IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-10826

GREGORY DEAN BANISTER,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Gregory Dean Banister, Texas prisoner # 1265563, was convicted by a jury of aggravated assault with a deadly weapon and sentenced to 30 years of imprisonment. He filed a 28 U.S.C. § 2254 application asserting numerous claims, which the district court denied on the merits. Banister now moves for issuance of a certificate of appealability (COA) with respect to 12 issues rejected by the district court: (1) ineffective assistance of counsel (IAC) based on appellate counsel's failure to challenge the legal and factual sufficiency of the evidence; (2) IAC based on trial counsel's failure to move for a directed verdict; (3) IAC based on trial counsel's failure to move to strike expert testimony; (4) IAC based on appellate counsel's failure to challenge an unsupported statement by the prosecutor in closing argument; (5) IAC based

on appellate counsel's failure to raise the denial of a lesser-included offense instruction on the offense of deadly conduct; (6) IAC based on trial counsel's failure to properly request a lesser-included offense instruction on the offense of reckless driving; (7) IAC based on trial counsel's failure to object to the trial court's limiting instruction; (8) IAC based on appellate counsel's failure to challenge the limiting instruction; (9) constructive or actual denial of appellate counsel based on the failure to include the jury charge in the appellate record; (10) admission of an incriminating statement in violation of the Fifth and Sixth Amendments; (11) denial of due process and a fair trial based on a juror's affidavit regarding the basis for her verdict; and (12) cumulative error.

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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 v. Cockrell*, 537 U.S. 322, 327 (2003). If a district court has rejected the claims on their merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This court must decide whether to grant a COA "without full consideration of the factual or legal bases adduced in support of the claims" and without deciding the merits of the appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

The court has an independent duty to examine whether it has jurisdiction over an appeal. *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003). Banister is seeking a COA that would allow him to appeal the district court's denial of his § 2254 petition. Filing a timely notice of appeal within

thirty days of entry of judgment is a jurisdictional prerequisite. 28 U.S.C. § 2107(a); *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 16–17 (2017) ("[A]n appeal filing deadline prescribed by statute will be regarded as 'jurisdictional,' meaning that late filing of the appeal notice necessitates dismissal of the appeal."). Judgment on Banister's petition was entered by the district court on May 15, 2017. Banister filed his notice of appeal on July 20, 2017—66 days later. The notice of appeal was not filed within thirty days, so we lack jurisdiction unless there was a reason the time to file was extended.

Banister timely filed a Rule 59(e) motion, which could extend the time for filing a notice of appeal until the entry of an order disposing of the motion. Fed. R. App. P. 4(a)(4)(A)(iv). However, a Rule 59(e) motion that "add[s] a new ground for relief" or "attacks the federal court's previous resolution of the claim on the merits" is construed as a successive habeas petition "since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Williams v. Thaler*, 602 F.3d 291, 302 (5th Cir. 2010) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005). A successive habeas petition filed in the district court is not among the motions that extends the time to file a notice of appeal. Fed. R. App. P. 4(a)(4)(A).

Here, Banister does not seek a COA on the denial of his Rule 59(e) motion but instead seeks to appeal the district court's reasoning in denying his initial § 2254 petition. Moreover, Banister's Rule 59(e) motion merely attacked the merits of the district court's reasoning in denying the § 2254 petition and is properly characterized as successive petition. Because the Rule 59(e) motion was a successive petition, it did not toll the period for timely filing a notice of appeal. Fed. R. App. P. 4(a)(4)(A); *Uranga v. Davis*, 879 F.3d 646, 648 (5th Cir.

2018) ("[A] purported Rule 59(e) motion that is, in fact, a second or successive § 2254 application is subject to the restrictions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and would not toll the time for filing a notice of appeal."); *Williams*, 602 F.3d at 303–04 ("[W]e do not believe that a habeas petitioner should have the opportunity to circumvent AEDPA's jurisdictional bar on second or successive applications based on little more than the petitioner's ability to [timely file a Rule 59(e) motion]."). As such, even if Banister's petition for a COA were construed as seeking a COA on the district court's denial of his Rule 59(e) motion, we would lack jurisdiction because the Rule 59(e) motion is a successive habeas petition that did not extend the notice of appeal filing period.

We DENY Banister's petition for a COA because we lack jurisdiction over the appeal.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GREGORY DEAN BANISTER, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	CIVIL ACTION NO. 5:14-CV-049-C ECF

ORDER

Petitioner, Gregory Dean Banister, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on April 9, 2014. Respondent filed an answer with brief in support on June 16, 2014, and relevant records on June 6, 2014. Petitioner filed a response on August 7, 2014, and a supplement on August 14, 2014.

I. BACKGROUND

The Court has reviewed the pleadings and state court records and finds the following:

1. Petitioner is in custody pursuant to a judgment and sentence out of the 154th District Court of Lamb County, Texas, in cause number 3900, styled *The State of Texas v. Gregory Bannister*.[1] On February 6, 2004, Petitioner was indicted for one count of aggravated assault with a deadly weapon, enhanced by a prior conviction for trafficking cocaine in Cause No. 95-CR-12383 out of the 9th Judicial District Court of Curry County, New Mexico. The indictment states, in part, that on or about the 11th Day of May, 2002, Petitioner did then and there:

> intentionally, knowingly, or recklessly cause serious bodily injury to B.J. Mitchell by failing to control a motor vehicle or by driving a motor vehicle without sufficient sleep, as a result of the introduction of cocaine into his body and thereby caused his motor vehicle to collide with B.J. Mitchell.

[1]Petitioner spells his name "Banister" in the instant petition.

2. Voir dire for the jury trial commenced on September 13, 2004. Trial commenced on September 14, 2004, and although Petitioner pleaded not guilty, the jury found Petitioner guilty as charged on September 16, 2004. The punishment phase commenced on September 17, 2014, and on the same day the court assessed Petitioner's punishment at thirty years' confinement. The trial court pronounced judgment the same day.

3. Petitioner filed a notice of appeal on September 8, 2004. In six issues on appeal, Petitioner argued that the trial court erred in admitting an oral statement by Petitioner in violation of Tex. Code Crim. Proc. Ann. art. 38.22, the Fifth Amendment, and the Sixth Amendment that the State failed to timely disclose in violation of Tex. Code Crim. Proc. Ann. art. 39.104. Petitioner also argued that the trial court erred in admitting evidence that the cocaine metabolite in his blood caused him to suffer cocaine crash over his objection in violation of Tex. R. Evid. 401, 702 and 403.

4. In an unpublished opinion filed September 29, 2006, the Seventh Court of Appeals affirmed the conviction. Petitioner filed a motion for rehearing that was overruled on November 6, 2006, and a Motion for Stay of Mandate that was denied on April 18, 2007. Mandate issued on May 10, 2007.

5. With the aid of counsel, Petitioner filed his petition for discretionary review on November 22, 2006, and it was refused by the Texas Court of Criminal Appeals (TCCA) on February 28, 2007.

6. Petitioner filed a petition for writ of certiorari to the United States Supreme Court that was denied on October 1, 2007.

7. Petitioner filed his application for writ of habeas corpus in the trial court on September 23, 2008. In State Writ No. 07,854-03, Petitioner raised sixty-five (65) grounds for review, which the Court will not recite here.

8. On May 2, 2012, the TCCA remanded the state writ to the trial court for findings regarding what advice trial counsel gave Petitioner concerning the inclusion of the deadly conduct offense as an alternative to going to trial. The trial court was also instructed to make additional findings regarding: whether counsel's advice led to rejection of a fifteen-year plea offer; whether, but for the advice, there was a reasonable probability the plea offer would have been presented to the court; whether the court would have accepted its terms; and whether the conviction or sentence, or both, under the plea offer's terms would have been less severe than under the actual judgment and sentence imposed. Finally, the trial court was directed to make findings of fact as to whether the performance of trial counsel was deficient and, if so, whether counsel's deficient performance prejudiced Petitioner. Both Angela French Overman (trial counsel) and Brian W. Wice (appellate counsel) submitted affidavits and amended affidavits in order to address Petitioner's claims of ineffective assistance, as did the County Attorney and Assistant County Attorney.

9. On October 10, 2012, the trial court entered its findings on ineffective assistance of counsel, ultimately concluding that trial counsel was not ineffective on the grounds discussed, and that, even if she had been, Petitioner was not prejudiced by counsel's alleged advice regarding the deadly conduct charge.

10. On April 2, 2014, the Court of Criminal Appeals denied Petitioner's writ application without written order.

11. Petitioner filed a Suggestion on May 1, 2014, that the court reconsider on its own motion the denial of the application for a writ of habeas corpus that was denied by the TCCA.

12. Petitioner is deemed to have timely filed the instant petition. The Court understands Petitioner's stated grounds for review to allege fifty-three (53) individual grounds for review that the Court has consolidated for the purpose of its review into the following categories: (1) trial court error; (2) prosecutorial misconduct; (3) illegal arrest; (4) ineffective assistance of counsel at trial; (5) ineffective assistance of counsel on appeal; and (6) other (including allegations that Petitioner was denied an appeal and juror bias).

13. This Court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§ 2241 and 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

II. STANDARD OF REVIEW

"The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Under the Antiterrorism and Effective Death Penalty Act, a petitioner may not obtain habeas corpus relief in federal court with respect to any claim adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision contrary to clearly established federal constitutional law or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

This section creates a "highly deferential standard for evaluating state-court rulings, . . . which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (internal quotation marks omitted).

"In the context of federal habeas proceedings, adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural." *Neal v. Puckett*, 239 F.3d 683, 686 (5th Cir. 2001). In Texas writ jurisprudence, a "denial" of relief usually serves to dispose of claims on their merits. *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000). *See Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) (holding that "denial" signifies the Court of Criminal Appeals addressed and rejected the merits of a state habeas claim,[2] while "dismissal" signifies the Court declined to consider the claim for reasons unrelated to the merits).

A state-court factual determination is not unreasonable merely because the federal court would have reached a different conclusion in the first instance. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. Petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Canales v. Stephens*, 765 F.3d 551, 563 (5th Cir. 2014). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, as in this case, it is an adjudication on the merits, which is entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997);

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[2]In *Ex parte Torres*, the Court of Criminal Appeals stated that "[d]ispositions relating to the merits should be labeled 'denials' while dispositions unrelated to the merits should be labeled 'dismissals' . . . ." *Id.* at 474. "A disposition is related to the merits if it decides the merits or makes a determination that the merits of the applicant's claims can never be decided." *Id.* (citing *Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995) (disposition is considered "on the merits" if the court refuses to determine the merits because of state procedural default)). *Accord Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004).

Singleton v. Johnson, 178 F.3d 381, 384 (5th Cir. 1999) (recognizing this Texas state writ jurisprudence).

Petitioner's burden before this Court is significantly heightened in that Petitioner cannot prevail even if he shows that the state court's determination was incorrect. Petitioner must also show that the state court unreasonably applied federal law or made an unreasonable determination of the facts. *Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir. 2002), *cert. denied, Neal v. Epps*, 537 U.S. 1104 (2003).

The facts of the case were summarized by the Seventh Court of Appeals sitting in Amarillo,Texas, and such were recited in Respondent's Answer. Petitioner has provided no evidence to refute the summary; therefore, the Court shall not recite the facts again.

III. DISCUSSION

As to each of the issues raised by Petitioner in his petition, this Court looks to whether the Petitioner has shown a federal constitutional violation and prejudice. 28 U.S.C. § 2254(a); *Carter v. Lynaugh*, 826 F.2d 408, 409 (5th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988). Errors of state law and procedure are not cognizable unless they result in the violation of a federal constitutional right. *Bridge v. Lynaugh*, 838 F.2d 770, 772 (5th Cir. 1988); *Jamerson v. Estelle*, 666 F.2d 241, 245 (5th Cir. 1982).

After carefully reviewing the state court records and the pleadings, the Court finds that an evidentiary hearing is not necessary to resolve the instant petition. *See Young v. Herring*, 938 F.2d 543, 560 n. 12 (5th Cir. 1991) ("[A] petitioner need not receive an evidentiary hearing if it would not develop material facts relevant to the constitutionality of his conviction.").

As a preliminary matter, the Court notes that Petitioner's 72-page Petition outlining his 53 grounds for review, 113-page memorandum in support, and 98-page reply brief exceed the 25-page limit for a brief and 10-page limit for a reply brief. *See* N.D. Tex. L. Civ. R. 7.2(c) (a brief must not exceed 25 pages (excluding table of contents and table of authorities), and a reply brief must not exceed 10 pages). Because Petitioner's memorandum in support and reply brief are in excess of this page limit, they are in violation of Local Rule 7.2(c). Petitioner's *pro se* status does not excuse his failure to comply with this Court's Local Rules.

The Court did not strike any of the above-mentioned pleadings at the time of their filing, and the Respondent responded to each claim almost seriatim. Petitioner even apologizes in his memorandum in support for the abundance of grounds and the amount of work that this Court will expend in determining the merits of all of the grounds because he felt them each worthy of review, but he then goes on to brief some of his arguments using styles similar to that of a play or short story.[3] Nevertheless, the Court admonishes Petitioner that raising every possible conceivable issue, however weak or outright frivolous, may have the effect of diluting any strong arguments that he may have. As the Supreme Court noted in *Jones v. Barnes*, 463 U.S. 745, 752 (1983), in the context of effective assistance of counsel on direct appeal:

> Most cases present only one, two, or three significant questions. . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

[3] *See e.g.*, Petitioner's Brief in Support section 4, page 4 (Doc. 2 at 94).

In other words, Petitioner's choice to raise so many arguments is about as effective as throwing spaghetti at a wall and just seeing if anything might stick. Nevertheless, the Court has endeavored to review each ground as thoroughly as practicable.

A. Trial Court Error (Grounds 8, 14, 17, 33)

Petitioner alleges that he is entitled to relief based on the following alleged trial court errors:

(1) the punishment hearing was fundamentally unfair because the trial court relied on unsupported facts when determining his punishment (Ground 8);

(2) the trial was fundamentally unfair because the judge became a witness in the case (Ground 14);

(3) he was denied a full and fair opportunity to litigate a Fourth Amendment claim (Ground 17); and

(4) he was denied a fair trial when the trial court improperly restricted his right to present evidence of significant probative value (Ground 33).

"[A] state defendant has no constitutional right to an errorless trial." *Bailey v. Procunier*, 744 F.2d 1166, 1168 (5th Cir. 1984). Trial court errors must do more than affect the verdict to warrant relief in habeas cases – they must render the trial as a whole fundamentally unfair. *Id.* To determine whether an error by the trial court rendered the trial fundamentally unfair, it must be determined if there is a reasonable probability that the verdict would have been different had the trial been conducted properly. *Rogers v. Lynaugh*, 848 F.2d 606, 609 (5th Cir. 1988). The United States Supreme Court has held that a federal harmless error standard applies on federal habeas review of state court convictions. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). The test is whether the error had "substantial and injurious effect" or influence in determining the jury's verdict. *Id.* at 637. Habeas petitioners are not entitled to habeas relief based on trial error

unless they can establish that it resulted in actual prejudice. *Id.* Habeas petitioners may not prevail in a federal habeas action simply by showing a violation of state law – they must show that the trial was fundamentally unfair, thus denying them due process by prejudicing the outcome of the trial. *Lavernia v. Lynaugh*, 845 F.2d 493, 496 (5th Cir. 1987).

In Ground 8 of his Petition, Petitioner argues that his punishment hearing was fundamentally unfair because the trial court relied on unsupported facts when determining his punishment. Specifically, Petitioner alleges that the trial court relied on facts that were actually contradicted by the evidence, such as that Petitioner was fatigued and impaired because of a cocaine crash and ran off the roadway when he hit the victim, when the evidence actually showed that the Petitioner was legally in the roadway when the accident occurred. Respondent points out that the judge mentioned the above matters during the punishment phase, after a verdict had been entered and Petitioner had already been found guilty of aggravated assault with a deadly weapon. Respondent further notes that the thirty-year sentence he received was within the range of punishment for a first degree felony with a deadly weapon, enhanced by a prior conviction. Indeed, the Court notes that Petitioner's sentence was on the lower end of the range for sentencing, when he could have received up to ninety-nine years' imprisonment and a $10,000.00 fine pursuant to Tex. Code Crim. Proc. art. § 12.42(b). In his objection, Petitioner places special emphasis on his contention that because the matters mentioned by the trial court in sentencing were likely the same as those relied upon by the jury in reaching the guilty verdict, the trial court's rationale necessarily rendered the entire trial unfair. On the contrary, the trial court's reliance on the supposedly unsupported facts in assessing a thirty-year sentence in no way impacted the verdict in the case. Petitioner is not entitled to relief on this ground.

In Ground 14 of his Petition, Petitioner argues that the trial was fundamentally unfair because the judge became a witness in the case. Specifically, Petitioner contends that when the judge read the jury charge to the jury, informing them that Banister had been convicted of other offenses when no such evidence was admitted during the course of the trial, the judge became the "functional equivalent" of a witness in the case and effectively abandoned his role as a "neutral arbiter and assumed the position of an active participant when he conveyed factual information to the jury that was neither admitted or [sic] admissible." At issue is the special instruction contained in the jury charge:

> You are instructed that certain evidence was admitted before you in regard to the defendant's having been charged and convicted of offenses other than the one for which he is now on trial. You are instructed that such evidence cannot be considered by you against the defendant as any evidence of guilt in this case. Said evidence was admitted before you for the purpose of aiding you, if it does aid you, in passing upon the credibility of the defendant as a witness for himself in this case, and to aid you, if it does aid you, in deciding upon the weight you will give to him as such witness, and you will not consider the same for any other purpose.

Pet'r Exhibit 3 at p. 2. Petitioner argues that the above instruction falsely informed the jury of other charged offenses resulting in conviction, when in fact no evidence of other convictions was ever admitted into evidence, and thus the trial judge was effectively testifying as a witness to those convictions, which was highly inflammatory and inherently prejudicial. In other words, Petitioner contends that the jury was not aware, until the trial court informed them, that Petitioner had a prior conviction.

Respondent counters that Petitioner has failed to demonstrate how the reading of the charge transformed the judge into a witness or illustrated any sort of bias towards him, arguing that he has not overcome the presumption that the judicial officer is unbiased. *Schweiker v.*

McClure, 456 U.S. 188, 195 (1982). Respondent presumes that Petitioner is "upset that the judge read a limiting instruction to disregard any evidence of prior conviction." Respondent further notes that the state habeas court held a hearing in response to Petitioner's motion to disqualify the judge wherein it was noted that evidence of extraneous offenses was admitted at trial.[4] Therefore, Petitioner has failed to show that the judge reading aloud the limiting instruction amounted to the judge acting as a witness for the state. In his reply, Petitioner argues that the extraneous offense evidence is irrelevant to this ground because the extraneous offense is not a conviction. Petitioner further argues that the evidence of prior convictions, presented by the judge as a witness, was inherently highly prejudicial evidence that would prejudice a person's ability to receive a fair and impartial trial. The Court disagrees. Even if Petitioner is correct that the judge's reading of the special instruction was error, he has not provided any authority, and the Court can find none, to support the conclusion that reading the instruction transformed the judge into a witness. Further, even if he could be characterized as a witness based upon the limiting instruction, Petitioner has not shown that the jury, upon hearing that Petitioner was convicted of an unspecified offense, placed significant weight on that information such that the information had a "substantial and injurious effect" or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Petitioner is not entitled to relief on this ground.

In Ground 17 of his Petition, Petitioner alleges that he was denied a full and fair opportunity to litigate a Fourth Amendment claim concerning blood evidence when the trial court

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[4]Such evidence was in the form of testimony by witnesses Deputy Wilson and Brian Cantrell who testified that Petitioner said he had been charged with intoxication manslaughter. SHCR-03 at 1389. "There was also testimony about the defendant "possibly leaving the scene of an accident where a person was killed, which would be another offense. Talked about the defendant drinking six or eight beers the day before. And then also there was testimony about the defendant using cocaine in Lubbock County, Texas." SHCR-03 at 1389.

improperly relied on the Texas implied consent law to overrule his motion to suppress. In support of his claim, Petitioner argues that he was never arrested and thus the Fourth Amendment, rather than the implied consent law, applied. In Response, the State counters that Petitioner did have an opportunity to and in fact did challenge the search and seizure on Fourth Amendment grounds by filing a motion to suppress in the trial court alleging that he was arrested without a warrant and without probable cause, that the results of all tests taken after his arrest were the fruits of an illegal search, that Petitioner failed to consent to the seizure of his blood, and that tangible evidence seized in connection with this case was seized without a warrant or probable cause. In his reply, Petitioner disputes Respondent's argument, urging the Court to find that he did not receive a full and fair opportunity to litigate his Fourth Amendment claim due to a combination of trial counsel's failure to be aware of the facts of the case (which would have led Petitioner and the witness Delacruz to testify in support of the motion), the prosecutor's misleading the trial court into believing that the implied consent law applied to his case, and consequently the trial court's failure to rule based on the appropriate constitutional standard.

As correctly pointed out by Respondent, the case of *Stone v. Powell*, 428 U.S. 465 (1976), bars federal habeas review of Petitioner's alleged violation of the Fourth Amendment. In *Stone v. Powell*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494. The Fifth Circuit has since interpreted an "opportunity for full and fair litigation" to mean just that: "an opportunity." *Janecka v. Cockrell*, 301 F.3d 316, 320 (5th Cir. 2002) (citing *Caver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978)), *cert. denied*,

537 U.S. 1196 (2003). "If a state provides the processes whereby a defendant can obtain full and fair litigation of a[F]ourth [A]mendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes." *Id.*

Petitioner's defense attorney filed a motion to suppress the State's evidence, and the trial court overruled the motion after conducting a hearing outside the presence of the jury. Although not raised on direct appeal, Petitioner attempted to re-litigate his Fourth Amendment claims on state habeas corpus review, and such claims were denied without written order. The record confirms that he was afforded ample opportunity for review of his Fourth Amendment claims at the state level. This review is sufficient to trigger the *Stone* bar. *See Janecka*, 301 F.3d at 320; *see also Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006) ("absent a showing that . . . Texas courts systematically and erroneously apply the state procedural bar rule to prevent adjudication of Fourth Amendment claims," the *Stone* bar obtains). Petitioner is not entitled to relief on this ground.

In Ground 33 of his Petition, Petitioner claims that he was denied a fair trial when the trial court improperly restricted his right to present evidence of significant probative value. Specifically, Petitioner complains that the trial court refused to allow counsel to inform the jury about the wind conditions at the time of the accident by way of a weather report for Lubbock, Texas, on the day of the accident, despite the fact that the State had "opened the door" to such testimony because numerous State witnesses testified that it was not windy at the time of the accident. In support of his argument, Petitioner claims that the weather report conflicted with their statements and that such evidence would have called into question not only these witnesses' credibility, but also the accuracy of their remembrance of the day's events.

Respondent argues that Petitioner has failed to prove that the trial court's decision "had a substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), because he has not demonstrated that such evidence would have been favorable to him, especially in light of the fact that if trial counsel had been able to admit such evidence, the State would have been able to submit additional, potentially unfavorable wind-related evidence in response.

"A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair." *Johnson v. Puckett*, 176 F.3d 809, 820 (5th Cir. 1999) (*citing Cupit v. Whitley*, 28 F.3d 532, 536 (5th Cir. 1994)). "The failure to admit evidence amounts to a due process violation only when the omitted evidence is a crucial, critical, highly significant factor in the context of the entire trial." *Id.* at 821 (*citing Thomas v. Lynaugh*, 812 F.2d 225, 230 (5th Cir. 1987). Petitioner has not demonstrated that evidence regarding the wind speed on the day of the accident would have been favorable to him or that its exclusion was harmful in the context of the entire trial. Accordingly, it cannot be said the exclusion of the evidence had a substantial and injurious effect or influence on the jury's verdict. Petitioner is not entitled to relief on this claim.

In sum, with respect to Petitioner's claims of trial court error, the Court finds that Petitioner states no violation of federal law or of his due process rights under the federal Constitution. The state court's determination of these habeas claims was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d).

B. Prosecutorial Misconduct (Grounds 15, 22, 34, 35, 46, 47)

Petitioner alleges that he is entitled to relief based on the following alleged instances of prosecutorial misconduct:

(1) the State knowingly sponsored false testimony and failed to correct the Judge's false testimony to the jury (Ground 15);

(2) the State failed to disclose coercive inapplicable written warnings (DIC-24 Form) given to Petitioner by Deputy Ojeda (Ground 22);

(3) the State used incriminating statements that were the product of an impermissible custodial interrogation (Ground 34);

(4) the State used evidence obtained from the police by their deliberate elicitation of statements from Petitioner after his right to counsel had attached (Ground 35);

(5) the cumulative effect of prosecutorial misconduct rendered the proceedings fundamentally unfair (Ground 46); and

(6) the cumulative effect of the State's misconduct coupled with the ineffective assistance of trial counsel rendered the proceedings fundamentally unfair (Ground 47).

"Prosecutorial misconduct is not a ground for [habeas] relief unless it casts serious doubt upon the correctness of the jury's verdict." *See Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001). A prosecutorial misconduct claim requires a court to consider three factors: "1) the magnitude of the prejudicial effect of the [prosecutorial action]; 2) the efficacy of any cautionary instruction given by the judge; and 3) the strength of the evidence supporting the conviction." *Id.* "Only where improper prosecutorial [comments] substantially affect the defendant's right to a fair trial do they require reversal." *Id.*

In Ground 15 of his Petition, Petitioner argues that the State knowingly sponsored false testimony and failed to correct the Judge's false testimony to the jury when he gave the special instruction contained in the jury charge that they had heard evidence that Petitioner had been

convicted of offenses other than the one for which he was then on trial. This Ground is merely a restatement of the claim made in Ground 14, and the Court finds that for the reasons stated in its discussion of that Ground 14, Petitioner is not entitled to relief on this ground.

In his Ground 22, Petitioner claims that the prosecution failed to disclose evidence favorable to his defense in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), when the State failed "to disclose coercive inapplicable written warnings (DIC-24 Form) given to [Petitioner] by Deputy Ojeda." In other words, Petitioner contends that he was coerced into signing a consent form for a blood draw after Deputy Ojeda transported him to the hospital and gave him verbal and written warnings (that his driver's license would be automatically suspended if he refused) that applied only in the event of his arrest for an offense involving the operation of a motor vehicle. Petitioner further argues that pursuant to Trooper Ponce's testimony, the record reflects that he was not actually arrested and therefore the warnings given by Deputy Ojeda were inapplicable, his consent was invalid, and the blood evidence that was used to procure his conviction should not have been admitted into evidence.

In his discursive Petition and brief in support, Petitioner attacks the blood evidence from several angles that seem to be interwoven. In this ground, Petitioner specifically cites to *Brady v. Maryland* and its progeny to support his contention that the DIC-24 was favorable to his defense and, if it had been disclosed to trial counsel, she would have been able to successfully challenge the admission of the blood evidence. In Respondent's Answer, Respondent grouped all of Petitioner's grounds regarding the blood evidence into one argument pertaining to Fourth Amendment grounds and relied on *Stone v. Powell*, 428 U.S. 465 (1976), to support the argument that Petitioner's claims are not cognizable on federal habeas review because the state of Texas

affords an opportunity for full and fair litigation of such a claim and pointing out that Petitioner did in fact litigate his claim in a motion to suppress. Respondent did not, however, address the claim under *Brady*.

All criminal defendants have a constitutionally protected privilege to request and obtain from the prosecution any exculpatory evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed. *California v. Trombetta*, 467 U.S. 479, 485 (1984) (citing *Brady v. Maryland*, 373 U.S. at 87). "Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *Id.*

There are three elements of a *Brady* claim: (i) the evidence at issue is favorable to the accused, (ii) the State suppressed the evidence, and (iii) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 280. Evidence is material if it would have put the whole case in such a different light as to undermine confidence in the verdict. *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006). "*Brady* does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Kutzner v. Cockrell*, 303 F.3d. 333, 336 (5th Cir. 2002).

Brady claims involve "the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. 97, 103 (1976)(emphasis added). Federal courts have long held that evidence uncovered at trial does not form the basis for a *Brady* claim. *See Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994) (holding there was no

basis for a *Brady* claim where the defense learned of several variances between the victim's written statement given immediately following the crime and her trial testimony when the variance was discovered at trial and the defense fully cross-examined the victim on the variance); *United States v. McKinney*, 758 F.2d 1036, 1049-50 (5th Cir. 1985) (holding that the prosecution did not suppress evidence where *Brady* materials were disclosed at trial and reasoning that "[i]f the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have, and indeed, should have been").

At the outset, the Court notes that Petitioner has failed to demonstrate how the DIC-24 constituted exculpatory evidence. Moreover, even if it is Petitioner's contention that he did not discover until Trooper Ponce's testimony during the trial that he was not, in fact, under arrest at the time that Deputy Ojeda gave him the admonishments and had him sign the DIC-24, such "evidence" does not constitute a *Brady* claim because it was discovered at trial. Petitioner is not entitled to relief on this ground.

In his Ground 34, Petitioner alleges that the State committed prosecutorial misconduct when it used incriminating statements that were the product of an impermissible custodial interrogation by Deputy Shaun Wilson, a jailer and sheriff's deputy who transported Petitioner and another prisoner to a health clinic. In his ground 35, Petitioner again takes issue with the testimony of Deputy Shaun Wilson but here argues that the State improperly used evidence obtained from the police by their deliberate elicitation of statements from Petitioner after his Sixth Amendment right to counsel had attached. The incriminating statements Petitioner refers to were described in detail in the opinion of the Seventh Court of Appeals:

> During trial the State sought to introduce testimony from Lamb County deputy sheriff Shaun Wilson that appellant had made a statement indicating he had used cocaine within a day before the collision. After voir dire of Wilson the defense objected on the basis the statement was the result of custodial interrogation without "proper warnings," in violation of his right to counsel, and the State had failed to give timely notice of its intent to call Wilson. The trial court overruled the objections. Wilson testified that while appellant was confined in the Lamb County jail in November 2003 he took appellant and another inmate to a clinic for medical treatment. According to Wilson, in the clinic's waiting room, while appellant was "talking in general to the other inmate and maybe a nurse . . . I happened to ask him what he was incarcerated for." Appellant replied "he was being charged with intoxicated Manslaughter." Wilson asked if the events occurred near the town of Earth. Appellant said it "happened on [highway] 84 up by Amherst." After further defense objections the court recessed for the evening to give the defense the opportunity to investigate the testimony.
>
> The State recalled Wilson during rebuttal.[5] Wilson was asked again about appellant's answer to his first question and replied: "He responded that he was in jail for Intoxicated Manslaughter." Wilson testified appellant then "stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before." Wilson testified he did not document the statement at the time or take any steps then to make an investigator or prosecutor working on the case aware of it. The prosecutor only learned of the statement during a lunchtime conversation the Friday before trial. The prosecutor asked Wilson to reduce his recollection of the event to writing and provided a copy to defense counsel the same afternoon.
>
> The State's rebuttal evidence also included testimony from Brian Cantrell, the other inmate at the clinic. Cantrell's testimony supported Wilson's version of events. He recalled that appellant askedWilson, "How can they charge me with Intoxication Manslaughter when I wasn't drunk, when I was on cocaine at the time. According to Cantrell that statement was not in response to questioning by Wilson.

Banister v. State, slip op. at 2-4.

Petitioner contends that as a result of the allegedly improper custodial interrogation by Wilson, the jury was able to hear that he had admitted to using cocaine and also "that he was the one who ran over" the cyclist, and he places special emphasis on the variations of Wilson's

[5]A defense expert testified that no conclusion could be drawn about when appellant consumed cocaine based on the analysis of his blood.

recollection of Petitioner's statements during the conversation. For instance, at one point, Wilson said that Petitioner "stated that he didn't understand why he was being charged with Intoxicated Manslaughter if he had used cocaine the day before" (5 RR 209); during cross-examination Wilson testified that Petitioner "stated that . . . he had used cocaine earlier." (5 RR 211-212).

Respondent notes that the appellate court found that Wilson's statement was not the product of a custodial interrogation in violation of Petitioner's Fifth and Sixth Amendment rights and argues that the appellate court's findings are entitled to deference, as it is the last reasoned state court opinion. *Ylst v. Nunnebaker*, 501 U.S. 797, 803 (1991). In his Response, Petitioner argues that the appellate court applied the wrong standard, using the Fifth Amendment custodial interrogation standard of review to his Sixth Amendment claim, instead of the standard of review set out in *Fellers v. United States*, 540 U.S. 519 (2004), and *Massiah v. United States*, 377 U.S. 201 (1964), and that such failure made the state court's conclusion objectively unreasonable.

The Sixth Amendment rubric announced in *Massiah v. United States* held that a defendant may not have "used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. 201, 206 (1964). "A *Massiah* violation has three elements: (1) the Sixth Amendment right to counsel has attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel's being present; and (3) that agent 'deliberately elicit[s]' incriminating statements from the defendant." *Henderson v. Quarterman*, 460 F. 3d 654, 664 (5th Cir. 2006) (alteration in original) (quoting *Massiah*, 377 U.S. at 206). Although Wilson did ask Petitioner why he was in jail, he did not ask

him any iteration of "what he did." Moreover, Petitioner has not and can not show that Wilson's question regarding what he was in jail for was in any way designed to elicit the incriminating response that he had used cocaine [earlier/the day before]. Indeed, the Court notes that although Wilson asked what he was in jail for, and Petitioner responded, "Intoxicated Manslaughter," there is nothing in the record to suggest that Wilson knew, or could have known, that Petitioner would expand on his answer with the additional information that he could not understand how he could be facing charges of intoxication manslaughter when he had used cocaine. Petitioner is not entitled to relief on these grounds.

In his Ground 46 and 47, Petitioner argues that the cumulative effect of prosecutorial misconduct rendered the proceedings fundamentally unfair and also that the cumulative effect of the State's misconduct coupled with the ineffective assistance of trial counsel rendered the proceedings fundamentally unfair. As the Court has concluded that Petitioner's claims of prosecutorial misconduct are without merit, Petitioner is not entitled to relief on these grounds.

For the reasons stated above, with respect to Petitioner's claims of prosecutorial misconduct, the Court finds that Petitioner states no violation of federal law or of his due process rights under the federal Constitution. The state court's determination of these habeas claims was not contrary to or an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d).

C. Illegal Arrest (Grounds 19, 20, and 21)

Petitioner alleges that he is entitled to relief based upon the circumstances of his arrest/detention, which led to the blood draw:

(1) his consent to the blood search was the product of an illegal detention or illegal arrest (Ground 19);

(2) DPS Trooper Manuel Ponce misinformed him that it was "mandatory" that he submit to blood withdrawal (Ground 20); and

(3) Deputy Ojeda misstated the consequences flowing from a refusal to submit to the blood withdrawal (Ground 21).

In support of these grounds, Petitioner refers to testimony of Trooper Ponce, who testified that after the accident he did not suspect Petitioner to be under the influence of alcohol or drugs and that he did not appear to be sleepy or fatigued, but he would have detained Petitioner if he had tried to leave the scene. Ponce also testified that he believed it was mandatory that a blood sample be drawn from the driver. Petitioner notes that Abel Delacruz's affidavit supported Petitioner's belief that he was ordered into the police vehicle and told that it was mandatory, and that Petitioner would not have gotten into the vehicle if he had not been ordered to do so after Ponce took his driver's license. Moreover, Petitioner again raises the matter of Deputy Ojeda giving him allegedly inapplicable warnings from the DIC-24 Form, causing his consent to be involuntary.

These grounds are merely restatements of his Fourth Amendment claims that have already been analyzed in this opinion with regard to his Ground 17. For the reasons stated in that section and in the Respondent's Answer, the Court finds that Petitioner has also failed to demonstrate that the state court's denial of his claims regarding the circumstances surrounding the drawing of blood evidence was contrary to or an unreasonable application of clearly established Supreme Court law. Petitioner is not entitled to relief on these grounds.

D. Ineffective Assistance of Trial Counsel

Twenty-eight of Petitioner's fifty-three grounds for review concern various instances of alleged ineffective assistance of trial counsel. Specifically, Petitioner argues that his trial counsel, Angela Overman, née French, was constitutionally ineffective because she

(1) failed to move for a directed verdict (Ground 3);

(2) failed to move to strike the State's expert testimony of D.P.S. toxicologist, Kathy Erwin, when she failed to "connect it up" (Ground 4);

(3) failed to object to the State's improper arguments (Ground 5);

(4) failed to educate the jury on the State's burden of proof as it related to the "as a result of the introduction of cocaine into the body" element contained in the indictment (Ground 7);

(5) failed to request a jury instruction on the lesser-included offense of reckless driving (Ground 10);

(6) failed to object to the trial court's charge instructing the jury that Petitioner had been convicted of other offenses (Ground 11);

(7) failed to object to the trial court's charge instructing the jury to use prior convictions to evaluate Petitioner's credibility when he exercised his constitutional right not to testify (Ground 12);

(8) failed to object to the prosecutor's improper argument that the Texas implied consent law applied in his case (Ground 18);

(9) failed to speak with Deputy Ojeda about the written and oral warnings he gave Petitioner prior to extracting his blood (Ground 23);

(10) failed to object to the trial court's holding that his blood draw was done by a qualified individual (Ground 24);

(11) stipulated to the chain of custody on the blood evidence (Ground 25);

(12) failed to object to the State's failure to satisfy its burden of proof with regard to warrantless searches (Ground 26);

(13) failed to file a timely motion to suppress the blood evidence within the trial court's timeline (Ground 27);

(14) affirmatively stated "no objection" to the admission of the blood evidence (Ground 28);

(15) failed to speak with witness Abel Delacruz until the third day of trial (Ground 29);

(16) called witness Abel Delacruz as a witness, consequently establishing elements of the State's case (Ground 30);

(17) failed to investigate the wind conditions at the time of the accident (Ground 31);

(18) failed to request a continuance in order to validate the information contained in the weather report (Ground 32);

(19) failed to properly preserve the trial record for appellate review of Petitioner's Sixth Amendment right to counsel claim (Ground 36);

(20) failed to enlist the services of a guilt/innocence fact investigator (Ground 40);

(21) failed to conduct an investigation into the facts and the law of the case (Ground 41);

(22) failed to impeach the State's accident reconstruction expert, Trooper Phillip Vandergrift, with his inconsistent testimony (Ground 42);

(23) failed to consult or hire an independent accident reconstruction expert (Ground 43);

(24) failed to adequately consult with Petitioner prior to trial (Ground 44);

(25) erroneously informed Petitioner that he was eligible for probation (Ground 49);

(26) failed to object to the admission of the accident reconstruction evidence that was obtained as a result of the authorities' illegal detention of a vehicle without probable cause (Ground 50); and

(27) failed to object when the State called witnesses Brian Cantrell and Deputy Wilson as rebuttal witnesses (Ground 51).

Petitioner further asserts that the cumulative effect of trial counsel's errors rendered the proceedings fundamentally unfair (Ground 45).

"The Sixth Amendment guarantees criminal defendants the effective assistance of counsel." *Yarbrough v. Gentry*, 540 U.S. 1, 5 (2003). The proper standard for reviewing a claim of ineffective assistance of trial counsel is enunciated in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Under the two-pronged *Strickland* standard, Petitioner must show that defense counsel's performance was both deficient and prejudicial. *Id.* at 687. An attorney's performance was deficient if the attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution. *Id.* That is, counsel's performance must have fallen below the standards of reasonably competent representation as determined by the norms of the profession. A reviewing court's scrutiny of trial counsel's performance is highly deferential, with a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Id.* at 689. Strategic choices made after a thorough investigation of both the law and facts are "virtually unchallengeable." *Id.* at 690-91. This is a heavy burden that requires a "substantial," and not just a "conceivable," likelihood of a different result. *Harrington v. Richter*, 562 U.S. 86 (2011); *see also Cullen v. Pinholster*, 563 U.S. 170 (2011).

Additionally, Petitioner must show that counsel's deficient performance prejudiced the defense. To establish this prong, Petitioner must show that counsel's errors were so serious as to deprive Petitioner of a fair trial. *Strickland*, 466 U.S. at 687. Specifically, to prove prejudice, Petitioner must show that "(1) there is a reasonable probability that, but for counsel's unprofessional errors, the ultimate result of the proceeding would have been different . . . and (2) counsel's deficient performance rendered the trial fundamentally unfair." *Creel v. Johnson*, 162 F.3d 385, 395 (5th Cir. 1998). "Unreliability or unfairness does not result if the ineffectiveness

of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A showing of significant prejudice is required. *Spriggs v. Collins*, 993 F.2d 85, 88 n. 4. (5th Cir. 1993). If a petitioner fails to show either the deficiency or prejudice prong of the *Strickland* test, then the Court need not consider the other prong. *Strickland,* 466 U.S. at 697.

When a state prisoner asks a federal court to set aside a conviction or sentence due to ineffective assistance of counsel, the federal court is required to use the "doubly deferential" standard of review that credits any reasonable state court finding of fact or conclusion of law and that presumes that defense counsel's performance fell within the bounds of reasonableness. *Burt v. Titlow,* ___ U.S. ___, 134 S. Ct. 10, 13, 187 L. Ed. 2d 348 (2013). Petitioner's ineffective-assistance-of-counsel claims were adjudicated on the merits in a state court proceeding, and the denial of relief was based on a factual determination that will not be overturned unless it is objectively unreasonable in light of the evidence presented in the state court proceeding. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

In his Ground 3, Petitioner argues that trial counsel rendered ineffective assistance by failing to move for a directed verdict on the grounds that the State failed to prove that the accident occurred "as a result of the introduction of cocaine into his body." The indictment charged Petitioner with aggravated assault with a deadly weapon by intentionally, knowingly, or recklessly causing serious bodily injury to B.J. Mitchell by failing to control a motor vehicle without sufficient sleep, as a result of the introduction of cocaine into his body and thereby causing his motor vehicle to collide with B.J. Mitchell. In support of his contention, he points to the record wherein both the State's expert (DPS Chemist Kathy Erwin) and defense expert (Dr.

James Booker) testified generally as to the"cocaine crash" effect but affirmatively testified that they could not conclude based on the evidence that Petitioner was experiencing "cocaine crash" at the time of the incident.

Respondent argues that the State's determination of this claim was not unreasonable, given that trial counsel moved for a mistrial based on the argument that the evidence was insufficient to prove the introduction of cocaine and that such motion for mistrial was denied. Moreover, the State argues that Petitioner has failed to show that the evidence was so meager that a directed verdict would have been granted. Consequently, Petitioner has shown neither deficiency nor prejudice. Petitioner objected to this argument, placing special emphasis on the fact that trial counsel's first affidavit in his state habeas proceedings reflected an incorrect recollection of Erwin's testimony regarding the cocaine crash. Petitioner also contends that the only evidence presented was so weak that the only way the jury could have found him guilty was based upon an impermissible surmise or suspicion and, as such, the trial court would have been bound by law to enter a verdict of not guilty following proper motion for directed verdict.

Although the expert testimony did not conclude that Petitioner was, in fact, experiencing a "cocaine crash" at the time of the accident, it is the jury's unique role to judge the credibility of witnesses, evaluate witnesses' demeanor, resolve conflicts in testimony, and weigh the evidence in drawing inferences from basic facts to ultimate facts. *Tibbs v. Florida*, 457 U.S. 31, 45 n. 21 (1982); *United States v. Millsaps*, 157 F.3d 989, 994 (5th Cir. 2009). Indeed, the record reflects that evidence was presented to support the allegation that the accident was the result of the introduction of cocaine into Petitioner's body.

Finally, even if Petitioner could somehow demonstrate that failure to move for a directed verdict was deficient, he has not shown that he was prejudiced by that failure, given that trial counsel made the argument in her motion for mistrial and it was denied. Trial counsel did not render ineffective assistance by not raising a meritless motion, and Petitioner has failed to show that but for counsel's actions, the result of the proceeding would probably have been different. *See Parr v. Quarterman*, 472 F.3d 245, 256 (5th Cir. 2006) (counsel is not ineffective for failing to raise meritless claims); *Smith v. Dretke*, No. 4:04cv4122, 2006 U.S. Dist. LEXIS 47215 (S.D. Tex., June 30, 2006) (failure to file meritless motion to dismiss is not ineffective assistance of counsel). Petitioner's claim on this point is without merit.

In his Ground 4, Petitioner argues that trial counsel was ineffective for failing to move to strike the State's expert testimony of D.P.S. toxicologist, Kathy Erwin, when she failed to "connect it up." In support of this ground, Petitioner argues that the trial court conditionally allowed Erwin to testify regarding the "cocaine crash" effect, finding that "[b]efore she can give testimony as to the crash effect she's going to have to establish some way that she can tell from these tests that he would be suffering from the crash effect. . . ." (5 RR 38). Respondent argues in response that trial counsel did object to the testimony and moved for a mistrial; however, Petitioner objects to Respondent's answer on this ground because he asserts that Respondent misconstrued this claim. The Court agrees that Respondent did not directly address the allegation that trial counsel failed to specifically move to strike the testimony based on Erwin's failure to connect it up; however, assuming *arguendo* that failure of trial counsel to move to strike such testimony was deficient, it does not necessarily follow that Petitioner is entitled to relief. As previously explained, in addition to showing that his counsel's performance was

deficient, Petitioner must also show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Petitioner is not entitled to relief on this ground.

Petitioner has raised nine (9) instances where he contends that trial counsel was deficient for failing to object (or made an affirmative statement that she had no objection). Specifically, he asserts that trial counsel failed to object to the State's improper arguments (Ground 5); the trial court's charge instructing the jury that Petitioner had been convicted of other offenses (Ground 11); the trial court's charge instructing the jury to use prior convictions to evaluate Petitioner's credibility when he exercised his constitutional right not to testify (Ground 12); the prosecutor's improper argument that the Texas implied consent law applied in his case (Ground 18); the trial court's holding that his blood draw was done by a qualified individual (Ground 24); the State's failure to satisfy its burden of proof with regard to warrantless searches (Ground 26); the admission of the accident reconstruction evidence, which was obtained as a result of the authorities' illegal detention of a vehicle without probable cause (Ground 50); and the State's calling Brian Cantrell and Deputy Wilson as rebuttal witnesses (Ground 51). Finally, Petitioner argues that trial counsel's affirmative statement of "no objection" to the admission of the blood evidence was ineffective assistance of counsel (Ground 28).

The Fifth Circuit continues to adhere to the rule that "the failure to 'raise meritless objections is not ineffective lawyering.'" *Halley v. Thaler*, 448 Fed. Appx. 518, 524 (5th Cir. 2011) (*citing Clark v. Collins*, 19 F.3d 959, at 966 (5th Cir. 1994)). Even with a basis to object, however, an attorney may render effective assistance despite a failure to object when the failure is a matter of trial strategy. *See Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (noting that

a failure to object may be a matter of trial strategy as to which courts will not second-guess counsel). Failure to make frivolous objections does not cause counsel's performance to fall below an objective level of reasonableness. *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998). On habeas review, federal courts do not second-guess an attorney's decision through the distorting lens of hindsight, but rather the courts presume that counsel's conduct falls within the wide range of reasonable professional assistance and under the circumstance that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

Relying on the trial record and trial counsel's affidavit and amended affidavit, the Texas Court of Criminal Appeals denied Petitioner's state habeas application and his claims of ineffective assistance of trial counsel. The Court has considered the pleadings, counsel's affidavits, and the state court records, and finds that Petitioner has failed to demonstrate that any of the objections above would have been granted or that, had they been raised or granted, there was a reasonable probability that the outcome of the trial would have been different. Petitioner has also failed to demonstrate that the state court's denial of his claims regarding trial counsel's failure to object to the specific instances listed in his grounds was contrary to or an unreasonable application of clearly established Supreme Court law. Petitioner is not entitled to relief on these grounds.

In his Ground 7, Petitioner argues that trial counsel was ineffective for failing to educate the jury on the State's burden of proof related to the "as a result of the introduction of cocaine into the body" element contained in the indictment. Petitioner contends that trial counsel herself did not understand that element noting that there was discussion on the first day of trial that resulted in agreement between trial counsel, the State, and the trial court that it was an

independent element that the State had the burden of proving. Petitioner asserts that the jury was not privy to this conversation or provided any clarification that the cocaine element had to be proved apart from the other elements of the indictment. Petitioner argues that the lack of education by defense counsel "reasonably likely resulted in the jury not knowing that the state had to prove that not only did [Petitioner] suffer a cocaine crash, but that the cocaine crash was the proximate cause of the collision." Doc. 1, p. 21. In other words, Petitioner claims that trial counsel was ineffective for failing to direct the jury to the fact that they had to find him guilty of every element of the crime with which he was charged. In support of this ground, Petitioner points to (1) the jury's request to see the board with proof of elements; (2) a letter and affidavit from Juror Garcia, which stated that the jury's decision was based on whether Petitioner ran over the person instead of whether the accident occurred as a result of the introduction of cocaine into the body, and that the jury had questions and wanted clarification; (3) the fact that trial counsel, the court, and the prosecution couldn't readily understand the same language of the indictment that was given in the jury charge; and (4) the fact that the jury returned a guilty verdict despite the absence of any evidence establishing that Petitioner suffered a cocaine crash or that cocaine was the proximate cause of the accident. In sum, Petitioner contends that given the absence of any proof by the State of the causal connection between the inactive metabolite in his system and the collision, it is reasonably likely that had defense counsel properly educated the jury on the "as a result of cocaine" element, the jury would have returned a verdict of not guilty.

Respondent notes that the record directly contradicts Petitioner's assertion that trial counsel did not educate the jury on the State's burden of proof, quoting trial counsel's closing argument. The Court does not repeat the specific quote here; however, it is abundantly clear that

trial counsel did in fact explain every element that was required to be proved by the State in her closing argument and admonished the jury that there was reasonable doubt that cocaine was in his system at the time he operated the vehicle. Petitioner has failed to demonstrate that counsel was ineffective in this ground or that the state court's determination of this habeas claim was contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this ground.

In his Ground 10, Petitioner argues that trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of reckless driving. In support of his claim, Petitioner argues that there was more than a scintilla of evidence that if he was guilty, he was guilty only of reckless driving; and he asserts that the jury requested to "add guilty by reckless" as an option. Petitioner avers that if counsel had requested the instruction, the court would have been bound by law to give it, and the jury would have had a third choice, other than guilty of aggravated assault or acquittal. Moreover, Petitioner complains that he does not remember counsel making the request and that, if she did, her failure to make sure it was on the record meant the issue was not preserved for appeal. Respondent counters that counsel stated in her affidavit in the state habeas proceeding that she did request reckless driving and simple assault during the charge conference, which was not on the record. Respondent also argues that Petitioner has failed to demonstrate that if he is guilty, he is guilty only of reckless driving. Respondent also notes that trial counsel provided her strategic reasons for her actions with regard to the lesser-included offense instructions in her affidavit.

The Court finds that Petitioner has failed to demonstrate that trial counsel's actions with regard to the lesser-included offense instructions were not strategic and has therefore not demonstrated that the state court's adjudication of his ineffective-assistance-of-counsel complaints was contrary to or an unreasonable application of clearly established Supreme Court law. Accordingly, Petitioner is not entitled to relief on this ground.[6]

In his Ground 23, Petitioner avers that trial counsel was ineffective for failing to speak to Deputy Ojeda about the written and oral warnings he gave to Petitioner prior to extracting his blood. Petitioner claims that if she had, she would have discovered that the warnings given to Petitioner prior to the blood draw were inapplicable and thus it was reasonably likely that she would have challenged the admission of the blood evidence. Respondent counters that this assertion is refuted by trial counsel's affidavit and the evidence in the record wherein she stated that to her recollection she did speak to Ojeda. This is further evidenced by the fact that trial counsel filed a motion to suppress the blood evidence. In his Reply, Petitioner argues that Respondent has misconstrued his claim and fails to address his allegation that had trial counsel spoken with Ojeda, she would have discovered that the warnings given to him prior to the blood draw were inapplicable, which caused her to fail to object to the evidence on that specific basis.

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[6]Moreover, to the extent that Petitioner argues that the trial court would have been bound by law to give the reckless driving instruction, it is well settled that in a noncapital case "the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue." *Creel v. Johnson*, 162 F.3d 385, 390 (5th Cir. 1998) (citation omitted); *see also Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *Alexander v. McCotter*, 775 F.2d 595, 601 (5th Cir. 1985) (holding lesser included offense instruction is not a federal constitutional matter in non-capital cases). The Texas Court of Criminal Appeals denied this claim. Absent a violation of the Constitution, we defer to the state court interpretation of its law for whether a lesser-included-offense instruction is warranted. *See Valles*, 835 F.2d at 128. It is beyond this Court's habeas authority to question a state-court judgment on the state-court jury instruction issue when no constitutional question exists. *Wood v. Quarterman*, 503 F.3d 408, 413 (5th Cir. 2007) (quoting *McGuire*, 502 U.S. 62, 67–68 (1991)) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Petitioner also argues, essentially, that trial counsel's affidavits were inconsistent and therefore unreliable.

"Mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). Petitioner's contention that trial counsel's affidavits are wholly unreliable, even after the original affidavit was amended, is conclusory. Moreover, even if the Court were to conclude that counsel failed to speak to Ojeda and that such failure was deficient on this ground (which it does not), Petitioner cannot demonstrate that such failure was also prejudicial because he has not demonstrated how his allegation regarding the warnings given by Ojeda would have resulted in a favorable outcome at trial. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on this ground.

In his Ground 25, Petitioner argues that trial counsel was ineffective because she stipulated to the chain of custody of the blood evidence, relieving the State of its burden to prove that the blood that was seized, tested, and admitted belonged to him. Respondent argues that Petitioner has given no reason for his trial counsel to have objected to the blood evidence and pointed to trial counsel's affidavit wherein she explained her reason for not objecting. Moreover, Respondent notes that the DPS chemist who conducted the analysis of the blood sample testified as to how she received the blood sample. In his Reply, Petitioner argues that he has in fact given a reason for trial counsel to have objected to the chain of custody of the blood evidence: specifically, that the record proves that none of the people who actually witnessed the withdrawal of his blood ever testified or were even on the witness list. Consequently, there is a reasonable

probability that the State would not have been able to produce the witnesses necessary to establish the beginning of the chain of custody.

Petitioner's argument that the State did not list or call witnesses to testify as to the chain of custody is not the same as evidence to suggest any impropriety with regard to the chain of custody, and therefore Petitioner has failed to show how he was prejudiced by counsel's alleged failure to challenge the chain of custody. Accordingly, Petitioner is not entitled to relief on this ground because he has failed to show how he was prejudiced as a result of this alleged deficiency on the part of counsel.

In his Ground 27, Petitioner argues that trial counsel was ineffective when she failed to file a timely motion to suppress within the trial court's deadline. Petitioner states that trial counsel did not file the motion to suppress until the first day of trial, September 13, 2004, even though she was given three months' notice that the deadline for filing pretrial matters was August 23, 2004. Petitioner states that the notice specifically warned that matters not filed prior to the deadline would be deemed waived. In support of this Ground, Petitioner argues that if trial counsel had filed the motion in a timely manner, he would have received a pretrial suppression hearing where he could have demonstrated that he was illegally detained, that he was told it was mandatory to give his blood, that he was given inapplicable warnings contained in the DIC-24 form, and that he did not voluntarily consent to the seizure of his blood. Petitioner alleges that he could have made the above demonstration with the testimony of Abel Delacruz, Trooper Ponce, and Deputy Ojeda. Respondent argues that this ground is conclusory and, as such, does not raise a constitutional claim. The Court agrees. Petitioner has not demonstrated that the state habeas

court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on this ground.

Petitioner next claims that trial counsel was deficient for failing to speak with witness Abel Delacruz until the third day of trial (Ground 29) and for calling Delacruz as a witness, consequently establishing elements of the State's case (Ground 30). In support of these grounds, Petitioner notes that Delacruz was listed on the State's subpoena list but was not ultimately called to testify during the State's case. Petitioner argues that had trial counsel spoken to Delacruz prior to trial, it is reasonably likely he could have testified at a pretrial suppression hearing concerning the blood evidence and trial counsel would have also realized that it was not a good idea to call Delacruz as a witness because he would bolster the State's claim that Petitioner had consciously disregarded the risk of the victim through his testimony. Moreover, if trial counsel had not called Delacruz, she would not have elicited testimony from Delacruz that (1) identified Petitioner as the driver of the car - an element that had not previously been proven by other testimony in the case; (2) Petitioner had told him "that we had hit a bicyclist"; and (3) Petitioner had told him that he had seen the bicyclist in his peripheral vision before striking him. Petitioner asserts that had Delacruz not been called, the jury would have had reasonable doubt and points to the affidavit of one juror who believes that he is not guilty.

In response, Respondent points to trial counsel's affidavit submitted in the state habeas proceedings wherein she explained her strategic decision for calling Delacruz as a witness and that Petitioner has failed to demonstrate how her interviewing Delacruz when she did amounted to deficiency or prejudice. The Court agrees. As Petitioner has not overcome the presumption of

reasonableness that should be attributed to the strategic reasons for counsel's handling of Delacruz as a witness, Petitioner is not entitled to relief on these grounds.

In his Grounds 31 and 32, Petitioner complains that trial counsel was deficient for failing to investigate the wind conditions at the time of the accident and for failing to request a continuance in order to validate the information contained in the report. In support of his claim, Petitioner states that he knew the day to be windy and informed counsel of that at their first meeting. After several witnesses testified that it was not a windy day, Petitioner gave trial counsel a copy of a weather report that indicated that the wind speed was 25.3 mph at the very hour and vicinity of the accident. The Court refused counsel's offer of the report, questioning its reliability. Petitioner concludes that it was reasonably likely that if trial counsel had investigated the wind conditions in advance, she would have been able to satisfy the court's concerns with more reliable information and the jury would have heard the truth about the wind conditions. Petitioner argues that the wind report was important not only to impeach the credibility of the aforementioned witnesses, but also to help the jury understand the circumstances of high winds on a bicyclist. Petitioner further argues that had counsel requested a continuance in order to validate the information contained in the report, she would have been able to satisfy the trial court's concerns about its reliability.

Respondent counters that trial counsel explained in her affidavit that her strategy was to cross-examine the state's witnesses of weather conditions in order to leave doubt in the jury's minds, rather than to enter into evidence a weather report and open up the possibility for the State to counter with testimony regarding the weather that possibly could have dispelled doubt. Consequently, Respondent argues, Petitioner has failed to overcome the presumption of

correctness that should be attributed to the strategic decision. In his Reply, Petitioner argues that trial counsel's affidavit is unreliable and that there was no possible downside to having the jury hear about the high winds. Moreover, Petitioner avers that counsel's reason for not admitting the weather report was not strategic and, if it was, it was an unreasonable one.

"Mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). As stated before, Petitioner's contention that trial counsel's affidavits are wholly unreliable, even after the original affidavit was amended, is conclusory. Moreover, even if the Court were to conclude that failure to investigate the wind conditions was deficient (which it does not), Petitioner cannot demonstrate that such failure was also prejudicial because he has not demonstrated how his allegation regarding the weather report would result in a favorable outcome at trial. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on these grounds.

In his Ground 36, Petitioner argues that trial counsel was deficient for failing to preserve the trial record for appellate review of his Sixth Amendment right-to-counsel claim. More specifically, Petitioner argues that counsel was deficient for failing to ensure that the record contained evidence of his intoxicated manslaughter indictment and, as a result, the record was not sufficient to establish that his right to counsel carried over from his initial charge of intoxicated manslaughter (for which he was in custody at the time of his conversation with State's witness Deputy Wilson) to his subsequent and convicting charge of aggravated assault. Petitioner is referring to the appellate court analysis of statements made to Deputy Wilson while he was in jail on intoxicated manslaughter to the effect of, "[h]ow can they charge me with

Intoxicated Manslaughter when I wasn't drunk, I was on cocaine at the time," and whether its admission during Deputy Wilson's testimony violated his Sixth Amendment right to counsel. *Banister*, slip op. at 3, 8-9.

Respondent responds that trial counsel explained in her affidavits that she did all she could to preserve error with regard to Wilson's testimony. Respondent also notes that the appellate court found the statement was not the product of a custodial interrogation and implicitly found in the alternative that the Sixth Amendment right to counsel did not attach. Also, Respondent argues that in any event it was not trial counsel's responsibility to insure that the indictment for intoxicated manslaughter was made part of the clerk's record. In his Reply, Petitioner contends that the appellate court's rationale was that if the Sixth Amendment Right were to attach, it could only attach if Petitioner was indicted at the time for manslaughter and this, Petitioner claims, bolsters his argument.

Whether or not inclusion of the indictment for intoxicated manslaughter was the responsibility of trial counsel, the Court finds that its absence from the record to be considered by the appellate court is of no moment because the appellate court expressly found that the statement in question was not made in response to a question that was designed or reasonably likely to elicit incriminating information. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on this ground.

In his Ground 40, Petitioner complains that trial counsel was deficient because she failed to enlist the services of a guilt/innocence investigator. In Ground 41, Petitioner complains that trial counsel was deficient because she failed to conduct an adequate investigation into the facts

and law of the case. In support of his claims, Petitioner describes a laundry list of instances where he claims that the lack of a reasonable investigation prevented trial counsel from properly employing a sound trial strategy and making informed tactical decisions in Petitioner's best interest.

In response, Respondent argues generally that Petitioner has failed to satisfy his burden of proof with regard to this claim, asserting that while counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, *Strickland*, 466 U.S. 691; *Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999), counsel is not required to pursue every path until it bears fruit or all conceivable hope withers. *Moore*, 194 F.3d at 616. Respondent also argues that Petitioner's assertion that counsel did not investigate is controverted by her affidavit and that he has failed to demonstrate what the investigation would have revealed and how the trial's outcome would have changed had counsel hired an investigator or investigated more than she did. In his Reply, Petitioner notes that he did in fact demonstrate what additional investigation would have revealed and again contends that counsel's affidavits in the state habeas proceedings are unreliable regarding these grounds.

At the outset, the Court notes that Petitioner has failed to provide any legal basis (much less a constitutional basis) for an attorney's duty to enlist the services of a "guilt/innocence investigator." Consequently, Petitioner's Ground 40 is wholly without merit, and he is not entitled to relief on that claim.

As to his claims that trial counsel was ineffective for failing to investigate the law and facts of the case, "mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). Although the Court notes

that Petitioner did point to specific instances where, he believes, further investigation by trial counsel would have led to a different result, such contention is purely conclusory and does not demonstrate that any such investigation would have in fact been favorable to Petitioner. Moreover, Petitioner has failed to demonstrate that counsel's strategic decisions regarding the investigations that she did conduct in relation to his case, as described in her affidavits, were unreasonable. Petitioner cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on Ground 41.

In his Ground 42, Petitioner contends that trial counsel was deficient for failing to impeach the State's accident reconstruction expert, Trooper Phillip Vandergrift, with his inconsistent testimony. In his Ground 43, Petitioner states that trial counsel was deficient for failing to consult or hire an independent accident reconstruction expert. Respondent counters that trial counsel refuted these claims in her affidavit and quoted the portion of her affidavit regarding her recollection of the matter and explaining her strategic reason for her decision not to continue questioning Vandergrift. In his reply, Petitioner argues that trial counsel's assertions are unreasonable, referring the Court to his "rebuttal affidavit" submitted in his state habeas proceedings. Nevertheless, the Court has considered the record on this matter and finds that Petitioner's allegation that trial counsel's affidavit is unreasonable on these grounds is conclusory; and as such, he cannot show that the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law. Petitioner is not entitled to habeas relief on Grounds 42 or 43.

In his Ground 44, Petitioner contends that trial counsel was deficient for failing to adequately consult with him prior to trial. In support of this ground, Petitioner points to specific matters that he believes counsel should have conferred with him about, which he believes would have led to a different outcome at trial. Respondent counters that this ground is controverted by trial counsel's affidavit and should be dismissed as conclusory. This Court agrees. Petitioner has failed to demonstrate that the state court's denial of this ground was contrary to or an unreasonable application of clearly established Supreme Court law.

In his Ground 49, Petitioner claims that trial counsel was deficient for erroneously informing him that he was eligible for probation. Specifically, Petitioner states that a few weeks prior to trial, he and his brother spoke with trial counsel regarding who should assess the punishment in the event of his conviction. In support of this ground, Petitioner included his own affidavit and the affidavit of his brother, recounting that during that conversation, Petitioner alleges that trial counsel advised him that he should have the judge assess punishment because "the judge can give you probation, the jury cannot." Petitioner alleges that based upon this advice, he elected to have the judge determine the punishment in this case. However, Petitioner contends that counsel prepared an application for community supervision and noted in her trial notes to "make sure judge can do prob on Agg/Assault." Petitioner argues that counsel should not have advised him that he was eligible for probation, based on the fact that the deadly weapon finding as well as his prior felony conviction would preclude him from receiving probation. Petitioner contends that if she had informed him that he was not eligible for probation, he would have elected to have the jury determine punishment and may have even decided to plea the case. Respondent refers again to the trial counsel's affidavit in the state habeas proceedings and

contends that trial counsel did not tell Petitioner that he was eligible for probation but that she did ask for leniency.

In *Sauceda v. Scott*, 51 F.3d 1042 (5th Cir. 1995) (Table) (available on WESTLAW at 1995 WL 152976), the petitioner claimed that counsel rendered ineffective assistance by failing to advise him that under Texas law, the judge could not assess a probated sentence while the jury could have. The district court found that even if counsel was inept, there was no evidence that had the petitioner been sentenced by the jury, he would have received probation. The Fifth Circuit affirmed, holding that the petitioner only alleged that he might have received probation, but that he failed to establish a reasonable probability that but for the alleged ineffectiveness, he likely would have received a lesser sentence if the jury had sentenced him.

Similarly, in the present case, Petitioner has failed to set forth a reasonable probability that he would have received a lesser sentence had the jury, rather than the judge, sentenced him. He was convicted of aggravated assault with an affirmative finding that he had used a deadly weapon, as a repeat offender. This was a first-degree felony, carrying a minimum of 15 years to a maximum of 99 years to life in prison; nonetheless, the judge gave him a 30 year sentence.

Petitioner has failed to establish a reasonable probability that he would have received a lesser sentence had it been imposed by the jury; on the contrary, based on the facts offered during the guilt-innocence phase and the punishment phase of the trial, it is plausible (if not likely) that the jury could have given him a harsher sentence than he actually received, which sentence was well short of the maximum available under the law.

Thus, even if trial counsel rendered ineffective assistance by incorrectly advising him that the judge could grant probation, Petitioner has failed to show that but for this dereliction, the

result of the proceeding would probably have been different, in that he would probably have received a lesser sentence from the jury or even accepted a plea. The fact that Petitioner waived his right to be sentenced by a jury does not itself show a constitutional violation. He has failed to meet the prejudice prong of *Strickland*, and so this claim of ineffective assistance of counsel is without merit.

Finally, Petitioner argues in his Ground 45 that the cumulative effect of trial counsel's errors rendered the proceedings fundamentally unfair. Federal habeas relief is only available for cumulative errors that are of a constitutional dimension. *Coble v. Dretke*, 444 F.3d 345, 355 (5th Cir. 2006); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997). Petitioner here has failed to establish any constitutional error in the conduct of his counsel. Therefore, relief is not available on this basis. *See Shields v. Dretke*, 122 Fed. Appx. 133, 154 (5th Cir. 2005) (claim that cumulative effect of trial counsel error was denial of effective assistance of counsel fails where petitioner has shown no such error); *United States v. Moye*, 951 F.2d 59, 63 n. 7 (5th Cir. 1992) ("Because we find no merit to any of Moye's arguments of error, his claim of cumulative error must also fail"). Accordingly, the Court concludes that Petitioner is not entitled to relief on his claims of ineffective assistance of counsel.

E. Ineffective Assistance of Appellate Counsel

Petitioner also claims that his appellate counsel, Brian W. Wice. was ineffective when he

(1) failed to challenge the legal sufficiency of the evidence (Ground 1);

(2) failed to challenge the factual sufficiency of the evidence (Ground 2);

(3) failed to raise as error the prosecutor's improper closing argument that Petitioner suffered a cocaine crash (Ground 6);

(4) failed to raise as error the trial court's denial of trial counsel's request for a lesser-included offense instruction on deadly conduct (Ground 9);

(5) failed to raise the ineffective assistance of counsel claims raised in Petitioner's Grounds 11-15 (Ground 16);

(6) failed to include the intoxicated manslaughter indictment with the record on appeal and failed to cite crucial portions of the trial record in his brief (Ground 37);

(7) raised factually insupportable errors on appeal while abandoning clearly meritorious ones (Ground 48); and

(8) failed to raise as error the trial court's allowance of extraneous conduct (Ground 52).

The *Strickland* standard for reviewing claims of ineffective assistance of counsel also applies to claims of ineffective assistance on direct appeal. *Evitts v. Lucy*, 469 U.S. 387, 395 (1985). Thus, to demonstrate that appellate counsel's performance was constitutionally inadequate, Petitioner must show that (1) appellate counsel was objectively unreasonable and (2) there is a reasonable probability that, but for appellate counsel's deficient performance, he "would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing *Strickland v. Washington*, 466 U.S. at 687-91, 694)). *See United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000) ("In the appellate context, the prejudice prong requires a showing that [the court] would have afforded relief on appeal.").

As listed above, Petitioner argues that appellate counsel Wice was ineffective for failing to raise multiple issues that he asserts would have been meritorious had they been presented by appellate counsel on appeal. For example, in support of his argument that appellate counsel Wice was ineffective for failing to raise the legal and factual sufficiency of the evidence on appeal, Petitioner relies on the Amended Affidavit submitted by Wice during the state habeas proceedings, wherein Wice states:

> In the two years since I have filed my original affidavit, I have had the chance to review that original affidavit, pertinent portions of the trial record, and pertinent portions of the court of appeals' opinion affirming Mr. Bannister's conviction. Viewed against that backdrop, I now believe that my assertion as to why I did not challenge either the legal or factual sufficiency of the evidence was mistaken, and that there was no tactical downside to having raised either of these issues. While I cannot say that either claim would have been meritorious, I recognize that, in the exercise of reasoned professional judgment, that I should have raised both of these appellate issues.

SHCR-03 at 6.

In a counseled appeal after conviction, the key is whether the failure to raise an issue worked to the prejudice of the defendant. *Sharp*, 930 F.2d at 453. This standard has been affirmed by the Supreme Court. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (holding that the petitioner must first show that his appellate attorney was objectively unreasonable in failing to find arguable issues to appeal, and also a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief raising these issues, he would have prevailed on his appeal). *See also Williams v. Taylor*, 529 U.S. 362 (2000); *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001).

An appellate counsel's failure to raise certain issues on appeal does not deprive an appellant of effective assistance of counsel where the petitioner did not show trial errors with arguable merit. *Hooks v. Roberts*, 480 F.2d 1196, 1198 (5th Cir. 1973). Appellate counsel is not required to consult with his client concerning the legal issues to be presented on appeal. *Id.* at 1197. An appellate attorney's duty is to choose among potential issues, using professional judgment as to their merits – every conceivable issue need not be raised on appeal. *Jones v. Barnes*, 463 U.S. 745, 749 (1983).

Although Petitioner places special emphasis on Appellate Counsel Wice's statement in the Amended Affidavit that he should have raised the issue of legal or factual sufficiency, the Court also notes Wice's statement that he "cannot say that either claim would have been meritorious." This Court agrees.

Petitioner has failed to show that his appellate attorney was objectively unreasonable in failing to argue the issues he believes should have been raised on appeal. He has also failed to show a reasonable probability that, but for his counsel's alleged unreasonable failure to file a merits brief raising these issues, he would have prevailed on his appeal. *Robbins, 528* U.S. at 285. Petitioner raised this claim in his state writ of habeas corpus, and the Court of Criminal Appeals rejected this issue when it denied state habeas relief. He has failed to show deficient performance or that there is a reasonable probability that, but for appellate counsel's alleged unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694. Petitioner cannot show that the state habeas court's denial of his claims of ineffective assistance of appellate counsel was contrary to, or involved an unreasonable application of, clearly established federal law. Petitioner is not entitled to habeas relief on his grounds asserting ineffective assistance of appellate counsel.

F. Other (Grounds 13, 38, 39, 53)

Finally, Petitioner has raised grounds that do not fall into any of the previous categories, including:

(1) Petitioner was actually or constructively denied appellate counsel because the court clerk omitted the court's final charge to the jury from the appellate record (Ground 13);

(2) Petitioner was denied a fair, factual first appeal as of right because the Seventh Court of Appeals analyzed his Fifth Amendment interrogation claim with a question not supported by the record (Ground 38);

(3) Petitioner was denied a fair, factual, first appeal as of right because the Seventh Court of Appeals analyzed his right to counsel claim with the inapplicable Fifth Amendment interrogation standard (Ground 39); and

(4) he was denied due process and a fair trial because a member of the jury based her verdict on non-evidentiary factors and failed to obey the mandatory instructions given by the trial court (Ground 53).

In his Ground 13, Petitioner argues that he was "actually or constructively denied appellate counsel because the court clerk omitted the court's final charge to the jury from the appellate record." In support of this ground, Petitioner notes that despite appellate counsel's Motion for Designation of the Appellate Record requesting the trial court's charge at both stages of the trial, the clerk's record failed to contain the court's final charge given to the jury during the guilt/innocence phase. Petitioner also contends that once the omission was discovered, appellate counsel requested that the clerk be ordered to supplement the record with same, but it was not. Additionally, Petitioner argues that the jury charge that was orally given to the jury was not dictated word for word in the record but rather the record contained a parenthetical displaying, "[c]harge read by the court." Petitioner has utterly failed to provide any legal basis for this ground, much less how the state habeas court's denial of this claim was contrary to, or involved an unreasonable application of, clearly established federal law. Petitioner is not entitled to relief on this claim.

In his Ground 38, Petitioner argues that he was denied a "fair factual first appeal as-of right because the Seventh Court of Appeals analyzed his Fifth Amendment interrogation claim with a question not supported by the record. [all sic]" Specifically, Petitioner takes issue with the

Seventh Court of Appeals' finding that "[h]ad Wilson asked what appellant had done rather than what he was charged with, the question would likely have elicited an incriminating response." *See Banister v. State*, No. 07-04-0479-CR, at 6 (Tex. App. - Amarillo Sept. 29, 2006). In his Ground 39, Petitioner argues that the Seventh Court of Appeals analyzed his right-to-counsel claim with the inapplicable and more stringent Fifth Amendment interrogation standard. The Court has already discussed Petitioner's claims regarding his contention that the Seventh Court of Appeals analyzed his claims under the wrong standard (see discussion of Grounds 34 and 35). For the reasons stated herein and in the Respondent's Answer, the Court finds that Petitioner has not demonstrated that the state court's adjudication of his constitutional claims was contrary to, or involved an unreasonable application of, clearly established federal law. Petitioner is not entitled to relief on these grounds.

Finally, in his Ground 53, Petitioner contends that he was denied due process and a fair trial because a member of the jury based her verdict on non-evidentiary factors and failed to obey the mandatory instructions of the trial court. In support of his claim, Petitioner refers to testimony of juror San Juanita Garcia, who had reasonable doubt during the jury deliberations and still believes that Petitioner was not guilty at all. Garcia also testified that she eventually gave in because other women on the jury (whom she knew because they were from the same town), belittled her and made her feel stupid. Respondent counters that Garcia's affidavit is not admissible in this forum pursuant to state and federal law. This Court agrees and finds that, based upon the law stated in Respondent's Answer, Petitioner has failed to demonstrate that the state court's adjudication of this claim was objectively unreasonable. Petitioner is not entitled to relief on this claim.

IV. CONCLUSION

For the reasons set forth above, the Court finds that Petitioner has not demonstrated that the state court's adjudication of his claims was contrary to or an unreasonable application of clearly established Supreme Court law as required by 28 U.S.C. § 2254(d). In addition, the Court finds that, pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), Petitioner has failed to show that reasonable jurists would (1) find the Court's "assessment of the constitutional claims debatable or wrong" or (2) find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling," and any request for a certificate of appealability should be denied. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

It is, therefore, ORDERED:

1. The instant Petition for Writ of Habeas Corpus is DENIED and dismissed with prejudice.
2. All relief not expressly granted is denied and any pending motions are denied.
3. Any request for certificate of appealability is denied.

Dated May 15, 2017.

SAM R. CUMMINGS
Senior United States District Judge