did not have unlimited peremptory challenges; or (2) that the one juror affected by the trial court’s change was in any way biased or unqualified to serve. He therefore fails to demonstrate a reasonable probability that the outcome would have been different if the trial court had not changed procedures, and thus fails to demonstrate that this claim would have succeeded on direct appeal even if the voir dire claim had been adequately briefed. Moreover, there is no constitutional right to peremptory challenges. *See, e.g., Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). Tong therefore both fails to show cause for his procedural default, and fails to demonstrate any constitutional error. The due process claim thus fails both on the merits, and on the basis of the procedural default.⁴

B. Confession-Related Claims

⁴ Tong argues that the change in voir dire procedure constitutes structural error. This argument is unavailing. A finding of structural error does not excuse a procedural default or result in a presumption of error on the merits. It simply means that any such error, once demonstrated, necessarily affected the trial and is not subject to harmless error analysis.

restrict the wide latitude counsel must have in making tactical decisions.” *Id.* (quotation marks and citation omitted). Whether a counsel’s decisions are legitimate will depend on the circumstances. *Id.* at 16.

Ayestas v. Thaler, 462 Fed. App’x 474, 479, (5th Cir. 2012), *vacated on other grounds*, 133 S.Ct. 2764 (2013).

Other than the evidence that he was sexually abused, much of the evidence Tong now cites is largely duplicative of, or merely provides some additional detail to, evidence that was before the jury. Moreover, as Respondent points out, counsel developed a biographical history with input from Tong. Tong made no mention of any sexual abuse in his youth. This omission provides some reason why counsel did not go digging for such evidence.

In sum, Tong fails to demonstrate that his counsel were deficient. They retained professional investigators, conducted interviews with Tong and members of his family, and retained appropriate experts to assist in the preparation of Tong’s mitigation case. Tong is not entitled to relief on this claim.

J. Ineffective Assistance of Appellate Counsel

Tong next raises several claims of ineffective assistance of counsel on his direct appeal. A defendant is constitutionally entitled to effective assistance of appellate counsel when he has a right to appeal under state law. *Evitts v. Lucy*, 469 U.S. 387, 395 (1985). The *Strickland* two-prong standard applies to claims of ineffective assistance of appellate counsel. *Duhamel v. Collins*, 955 F.2d 962, 967 (5th Cir. 1992).

Appellate counsel is not required to raise every possible non-frivolous claim on appeal. “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.” *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). However, “a reasonable attorney has an obligation to research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful. . . . Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court’s attention.” *United States v. Williamson*, 183 F.3d 458, 462-63 (5th Cir. 1999).

1. Voir Dire

Tong first argues that counsel was ineffective by inadequately briefing the jury voir dire issue discussed above. While the trial court’s actions in changing the voir dire process midstream is quite troubling, Tong fails to identify any due process violation, as discussed in detail above. Because the underlying claim does not state a constitutional violation, it did not constitute deficient performance for counsel to fail to fully brief this issue, nor can Tong demonstrate any *Strickland* prejudice. For the same reasons, the state habeas court’s conclusion that counsel was not ineffective for failing to adequately brief this issue was not unreasonable. This claim is without merit.

2. Confession Issues

Tong next argues that appellate counsel was ineffective by failing to raise issues relating to his confessions. As discussed above, however, these claims lack merit. Counsel was not ineffective for failing to raise meritless claims.

3. Identification Issues

In his final claim of ineffective assistance of appellate counsel, Tong argues that counsel was ineffective for failing to raise any issues relating to Alvear’s identification of Tong. As discussed above, however, Tong fails to show that the lineup was improperly

APPENDIX E

Tong v. State, 25 S.W.3d 707 (Tex. Crim. App. 2000)

25 S.W.3d 707
Court of Criminal Appeals of Texas,
En Banc.

Chuong Duong TONG, Appellant,
v.
The STATE of Texas.

No. 73058.

|
April 12, 2000.

|
Opinion Denying Rehearing Sept. 20, 2000.

Synopsis

Defendant was convicted in the District Court, Harris County, [William T. Harmon](#), J., of capital murder, and he was sentenced to death. On automatic direct appeal, the Court of Criminal Appeals, [Meyers](#), J., held that: (1) anti-sympathy jury instruction did not violate Eighth Amendment; (2) admission of unadjudicated extraneous offenses at punishment did not violate Fourteenth Amendment; and (3) defendant was not denied effective assistance of counsel.

Affirmed.

[Johnson](#), J., dissented by separate opinion, in which [Mansfield](#) and [Womack](#), JJ., joined.

[Womack](#) and [Johnson](#), JJ., also dissented from denial of motion for rehearing.

Attorneys and Law Firms

*709 [Robert A. Morrow](#), [Janet Morrow](#), Spring, for appellant.

Carol M. Cameron, Asst. DA, Houston, for State.

OPINION

[MEYERS](#), J., delivered the opinion of the Court in which [McCORMICK](#), P.J., and [KELLER](#), [PRICE](#), [HOLLAND](#), and [KEASLER](#) joined.

Appellant was convicted of capital murder in March, 1998. [tex. Penal Code Ann. § 19.03\(a\)](#). Pursuant to the jury's answers to the special issues set forth in [Texas Code of Criminal Procedure article 37.071 §§ 2\(b\) and 2\(e\)](#), the trial judge sentenced appellant to death. [Art. 37.071 § 2\(g\)](#).¹ Direct appeal to this Court is automatic. [Art. 37.071 § 2\(h\)](#). Appellant raises eighteen points of error, but does not challenge the sufficiency of the evidence to support either his conviction or his punishment. We affirm.

¹ Unless otherwise indicated all future references to Articles refer to Code of Criminal Procedure.

JURY SELECTION

In his first point of error, appellant complains that the trial judge abused his discretion by changing the method of jury selection in the middle of voir dire. Appellant asserts that this change prevented him from intelligently utilizing his peremptory challenges, thus denying him the effective assistance of counsel, due process of law, and due course of law.

According to appellant, the judge assured him at the beginning of trial that he “would be given as many peremptory challenges as he requested,”² and he relied on this promise in conducting his voir dire. However, appellant contends that, as they were nearing the end of voir dire, the trial judge abruptly returned to “the old-fashioned *710 way,” but refused to restore any of his strikes. Hence, appellant claims he went from a position of having unlimited strikes to a position of having no strikes, which harmed him by subsequently forcing him to accept an undesirable juror.

² The exact agreement is not confirmed in the record. However, there are occasional references by both parties to appellant having “unlimited peremptories.”

Appellant maintains that the trial court's decision to alter its voir dire procedure deprived appellant of due process of law, due course of law and the effective assistance of counsel.³ However, appellant fails to cite any relevant authority, from this jurisdiction or from any other, to support his constitutional claims. In fact, Appellant cites only one case which he maintains is favorable to his position. Specifically, he asserts that *Sanne v. State*, 609 S.W.2d 762, 767 (Tex.Crim.App.1980), supports his constitutional claim. However, we can find nothing in *Sanne* that can be read to support appellant's argument. That case dealt with a facial constitutional challenge to the statutory requirement in death penalty cases that the parties exercise peremptory challenges after examination of individual venire persons, rather than being able to use peremptories after having seen the entire venire. *Sanne* neither deals with the same issue presented in the instant case, nor provides any relevant constitutional or statutory framework for evaluating his claim.

³ Appellant does not argue that the procedure utilized by the trial court was non-constitutional error under any relevant statute. Instead, he asserts, through a detrimental reliance/estoppel-type-argument, that the trial judge's decision to return to the “old-fashioned” method of voir dire, after he had initially told counsel that he would provide him with unlimited strikes, amounted to constitutional error.

This is not to say that appellant may not make a novel argument for which there is no authority directly on point. However, in making such an argument, appellant must ground his contention in analogous case law or provide the Court with the relevant jurisprudential framework for evaluating his claim. In failing to provide any relevant authority suggesting how the judge's actions violated any of appellant's constitutional rights, we find the issue to be inadequately briefed. See *tex.R.App. P. 38.1(h)*; see also *McDuff v. State*, 939 S.W.2d 607, 621 (Tex.Crim.App.1997). **Appellant's first point of error is overruled.**

PUNISHMENT PHASE

In his fourth point of error, appellant charges that his capital punishment proceedings violated the Cruel and Unusual Punishment Clause under the Eighth and Fourteenth Amendments. Specifically, he notes that the trial court instructed the jury that it could not be influenced by “sympathy” when answering the special issues.⁴ Appellant maintains that this “anti-sympathy” charge misled jurors into thinking that it would be improper for them to consider sympathy based on mitigating evidence, which might ultimately have led them to conclude that a life sentence was more appropriate than death.

⁴ The trial court instructed the jury that it was “not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you and in answering Special Issue No. 2.”

Appellant's assertion is contrary to the law. As we recently reiterated in *Prystash v. State*, 3 S.W.3d 522, 534–35 (Tex.Crim.App.1999), evidence that relies on mere sympathy or emotional response is irrelevant to the jury's consideration of the deathworthiness of the defendant. See also *Rhoades v. State*, 934 S.W.2d 113, 126 (Tex.Crim.App.1996) (finding photographs of defendant which depict cheerful early childhood irrelevant because such evidence has no relationship to defendant's conduct);

Goff v. State, 931 S.W.2d 537, 555–56 (Tex.Crim.App.1996) (homosexuality of victim, if unknown to defendant and unrelated to crime, irrelevant to jury's ability to consider and give mitigating effect to *711 background or character of defendant). Indeed, we have held that anti-sympathy charges are appropriate in that they properly focus the jury's attention on those factors relating to the moral culpability of the defendant. See *McFarland v. State*, 928 S.W.2d 482, 522 (Tex.Crim.App.1996). Nor do such charges unconstitutionally contradict mitigation instructions. See *Fuentes v. State*, 991 S.W.2d 267, 276–77 (Tex.Crim.App.1999); *Green v. State*, 912 S.W.2d 189, 195 (Tex.Crim.App.1995). **Appellant's fourth point of error is overruled.**

In his fifth point of error, appellant contends that the trial court erred by refusing to instruct the jury that they could not consider unadjudicated offenses unless the State proved beyond a reasonable doubt that appellant committed those acts. Such an instruction is not required when, as was done in the instant case, the special issues include an instruction on the State's burden of proof. *Jackson v. State*, 992 S.W.2d 469, 477 (Tex.Crim.App.1999). **Point of error five is overruled.**

Appellant argues in his seventh point of error that the admission of unadjudicated extraneous offenses at punishment violated the Fourteenth Amendment. This Court has held on a number of occasions that Article 37.071, which controls the sentencing phase of a capital murder trial, allows the admission of unadjudicated extraneous offenses at punishment and that this practice does not violate Fourteenth Amendment. See, e.g., *Cockrell v. State*, 933 S.W.2d 73, 93–94 (Tex.Crim.App.1996). Appellant recognizes this line of cases, but argues that they should be overturned. This we decline to do. **Point of error seven is overruled.**

In his fifteenth point of error, appellant argues that the Eighth Amendment erects a *per se* bar to victim character/impact evidence. Appellant recognizes that we have already addressed and rejected an identical argument in *Mosley v. State*, 983 S.W.2d 249, 261–265 (Tex.Crim.App.1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 550 (1999); see also *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). We decline appellant's invitation to reconsider that decision. **Point of error fifteen is overruled.**

In his sixteenth point of error, appellant asserts that he is entitled to a new trial on punishment so that his defense counsel “may make the choice this Court declared available in *Mosley v. State* (decided after appellant's trial), that is, whether to waive the mitigation issue entirely as a means of preventing the introduction of any victim [character/impact] evidence.” Appellant claims that the law that existed at the time of his trial prevented him from waiving the mitigation issue. He argues that had the law given him the opportunity that *Mosley* provides, he would have been able to prevent the State from introducing any victim impact evidence.

This Court's opinion in *Mosley* did not create, as appellant maintains, a new rule regarding waiver of the mitigation special issue. To date, this Court has not decided whether a capital defendant can waive that issue.⁵ Cf. *Prystash v. State*, 3 S.W.3d 522, 532 (Tex.Crim.App.1999). The statement in *Mosley* that appellant claims created a “newly announced waiver choice” was not necessary to the holding in that case and is therefore *dicta*. It is true that the majority in *Mosley* suggested that a defendant could waive reliance upon and submission of the mitigation issue, thereby rendering victim impact and character evidence irrelevant and inadmissible. See *712 Art. 37.071 § 2(e); *Mosley*, 983 S.W.2d at 264. However, this statement was made in connection with several points concerning victim impact evidence, and the holding under these points pertains to the admissibility of the victim impact evidence, not whether the special issue can be waived. **Point of error sixteen is overruled.**

⁵ In the instant case, appellant made no attempt to waive the mitigation issue at trial. In the absence of a timely request or objection, we will not decide the substantive issue of whether the mitigation issue is waivable. See Tex. R.App. P. 33.1(a)(1) (as a prerequisite to complaining on appeal, party must show that he made timely request, objection, or motion).

EFFECTIVE ASSISTANCE OF COUNSEL

In seven separate points of error, appellant claims that his trial counsel rendered ineffective assistance under the state and federal constitutions. When confronted with an ineffective assistance of counsel claim from either stage of a capital trial, we apply

the two-pronged analysis set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See *Hernandez v. State*, 726 S.W.2d 53 (Tex.Crim.App.1986) (adopting *Strickland* as applicable standard under Texas Constitution).

Under the first prong of the *Strickland* test, an appellant must show that counsel's performance was "deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To be successful in this regard, an appellant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Under the second prong, an appellant must show that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. 2052. The appropriate standard for judging prejudice requires an appellant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. Appellant must prove both prongs of *Strickland* by a preponderance of the evidence in order to prevail. *McFarland v. State*, 845 S.W.2d 824, 842 (Tex.Crim.App.1992).

The review of defense counsel's representation at trial is highly deferential. We engage in "a strong presumption" that counsel's actions fell within the wide range of reasonably professional assistance. See *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. It is appellant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*; see also *Chambers v. State*, 903 S.W.2d 21, 33 (Tex.Crim.App.1995).

In his second and third points of error, appellant asserts that his counsel was ineffective at the punishment stage of trial for failing to object to the State's arguments interpreting the mitigation instruction as "limiting jurors to considering only those facts that they found reduced appellant's moral blameworthiness, and interpreting the instructions to prohibit any consideration of sympathy for appellant."⁶ In its punishment charge, the trial court instructed the jurors that when answering the special issues they were "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" in considering the evidence. He further instructed the jury that in answering the mitigation special issue, the jury should consider "mitigating" evidence

⁶ In his second point, appellant asserts that he was denied his federal constitutional rights. In his third point, he asserts he was denied his rights under the Texas Constitution.

to be evidence that a juror might regard as reducing the defendant's moral blameworthiness, including, but not limited to, evidence of the defendant's background and character, or the circumstances of the offense that mitigates against the imposition of the death penalty.

*713 See Art. 37.071 § 2(f)(4). These statements were proper recitations of the law. See *Prystash v. State*, 3 S.W.3d 522, 534–35 (Tex.Crim.App.1999) (evidence that relies on mere sympathy or emotional response is irrelevant to the jury's consideration of the deathworthiness of the defendant); *McFarland*, 928 S.W.2d at 522 (anti-sympathy charge properly focuses attention of the jury on those factors relating to a moral inquiry into the culpability of the defendant).

The argument about which appellant complains was merely a reiteration of the law on which the jury was charged and was, therefore, proper argument. See *Lagrone v. State*, 942 S.W.2d 602, 619 (Tex.Crim.App.1997). As such, defense counsel did not fall below an "objective standard of reasonableness" for failing to object. **Points of error two and three are overruled.**

In his sixth point of error, appellant alleges that his trial counsel was ineffective at punishment for failing to inform the jury in his final argument that the burden of proof on the future dangerousness issue implicitly included the burden to prove beyond a reasonable doubt that appellant committed the unadjudicated extraneous offenses. Further, appellant asserts that his counsel should have informed the jury that the State had to meet this burden before the jury could use evidence of the extraneous offenses in answering the special issues. In effect, appellant argues that it was incumbent upon defense counsel to go beyond the jury charge and instruct the jury that the State's burden on the extraneous offenses was subsumed within the general burden on the special issues. There is no such duty under the law.

The jury was properly instructed regarding the burden of proof concerning the special issues. We have held that a trial court does not err in failing to submit in the punishment jury charge a separate instruction on the burden of proof on extraneous offenses. *See Kutzner v. State*, 994 S.W.2d 180, 188 (Tex.Crim.App.1999). The jury therefore was given the proper legal framework for deciding the case. The points of the charge that defense counsel chose to emphasize in argument were a matter properly left to the realm of trial strategy. Hence, we cannot say that trial counsel was ineffective for failing to make this argument. **Point of error six is overruled.**

In his seventeenth point of error, appellant submits that his counsel was ineffective for failing to object to victim testimony concerning victims not named in the indictment.⁷ Specifically, appellant complains about the testimony of two witnesses, Vincent and Hanah Lee, who were victims of an unadjudicated extraneous burglary/aggravated robbery that appellant allegedly committed.⁸ The prosecutor elicited testimony from both of the Lees regarding the effect the event had on their lives.

⁷ Given his argument, we will assume appellant means “victim impact testimony/evidence” as opposed to just “victim testimony,” which is arguably more all-encompassing.

⁸ During a home invasion, appellant allegedly shot Mr. and Mrs. Lee and their 22-month-old daughter.

Impact testimony from the victims of an extraneous offense is not the type of “victim impact evidence” contemplated by *Mosley* and *Payne v. Tennessee*, and therefore, was arguably objectionable.⁹ *714 *Payne*, 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Mosley*, 983 S.W.2d at 261–265; *see also Cantu v. State*, 939 S.W.2d 627 (Tex.Crim.App.1997). However, the record in the instant case is silent as to why appellant's counsel failed to object and is therefore insufficient to overcome the presumption that counsel's actions were part of a strategic plan.¹⁰ *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex.Crim.App.1999). **Point of error seventeen is overruled.**

⁹ In saying that the Lees' testimony was arguably objectionable, we are not deciding that the evidence was necessarily *inadmissible*. Instead, we only mean to suggest that, given the fact that the evidence was offered during the State's case-in-chief on punishment rather than as rebuttal to any defensive mitigation evidence, the testimony provided defense counsel with a ripe opportunity to litigate the issue. *See, e.g., Mosley*, 983 S.W.2d at 263 (“[W]e observe that victim impact evidence is relevant only insofar as it relates to the mitigation issue. Such evidence is patently irrelevant, for example, to a determination of future dangerousness”).

¹⁰ Because a record focused on the conduct of trial counsel is not typically developed at trial, it is often difficult to review an effective assistance of counsel claim on direct appeal. Hence, these claims are usually better raised in a post-conviction application for a writ of habeas corpus. In such an instance, prior rejection of the claim on direct appeal will not bar relitigation of the claim to the extent that an applicant gathers and introduces evidence not contained in the direct appeal record. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex.Crim.App.1997) and *Jackson*, 877 S.W.2d at 772 (Baird, J., concurring).

In his eighteenth point of error, appellant submits that his counsel was ineffective at punishment for failing to object to victim testimony in which the victims expressed their opinions of appellant and their wish that he receive the death penalty. While this may have also been objectionable testimony, without some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic design.¹¹ *See Thompson, supra*. **Point of error eighteen is overruled.**

¹¹ The record does show that defense counsel objected that Hanah Lee's statement was “nonresponsive,” however, the objection was overruled and no other action was taken.

MOTION FOR NEW TRIAL

In his thirteenth point of error, appellant argues that the trial court denied him the effective assistance of counsel during his motion for new trial when it granted the State's motion to quash his subpoenas for jurors who had declined to answer defense counsel's post-trial questions relating to their service. In his fourteenth point, he contends that the trial court denied him the effective assistance of counsel by issuing a blanket direction to jurors that they were under no obligation to answer any questions

regarding their service.¹² More specifically, appellant asserts that his counsel was unable to render effective assistance in investigating statutory grounds for a new trial because the jurors had refused to speak with him. *See* [tex.R.App. P. 23.1](#) (grounds for a new trial in criminal cases).

¹² Consistent with this instruction, the State sent jurors a letter after trial reiterating that they could, but did not have to, discuss their jury service.

A nearly identical argument was raised and rejected in *Jackson v. State*, 992 S.W.2d 469, 475–76 (Tex.Crim.App.1999). In that case, we noted that “ ‘[t]he refusal of any or all of the jurors, after their discharge, to talk to appellant’s counsel or to sign affidavits relating to conduct in the jury room violates no statute and does not authorize reversal.’ ” *Id.* at 475 (quoting *Phillips v. State*, 511 S.W.2d 22, 30 (Tex.Crim.App.1974)). We also noted that no error occurs when jurors are informed that they are under no obligation to talk to defense counsel. *Id.* at 31. We therefore concluded that the defendant in that case had no legal right to compel jurors to cooperate with defense counsel after they had rendered their verdict. *Id.*

Just as was the case in *Jackson*, in the instant case counsel had the right to pursue an investigation on appellant’s behalf. Nothing prevented counsel from contacting the jurors and attempting to elicit information from them. However, nothing in the law obligated the jurors to cooperate with the defense investigation. *See id.* Appellant was not deprived of the effective assistance of counsel because he was not prevented from doing anything that he had the legal right to do. *Id.* at 475–476. **Points of error thirteen and fourteen are overruled.**

***715 CONSTITUTIONALITY OF ARTICLE 37.071**

In his eighth point of error, appellant asserts that the mitigation special issue is unconstitutional because it omits a burden of proof. [Art. 37.071 § 2\(e\)](#). He asserts in his ninth point that the issue is constitutionally infirm because any meaningful appellate review of the jury’s answer on the issue is impossible. In his tenth point, appellant asserts that the mitigation issue is unconstitutional when read in conjunction with Article 44.251, which requires a sufficiency review of the mitigation issue.

We have previously addressed and rejected all of these points. *See* *McFarland*, 928 S.W.2d at 498–99, 518–19; *Lawton v. State*, 913 S.W.2d 542, 556–558 (Tex.Crim.App.1995); *see also* *Jackson*, 992 S.W.2d at 481. Appellant gives us no compelling reason to revisit these issues here. **Points of error eight through ten are overruled.**

In his eleventh point of error, appellant submits the “12–10” rule of [Article 37.071 §§ 2\(d\)\(2\) and \(f\)\(2\)](#) is unconstitutional. We have previously decided this contention contrary to appellant’s position. *Jackson*, 992 S.W.2d at 481; *McFarland*, 928 S.W.2d at 519. **Point of error eleven is overruled.**

In related point of error twelve, appellant avers that the trial court erred in denying his requested charge informing the jury that he would receive a life sentence should they fail to agree on the answer to any one of the punishment issues. *See* [Art. 37.071 § 2\(a\)](#). Appellant alleges that this denial violated the Eighth Amendment. We have previously addressed and rejected this issue, and appellant has given us no reason to revisit it here. *See* *Cantu*, 939 S.W.2d at 644. **Appellant’s twelfth point of error is overruled.**

Finding no reversible error, we affirm the judgment of the trial court.

JOHNSON, J., filed a dissenting opinion in which MANSFIELD and WOMACK, J.J., joined.

JOHNSON, Judge, dissenting, in which MANSFIELD and WOMACK join.

I respectfully dissent as to the majority's disposition of point of error number one. Appellant asserts that he was assured by the trial judge that he would be given unlimited peremptory challenges, and the record confirms this. *See ante*, at 709 n.2. However, near the conclusion of voir dire, the judge changed his mind and refused to grant any further peremptory challenges unless defense counsel first attempted to get those jurors excused for cause. He subsequently granted the defense only one additional peremptory challenge.

The majority dismisses this point of error because it is "inadequately briefed." Although acknowledging that appellant is not prohibited from making "a novel argument for which there is no authority directly on point," the majority goes on to state that "appellant must ground his contention in analogous case law or provide the Court with the relevant jurisprudential framework for evaluating his claim." *Ante*, at 710.

In the instant case, it appears to be less that appellant's argument is novel than that the specific fact pattern is novel. While the appellant has cited no analogous case law on this issue and the briefing on this point is marginal, I believe that appellant has provided us with a "relevant jurisprudential framework" for evaluating his claim.

Appellant argues in relevant part:

Defense counsel ... had freely used their (supposedly) unlimited strikes on panelists they would have challenged for cause had they been operating under the usual restrictions, so that, to their complete surprise, they found themselves with *no* strikes left to embark upon the suddenly old-fashioned jury selection.

***716** Being denied the strikes to which they were statutorily entitled, Appellant's attorneys were forced to accept Mrs. Sullivan as the eleventh juror when she was unacceptable; even if she were not vulnerable to a challenge for cause (which counsel conceded) striking her would have been the classic example of the intelligent use of a peremptory challenge.

Had counsel proceeded from the first with the traditional limitations he could not complain if he had run out of strikes by the time he reached Mrs. Sullivan; those strikes would have been expended with full awareness of the risks. The trial court's abrupt return to the traditional voir dire procedure would not have harmed Appellant if the court had restored the wasted strikes. The refusal to do so was unnecessary and was clearly an abuse of discretion because it denied his Appellant the right to his counsel's intelligent (fully informed) use of peremptory challenges, tainting his jury panel with the unacceptable juror and denying Appellant his due process right to a fair jury selection procedure.

* * * *

The "procedure followed" was not the trial court's usual "unlimited defense strikes" or the "old-fashioned way." It was, instead, the change from one procedure to the other without putting defense counsel on the proper footing to exercise peremptory challenges intelligently. What was an intelligent use of strikes under the first procedure turned out to be the total eradication of any possibility for the intelligent use of strikes after the trial court changed the rules.

Appellant asks for relief from this abuse of discretion which denied him his federal and state constitutional rights to the effective assistance of counsel, as well as due process and due course of law. Sixth Amendment United States Constitution; [Art. I Sec. 10, Texas Constitution](#). He has shown the necessary harm and is entitled to a new trial.

The alleged harm is not from the nature of the individual procedures but from the sudden and unexpected change in procedure. In sum, appellant argues that he relied, to his detriment, on the trial judge's assurance that he would have unlimited peremptory strikes. Although such a claim of detrimental reliance does not appear often in criminal jurisprudence,¹ we have dealt with it occasionally. *See, e.g., Taylor v. State*, 10 S.W.3d 673, 677, 681-85 (Tex.Crim.App.2000) (generally discussing how extent of reliance on old rule should factor into analysis in determining whether new rule of state law should be given retroactive effect,); *Cf. Ex parte Moody*, 991 S.W.2d 856 (Tex.Crim.App.1999); *Broddus v. State*, 693 S.W.2d 459 (Tex.Crim.App.1985).²

¹ The concept of detrimental reliance comes up frequently in contract disputes, where it is usually phrased in terms of equitable estoppel. See 34 Tex. Jur.3d *Estoppel* §§ 10 & 18 (1984).

² *Moody* and *Broddus* both dealt with a defendant's plea that was entered with the defendant's understanding, based on erroneous assurances made by the trial judge, prosecutor and/or defense counsel, that a particular condition would be fulfilled. *Moody*, 991 S.W.2d at 857; *Broddus*, 693 S.W.2d at 460. We granted relief in both cases on the basis that, because the condition could not be fulfilled, the defendant's plea was not entered voluntarily or knowingly. *Moody*, 991 S.W.2d at 858–59; *Broddus*, 693 S.W.2d at 461. Although not explicitly stated, the underlying rationale for these cases appears to be that the defendant's plea was made in reliance on the erroneous assurances made to him, to his detriment.

On this basis, I believe that appellant has adequately briefed this point of error and that we should address it on the merits. Alternatively, given the trial judge's *717 actions at trial and the fact that this is a capital case, I would order re-briefing on this point. See *tex.R.App. P. 38.9(b)*. I dissent.

OPINION ON APPELLANT'S MOTION FOR REHEARING

PER CURIAM.

We affirmed appellant's conviction for capital murder and sentence of death. *Tong v. State*, 25 S.W.3d 707 (Tex.Crim.App. 2000). In his motion for rehearing, appellant claims we improperly held one of his points of error inadequately briefed.

We begin by reprinting the pertinent facts from our opinion on original submission:

In his first point of error, appellant complains that the trial judge abused his discretion by changing the method of jury selection in the middle of voir dire. Appellant asserts that this change prevented him from intelligently utilizing his peremptory challenges, thus denying him the effective assistance of counsel, due process of law, and due course of law.

According to appellant, the judge assured him at the beginning of trial that he “would be given as many peremptory challenges as he requested,” and he relied on this promise in conducting his voir dire. However, appellant contends that, as they were nearing the end of voir dire, the trial judge abruptly returned to “the old-fashioned way,” but refused to restore any of his strikes. Hence, appellant claims he went from a position of having unlimited strikes to a position of having no strikes, which harmed him by subsequently forcing him to accept an undesirable juror.

Appellant maintains that the trial court's decision to alter its voir dire procedure deprived appellant of due process of law, due course of law and the effective assistance of counsel.

Tong, op. at 709 (footnotes omitted).

Appellant argued on original submission and continues to argue on rehearing, that his claim is supported by this Court's opinion in *Sanne v. State*, 609 S.W.2d 762, 767 (Tex.Crim.App.1980). *Sanne* deals with the question of assessing harm in connection with a complained-about voir dire procedure provided for by statute.¹ Appellant's point of error is constitutionally based and grounded in a theory of detrimental reliance. By no stretch can *Sanne* be read to support appellant's argument that the trial court's unorthodox voir dire procedure, on which appellant claims he relied to his detriment, amounted to an abuse of discretion which deprived appellant of due process, due course of law, and effective assistance. Appellant has provided no authority in support of his detrimental reliance theory or his due process, due course of law, ineffective assistance claims.²

¹ As we explained on original submission, the appellant in *Sanne* claimed the statutory provision in death penalty cases that the parties exercise peremptory challenges after examination of individual venire persons, as opposed to making peremptory challenges after having seen the entire venire, as in non-capital cases, violated equal protection and due process of law. We assumed, without deciding,

that the constitutional claim had merit, but held that the appellant had failed to demonstrate harm. *Sanne*, 609 S.W.2d at 767. Appellate litigants are not permitted to make such assumptions, but bear a burden to demonstrate error or lack thereof.

2 Appellant cites two cases in his brief on original submission. He cites *Martinez v. State*, 867 S.W.2d 30, 35 (Tex.Crim.App.1993) (conduct of voir dire examination rests within sound discretion of trial court, and only abuse of such discretion will call for reversal on appeal), for the proposition that abuse of discretion is the standard applicable to an appellate court's review of a trial court's actions in the voir dire context. Appellant also cites *Sanne*. As discussed, to the extent that *Sanne* could be viewed as applicable, it goes to the question of harm, not error.

Appellant claims he was denied the intelligent use of peremptory challenges, but does not cite any cases discussing the intelligent exercise of peremptory challenges. Appellant's claim is also based on a theory of detrimental reliance, but he does not cite to any cases discussing any type of detrimental reliance, even in an analogous context.

*718 By relying on *Sanne*, appellant puts the question of harm ahead of the question of error. While this Court has occasionally analyzed voir dire issues solely on the basis of harm, skipping the preliminary question of error, *Jones v. State*, 982 S.W.2d 386 (Tex.Crim.App.1998); *Anson v. State*, 959 S.W.2d 203 (Tex.Crim.App.1997); *Gardner v. State*, 733 S.W.2d 195, 212 (Tex.Crim.App.1987), *cert. denied*, 488 U.S. 1034, 109 S.Ct. 848, 102 L.Ed.2d 979 (1989), this should not be taken as a suggestion to appellate litigants that the question of error in the voir dire context need not be addressed. When briefing an issue on direct appeal, the question of error should always be addressed first, followed by a discussion of whether or not the alleged error is harmful.

Because appellant continues to rely solely upon authority pertaining to the question of harm, we deny appellant's motion for rehearing. Our opinion on original submission is affirmed.

Judges WOMACK and JOHNSON dissent from the denial of appellant's motion for rehearing.

All Citations

25 S.W.3d 707

APPENDIX F

Ex parte Chuong Duong Tong, 2009 WL 1900372 (Tex. Crim. App. July 1, 2009)

2009 WL 1900372

Only the Westlaw citation is currently available.

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

ORDER

Do Not Publish

Court of Criminal Appeals of Texas.

Ex Parte CHUONG DUONG TONG.

No. WR-71,377-01.

I

July 1, 2009.

On Application for Writ of Habeas Corpus, Cause No. 760745-A, In the 178th District Court, Harris County.

ORDER

PER CURIAM.

*1 This is an application for writ of habeas corpus filed pursuant to the provisions of [Article 11.071, Tex.Code Crim. Proc.](#)

In March 1998, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to [Article 37.071, Tex.Code Crim. Proc.](#), and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal, *Tong v. State*, 25 S.W.3d 707 (Tex.Crim.App.2000), *cert. denied*, 532 U.S. 1053 (2001).

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

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions with the exception of findings nos. 84 and 105, and conclusions nos. 33 and 40, which we explicitly reject. Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 1st DAY OF JULY, 2009.

All Citations

Not Reported in S.W.3d, 2009 WL 1900372

End of Document

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APPENDIX G

Relevant pages from state district court findings

FIFTH GROUND FOR RELIEF – EFFECTIVENESS OF APPELLATE COUNSEL

-briefing voir dire issue

92. The Court finds that, after exhausting his fifteen statutorily allowed peremptory challenges, the applicant requested eight additional peremptory challenges which the trial court granted (IX R.R. at 86-7; X R.R. at 11, 154; XI R.R. at 100, 108, 141, 147; XIII R.R. at 11); see also TEX. CODE CRIM. PROC. art. 35.15(a)(in capital case where State seeks death penalty, defendant is entitled to fifteen peremptory challenges).

93. The Court finds that, after granting the applicant his request for a ninth peremptory challenge, the trial court announced, "No more peremptory challenges will be granted unless challenge for cause is made first" (XIII R.R. at 27, 35).

94. The Court finds that the applicant then requested an additional peremptory for venireperson Robert Greenlaw which the trial court denied; that the applicant's challenge for cause to venireperson Greenlaw was denied; that the trial court then granted the applicant's request for an additional peremptory which the applicant used to strike venireperson Greenlaw; and, that the trial court again explained that he would only consider granting additional peremptories where the applicant challenged a venireperson for cause and the challenge was denied (XIII R.R. at 76-82).

95. The Court finds that the trial court granted the applicant's challenge for cause to the next venireperson, Brenda Peeples (XIII R.R. at 118, 145).

96. The Court finds that the applicant then challenged venireperson Roslyn Sullivan for cause, stating, "we challenge her for cause not on the way she answered any of the questions now, she answered the questions properly, but you asked us to challenge for cause prior to requesting an extra peremptory at any time;" that the trial court asked counsel if that was their only basis for challenging Sullivan for cause; that, when trial counsel answered in the affirmative, the trial court denied the challenge for cause; that

the trial court then denied the applicant's request for an additional peremptory to use on venireperson Sullivan; and, that Sullivan was seated as a juror in the applicant's capital murder trial (XIII R.R. at 203-6).

97. The Court finds that appellate counsel on direct appeal of the instant conviction, urged a point of error contending that the trial judge abused his discretion by changing the method of jury selection in the middle of voir dire, and the applicant was prevented from intelligently exercising his peremptory strikes and denied the effective assistance of counsel, due process of law, and due course of law. *Tong*, 25 S.W.3d at 709.

98. The Court finds that the Court of Criminal Appeals, on direct appeal of the instant cause, initially held that the applicant's peremptory challenge/voir dire issue was inadequately briefed. In denying the applicant's request for rehearing and affirming its opinion on original submission, the Court of Criminal Appeals stated that the applicant failed to first address the question of error in the voir dire point of error and instead just argued harm. *Id.* at 717-8.

99. The Court finds that appellate counsel acknowledged on appeal that juror Sullivan was not subject to a challenge for cause. *Applicant's direct appeal brief* at 18.

100. The Court further finds that the applicant fails to demonstrate that any of the jurors who served during his capital murder trial were not qualified.

101. The Court finds that the applicant did not rely on the trial court's alleged grant of an unlimited number of peremptory strikes based on the following: (1) the applicant challenged eight venire members for cause, six of which were granted, and four of which were requested prior to the applicant exhausting his statutorily-provided fifteen peremptory strikes (IV R.R. at 88; VI R.R. at 62, 68; VII R.R. 40, 42; XI R.R. at 157; XIII R.R. at 77-9, 203; XVIII R.R. at 118, 145); and, (2) the applicant *affirmatively requested* each of the ten additional peremptory strikes that the trial court granted, after exhausting

his statutorily-provided fifteen peremptory strikes (IX R.R. at 106; X R.R. at 22, 154; XI R.R. at 100, 108, 141, 147; XIII R.R. at 11, 27, 34).

102. The Court finds that the applicant fails to show that the trial court erred in its voir dire process or that the voir dire process harmed the applicant. *See Tong*, 25 S.W.3d at 717-8 (on direct appeal, court did not hold that trial court's voir dire process was erroneous or harmful).

-“line of duty”issue

103. The Court finds that testimony was elicited during the trial of the instant cause that the complainant was off duty and working on April 6, 1997, when the applicant walked into the Sunny's convenience store and pulled a gun on the complainant; that the complainant advised the applicant to stop and identified himself as a peace officer when the applicant tried to open the register; that the complainant also showed the applicant his badge and told the applicant that he was not going to get away with the robbery; and, that the applicant then shot and killed the complainant. *State's Exhibits 4 and 43, Applicant's Statements.*

104. The Court finds that alternate theories of committing capital murder were submitted to the jury disjunctively, allowing the jury to convict the applicant if it determined that the applicant murdered a peace officer or intentionally committed the murder in the course of committing or attempting to commit robbery, and the jury returned a general verdict of “guilty of capital murder” (I Ct.R. at 123-4, 170-1).

105. The Court finds that the applicant's ground for relief alleging that the State offered insufficient evidence to prove that the complainant was in the line of duty as a peace officer when he was murdered and appellate counsel was ineffective for failing to urge direct appeal error on such basis is essentially an attack on the sufficiency of the evidence. *See Ex parte Christian*, 760 S.W.2d 659 (Tex. Crim. App. 1988)(challenges to

34. Because the State's argument, set forth in *Finding of Fact 87*, was proper as a response to the argument of trial counsel and a reasonable deduction from the evidence presented; accordingly, trial counsel was not ineffective for failing to object to the argument. See *Adujo v. State*, 755 S.W.2d 138, 144 (Tex. Crim. App. 1988) (prosecutor may answer the jury argument of opposing counsel).

-trial counsel's affidavits

35. Because the applicant's claim that trial counsel violated attorney-client privilege in their affidavits responding to the applicant's habeas ineffective allegations does not involve a jurisdictional defect or denial of a fundamental or constitutional right, the applicant's claim need not be considered in the instant habeas proceeding.

36. Alternatively, trial counsel did not violate the provisions of TEX. DISCIPLINARY R. PROF'L CONDUCT in their responses by affidavit to the applicant's habeas claims of ineffective assistance of counsel.

FIFTH GROUND FOR RELIEF – EFFECTIVENESS OF APPELLATE COUNSEL

-briefing voir dire issue

37. The applicant fails to demonstrate that the trial court erred in its voir dire process or that the applicant was harmed by the voir dire procedure; accordingly, the applicant's ineffective claim based on appellate counsel's briefing of the voir dire issue is meritless. *Smith v. Robbins*, 528 U.S. 259, 285 (2000)(defendant asserting that his appellate counsel was ineffective must satisfy *Strickland* standard).

38. Because the trial court's denial of the applicant's request for an additional peremptory challenge after the applicant exhausted his statutory peremptory strikes did not constitute an abuse of discretion, the applicant cannot demonstrate harm based on the applicant's claim that appellate counsel failed to fully brief the voir dire issue.

39. The applicant fails to show deficient performance, much less harm in appellate counsel's failure to properly brief the issue of the trial court's method of granting the

applicant additional peremptory strikes because the applicant fails to demonstrate that an unqualified juror served. *Jones v. State*, 982 S.W.2d 386, 393 (Tex. Crim. App. 1998)(the applicant's only substantial right is that jurors who serve be qualified).

-“line of duty” issue

40. Because the applicant's claim urging that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence that the complainant was in the line of duty as a peace officer when he was murdered is essentially an attack on the sufficiency of the evidence, such claim need not be considered as it is not cognizable on habeas. *Ex parte Christian*, 760 S.W.2d 659, 660 (Tex. Crim. App. 1988)

41. In the alternative, the complainant was killed in the line of duty as a peace officer; accordingly, appellate counsel was not ineffective for failing to challenge the sufficiency of such evidence on direct appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983)(courts cannot second-guess an appellate counsel's professional judgment to brief only stronger points of error).

42. The applicant fails to show that he was harmed by appellate counsel's failure to brief the line of duty issue because the jury was properly charged on an alternative theory of capital murder, and the jury returned a general verdict of guilt. *Hathorn v. State*, 848 S.W.2d 101 (Tex. Crim. App. 1992)(when more than one theory is presented in an indictment and there is evidence supporting the different theories, the jury is properly charged on all of them);

-failure to raise issues in habeas application

43. The applicant fails to show ineffective assistance of appellate counsel based on counsel's failure to urge the meritless claims alleged in the instant habeas application. *Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994).

APPENDIX H

Texas Code of Criminal Procedure art. 11.071

Vernon's Texas Statutes and Codes Annotated
Code of Criminal Procedure (Refs & Annos)
Title 1. Code of Criminal Procedure
Habeas Corpus
Chapter Eleven. Habeas Corpus (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 11.071

Art. 11.071. Procedure in death penalty case

Effective: September 1, 2015

[Currentness](#)

Sec. 1. Application to Death Penalty Case

Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. Representation by Counsel

(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under [Article 42.01](#), shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under [Section 78.054, Government Code](#), other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by [Acts 2009, 81st Leg., ch. 781, § 11](#).

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under [18 U.S.C. Section 3599](#). The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney

fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under [Section 78.054, Government Code](#), the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under [Section 78.056, Government Code](#). The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.¹

Sec. 2A. State Reimbursement; County Obligation

(a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed \$25,000. Compensation and expenses in excess of the \$25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed \$25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of \$25,000.

Sec. 3. Investigation of Grounds for Application

(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. Filing of Application

(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. Untimely Application; Application Not Filed

(a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. Subsequent Application

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or [Article 11.07](#) because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under [Article 37.071](#), [37.0711](#), or [37.072](#).

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. Issuance of Writ

(a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under [Section 78.056, Government Code](#), if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under [Section 78.054, Government Code](#).

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

- (1) make an appropriate notation that a writ of habeas corpus was issued;
- (2) assign to the case a file number that is ancillary to that of the conviction being challenged; and
- (3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.
- (d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. Answer to Application

- (a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.
- (b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. Findings of Fact Without Evidentiary Hearing

- (a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.
- (b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.
- (c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.
- (d) The clerk of the court shall immediately send to:
 - (1) the court of criminal appeals a copy of the:
 - (A) application;
 - (B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(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.

Sec. 9. Hearing

(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under [Section 74.054](#) or [74.055, Government Code](#), may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(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.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. Rules of Evidence

The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. Review by Court of Criminal Appeals

The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After

reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

Credits

Added by Acts 1995, 74th Leg., ch. 319, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1336, §§ 1 to 5, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 803, §§ 1 to 10, eff. Sept. 1, 1999; Acts 2003, 78th Leg., ch. 315, §§ 1 to 3, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 787, § 13, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 965, § 5, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 593, § 3.06, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 781, §§ 2 to 5, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 781, § 11, eff. Jan. 1, 2010; Acts 2011, 82nd Leg., ch. 1139 (H.B. 1646), § 1, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 78 (S.B. 354), § 2, eff. May 18, 2013; Acts 2015, 84th Leg., ch. 1215 (S.B. 1743), §§ 1 to 5, eff. Sept. 1, 2015.

Notes of Decisions (212)

Footnotes

1 V.T.C.A., Government Code § 78.051 et seq.

Vernon's Ann. Texas C. C. P. Art. 11.071, TX CRIM PRO Art. 11.071

Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

End of Document

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