No. _____

IN THE

Supreme Court of the United States

AMOS J. WELLS III,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Petitioner was sentenced to death after his own counsel presented expert testimony that petitioner's genetic makeup made it more likely that he would commit future violent offenses. That evidence was in itself sufficient to establish future dangerousness—one of two necessary conditions in Texas for imposing a death sentence—and thus effectively conceded the issue, while conferring no countervailing strategic advantages. Nonetheless, in petitioner's federal habeas proceeding, the district court denied relief, and the Fifth Circuit denied petitioner a certificate of appealability. 28 U.S.C. 2253. The question presented is:

Whether trial counsel provides constitutionally ineffective assistance of counsel at the sentencing phase of a capital trial by presenting evidence that concedes future dangerousness.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Wells v. *Guerrero*, No. 24-70002, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on July 22, 2025. Rehearing denied on August 19, 2025.

Wells v. *Lumpkin*, No. 21-CV-1384, U.S. District Court for the Northern District of Texas. Judgment entered on November 2, 2023. Petitioner's motion to alter or amend the judgment denied on January 5, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amos J. Wells III respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-12a) is available at 2025 WL 2051145. The court of appeals' order denying rehearing and rehearing en banc (App. 100a) is unpublished.

The district court's opinion denying petitioner's petition for a writ of habeas corpus and request for a certificate of appealability (App. 13a-82a) is available at 2023 WL 7224191. The district court's opinion denying petitioner's motion to alter or amend the judgment (App. 83a-99a) is available at 2024 WL 69161.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2025. On August 19, 2025, the court of appeals denied petitioner's timely petition for rehearing. On October 28, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 17, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, U.S. Const. amend. VI, provides in relevant part: "In all criminal prosecutions, the accused shall

enjoy the right * * * to have the Assistance of Counsel for his defence."

INTRODUCTION

Petitioner Amos Wells was sentenced to death in Texas after penalty-phase proceedings in which his own counsel presented expert testimony that petitioner's genetic makeup predisposed him to future violence. That testimony was devastating. Petitioner's only chance of avoiding the death penalty was to convince the jury that evidence of his future dangerousness was outweighed by evidence of mitigation. But the defense's own expert testified, based on debunked science, that petitioner had a genetic "defect" that made him many times more likely than others to commit violent offenses—even in prison—and that he would have difficulty controlling his violent urges in the future. And having presented that testimony, petitioner's own counsel told the jury that petitioner, an African-American man, was a "gangster" who was incurably prone to violence. The defense itself thus conceded future dangerousness, thereby relieving the prosecution of its burden on that critical aggravating special issue. The prosecution took full advantage, repeating over and over to the jury that the *defense's own expert* had conceded future dangerousness. Unsurprisingly, given that his own counsel functioned as an adjunct to the prosecution, petitioner was sentenced to death.

The Sixth Amendment guarantees criminal defendants the right to effective "assistance of counsel"—that is, to counsel who "make[s] the adversarial testing process work in the particular case." *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). This Court has

accordingly scrutinized decisions by counsel that tend to *undermine* the adversarial process—in particular, the decision to concede guilt. See, *e.g.*, *Florida* v. *Nixon*, 543 U.S. 175 (2004). In *Nixon*, the Court upheld a concession of guilt in a capital trial—but on the premise that because the true focus of the adversarial proceeding was the sentencing phase, counsel's concession of guilt could reasonably be expected to yield corresponding strategic advantages for the defendant at sentencing. Without those strategic advantages, a concession does nothing more than relieve the prosecution of its burden of proof, distorting the adversarial process and depriving the defendant of effective assistance.

Counsel's concession of petitioner's future dangerousness at sentencing had just that distorting effect. None of the circumstances that made it reasonable to concede guilt in *Nixon* were present here. By conceding a prerequisite to a death sentence at the sentencing stage, counsel vitiated the adversarial process with respect to the most critical issue in the case—whether petitioner could avoid death. And given that the sentencing-phase analysis involved discretionary weighing, the fact that petitioner's *own counsel* presented evidence that petitioner was incurably predisposed to violence made it far less likely that the jury would view him as deserving of mercy. As this Court has recognized, when defense counsel offers evidence of future dangerousness, the jury will view it as a particularly weighty "admission against interest." *Buck* v. *Davis*, 580 U.S. 100, 122 (2017). Making matters worse, the violence-genetics theory also undermined petitioner's only substantial mitigating evidence, and because the theory itself has been debunked, it invited the jury to sentence petitioner to death based on an immutable

characteristic that was both irrelevant and racially charged. Counsel's concession of future dangerousness thus had no possible strategic benefits—and it eliminated any hope petitioner might have had of avoiding the death penalty. Under *Nixon*'s reasoning, counsel was unquestionably ineffective.

The district court nonetheless rejected petitioner's claim, and the Fifth Circuit denied petitioner a certificate of appealability. 28 U.S.C. 2253. This is not the first time the Fifth Circuit has improperly denied a certificate of appealability in a capital case involving counsel's presentation of aggravating evidence, see *Buck*, 580 U.S. at 116-117, and this Court's intervention is just as urgently warranted here. Jurists of reason could easily "disagree with the district court's resolution of [petitioner's] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003). The Fifth Circuit concluded otherwise only by characterizing the violence-genetics theory as standard double-edged mitigating evidence and entirely ignoring *Nixon* and *Buck*. But the question whether reasonable jurists could debate an issue must be considered in light of the relevant precedents of this Court. The Fifth Circuit failed to do that. And because section "2253 does not limit the scope of [this Court's] consideration of the underlying merits," *Buck*, 580 U.S. at 118, this Court should grant certiorari and review the merits of petitioner's ineffective-assistance claim as well as the denial of a certificate of appealability.

STATEMENT OF THE CASE

A. Factual Background and Initial Proceedings

1. On July 1, 2013, petitioner became upset with his pregnant girlfriend, Chanice Reed, and argued with Reed and her mother outside Reed's home. *Wells* v. *Texas*, 611 S.W.3d 396, 402-403 (Tex. Crim. App. 2020). The argument culminated in petitioner shooting and killing Reed and her unborn child, her mother, and her ten-year-old brother. *Ibid.* An hour later, petitioner surrendered himself to law enforcement. *Id.* at 404-405. A video recording of petitioner's initial custody and interrogation shows petitioner sobbing and apologizing to the detective when informed that the victims had died. See Pet. C.A. Br. 40-41, 51 (petitioner cried and expressed remorse in contemporaneous interviews); ROA.13489[1]; see also ROA.13501-13504. Petitioner ultimately confessed to the killings. 611 S.W.3d at 404-405.

Petitioner was charged with capital murder and the trial court appointed William Ray and Stephen Gordon as his counsel. *Wells*, 611 S.W.3d at 405; see ROA.5115, ROA.5137-5141. On November 3, 2016, a jury found petitioner guilty of capital murder. ROA.5810.

2. The penalty phase of petitioner's trial followed. Under Texas law, the jury had to answer two special issues to decide whether petitioner would receive the death penalty. First, the jury was required to consider

[1] "ROA" refers to the Record On Appeal filed in the court of appeals.

whether the prosecution had proven beyond a reasonable doubt that there was a "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071 §§ 2(b)(1), (c). Second, if the jury answered "yes" to the first special issue, it then had to consider whether a "sufficient mitigating circumstance or circumstances" warranted imposing life imprisonment without parole rather than death. *Id.* art. 37.071 § 2(e)(1). Petitioner could be sentenced to death only if the jury unanimously answered "yes" to the first issue and "no" to the second. *Id.* art. 37.071 §§ 2(d)(2), (f)(2), (g).

a. Defense counsel's primary theory of mitigation was that petitioner was genetically predisposed to violence. In support of that "violence genetics" theory, defense counsel presented expert testimony from psychiatrist Dr. William Bernet. ROA.12802; see ROA.12825.

Dr. Bernet testified that petitioner had a "poorly functioning" Monoamine Oxidase A ("MAOA") gene. ROA.13033, ROA.13073. That defective gene, together with petitioner's adverse childhood experiences, supposedly "increased the probability that he would act in a violent" manner going forward. ROA.13076. Dr. Bernet further testified that an allegedly landmark study demonstrated that *32%* of children who had the defective gene and were moderately but not severely maltreated "had been convicted of a violent crime." ROA.13057. Dr. Bernet therefore opined that petitioner, who Dr. Bernet believed met those criteria, was "*four and a half times* more likely" than "a typical person" to engage in violence in the future. ROA.13077-13078 (emphasis added). Dr. Bernet

also told the jury that the science underpinning the violence-genetics theory was "valid." ROA.13020. But in reality, the "scientific community[]" harbored "serious and widespread doubts about" the validity of the studies on which Dr. Bernet relied. ROA.15138.

The prosecution, for its part, seized upon Dr. Bernet's testimony as demonstrating petitioner's future dangerousness—thereby establishing the first prerequisite to impose the death penalty under Texas law. In closing arguments, for example, the State repeatedly emphasized that "this is the easy answer, and they *conceded it through all their experts*." ROA.13793 (emphasis added); see, *e.g.*, ROA.13751, ROA.13791. Indeed, the State urged: "Have we proven to you there's a probability that the Defendant would commit criminal acts of violence that constitute a continuing threat to society? * * * *Their own expert tells you he is going to be dangerous.*" ROA.13790-13791 (emphasis added).

Defense counsel tried to use Dr. Bernet's testimony to suggest that petitioner could not be blamed for his genetic makeup. But that testimony ended up underscoring that petitioner would likely be violent in the future. Dr. Bernet testified that individuals with the defective MAOA gene and adverse childhood experiences have a "harder" time "control[ling] anger." ROA.13044. And Dr. Bernet testified that petitioner had, for instance, "many times" gotten "very angry, out of control," which "indicate[d] that this gene-environment interaction was happening all through his childhood and his adolescence and his young adulthood." ROA.13075.

Defense counsel also presented evidence about petitioner's difficult childhood. Witnesses testified, among other things, that petitioner frequently witnessed domestic violence and was abandoned by his father. See, *e.g.*, ROA.13329 (expert testimony describing "complex developmental trauma, which is sort of like childhood posttraumatic stress disorder, but it's more toxic").[2]

But the force of that evidence of childhood mistreatment was undermined by Dr. Bernet's testimony regarding "violence genetics." In particular, Dr. Bernet testified that the violence-genetics theory turned on the proposition that petitioner had experienced only *moderately* adverse childhood experiences. That is because children who have suffered extreme abuse, Dr. Bernet asserted, would act out violently regardless of whether they have a defective MAOA gene. ROA.13045. Dr. Bernet therefore emphasized his view that petitioner had experienced—at most—just the "middle range" of childhood maltreatment. ROA.13045. Indeed, under one prominent study's definition of maltreatment, Dr. Bernet explained, petitioner had not experienced childhood maltreatment at all. ROA.13084.

The State took full advantage of that defense testimony. For example, the prosecution emphasized in closing arguments Dr. Bernet's concession that petitioner "would not have been considered to have * * * severe childhood maltreatment." ROA.13754; see ROA.13799. The prosecution contended that Dr. Bernet's concession undercut any mitigating value

[2] The trial court excluded evidence of petitioner's expression of remorse upon turning himself in. See App. 8a-12a.

that petitioner's upbringing might have otherwise had.

b. The jury returned the penalty-phase findings that the State sought. Specifically, the jury found (1) a probability that petitioner would commit violent crimes in the future, and (2) a lack of mitigating circumstances justifying a sentence short of death. ROA.5860-5861. The trial court thus sentenced petitioner to death. ROA.5860-5861.

3. Petitioner subsequently filed a direct appeal in the Texas Court of Criminal Appeals ("TCCA"). The TCCA affirmed petitioner's conviction and death sentence. See *Wells*, 611 S.W.3d at 402.

4. In 2019, petitioner sought post-conviction relief in state court. ROA.16824. As relevant here, petitioner contended that his trial counsel were ineffective for presenting the violence-genetics theory. ROA.16865. The state court recommended denying the claim, adopting the State's proposed conclusion that trial counsel made a reasonable strategic decision to present that theory to the jury and that petitioner was not prejudiced by the approach. ROA.17796-17798.

The TCCA denied relief. *Ex parte Wells*, No. WR-86,184-01, 2021 WL 5917724 (Tex. Crim. App. Dec. 15, 2021), *cert. denied sub nom.*, *Wells* v. *Texas*, No. 21-7388, 142 S. Ct. 2722 (2022). With regard to petitioner's trial-counsel ineffective assistance of counsel claim, the court stated without elaboration that "Applicant fails to meet his burden under *Strickland* v. *Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's

representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance." *Id.* at *1.

B. Proceedings Below

1. In March 2023, petitioner filed an amended federal habeas petition. ROA.517. As relevant here, petitioner contended that trial counsel was ineffective for presenting the violence-genetics theory, including via Dr. Bernet's expert testimony. ROA.580-596.[3]

The district court denied the petition and also denied a certificate of appealability with respect to all issues. App. 13a-82a. The district court rejected petitioner's ineffective-assistance claim based on the violence-genetics theory on the ground that defense counsel made a reasonable strategic decision to present double-edged evidence that could have lessened petitioner's moral blameworthiness in the eyes of the jury. App. 56a-58a. The court acknowledged in passing that the evidence could suggest future dangerousness, but did not otherwise analyze its harmful effects. The court also stated that petitioner had not demonstrated the requisite prejudice. *Ibid.* Petitioner subsequently filed a motion to alter or amend the district court's judgment, which the court denied. App. 83a-99a.

2. Petitioner then moved for a certificate of appealability in the Fifth Circuit. In particular, petitioner argued that Dr. Bernet's expert testimony *established*

[3] Petitioner also raised additional arguments that are not at issue in this petition.

one of the prerequisites to a death sentence: that he is likely to commit violent crimes in the future. At the same time, the testimony had no mitigating value—and in fact only undercut the remainder of the mitigation case. Under those circumstances, trial counsel's decision could not be characterized as a strategic choice warranting deference. Petitioner further contended that defense counsel's presentation of the violence-genetics testimony constituted deficient performance under *Buck* v. *Davis*, 580 U.S. 100 (2017). And petitioner explained how counsel's presentation of the violence-genetics testimony plainly caused prejudice.

The Fifth Circuit rejected those arguments and denied a COA. The court held that "[j]urists of reason would not debate the district court's resolution of" petitioner's ineffective-assistance claim based on the violence-genetics theory. App. 6a. Petitioner's trial counsel, the court reasoned, "acknowledged all along that this evidence could support a positive finding on the issue of future violence." *Ibid.* In support of that notion, the court below noted a "memorandum of trial counsel submitted in 2016" that "acknowledg[ed] this evidence 'could potentially help the State's efforts' to show a probability of future violence." *Ibid.* (quoting ROA.15978). But the court reasoned that because "[c]ounsel nonetheless believed" the violence-genetics evidence "could be a sufficiently mitigating fact," the choice to present it fell "within the heartland of 'strategic decisions'" that are reserved for counsel. App. 6a-7a. That was "why the federal district court rejected [petitioner's] claim," and, in the court of appeals' view, "the district court's treatment of this claim" is not "debatable among jurists of reason." App. 7a.

3. The Fifth Circuit subsequently denied petitioner's rehearing petition in an unreasoned *per curiam* order. App. 100a.

REASONS FOR GRANTING THE PETITION

At sentencing, defense counsel conceded petitioner's future dangerousness by presenting expert evidence that petitioner had a genetic anomaly that predisposed him to violence and made it difficult to control his violent impulses. That evidence was in itself sufficient to enable the jury to answer "yes" to the future-dangerousness special issue that was a prerequisite to imposing a death sentence. At the same time, the evidence offered no possible advantage for petitioner: it was only aggravating, not mitigating, and in fact its introduction *undermined* petitioner's only other mitigating evidence. And as this Court has recognized in a materially similar context, the evidence doubtlessly had a powerful effect on the jury, as it came from a purportedly qualified expert psychiatrist who was testifying for the defense. *Buck* v. *Davis*, 580 U.S. 100 (2017).

Counsel's introduction of the violence-genetics evidence was clearly ineffective under the principles set forth in two lines of this Court's precedents. First, because counsel's core Sixth Amendment function is to "make the adversarial testing process work in the particular case" by zealously advocating for the defendant, *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984), this Court has carefully scrutinized defense-counsel concessions. *Florida* v. *Nixon*, 543 U.S. 175 (2004). This Court has held that conceding the defendant's *guilt* in a capital case is not ineffective if counsel reasonably anticipates that the concession will benefit the defendant at the all-important sentencing phase.

Id. at 189-191. This Court has not had occasion to consider concessions of future dangerousness at sentencing. But *Nixon*'s caution about concessions of guilt applies *a fortiori* to concessions of future dangerousness: by conceding a prerequisite to a death sentence, those concessions materially increase the likelihood that the defendant will be sentenced to death. And it should be self-evident that a concession of future dangerousness by the defendant's *own counsel* will be particularly devastating before the jury, and will undermine any effort to persuade the jury that mitigating factors warrant mercy.

Second, counsel's presentation of the violence-genetics evidence invited the jury to sentence petitioner to death based on irrelevant immutable characteristics. In *Buck*, this Court held that counsel was ineffective for presenting evidence that the defendant was more likely to be violent in the future because of his race—an immutable and irrelevant characteristic. 580 U.S. at 121. Counsel here did not make an explicitly racial argument. But petitioner's genetic makeup was just as irrelevant and immutable: the science underlying the violence-genetics theory had been debunked, meaning that counsel in effect invited the jury to sentence petitioner to death based on his genetic characteristic that bore no relation to any relevant sentencing consideration. Making matters worse, although race was not explicitly an issue, the argument that petitioner, an African-American man, was genetically predisposed to violence carried an unacceptable risk of evoking "noxious" racial stereotypes in the capital-sentencing context. *Ibid*.

Petitioner's ineffective-assistance claim thus flows directly from bedrock Sixth Amendment principles. In

nonetheless denying a certificate of appealability, the Fifth Circuit disregarded this Court's precedents and failed to recognize that reasonable jurists could at least disagree as to how those precedents apply to petitioner's case.

The questions presented here are also critically important. This Court has regularly granted certiorari to address whether and when the Sixth Amendment permits defense counsel in a capital case to make certain concessions at trial in the hopes of avoiding the death penalty. This Court should grant certiorari and address both the denial of a certificate of appealability and the merits of petitioner's ineffective-assistance claim.

I. The Fifth Circuit's Denial of a Certificate of Appealability Conflicts with This Court's Decisions and Undermines the Sixth Amendment's Bedrock Protections.

A. Counsel's concession of future dangerousness constitutes deficient performance.

1. This Court's precedents clearly establish that counsel performs deficiently by presenting *aggravating* evidence that establishes a prerequisite for the death penalty while providing no meaningful benefit in mitigation. Counsel's fundamental duty is to ensure "the proper functioning of the adversarial process" by advocating for a favorable outcome—here, by advocating that the jury not impose a death sentence. *Strickland*, 466 U.S. at 685-686. When trial counsel fails to "render the trial a reliable adversarial testing process," he or she has rendered ineffective assistance. *Id.*

at 688; *United States* v. *Cronic*, 466 U.S. 648, 655-656 (1984).

Because counsel's primary function is to ensure the fairness and reliability of the adversarial process, this Court has carefully scrutinized counsel's concession of the defendant's guilt. In *Nixon*, this Court held that defense counsel may constitutionally concede guilt at the guilt phase (at least when the defendant is silent as to that course) in the hope that doing so will help the defendant avoid a death sentence at the penalty phase. 543 U.S. at 192. But that holding was founded on a critical premise: that conceding guilt would not significantly undermine the adversarial process, and could have important strategic benefits at the penalty stage. This Court emphasized that "the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus." *Id.* at 190-191. Because "[p]rosecutors are more likely to seek the death penalty * * * when the evidence is overwhelming," "[c]ounsel therefore may reasonably decide to focus on the trial's penalty phase" in the hopes that conceding guilt will lead the jury to view the defendant's mitigation case more favorably or credibly. *Id.* at 191-192. At the same time, the Court recognized that "such a concession" "might present a closer question" in a mine-run trial where prosecutors have not sought the death penalty, *id*. at 190-191—because in that case, conceding guilt would cede the adversarial process with respect to the only question before the jury, with no corresponding benefits at any subsequent sentencing phase.

Nixon embodies the fundamental principle that although counsel has leeway to make strategic decisions, a decision to concede guilt has particularly concerning

implications for the adversarial process.[4] Therefore, under *Nixon*'s reasoning, counsel's concession of an ultimate issue on which the prosecution bears the burden satisfies *Strickland* only to the extent that the strategy may reasonably yield commensurate advantages with respect to *other* aspects of the adversarial process. Indeed, the very concept of a "strategic judgment," as explicated in cases like *Strickland* and *Nixon*, assumes that counsel reasonably anticipates that the defendant will receive a net advantage from the chosen course. *Strickland*, 466 U.S. at 688, 690-691.

Although no concession of future dangerousness was at issue in *Nixon*, the import of *Nixon*'s reasoning is that such concessions raise even greater concerns than concessions of guilt. Counsel's concession of guilt at the guilt phase of a capital trial can lessen the emphasis on evidence of the offense and build credibility for the sentencing phase—the phase that *Nixon* recognized is the main event in most capital trials. 543 U.S. at 191. By contrast, counsel's concession of future dangerousness occurs during that all-important sentencing phase and relieves the prosecution of its burden on a critical prerequisite to a death sentence. The concession, moreover, tells the jury that the defendant's own counsel has concluded that the defendant is incurably violent. Given that the jury has leeway to weigh future

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[4] In *McCoy* v. *Louisiana*, 584 U.S. 414 (2018), this Court clarified that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id*. at 417. That rule flows from the defendant's right to decide the objectives of the defense, including the right to insist on maintaining an adversarial posture vis-à-vis the prosecution.

dangerousness against mitigation to reach what it views as a just verdict, there is a significant chance that the jury will give evidence of future dangerousness offered by the *defense* outsize weight in its analysis. This Court has recognized that very effect, explaining that "[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Buck*, 580 U.S. at 122. Thus, despite counsel's ordinary leeway to make strategic decisions, the principles set forth in *Nixon*, *Buck*, and *Strickland* require that counsel's concession of future dangerousness be upheld only to the extent that it can be justified by corresponding advantages to the defendant in the sentencing phase.

2. Those principles establish that counsel's presentation of evidence that petitioner was genetically predisposed to violence constituted ineffective assistance. That evidence not only established future dangerousness—a prerequisite to imposing death—it also seriously undermined petitioner's mitigation case. Stated differently, the violence-genetics evidence had *zero* benefit to petitioner, direct or indirect; its sole value was to the prosecution. Under those circumstances, counsel's use of the testimony cannot be defended as a reasonable strategic judgment.

a. The expert testimony that trial counsel elicited affirmatively established future dangerousness, thereby relieving the prosecution of its burden. Defense expert Dr. Bernet testified that petitioner was genetically predisposed to violence because his defective MAOA gene made it more difficult for him to control his anger. ROA.13033, ROA.13073. Specifically, Dr. Bernet testified that while 7% of people without

the violence gene go on to be convicted of a violent crime, people like petitioner—those with the violence gene and adverse childhood experiences—are "*four and a half times*" more likely to commit violent acts. ROA.13057 (emphasis added); see also ROA.13078 (similar testimony). The upshot of that evidence was that 32% of people with a similar profile to petitioner carry out violent crimes in the future. ROA.13057.

The unmistakable implication of that testimony was that petitioner *would be violent in the future*. The Fifth Circuit discounted the import of Dr. Bernet's testimony on the ground that it was expressed in statistical probabilities. App. 6a-7a. But at the time of Dr. Bernet's testimony, *petitioner had just been convicted of a violent offense*. Thus, whatever the predictive import of Dr. Bernet's stated probabilities for someone who had not previously committed violent acts, the indisputable conclusion of Dr. Bernet's testimony as applied to petitioner, given his history of violence, was that petitioner was within the 32% of people with the gene who would commit violent crimes in the future. Dr. Bernet confirmed as much: when asked to confirm that he was "telling this jury * * * this defendant's going to be violent in the future," Dr. Bernet answered affirmatively, stating that petitioner would have difficulty "control[ling] his anger" in the future. ROA.13077. And because genetics are an immutable characteristic, the clear import of Dr. Bernet's testimony was that anyone with the violence gene who had experienced the requisite level of childhood maltreatment—like petitioner—was *incurably* predisposed to commit violent acts, regardless of treatment or environment.

Counsel's presentation of Dr. Bernet's violence-genetics testimony therefore unquestionably conceded future dangerousness. The future-dangerousness inquiry asked the jury to decide whether there was "more than a 'possibility'" that petitioner might be violent in the future. ROA.7551-7552, ROA.7575 (trial court forbidding defense counsel from suggesting that "probability" means more "than 50/50" or "more likely * * * than something else"); see also, *e.g.*, ROA.7159-7161, ROA.7290, ROA.7552, ROA.10907-10908. Dr. Bernet's testimony—that petitioner, who had just been convicted of a violent crime, had an incurable genetic mutation that predisposed him to violence and made it difficult to control his anger—easily satisfied that standard. And because this testimony was presented on petitioner's behalf by someone qualified as an expert, the testimony was bound to carry particular weight with the jury. *Buck*, 580 U.S. at 120-121. Reasonable jurors would have concluded (and apparently did conclude) that there was far more than a possibility that petitioner would be violent in the future; with his asserted genetic makeup, future violence was a near certainty.

Any doubt that defense counsel conceded future dangerousness is eliminated by the prosecution's extensive use of the testimony. The prosecution emphasized that the future dangerousness special issue "is the easy answer, and *they conceded it through all their experts*." ROA.13793 (emphasis added). The prosecution repeatedly reminded the jury that Dr. Bernet had "agreed" that petitioner "is dangerous" and that, given petitioner's *genetic* predisposition towards violence, Dr. Bernet had "agreed" that petitioner was "*never going to not be dangerous*." ROA.13751 (emphasis added); see also ROA.13751 (prosecution argument

that Dr. Bernet "agreed" that petitioner "will continue to be dangerous"). In closing, the prosecution impressed upon the jury that Dr. Bernet's testimony was "telling us [petitioner is] going to be dangerous"—and that Dr. Bernet's testimony was "all about" future dangerousness, and nothing more. ROA.13791.

Defense counsel thus relieved the prosecution of its burden of establishing future dangerousness—the key prerequisite to a death sentence, and the "focus of the proceeding." *Buck*, 580 U.S. at 120. And because Dr. Bernet testified for the defense, neither side had any incentive to test his opinions on cross-examination. As a result, counsel's decision to introduce the violence-genetics testimony completely vitiated the adversarial process with respect to future dangerousness.

b. Conceding future dangerousness held no possible strategic advantage for petitioner. *Nixon*, 543 U.S. at 190-192. Unlike in *Nixon*, the concession occurred at the sentencing phase, when the only question left was whether petitioner's future dangerousness was outweighed by mitigating factors. The violence-genetics evidence established future dangerousness. But it did not in any respect help petitioner persuade the jury that mitigating factors outweighed future dangerousness. Quite the opposite.

To begin, evidence that petitioner was genetically predisposed to behave violently had no mitigating value in itself. To be sure, the purportedly genetic origin of petitioner's alleged predisposition to violence meant that petitioner's condition was not his "fault." But neither would it be a defendant's fault that he was diagnosed as a psychopath—yet an argument that a defendant should receive mercy because he was a

psychopath would hardly convince the average juror.[5] The same is true of the violence-genetics theory. It evoked cultural fears of genetically-primed killers without evoking any countervailing sympathy (unlike afflictions such as mental illness or disability). And here, the evidence carried another significant risk, of conjuring powerful racial stereotypes. See pp. 24-25, *infra*. Indeed, petitioner's own counsel encouraged the jury to consider petitioner a "defect" and a "gangster." ROA.13768, ROA.13773. It is difficult to see how that framing could have possibly persuaded the jury to spare petitioner's life, and competent counsel would have recognized as much.

Moreover, the violence-genetics testimony *undermined* petitioner's only other significant mitigation argument: that he had endured a traumatic childhood. The strength of that argument turned on emphasizing the extent and seriousness of petitioner's childhood maltreatment to win the jury's sympathies. See *Wiggins* v. *Smith*, 539 U.S. 510, 534-535 (2003)

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[5] Indeed, evidence that a defendant cannot manage his violent impulses—for whatever reason—is unsurprisingly understood to have little mitigating force. See, *e.g.*, Paul S. Appelbaum & Nicholas Scurich, *Impact of Behavioral Genetic Evidence on the Adjudication of Criminal Behavior*, 42 J. Am. Academy of Psychiatry and the Law 91, 91 (2014) (participants in study "imposed longer prison sentences" when told a hypothetical defendant was genetically predisposed towards criminal behavior and had been abused as a child); *Schriro* v. *Landrigan*, 550 U.S. 465, 480-481 (2007) (characterizing defendant's mitigation evidence, including claim that he "may also have been genetically predisposed to violence," as "weak" (citation omitted)); *Littlejohn* v. *Royal*, 875 F.3d 548, 562 (10th Cir. 2017) (evidence that defendant struggled with impulse-control "typically tends to offer little, if any, quality mitigating evidence and, actually, may come with a sharp aggravating-evidence component").

(characterizing evidence of "severe privation and abuse" in the "first six years of [the defendant's] life" as "powerful" mitigating evidence). The jury heard that petitioner frequently witnessed domestic violence as a child and had been abandoned by his father. ROA.13342-13343; see ROA.13329 (expert testimony about petitioner's "complex developmental trauma"). But in the very next breath, the defense *minimized* petitioner's childhood mistreatment. Because the violence-genetics theory relied on petitioner having suffered moderate—*but not severe*—childhood maltreatment, Dr. Bernet downplayed the severity of petitioner's mistreatment. ROA.13045. In fact, Dr. Bernet testified that under the definition of childhood maltreatment in a prominent study of the violence gene, petitioner *did not experience any maltreatment at all*. ROA.13084, ROA.13103. That assertion all but eviscerated petitioner's otherwise persuasive mitigation case.

As with future dangerousness, the prosecution predictably exploited Dr. Bernet's testimony. The prosecution argued to the jury that even the defense's expert had conceded petitioner did not experience "severe childhood maltreatment." ROA.13754. Thus, trial counsel's choice to present the violence-genetics testimony not only helped the prosecution establish a prerequisite for imposing a death sentence, it undermined petitioner's best—and only—chance of appealing for mercy. No rational defense counsel would opt for such a senseless course of action. Because trial counsel's decision to present this evidence failed to "make the adversarial testing process work" in petitioner's case, *Strickland*, 466 U.S. at 690, counsel's conduct fell outside the range of professionally competent assistance.

3. Counsel's presentation of the violence-genetics evidence constituted deficient performance for a second, independent reason: it invited the jury to sentence petitioner to death based on an irrelevant immutable characteristic.

a. In *Buck*, this Court held that counsel who introduced evidence that the defendant was more likely to be violent in the future because he was African American provided ineffective assistance. This Court emphasized that a defendant's race is both immutable and completely irrelevant to the capital sentencing inquiry. 580 U.S. at 119. As *Buck* explained, "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes th[e] guiding principle" that "[o]ur law punishes people for what they do, not who they are." *Id.* at 123. Thus, "[n]o competent defense attorney would introduce such evidence about his own client." *Id.* at 119.

Although the immutable trait at issue in *Buck* was race, this Court has made clear that it is unconstitutional to sentence a defendant to death based on *any* immutable characteristic that bears no relation to the sentencing inquiry into moral culpability and future dangerousness. See *Buck*, 580 U.S. at 124 (noting that departure from "basic principle" of individualized sentencing was "*exacerbated* because it concerned race" (emphasis added)); *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983) (a State may not sentence the defendant to death based on purportedly aggravating factors that are "irrelevant to the sentencing process"); *Romano* v. *Oklahoma*, 512 U.S. 1, 7 (1994). It follows that, as *Buck* held, it is ineffective assistance for counsel to introduce such evidence at the sentencing phase.

b. The violence-genetics evidence encouraged the jury to sentence petitioner to death based on an immutable genetic trait that bore no relation to any permissible sentencing consideration. At the time of petitioner's sentencing, there was no scientifically reliable connection between petitioner's MAOA gene and any predisposition to violence. In fact, the violence-genetics theory had been thoroughly debunked. ROA.15134; see ROA.12836 (MAOA studies are "fraught with problems with methodology, interpret[ive] flaws, including inconsistencies and * * * loose standards for replication"). Indeed, Dr. Bernet's testimony relied on "scientific studies that had been strongly and publicly criticized as potentially wrong or misleading." ROA.15144; see ROA.15138. And courts had already long concluded that this sort of evidence was unreliable. See, *e.g.*, *Mobley* v. *Georgia*, 265 Ga. 292, 293 (1995).

It therefore would have been "patently unconstitutional" for the *prosecution* to argue that Wells should be sentenced to death based on his genetic makeup alone, when there was no link between the MAOA gene and a propensity for violence. *Buck*, 580 U.S. at 119 (citing *Zant*, 462 U.S. at 885); cf. *United States* v. *Cossey*, 632 F.3d 82, 88 (2d Cir. 2011) ("undisput[ably] * * * impermissible" for a sentencing court to make a finding about the defendant's likelihood to re-offend based on an "unsupported theory of genetics"). By doing exactly that, defense counsel performed deficiently.

Moreover, by asserting that petitioner's genes predisposed him to violence, while at the same time referring to petitioner as a "gangster," ROA.13768, ROA.13773, counsel created an unacceptable risk that

the jury would sentence petitioner to death based on a "powerful racial stereotype—that of black men as 'violence prone.'" *Buck*, 580 U.S. at 121 (citation omitted). Counsel even exacerbated that risk by observing during an examination at the penalty phase that "young black kids with guns is probably not a good situation." ROA.13694. To be sure, no party in this case explicitly pressed any racial stereotype in the manner of *Buck*. But any competent counsel would have recognized that presenting his African-American client as a "black kid[] with [a] gun[]" and a violence-prone "gangster"—a label with unmistakable racial overtones—could make race highly salient in the future-dangerousness analysis. And given that future dangerousness was the central question at sentencing, counsel's presentation created the risk that the jury would "mak[e] a decision on life or death on the basis of race." *Buck*, 580 U.S. at 121. Any competent counsel would have avoided that unacceptable risk by refraining from presenting the violence-genetics evidence.

B. Presentation of the discredited violence-genetics theory unquestionably prejudiced petitioner.

Buck leaves no doubt that counsel's concession of future dangerousness prejudiced petitioner. There, this Court found prejudice where Texas's "future dangerousness" special issue was a critical focus of the penalty phase proceedings; the evidence of future dangerousness other than the expert's testimony about race was not overwhelming; and the expert testimony that Buck's race predisposed him to violence likely carried weight with the jury as "hard statistical evidence." 580 U.S. at 121. Critically, the Court explained, "[w]hen a defendant's own lawyer puts in the offending

evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Id*. at 122. Accordingly, this Court easily concluded that Buck "demonstrated prejudice," notwithstanding the "brutality of Buck's crime and his lack of remorse." *Id.* at 120-122.

This case is materially indistinguishable. Without Dr. Bernet's expert testimony, the jury may well have declined to find future dangerousness. As in *Buck*, the bulk of petitioner's past violence (including the underlying offense itself) had occurred in the context of romantic relationships. ROA.13747-13750. But as this Court explained in *Buck*, that evidence was not especially persuasive, because if the defendant was sentenced to life in prison, "no such romantic relationship would be likely to arise." 580 U.S. at 120-121. "A jury could conclude that those changes would minimize the prospect of future dangerousness." *Id.* at 121. But like Buck's race, petitioner's genetic makeup would not change in prison. *Ibid*. The prosecution here also cited one alleged assault incident in prison, see ROA.13745-13751, but the defense presented testimony that petitioner was otherwise a well-behaved inmate, see ROA.12287-12288.

As in *Buck*, then, the defense-expert testimony likely carried substantial weight. Defense counsel presented Dr. Bernet as "as a medical expert bearing the court's imprimatur," 580 U.S. at 121, who could provide the jury with seemingly concrete studies replete with statistics expressing relative predisposition to violence. Worse yet, the fact that this "hard statistical evidence" was provided by the *defense* enhanced its credibility with the jury immeasurably. *Ibid*. All told, had petitioner's counsel not presented Dr. Bernet's

expert testimony that petitioner would be a future danger, there is a reasonable probability that "at least one juror would have harbored a reasonable doubt" about whether petitioner was "likely to be violent in the future." *Id*. at 120.

Moreover, here the violence-genetics testimony had a prejudicial effect absent in *Buck*: as explained above, to make the violence-genetics theory work, Dr. Bernet had to tell the jury that petitioner's childhood mistreatment was not severe. See pp. 21-22, *supra*. Evidence of childhood mistreatment is ordinarily "powerful" mitigating evidence, *Wiggins*, 539 U.S. at 534—but here, petitioner's own expert downplayed that evidence, undermining the *only* evidence presented at sentencing that could evoke the jury's sympathy. Absent that testimony, "at least one juror" could well have given more weight to the mitigation case. See *Buck*, 580 U.S. at 120.

C. The Fifth Circuit's denial of a certificate of appealability cannot be reconciled with *Strickland*, *Nixon*, and *Buck*.

The Fifth Circuit held that reasonable jurists would not debate the proposition that counsel made a reasonable strategic judgment to present "double-edged" evidence. The court relied on trial counsel's assertion that the violence-genetics evidence "could be a sufficiently mitigating fact," and held that this statement placed counsel's decision to present the evidence in the "heartland" of strategic decisions that are presumptively reasonable. App. 6a-7a. The court then held that reasonable jurists would not debate the district court's holding that petitioner had not rebutted the

presumption of reasonableness. App. 7a. That conclusion cannot be reconciled with this Court's decisions in *Nixon*, *Strickland*, and *Buck*.

At the outset, the district court's conclusion that counsel did not concede future dangerousness (which the court of appeals appears to have adopted, App. 6a-7a) was erroneous. At a bare minimum, it was debatable by reasonable jurists. The district court asserted that Dr. Bernet's testimony that 32% of people with petitioner's genetic makeup were likely to commit violence "was clearly distinct from any suggestion that Petitioner was more likely than *not* to be violent in the future." App. 90a.[6] But "more likely than not" was not the standard that the jury was asked to apply to the future dangerousness element; rather, they were asked to decide whether there was "more than a 'possibility'" that petitioner might be violent in the future. ROA.7551-7552; see also ROA.7575; see p. 19, *supra*. And Dr. Bernet's evidence was more than sufficient to support answering "yes" to that question. After all, presented with evidence that 32% of people like petitioner were incurably predisposed to commit violent acts, and the fact that petitioner had already been proven to be within the 32%, any reasonable jury would conclude that there was more than a possibility that petitioner would be violent in the future. That is precisely why the prosecution emphasized to the jury that the defense had "conceded" future dangerousness. See p. 19, *supra*.

[6] The district court also asserted that the state court had found as a fact that counsel did not concede future dangerousness. App. 90a. The state court made no such finding. ROA.17791-17798.

Because the district court, and by extension the Fifth Circuit, failed to recognize the violence-genetics evidence as the concession that it was, the courts failed to analyze the reasonableness of counsel's concession under *Nixon*'s framework. *Nixon* held that counsel's concession was reasonable only because it did not undermine the reliability of the adversarial process as to guilt and it reasonably could be thought to have benefits at the sentencing phase. 543 U.S. at 190-192. But the courts below did not even consider the violence-genetics evidence's devastating impact on the adversarial process at *sentencing*, not to mention its lack of any countervailing benefits to petitioner. The evidence relieved the prosecution of its burden of establishing the critical prerequisite to death. It undermined the mitigating evidence by leading Dr. Bernet to opine that petitioner had not suffered serious mistreatment. It made the jury far more likely to find that future dangerousness outweighed mitigation, because the upshot of that testimony was that petitioner was *incurably* violent for reasons that did not make him sympathetic or deserving of mercy. ROA.13082-13083. And it risked inviting the jury to sentence petitioner to death based on nothing more than his genetic makeup.

Reasonable jurists therefore could at least debate whether counsel's concession was unreasonable under the principles established in *Nixon*, *Strickland*, and *Buck*. The Fifth Circuit's contrary conclusion squarely conflicts with those decisions. The court could not properly conclude that reasonable jurists would not debate the district court's rejection of petitioner's claim when neither court actually considered how this Court's relevant precedents should apply. This Court should correct that error. And because section "2253 does not limit the scope of [this Court's] consideration

of the underlying merits," *Buck*, 580 U.S. at 118, this Court should review the merits of petitioner's ineffective-assistance claim.

II. The Question Presented Is Critically Important.

This Court's review is acutely needed. The question presented implicates a serious issue about trial counsel's obligations in capital cases, and the resolution of that question is of the utmost significance.

1. This Court has regularly granted certiorari to address whether, and if so under what circumstances, the Sixth Amendment permits defense counsel in a capital case to make certain concessions at trial in an effort to avoid the death penalty. In *McCoy* v. *Louisiana*, 584 U.S. 414 (2018), for example, this Court granted certiorari to address "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection" when "counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 417, 420. In *Buck*, this Court granted certiorari to address the constitutionality of Buck's counsel calling an expert to testify that Buck was statistically more likely to act violently in the future. See 580 U.S. at 104. And in *Nixon*, this Court granted certiorari "to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient." 543 U.S. at 186.

The question presented here is of a piece with the issues decided in *McCoy*, *Buck*, and *Nixon*. This case likewise presents an important question about whether and when trial counsel may concede critical issues consistent with the Sixth Amendment—here, whether and when counsel may present evidence establishing his own client's future dangerousness at the sentencing phase of a capital trial. Indeed, defense counsel's conduct here was more egregious than in cases like *McCoy*, where this Court acknowledged that "[c]ounsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty." 584 U.S. at 422; see *Nixon*, 543 U.S. at 190-191 ("Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus."). This Court has not yet had occasion to consider a concession of aggravating elements at the sentencing phase—but under any fair reading of *Nixon*, *Strickland*, and *Buck*, such concessions should be considered reasonable only if they offer commensurate strategic benefits as to other parts of the sentencing proceeding.

2. The question presented also has immense implications for the operation of a capital trial. Attorneys in capital cases routinely face a variant of the dilemma here—i.e., may they, consistent with constitutional obligations, make certain concessions at trial that they deem to be in furtherance of the ultimate goal of avoiding the death penalty. And that dilemma presents weighty issues that strike at the heart of the Sixth Amendment's demands. Only this Court can definitively resolve those issues. For that reason, providing a clear answer to the question presented would provide much needed guidance to prosecutors, defense counsel,

and more generally facilitate the fair and efficient functioning of the justice system.

3. Finally, the question presented is of overriding importance to petitioner. His trial counsel were permitted to present testimony that established one of the prerequisites to a death sentence—future dangerousness—and substantially undermined the defense's presentation on the other prerequisite—mitigation. And as this Court has recognized, "[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value" by the jury. *Buck*, 580 U.S. at 122. But the Fifth Circuit refused to enforce this Court's Sixth Amendment precedents, and instead rubberstamped petitioner's counsel's deficient performance. As a result, petitioner faces the death penalty. Had the court of appeals properly enforced the Constitution's guarantees, petitioner would be entitled to a certificate of appealability at minimum, and in all likelihood, ultimately to a new sentencing hearing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2025

APPENDICES

APPENDICES

APPENDIX A

No. 24-70002

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMOS WELLS,

Petitioner-Appellant,

v.

ERIC GUERRERO, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent-Appellee.

[Filed] July 22, 2025

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

USDC No. 4:21-CV-1384

Before Stewart, Graves, and Oldham, *Circuit Judges*.

PER CURIAM:[1]

A Texas jury convicted Amos Wells of multiple murders and sentenced him to death. After exhausting his appeals and postconviction remedies in state court, Wells sought postconviction relief in federal court. The district court denied it. Now Wells asks us for a certificate of appealability ("COA"). Because his claims are not debatable amongst jurists of reason, we deny his application.

I

On July 1, 2013, Amos Wells became angry with his pregnant girlfriend, Chanice Reed, for refusing to

[1] This opinion is not designated for publication. *See* 5th Cir. R. 47.5

answer his phone calls. He drove to her home with a gun in his truck. When he arrived, he took Chanice outside and the two argued. Wells shot Chanice four times and killed her; Wells shot Chanice's mother twice and killed her; and Wells shot Chanice's ten-year- old brother, Eddie, four times and killed him. Wells also killed Chanice's unborn baby.[2] *Wells v. State*, 611 S.W.3d 396, 403 (Tex. Crim. App. 2020). The shooting stopped when Wells' gun jammed. Wells got into his truck, drove around town, and then went to the police station and confessed.

A jury convicted Wells of capital murder and sentenced him to death. The penalty phase required the jury to find "a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society," and that there were no "sufficient mitigating circumstance or circumstances to warrant" a life sentence without parole instead of the death penalty. The jury made those requisite findings and Wells received a death sentence. He brought a direct appeal to the Texas Court of Criminal Appeals, raising thirteen points of error. *Id.* at 402. The CCA found no error and affirmed the conviction and sentence.

Wells sought post-conviction habeas relief in state court and appealed its denial to the Texas Court of Criminal Appeals and Supreme Court of the United States. *See Ex parte Wells*, No. WR-86, 184-01, 2021 WL 5917724 (Tex. Crim. App. Dec. 15, 2021), *cert. denied sub nom.*, *Wells v. Texas*, 142 S.Ct. 2722 (2022). He then brought a federal habeas petition in the Northern District of Texas, raising nine claims. The district court found all meritless and denied the

[2] Postmortem DNA testing confirmed that Wells was, in fact, the child's father. *Id*.

petition along with Wells's accompanying motions to stay state proceedings and for a COA. *Wells v. Lumpkin*, No. 4:21-CV-01384-O, 2023 WL 7224191 (N.D. Tex. Nov. 2, 2023). Wells filed a motion under Rule 59(e) to alter or amend the judgment, which the district court also denied. Wells timely appealed.

II

Wells requests a certificate of appealability on four of his claims. *See* 28 U.S.C. § 2253(c)(3) (limiting the availability of a COA to a "specific issue or issues"). We "may issue" a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). That standard requires a petitioner to "demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court's ruling rested on procedural grounds, the prisoner must show both that the procedural ruling is debatable and that it is debatable whether he stated a valid claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

"The COA inquiry . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El*, 537 U.S. at 327). Thus, at this preliminary COA stage, we do not consider the *merits* of Wells' claims—only whether he has shown that the district court's resolution of them is *debatable* amongst jurists of reason. *See id.*

None of Wells' claims meets the COA standard. We first (A) hold that jurists of reason would not debate whether Wells' trial counsel rendered ineffective assistance by (1) presenting expert testimony about his possible genetic predisposition to violence and (2) failing to strike a particular juror who allegedly believed that the death penalty should be mandatory for those guilty of murder. We then (B) explain that jurists of reason would not debate whether the trial court violated the Eighth Amendment by excluding certain potentially mitigating video evidence. Finally, we (C) hold that jurists of reason would not debate whether Wells' appellate counsel rendered ineffective assistance by failing to argue that Eighth Amendment issue on appeal.

A

Ineffective assistance of counsel ("IAC") claims are governed by the standard set forth by the Supreme Court in *Strickland v. Washington*, 466

U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient," which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. *Id.* at 687. The defendant must also show prejudice, which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.*

Where a defendant's IAC claim is adjudicated under § 2254(d)(1), "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). So the state court's determination "must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.*, *see also*

Burt v. Titlow, 571 U.S. 12, 15 (2013) (describing this review as "doubly deferential"). So, in addition to respecting the state court's decision, we afford a "strong presumption of reasonableness" to Wells' counsel. *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (per curiam) (quotation omitted); *Titlow*, 571 U.S. at 15. Even where "counsel's conduct was far from exemplary," relief is warranted only where "*every* fairminded jurist would agree that *every* reasonable lawyer would have made a different decision." *Dunn*, 594 U.S. at 739–40 (emphasis in original) (cleaned up).

And under *Buck*, we do not ask if the district court correctly applied these legal rules. We ask only whether the district court's resolution of the claim is debatable amongst jurists of reason. *See Buck*, 580 U.S. at 115.

1

Wells first contends trial counsel rendered IAC by presenting expert testimony that he was genetically predisposed to violence at the penalty phase. The defense's theory went as follows: Mutations in the Monoamine Oxidase A ("MAOA") gene can affect the brain's metabolism of serotonin. When combined with childhood abuse, low-activity MAOA mutations increase the likelihood of future violent behavior and difficulty controlling anger. Wells' team of experts determined that he had the low-activity MAOA mutation and a "semi traumatic environment in formative years," contributing to "a greater likelihood that [Wells] could have explosive and violent outbursts in his lifetime."

Wells now objects to this strategy on two grounds: First, he argues it conceded a necessary element to the prosecution. *See* ROA.5861 (requiring jury to find a "probability" that Wells "would commit future acts

of violence" at penalty phase). Second, he contends that it permitted the jury to convict him based on an "immutable genetic trait." *see Buck*, 580 U.S. at 123 ("Dispensing punishment on the basis of an immutable characteristic flatly contravenes th[e] guiding principle" that "[o]ur law punishes people for what they do, not who they are."). The CCA rejected this claim on the merits. And the district court held the claim "border[s] on frivolous." *Wells*, 2023 WL 7224191, at *10.

Jurists of reason would not debate the district court's resolution of this claim. The record shows that the state habeas court acknowledged the "wide range of reasonable professional assistance" and the "heavy measure of deference" due to strategies developed for trial. It accordingly declined to evaluate counsel's performance using the "twenty-twenty vision of hindsight." And it acknowledged the danger of using evidence like this, which is often "a double-edged sword that jurors could consider either as sufficiently mitigating evidence or as powerful evidence of future dangerousness."

Wells' counsel acknowledged all along that this evidence could support a positive finding on the issue of future violence. *See* ROA.15978 (memorandum of trial counsel submitted in 2016) (acknowledging this evidence "could potentially help the State's efforts" to show a probability of future violence). Counsel nonetheless believed it "could be a sufficiently mitigating fact" because Wells chose neither his genetics nor his childhood experiences, diminishing his perceived culpability. So counsel concluded it might "ultimately help [Wells'] chances of not receiving the death penalty." Additionally, Wells' genetic expert testified that the increased probability of violence "doesn't mean it's likely to happen; it means he's more likely than

an average person." His counsel argued that the genetic testimony "gives you cause to pause" and asked whether Wells should receive the death penalty "when we know there are [three] things he couldn't control . . . genes, his brain, and his environment."

Whether to present such evidence lies within the heartland of "strategic decisions" that appellate courts cannot second-guess unless the defendant rebuts their "strong presumption of reasonableness." *Dunn*, 594 U.S. at 739 (quotation omitted). That is precisely why the federal district court rejected Wells' claim. *See Wells*, 2023 WL 7224191, at *11 (describing this theory as "nothing more than mere post-hoc disagreement with trial counsel's strategy"). And we do not think the district court's treatment of this claim is debatable among jurists of reason.

2

Wells further argues his trial counsel rendered IAC by failing to strike a juror based on his comments about the death penalty during voir dire. *Strickland* also governs challenges to counsel's failure to strike or challenge prospective jurors for cause. *Harper v. Lumpkin*, 64 F.4th 684, 692 (5th Cir. 2023); *see also id.* at 693 (holding that no "clearly established federal law . . . would allow reasonable jurists to debate th[e] conclusion" that counsel was not ineffective when it failed to challenge jurors who "expressed the opinion that they could answer the special issues in such a way that either life or death would result based on the evidence and the law").

In a voir dire questionnaire, one prospective juror indicated he believed the death penalty should apply to those found guilty of murder. During his voir dire examination, however, the juror accepted that Texas law requires aggravating factors in addition to a mere

finding of guilt to impose a death sentence. He also pledged that he would not always find a defendant dangerous in the future and would answer the special issues based on the evidence adduced at trial. At the end of examinations from both the prosecution and the defense, the juror affirmed he "might give [Wells] a death sentence and [he] might not."

We have held that failure to strike a juror is constitutionally permissible when he pledges during voir dire to follow the law. *Harper*, 64 F.4th at 693. Moreover, trial counsel may make reasonable strategic decisions in striking or not striking prospective jurors. *Cf. Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("The Constitution, after all, does not dictate a catechism for voir dire . . .").

The CCA rejected this claim on the merits. And the district court held "[t]his claim fails to satisfy either prong of *Strickland* under *de novo* review and does not warrant federal habeas relief." *Wells*, 2023 WL 7224191, at *21.

Jurists of reason would not debate the district court's decision. Trial counsel explained that he was concerned about peremptorily striking the juror because he was a minority, fearing that it would undermine his *Batson* challenge. Trial counsel was also concerned that using one of his peremptory strikes could result in a "much worse" juror getting seated. The district court therefore held there were no grounds for a for-cause strike, and that Wells suffered no prejudice in any event. Jurists of reason would not debate that decision.

B

Wells also alleges the trial court violated his Eighth Amendment right to present mitigating evidence by excluding certain video evidence— specifi-

cally, video evidence of Wells' purported remorsefulness in the police interrogation room. "[T]he Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (quotation omitted). The decision to exclude such evidence "is quintessentially a trial error subject to harmless error review." *Rhoades v. Davis*, 914 F.3d 357, 368 (5th Cir. 2019).

Wells' counsel sought to introduce the recording during the penalty phase to show Wells "was acting strange" or "under some distorted emotional sense." ROA.13495–96. The video lasts about eight hours and depicts his initial, hourlong interview, six hours of Wells' detention, and his second, hourlong interview. *Wells*, 611 S.W.3d at 407. During the downtime between the interviews, Wells exhibited some strange behavior and made repeated comments like "This is too weird" and "This is a dream." *Id.* Wells contends this evidence tended to show his remorse, and such remorsefulness could constitute mitigating evidence at sentencing.

The CCA held this claim was procedurally defaulted because Wells never tried to introduce the evidence to show remorse and because some of the evidence did not satisfy the State's hearsay rules. And in any event, the CCA held the claim was meritless because any error was harmless beyond a reasonable doubt. On federal review, the district court held that the CCA's ruling constituted an adequate and independent state ground that barred federal relief. *Wells*, 2023 WL 7224191, at *8. To secure a COA, Wells must show both that the district court's procedural ruling is debatable and that the underlying constitutional claim is debatable. *Slack*, 529 U.S. at 484.

Neither ground is debatable. As to the district court's procedural ruling, the record shows that Wells failed to make the specific evidentiary proffer required by Texas law. *Golliday v. State*, 560 S.W.3d 664, 669–70 (Tex. Crim. App. 2018); Tex. R. Evid. 103(a)(2); Tex. R. App. P. 33.1(a)(1)(A). Nor would jurists of reason debate the district court's application of Texas's evidentiary rules.

In any event, Wells has failed to show that the underlying merits are debatable. That is because jurists of reason would conclude that, at best, the excluded evidence was cumulative. The jury saw several pieces of evidence that showed the same alleged remorse: a video of Wells taken immediately after the offense and before the excluded video began, officer's testimony about his "trance-like demeanor," testimony about a phone call Wells made "immediately after the shootings," and evidence about his suicidal and distraught state. That is a considerable amount of material showing Wells' mental state after the murders. *Cf. Wong v. Belmontes*, 558 U.S. 15, 23 (2009) ("Additional evidence on these points would have offered an insignificant benefit, if any at all.").

Additionally, trial counsel presented a host of other mitigating evidence attempting to demonstrate the same attributes Wells contends the video would show. That included testimony from family members, doctors and mental health professionals, people from his childhood, and Wells himself. Wells has shown no reason to think that "the evidence in favor of mitigation and the evidence against mitigation [was] so delicately balanced that the excluded . . . video would have been enough to tip the scales." *Wells*, 611 S.W.3d at 418.

In short, Wells cannot show that the district court's procedural ruling was debatably wrong. Nor

can he show that the merits underlying his Eighth Amendment claim are debatable.

C

Finally, Wells contends that his appellate counsel rendered IAC on state direct review by failing to object to the trial court's exclusion of three "jailhouse media interviews" from the day after the murders. These videos showed Wells "cr[ying], express[ing] his desire to die, and apologiz[ing]." Appellate counsel initially challenged only the exclusion of the interrogation room video, not the next day's news clips.

This claim is subject to the *Strickland* standard, as clarified in *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel provides IAC where he acts "objectively unreasonabl[y]," *id.* at 285, in "fail[ing] to discover nonfrivolous issues and [filing] a merits brief raising them." *Id.* The defendant must also show prejudice. *Id.* at 286. Generally, to succeed on this kind of claim, defendants must instead show that omitted issues "are clearly stronger than those presented." *Id.* at 288 (quotation omitted). That requirement respects counsel's strategic discretion: "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.*

The CCA rejected this claim on the merits. It concluded that any error was harmless because the jury considered "better, more compelling evidence" of Wells' mental condition shortly after the murders. And the district court held Wells' ineffective-assistance-of-appellate-counsel "claims fail to satisfy the prejudice prong of *Strickland* and thereby fail to warrant federal habeas relief." *Wells*, 2023 WL 7224191, at *24.

Jurists of reason would not debate the district court's resolution of this claim. During state habeas proceedings, appellate counsel submitted an affidavit stating that he raised "all of the points of error in the appeal that [he] determined to have merit." He appealed exclusion of the interrogation video over the others because he "thought [it] had the best chance" of aiding reversal. For good reason: The jailhouse media interview videos contained highly negative commentary about Wells from reporters, the victims' family members, and a neighbor. We therefore do not think jurists of reason would debate the district court's rejection of this claim.

* * *

Wells has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Accordingly, his motion for a COA is DENIED.

APPENDIX B

No. 4:21-CV-01384-O

(Capital Case)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMOS J. WELLS III,

Petitioner,

v.

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

Respondent.

[FILED November 2, 2023]

MEMORANDUM OPINION & ORDER

Before the Court are Petitioner Amos J. Wells III's Amended Petition for Writ of Habeas Corpus (ECF No. 58), filed March 20, 2023; Petitioner Amos J. Wells III's Motion to Stay Proceedings (ECF No. 60), filed March 20, 2023; Respondent Bobby Lumpkin's Answer to the Amended Petition for Writ of Habeas Corpus (ECF No. 69), filed July 19, 2023; Respondent Bobby Lumpkin's Opposition to the Motion to Stay Proceedings (ECF No. 70), filed July 19, 2023; Petitioner Amos J. Wells III's Reply in Support of the Amended Petition for Writ of Habeas Corpus (ECF Nos. 80, 81), filed September 18, 2023; and Petitioner Amos J. Wells III's Reply in Support of the Motion to Stay Proceedings (ECF No. 79), filed September 18, 2023.

For the reasons set forth herein, the Court **DENIES** the Amended Petition for Writ of Habeas Corpus, the Motion to Stay Proceedings, and the Certifi-

cate of Appealability.

I. BACKGROUND

A. CAPITAL MURDER OFFENSE[1]

On July 1, 2013, Petitioner became infuriated at Chanice Reed, his eight-month-pregnant girlfriend, for not answering his calls. So, Petitioner drove to Chanice's Fort Worth home where she resided with her grandmother, mother, and two younger brothers. When Petitioner arrived at the Reed household, Chanice was home with Annette Reed, her mother, and E.M., her ten-year- old little brother. K.S., Chanice's seventeen-year-old brother, was not at home at the time. However, while on the phone with his mother to seek her permission to go swimming, K.S. overheard Chanice and Petitioner verbally quarreling. Specifically, K.S. overheard Chanice utter: "Stop, Amos, you're scaring me." K.S. was also able to hear Annette raising her voice at Petitioner before hanging up on the mother-and-son phone call.

Not long afterward, Annette placed a phone call asking Joylene Parsons, her aunt, to come over to the Reed home. According to Parsons, Annette sounded extraordinarily troubled. Parsons also described overhearing a man unleashing a "bone-chilling scream" at the top of his lungs in the background of the call. After hearing Annette say, "You not going in there," Parsons asked who else was at the Reed home. Annette replied with "Chanice's boyfriend." Parsons understood that Annette was referring to Petitioner. Annette subsequently stated that "[Chanice]

[1] Unless noted otherwise, this section is a summary of the undisputed facts expounded upon in detail in the Texas Court of Criminal Appeals' opinion affirming Petitioner Amos J. Wells III's conviction and sentence on direct appeal. *See Wells v. State*, 611 S.W.3d 396 (Tex. Crim. App. 2020).

got to be the stupidest bitch to open the door to let that fool in," and to "Come on, come on." Parsons immediately called nearby family members and 9-1-1 for help. While the 9-1-1 operator was in the middle of asking questions, Annette reported "He's going to his truck," before her line on the call suddenly went dead.

A bystander was working on a driveway down the street from the Reed household. He heard the commotion and watched as a man and a woman argued loudly in the Reed's front yard. The bystander testified that the argument began to escalate in intensity. He saw the man retrieve a handgun from a Chevrolet Tahoe parked in front of the Reed home, return back to the front yard, and proceed to aim and fire the handgun directly at the woman multiple times from point-blank range as she cried out in desperation: "No, no, no." According to the bystander, another woman approached, urgently attempting to deflect or disarm the man of his handgun. Without hesitation, the man proceeded to aim and fire the handgun directly at the second woman multiple times from point-blank range as well. Hearing the blaze of yet even more gunshots, the bystander remained hidden by his house until the perpetrator drove off in the Tahoe. He subsequently went into the Reed home and observed a woman, later identified as Chanice, lying outside the front door with her eyes open. Chanice was profusely bleeding and completely unresponsive.

1. The Murders

First responders arrived within minutes of the first 9-1-1 report of the shootings. They discovered that Chanice with four gunshots to her pregnant body. One round pierced her skull right in between her eyes and cut its way through the right side of her brain. A second round punctured her lower chest. A third

round burst into Chanice's pregnancy-stretched left abdomen, inflicting irreversible damage by tearing through her lungs, stomach, aorta, and thoracic spine. The fourth round penetrated Chanice's back through her left side, ripping open a superficial gunshot wound. First responders at the scene, including emergency paramedics, were unable to save or revive Chanice's life. Chanice's unborn baby was also unable to be saved and perished along with his mother. Postmortem testing revealed that Petitioner was the biological father of the slain child.

Chanice's mother Annette suffered two fatal gunshots to her head. One large-caliber bullet drilled right into her mid-forehead, severing her anterior cerebral artery supplying blood to the brain and eventually depositing at the base of her ruptured brain. The second bullet scalped Annette from above her right ear, shredding more of her brain and crumbling down her left eye socket and eyeball with it. Early responders to the scene found Annette still alive as she was on the ground and helplessly shrieking. Chanice's mother would suffer the same fate as Chanice shortly thereafter at the hospital.

Chanice's little brother E.M. suffered four gunshot wounds to his ten-year-old body. The child's slain body had been found in a hallway inside of the actual residence. One shot blistered through his right ear, rattled down his neck on the right side, lacerated his left subclavian vein and lung, and then ejected out through his back. A second shot was lodged into the front of his chest, puncturing the lower pericardial sac of E.M.'s heart and slashing through his diaphragm, liver, and interior vena cava carrying blood to his heart, cutting further through his lung and rib thereafter, and finally bursting back out of the juvenile's body through his back. A third shot again per-

forated the front of his chest—this time blazing through E.M.'s stomach, colon, mesentery, and left iliopsoas muscle before erupting back out from the child's back. The fourth gunshot scorched through E.M.'s left forearm from back to front.

2. The Investigation and Arrest

All the cartridge casings recovered at the scene were of the same .9-millimeter caliber and brand. It was later confirmed that they had all been fired from the same weapon. Based on statements from witnesses and family members collected at the scene of this killing spree, law enforcement focused their investigation on Petitioner as the main suspect. In the meantime, Petitioner called Valricia Brooks, a former girlfriend who shared a daughter with Petitioner, and told her what transpired. He confessed to her that he had shot and killed Chanice, Annette, and E.M. and that he was considering fleeing. Petitioner's brother, Amron Wells, eventually joined the call with Petitioner and Brooks. Petitioner also informed his brother of the killings. Petitioner indicated his intent to drive off somewhere to commit suicide and asked Amron to care for his daughter for him. Brooks arranged a phone call between Petitioner and his daughter and subsequently advised Petitioner to turn himself in to the authorities.

Later that evening, Petitioner walked into the Forest Hills Police Department lobby and, in a rambling and incoherent manner, blurted, "Put me in jail; kill me." Sergeant Christopher Hebert noted that Petitioner was a "sweaty, big guy, muscular, [and] had a dazed kind of spacey look on him." Sergeant Hebert handcuffed Petitioner as a safety precaution. He further described Petitioner's demeanor as being "like a calm storm . . . calm demeanor but aggressive," and "look[ing] like he could [] explode any second." Fort

Worth officers then transported Petitioner to a Fort Worth police station, where Detectives Matthew Barron and Tim O'Brien attempted to interview Petitioner that night. Without reading *Miranda* warnings, Detective Barron began by asking Petitioner routine intake questions, i.e., name, date of birth, and address. Petitioner voluntarily answered these questions. Detective Barron followed up by inquiring: what Petitioner had done that day; why Petitioner showed up at the Forest Hills police station; whether Petitioner had been on the street where the Reed family resided; and what had happened on the street where the Reed family resided. Petitioner denied being present on that street that day. When Detective Barron asked Petitioner to tell him what had happened on that street, Petitioner repeatedly answered, "You tell me what happened."

Having not acquired useful information after forty or so minutes of questioning and an eight-minute break, the detectives ceased their interview of Petitioner and shifted gears toward interviewing others who were asked to give statements at the station. Slightly past midnight, Detective Barron made a determination that the authorities had probable cause to arrest Petitioner and search Petitioner's residence. Detective Barron obtained and executed a search warrant at Petitioner's residence during the early morning hours of July 2, 2013. The search turned up a undegraded empty cardboard .9 millimeter ammunition box; an opened .9 millimeter ammunition box containing 38/50 unspent cartridges matching the casings found at the crime scene; a gun magazine loaded with thirteen .9 millimeter rounds; an otherwise empty plastic handgun case that contained a single unspent .9 millimeter round; and a home security system control box containing time-stamped vid-

eos, which depicted Petitioner backing out of the driveway alone in his Tahoe shortly before the offense on July 1, and Petitioner's brother pulling into the driveway alone in the Tahoe later that same night.

Upon completion of the search, Detective Barron obtained an arrest warrant later that morning and returned to Petitioner's interview room to inform him that he was being charged with capital murder. Detective Barron proceeded to issue the standard *Miranda* warnings to which Petitioner waived his rights in response. Detective Barron re-interviewed Petitioner, which consummated in Petitioner breaking down crying and confessing in detail to the murders of Chanice, Annette, and E.M. on July 1, 2013.

3. The Indictment

On September 16, 2013, a Tarrant County grand jury indicted Petitioner on three counts of capital murder, to wit: intentionally and knowingly shooting Chanice and her mother Annette during the course of the same criminal episode; intentionally and knowingly shooting Chanice and her brother E.M. during the same criminal episode; and intentionally and knowingly shooting E.M. and his mother Annette during the same criminal episode.[2] Petitioner's original indictment included a deadly weapon allegation. On March 6, 2015, Petitioner was re-indicted on a single count of capital murder, to wit, intentionally and knowingly shooting Chanice and her mother Annette during the same criminal episode, with a second paragraph containing a deadly weapon allegation.[3]

[2] ECF No. 73-5, 37-38.

[3] ECF No. 73-5, 18-19.

B. CAPITAL MURDER PROCEEDINGS

Petitioner's capital murder trial commenced on October 31, 2016. In addition to the evidence summarized above, the prosecution presented testimony from the medical examiners who conducted the autopsies on Petitioner's three victims. Petitioner did not testify at the guilt- innocence phase of trial and advised his trial counsel on the record that he did not wish them to call any other witnesses or offer any evidence.[4] On November 3, 2016, at the conclusion of the evidence on guilt-innocence, the jury found Petitioner guilty beyond a reasonable doubt of capital murder as charged in the indictment[5]. *See* TEX. PENAL CODE § 19.03(a)(7)(A).

The punishment phase of Petitioner's trial commenced on November 4, 2016. The prosecution presented testimony and other evidence showing that: (1) on multiple occasions Petitioner assaulted a prior romantic partner, Valricia Brooks, who was also the mother of his child; (2) on multiple occasions prior to the date of the fatal shootings, Petitioner behaved violently toward Chanice Reed; and (3) while awaiting trial for capital murder, Petitioner assaulted another inmate at the Tarrant County Jail.

Trial counsel for Petitioner presented extensive testimony from Petitioner's parents, family, and mental health experts showing that: (1) Petitioner endured a violent, unstable, emotionally abusive family life during his upbringing; (2) Petitioner was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") as a child, for which he was prescribed medication; (3) Petitioner's mother suffered from per-

[4] ECF No. 74-33; 36 R.R. 12-18

[5] ECF Nos. 73-5, 74-36; 1 C.R.T. 713; 33 R.R. 58-61.

sonality disorders that left her incapable of distinguishing right from wrong; and (4) Petitioner's biological father displayed a lack of personal and financial responsibility. The defense also presented extensive expert testimony showing that Petitioner was genetically predisposed to violence. Petitioner's trial counsel contended that this made Petitioner less morally culpable for his own acts of violence.

Finally, Petitioner himself took the stand during the punishment phase of trial and testified that: (1) he had participated in counseling sessions to address his violent acts toward Brooks and Reed; (2) he had no recollection of shooting any of his victims; (3) he had a long history of difficulty controlling his emotions, particularly when angry; and (4) he was sincerely remorseful for his offenses.

On November 18, 2016, the jury returned its punishment phase verdict and found: (1) beyond a reasonable doubt that there was a probability Petitioner would commit criminal acts of violence constituting a continuing threat to society; and (2) there were insufficient mitigating circumstances warranting the imposition of a sentence of life imprisonment without the possibility of parole.[6] The trial court entered judgment and imposed a sentence of death.[7] *See* TEX. PENAL CODE §§ 19.03(a)(7), 19.02(b)(1).

C. DIRECT APPEAL

Petitioner directly appealed his conviction and sentence. Attorney John Stickels filed the Appellant's Brief for Petitioner on May 13, 2018. In it, appellate counsel argued thirteen points of error challenging

[6] ECF Nos. 73-6, 267; 2 C.R.T. 756; 45 R.R. 50-195.

[7] ECF No. 73-6; 2 C.R.T. 763-65, 777-90.

the decisions rendered by the state trial court.[8] The Texas Court of Criminal Appeals unanimously affirmed the judgment of the state trial court convicting Petitioner of capital murder and sentencing Petitioner to capital punishment. *Wells*, 611 S.W.3d at 430.[9]

D. STATE HABEAS CORPUS PROCEEDINGS

On April 18, 2019, Petitioner applied for state habeas corpus relief. Attorneys Benjamin Wolff, Ashley R. Steele, and Michelle Ward, all associated with the Texas Office of Capital and Forensic Writs, filed Petitioner's 400-plus page state habeas corpus application with voluminous exhibits accompanying the same.[10] The application was also accompanied by several thousand pages of exhibits, including thousands of pages of sealed medical, mental health, and school records.[11] Petitioner raised nine claims for habeas corpus relief in the state post-conviction process.

The state habeas trial court did not hold an evidentiary hearing. Instead, it directed the parties to file affidavits with proposed findings of fact and conclusions of law. Upon review, the state habeas trial court adopted with only minor modifications the proposed findings of fact and conclusions of law submitted by the State.[12] In its findings and conclusions, the court found credible and relied heavily on the affida-

[8] ECF No. 73-2.

[9] *See also* ECF No. 73-32.

[10] *See* ECF Nos. 76-16, 76-10, 76-11, 76-13, 76-12.

[11] *See* ECF Nos. 78-1 to 78-13.

[12] *Compare* State's Proposed Findings of Fact and Conclusions of Law, ECF No. 76-19, 20; 2 S.H.C.R. 409-500, 503-44, *with* August 10, 2021 Order of State Habeas Court, ECF No. 76-20; 2 S.H.C.R. 656-57.

vits furnished by trial counsel for Petitioner, i.e., attorneys Bill Ray and Stephen Gordon.[13] The Texas Court of Criminal Appeals denied state habeas relief on the merits, expressly adopting all but one of the trial court's factual findings and conclusions of law. *See Ex parte Wells*, WR-86,184-01, 2021 WL 5917724 (Tex. Crim. App. Dec. 15, 2021).[14]

On May 16, 2022, the Supreme Court of the United States denied Petitioner's certiorari petition. *Wells v. Texas*, 142 S. Ct. 2722 (2022).

II. LEGAL STANDARD

"Federal habeas features an intricate procedural blend of statutory and caselaw authority." *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019). The blend largely consists of the two core strictures codified under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254. First, AEDPA requires a petitioner to "exhaust[] the remedies available in the courts of the State" before seeking federal habeas relief. § 2254(b)(1)(A). Ordinarily, a petitioner satisfies this exhaustion requirement by raising his federal claim before the state courts, per state procedures. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999).

Second, AEDPA requires a petitioner to show that the state court decision was either: (1) "contrary to, or involved an unreasonable application of" clearly established federal law; or (2) rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d);

[13] *See* ECF No. 78-13, 189-207, 327-33; 3 S.H.C.R. 2689-3707 (Affidavit of Attorney Ray); 3 S.H.C.R. 2827-55 (Affidavit of Attorney Gordon).

[14] *See also* ECF No. 76-17.

Brown v. Davenport, 596 U.S. 118, 135 (2022).

(1) With respect to applying clearly established federal law, a state court decision is "contrary to" clearly established federal law if the state court: (i) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (ii) decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court decision "unreasonably applies" clearly established federal law to the facts of the petitioner's case if the application (iii) is objectively unreasonable rather than merely incorrect or erroneous. *McDaniel v. Brown*, 558 U.S. 120, 132–33 (2010). Legal principles are "clearly established" when Supreme Court precedents, existing at the time of the state court decision, establish those principles. *Brown*, 142 S. Ct. at 1525.

(2) With respect to determining facts from the evidence, a state court finding is presumed reasonable unless the petitioner demonstrates by clear and convincing evidence that it is erroneous. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Nor is a factual determination unreasonable merely because reasonable minds reviewing the record might disagree about the factual finding or the implicit credibility determination underlying the factual finding. *Id.*

In addition to the onerous thresholds erected by AEDPA, the petitioner must also persuade that the state court's error during adjudication of the petitioner's criminal case was not harmless. *Brown*, 142 S. Ct. at 1517. To do so, the petitioner must show that the error had a "substantial and injurious effect or

influence" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993). If, however, the state court fails to adjudicate a claim on the merits that the petitioner presents to this Court, that claim will receive *de novo* review. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009).

Under *Teague* non-retroactivity, a federal habeas court is barred from applying a new rule of federal constitutional criminal procedure retroactively on collateral review. *See Caspari v. Bohlen*, 510 U.S. 383, 389-390 (1994) (citing *Teague v. Lane*, 489 U.S. 288 (1989)). A court applies a "new rule" of criminal procedure in a case if "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original). This includes a holding that either "breaks new ground" or "imposes a new obligation on the States or the Federal Government." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (cleaned up). *Teague* precludes a federal habeas court from ruling in favor of the petitioner's claim on collateral review unless a state court hearing the same claim at the time of the petitioner's final conviction "would have felt compelled by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

A petitioner's conviction becomes final under *Teague* when the availability of direct appeal to the state courts has been exhausted and either the time for filing a certiorari petition with the U.S. Supreme Court has elapsed or the U.S. Supreme Court has issued a final denial of a timely filed certiorari petition. *Caspari*, 510 U.S. at 390. Notwithstanding the enactment of AEDPA, federal habeas courts remain bound to apply *Teague* in collateral review proceed-

ings. *See Horn v. Banks*, 536 U.S. 266, 268-72 (2002); *Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir. 2003).

III. ANALYSIS

Three matters are ripe for the Court's review: (A) the Amended Petition for Writ of Habeas Corpus; (B) the Motion to Stay Proceedings; and (C) the Certificate of Appealability. The Court proceeds by addressing each in turn.

A. PETITION FOR WRIT OF HABEAS CORPUS

Petitioner raises nine claims in support of his Amended Petition for a writ of habeas corpus: (1) unconstitutional exclusion of video mitigation evidence under the Eighth and Fourteenth Amendments; (2) ineffective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments for failing to present a cogent mitigation case and rebut *mens rea*, and for seating a partial juror; (3) ineffective assistance of trial counsel and state habeas counsel for failing to have the full video of an exhibit admitted into the record; (4) ineffective assistance of appellate counsel for failing to timely address exclusion of video evidence; (5) ineffective assistance of trial counsel for using racially charged remarks; (6) deprivation of due process of law under the Fourteenth Amendment from prosecutorial misconduct; (7) deprivation of due process of law for the presentation of genetic evidence; (8) the unconstitutionality of the state capital sentencing and post-conviction relief system; and (9) the unconstitutionally of capital punishment.

Addressing each in turn, the Court **DENIES** all nine of Petitioner's claims as well as all additional prayers for relief provided in the Amended Petition.

1. Constitutionality of Evidence Exclusion at Capital Sentencing (Claim One)

Petitioner first claims that the state trial court violated the Eighth and Fourteenth Amendments to the Constitution by excluding Defendant's Exhibits 81A, 82A, 83A, and 84A.[15] Specifically, Petitioner contends that the exclusion of the four videos contained within Defendant's Exhibits 81A-84A violated his constitutional rights to present mitigating evidence during capital sentencing proceedings under *Lockett v. Ohio*, 438 U.S. 586 (1978).

Defendant's Exhibit 81A is a police interrogation room recording of Petitioner within hours of turning himself in. Petitioner asserts that it depicts him crying, disoriented, confused, and docile and respectful to law enforcement. Defendant's Exhibits 82A, 83A, and 84A consist of three video- recorded interviews between Petitioner and local media. In a similar light, Petitioner asserts that these recordings depict him crying and apologizing for killing his pregnant girlfriend and unborn child, his girlfriend's mother, and his girlfriend's ten-year-old little brother.

But after reviewing this first constitutional claim for habeas corpus relief under a *de novo* standard, the Court finds it utterly lacking any serious merit.

i. Legal Standard

The Supreme Court plurality in *Lockett v. Ohio* held that a jury cannot be precluded from considering as a mitigating factor "any aspect of a defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sen-

[15] Amend. Pet. at 9-40.

tence less than death." 438 U.S. 586, 604 (1978). On the other hand, a trial court retains its inherent authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n.12. While the Supreme Court has since held that a jury cannot be precluded from considering relevant mitigating evidence, *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), it has also clarified that "gravity has a place in the relevance analysis, insofar as a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." *Tennard v. Dretke*, 542 U.S. 274, 286 (2004). As such, not all purportedly mitigating evidence is relevant and therefore mandatory for a jury to consider. *See Bigby v. Stephens*, 595 F. App'x 350, 353 (5th Cir. 2014).

Supreme Court precedents confers upon a criminal defendant "the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence." *Kansas v. Marsh*, 548 U.S. 163, 175 (2006). But "[t]he thrust of [the Supreme Court's] mitigation jurisprudence ends here." *Id.* For the *Lockett* decision and its progeny "stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence." *Johnson v. Texas*, 509 U.S. 350, 361 (1993) (cleaned up). Conversely, the incorporated Eighth Amendment "does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." *Oregon v. Guzek*, 546 U.S. 517, 526 (2006); *see, e.g.*, *Johnson*, 509 U.S. at 362; *Buchanan v. Angelone*, 103 F.3d 344, 349 (4th Cir. 1996) (holding that a trial court's exclusion of evidence pur-

suant to a state hearsay rule did not violate the constitution because "the statements would have had only cumulative probative value").

Furthermore, a trial court's decision to exclude relevant mitigating evidence is subject to harmless error review. *Rhoades v. Davis*, 914 F.3d 357, 367-69 (5th Cir. 2019). Thus, in order to succeed on a mitigating evidence exclusion claim, a petitioner must demonstrate to the federal habeas court that the alleged error had a "substantial and injurious effect or influence" on the outcome of the petitioner's criminal trial. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

ii Exclusion of Defendant's Exhibits 81A-84A

At the outset, Defendant's Exhibits 82A–84A were properly excluded for being littered with hearsay in Petitioner's statements, media reporters' commentary, victims' family statements, and a neighbor's commentary regarding the murders. *See Simmons v. Epps*, 654 F.3d 526, 542-44 (5th Cir. 2011) (holding that the state court's decision to exclude for hearsay purportedly mitigating videotape evidence was not unreasonable). Petitioner did not offer versions of these videotape exhibits that omitted the hearsay contained therein.[16] The state trial court was therefore correct in concluding that Defendant's Exhibits 82A-84A were excludable. *See* Tex. R. Evid. 801.

Relying on the Supreme Court's decision in *Green v. Georgia*, 442 U.S. 95 (1979), Petitioner retorts that "evidentiary rules cannot be applied 'mechanistically to defeat the ends of justice." But the Fifth Circuit has recognized that the reach of *Green* is actually "quite limited." *Simmons*, 654 F.3d at 543. It certainly does not reach the excluded evidence at issue here.

[16] See 45 R.R. 21-24.

Unlike in *Green*, where the trial court excluded evidence that another person confessed to the crime, the "probative value of" Defendant's Exhibits 82A-84A excluded in this case "pales in comparison." *Id.* Petitioner's jailhouse interviews with local media lack substantial indicia of reliability. *See id*. As the Fifth Circuit panel in *Simmons* noted in its decision to uphold the exclusion of a videotape created by a petitioner expressing remorse, Petitioner's expression of remorse "was less of a statement against interest, because [Petitioner] did not directly confess to the crime and may have had ulterior motives to create the tape." *Id.* at 544. Neither were Petitioner's media hits the sole avenue for him to proffer evidence of remorse, as himself and other defense witnesses testified at great length to Petitioner's remorsefulness. *See id.* Consequently, Petitioner fails to demonstrate that the state trial court improperly excluded Defendant's Exhibits 82A-84A.

As for Defendant's Exhibit 81A, Petitioner argues that it was improper for the state trial court to "exclude the recording of [Petitioner] while not being interviewed but being detained at the Fort Worth Police Department contained in the Defendant's Exhibit [81A]."[17] Petitioner maintains that the entire six-hour segment between jailhouse interviews should have been admitted because it was relevant mitigating evidence of his mental condition briefly after committing the murder spree. The Court disagrees and finds that the state trial court's decision to exclude the contested six-hour segment of the 81A videotape, along with the entirety of the 82A-84A videotapes, was harmless.

Petitioner did not raise the argument during trial

[17] 45 R.R. 20.

that Defendant's Exhibits 81A-84A were admissible to show remorsefulness, and therefore forfeited any such argument to begin with. In the State of Texas, a specific articulation of the legal basis of an evidentiary proffer is necessary to preserve error. *See Golliday v. State*, 560 S.W.3d 664, 669-70 (Tex. Crim. App. 2018). On direct appeal, the state appellate court found that Petitioner failed preserve this claim. *Wells*, 611 S.W.3d at 422 (citing Tex. R. App. P. 33.1). In the context of this federal habeas proceeding, even on *de novo* review, the Court is bound to accept this finding as a matter of state law. *See Buntion v. Lumpkin*, 982 F.3d 945, 951 (5th Cir. 2020) (expounding that "a basic tent of federal habeas review is that a federal court does not have license to question a state court's finding of procedural default . . . based upon an adequate and independent state ground." (cleaned up)); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). The state appellate court's finding constitutes an independent and adequate bar to Petitioner's claim in this Court that the excluded portions of Defendant's Exhibits 81A-84A prevented Petitioner from presenting mitigating evidence of his remorse. *See Scheanette v. Quarterman*, 482 F.3d 815, 823 (5th Cir. 2007). Petitioner makes no effort to rebut Fifth Circuit precedent holding that Texas' contemporaneous objection rule constitutes an independent and adequate state ground for precluding his claim. *See Scheanette*, 482 F.3d at 823.

Accordingly, the Court holds that this claim does not entitle Petitioner to habeas relief from his conviction and sentence and should therefore be **DENIED**.

2. Due Process of Law Deprivation by Prosecutorial Misconduct (Claim Six)

Petitioner's sixth claim alleges that the prosecution for the People of the State of Texas deprived him of due process of law guaranteed under the Fourteenth Amendment.[18] In support of this prosecutorial misconduct claim, Petitioner specifically asserts that in closing arguments to the jury during the punishment phase of trial, the state's representatives knowingly made: false statements regarding Petitioner's lack of remorse by arguing that Petitioner "never shed a tear" over the murders; and misleading discussion of the incident where Regin Hooks stabbed Petitioner by arguing that Petitioner was the aggressor. The Court is firmly unpersuaded by any of this.

i. Legal Standard

To successfully make out a due process of law deprivation in this context, the petitioner must first establish that the prosecution's argument was improper. *See Watts v. Quarterman*, 448 F. Supp. 2d 786, 814-15 (W.D. Tex. 2006) (collecting cases). A proper prosecutorial jury argument consists of either: (1) a summation of the evidence; (2) a reasonable deduction from the evidence; (3) a response to an opponent's argument; or (4) a plea for law enforcement. *Hughes v. Quarterman*, 530 F.3d 336, 347 (5th Cir. 2008); *Ward v. Dretke*, 420 F.3d 479, 497 (5th Cir. 2005). During closing arguments in particular, the prosecution "is not prohibited from reciting to the jury those inferences and conclusions she wishes the jury to draw from the evidence so long as those inferences are grounded upon evidence." *Dowthitt v. Johnson*, 230 F.3d 733, 755 (5th Cir. 2000) (cleaned up).

[18] Amend. Pet. at 107-09.

Rather, a prosecutorial remark is reasonable and within constitutional boundaries for merely "requesting the jury to draw a desired conclusion based upon the evidence." *Id.*

But even if the petitioner identifies certain improper remarks elicited by the prosecution, the fact that the remarks "were undesirable or even universally condemned" is insufficient on its own to establish a constitutional violation. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (cleaned up). The dispositive inquiry is "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see Parker v. Matthews*, 567 U.S. 37, 45 (2012) (per curiam). To clear the persuasive hurdle of prejudice rendering a trial fundamentally unfair, Petitioner bears the burden of showing that the prosecution's remarks "evince either persistent and pronounced misconduct or . . . the evidence was so insubstantial" that a conviction would not have resulted but for the remarks. *Harris v. Cockrell*, 313 F.3d 238, 245 (5th Cir. 2002) (cleaned up). Supreme Court precedent further dictates that a writ of habeas corpus shall not warrant based on a mere trial error unless the alleged error had a "substantial and injurious effect or influence" on the verdict issued against the petitioner. *Brecht*, 507 U.S. at 637.

Even under a *de novo* standard of review, Petitioner falls well short of his persuasive hurdle on this constitutional due process claim.

ii. Statements on Lack of Remorse

Petitioner's first allegation in support of this claim is that during the punishment phase of trial, the prosecution falsely asserted in closing arguments

that Petitioner "never shed a tear, not a single tear" in his testimony about personally seeing the victims' dead bodies at the scene of the murder spree.[19]

But the Court finds this portion of the prosecution's closing arguments to be wholly proper. For the reference to Petitioner's failure to "shed a tear" was a mere reminder to the jury of Petitioner's *own* in-court testimony provided to the jury earlier in the trial. The prosecution here specifically referenced Petitioner's testimony in the punishment phase of the capital murder trial to support its argument that Petitioner lacked remorse for the murders. Based on the Court's review of the record containing Petitioner's punishment phase testimony, the prosecution's supporting reference to that testimony was an entirely fair and accurate "summation of the evidence." *Watts*, 448 F. Supp. 2d at 815-16. There is nothing in the record to suggest that Petitioner cried or otherwise shed a single tear while testifying directly before the jury about observing first-hand the slain bodies of his pregnant girlfriend Chanice, her mother Annette, and her younger brother E.M.[20]

Further than that, Petitioner's punishment phase testimony produced an exchange on cross- examination that affirmatively *supported* the closing argument on remorsefulness put forth by the prosecution:

Q. You know, you didn't cry a single time when you described shooting anybody.

A. You can – *you can say that*, but –

Q. Well, that's true. You didn't.

[19] Amend. Pet. at 108 (citing 46 R.R. at 98:3-9).

[20] *See* 45 R.R. 50-194.

A. I was hurting. It's – *you can say that*.[21]

The record before the Court therefore indicates that the prosecution's lack-of-remorsefulness argument in reference to Petitioner's first-hand account of the murders merely "request[ed] the jury to draw a desired conclusion based upon the evidence." *Dowthitt*, 230 F.3d at 755. As such, the Court finds this portion of the prosecution's closing argument to be in perfect harmony with the due process of law owed to Petitioner.

iii. Discussion of the Hooks Incident

Petitioner's second allegation in support of this claim is that during the punishment phase of trial, the prosecution also misleadingly discussed in closing argument the incident where "[Petitioner] gets involved in an assault where Regin Hooks has enough of it, and she cuts him with a knife."[22] Specifically, Petitioner contends that the prosecution misleadingly asked "[w]hat was going on that this woman is so scared of [Petitioner] that she cuts him with a knife?" and misleadingly asserted that this incident "tells [the jury] how terrified she was of [Petitioner]."[23]

Here, Petitioner similarly fails to show how this portion of the closing arguments amounted to anything other than an entirely proper prosecutorial argument to address to a jury. In presenting this line of argument in its closing, the prosecution simply drew upon Petitioner's punishment phase testimony and other supporting evidence in the record. Earlier in the trial, Petitioner had briefly testified that Hooks

[21] 45 R.R. 162 (emphasis added).

[22] Amend. Pet. at 108 (citing 46 R.R. at 87:4-9).

[23] Amend. Pet. at 108 (citing 46 R.R. at 87:6-8).

was charged with aggravated assault with a deadly weapon for slashing him with a knife, but that Petitioner himself was not arrested because of the incident.[24] Petitioner was then questioned on cross-examination about the defense investigator's notes describing the same incident.[25] The notes stated that Hooks demanded compensation after engaging in sexual intercourse with Petitioner, to which Petitioner had refused. The notes also included a statement by Hooks that Petitioner had "'always been abusive'—beating on her."[26] Petitioner acknowledged the notes indicating Hooks's report of his abuse, but denied ever actually abusing Hooks and further accused her of lying.[27] The prosecution pointed out on cross-examination that, contrary to the testimony of defense witnesses that Petitioner had an issue with controlling anger and violence, Petitioner was perfectly capable of controlling these impulses when Hooks cut him with a knife.[28] On top of this, the trial record was rife with evidence of Petitioner insistently denying nearly every assault and domestic abuse incident he allegedly committed, including those that Petitioner *himself* pleaded guilty to and were photographically documented.[29]

In light of this trial record, the above-referenced segment of the prosecution's closing argument at issue here constituted an appropriate recitation of the "inferences and conclusions [the prosecution] wishe[d]

[24] 45 R.R. 85–86.

[25] 45 R.R. 150–52; S.X. 200.

[26] *Id.*

[27] 45 R.R. 152.

[28] 45 R.R. 152–53.

[29] S.X. 180, 182, 185–186, 189–92.

the jury to draw from the evidence" of Petitioner's pattern of violence and abuse toward women. *Dowthitt*, 230 F.3d at 755. In doing so, the argument itself made a perfectly "reasonable deduction from the evidence," as summarized above, that Petitioner had minimized, misled, or even lied about the extent of his abusive and violent behavior toward Hooks. *Hughes*, 530 F.3d at 347; *Watts*, 448 F. Supp. 2d at 814-16.

Neither does Petitioner have any legitimate basis for contending that his capital murder trial somehow became "fundamentally unfair" on account of the prosecution's closing argument on the Hooks incident. *Darden*, 477 U.S. at 178-183; *Brecht*, 507 U.S. at 637. For one thing, the jury was made aware of the fact that Hooks had been charged as a result of the slashing incident while Petitioner had not.[30] Moreover, well beyond Hooks's report of Petitioner's abuse, the jury was presented with other voluminous evidence of Petitioner's pattern of physical abuse toward his girlfriends that was far more detrimental to Petitioner's case—including that his pattern of abuse ultimately culminated in the grisly killings of his pregnant girlfriend and unborn child, his girlfriend's mother, and his girlfriend's little brother. *See Wells*, 611 S.W.3d at 419-20. When juxtaposed against this mountain of aggravating evidence implicating Petitioner's domestic violence and abuse habits toward women, Petitioner cannot seriously contend that the brief prosecutorial commentary on the Hooks incident inflicted a "substantial and injurious effect or influence" on the jury's verdict sentencing him to death. *Brecht*, 507 U.S. at 637. As with the lack- of-remorsefulness argument, the Court similarly finds this portion of the

[30] 45 R.R. 86.

prosecution's closing argument to be in perfect harmony with the due process of law owed to Petitioner.

Accordingly, the Court holds that this claim does not entitle Petitioner to habeas relief from his conviction and sentence and should therefore be **DENIED**.

3. Due Process of Law Deprivation by Expert Trial Testimony (Claim Seven)

Petitioner's seventh constitutional claim postulates that trial counsel's presentation of and the prosecution's reliance on genetic evidence deprived him of his due process of law guarantee under the Fourteenth Amendment.[31] Specifically, Petitioner contends that the introduction of and reliance upon expert opinion testimony that Petitioner is genetically prone to violence constituted a violation of his right to receive a criminal sentence based on reliable information and not immutable genetic makeup. Upon a *de novo* review of Petitioner's seventh constitutional claim for relief, the Court finds it bordering on frivolous.

i. Reliable Information

Petitioner first argues the genetic evidence violated his due process right to be criminally sentenced based on reliable information.[32] Petitioner relies on the Supreme Court's opinion in *Townsend v. Burke* for the proposition that a sentence cannot be based on inaccurate or unreliable information. 334 U.S. 736, 741 (1948). But that reliance is inapposite here. In *Townsend*, the Supreme Court found a defendant was deprived of due process of law where he was without counsel and the trial court predicated his sentencing

[31] Amend. Pet. at 109-13.

[32] Amend. Pet. at 109-10 (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

on criminal charges for which he was found not guilty. *Id.* at 740-41. It is plainly obvious that trial counsel's calculated decision to present the genetic evidence in Petitioner's case bears no resemblance to the factual circumstances at play in *Townsend*. Here, the crux of Petitioner's claim is a belated disagreement with trial counsel's *strategy*. This is insufficient to show he was deprived of a fair sentencing process. *See United States ex rel. Welch v. Lane*, 738 F.2d 863, 864–65 (7th Cir. 1984) (a defendant has "a right to a fair sentencing *process*—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information" (emphasis in original)).

Moreover, Petitioner fails to show Dr. Bernet's testimony was inaccurate or unreliable. For the same reasons that Petitioner fails to show that trial counsel was ineffective for presenting the genetic evidence, Petitioner cannot show that his sentence was based on unreliable information. *See State v. Yepez*, 483 P.3d 576, 584 (N.M. 2021) (holding that the trial court did not abuse its discretion in concluding that "the scientific findings of low-activity MAOA genotypes moderating the effects of childhood maltreatment to increase the likelihood of antisocial and aggressive behavior in males satisfied the *Daubert* reliability factors"); *People v. Adams*, 336 P.3d 1223, 1241-42 (describing testimony of a forensic psychologist that "it had recently been shown that there is a powerful association with severe antisocial behavior later in life when childhood maltreatment combines with the presence of an inherited type of gene, the 3-repeat allele MAOA gene"). Moreover, Dr. Bernet even conceded to the jury that not all studies confirmed the early research regarding the MAOA genet-

ic variant.[33] Petitioner simply fails to show the jury sentenced him based on unreliable or false evidence. *See Renteria v. Davis*, 814 F. App'x 827, 833–34 (5th Cir. 2020) (finding *Townsend* inapplicable where a petitioner does not demonstrate that his sentence "was predicated on inaccurate information").

Petitioner's claim might also be understood to arise under the Eighth Amendment as incorporated through the Fourteenth. If such is the case, the Fifth Circuit expounded that where the Supreme Court has discussed the Eighth Amendment's heightened reliability requirement, "it is not talking about the appropriate sources for information introduced at sentencing or even, more generally, about the reliability of the evidence." *United States v. Fields*, 483 F.3d 313, 336 (5th Cir. 2007). Rather, it has instead focused on the necessity of delineating the types of offenses for which capital punishment is appropriate and the need for individualized sentencing. *Id.* To that end, "the need for greater reliability in the selection of an appropriate punishment entails *not* stricter evidentiary rules, but the assurance of 'individualized sentencing' once a defendant is eligible for the death penalty." *Id.* (emphasis in original) (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Therefore, assuming *arguendo* that Petitioner has raised an incorporated Eighth Amendment claim here, he does not demonstrate how trial counsel's presentation of the genetic evidence contravened his constitutional safeguard against "cruel and unusual" punishment. U.S. CONST. AMEND. VIII.

As such, the Court finds no merit to this allegation in support of the due process claim.

[33] 43 R.R. 104–05.

ii. Immutable Genetic Makeup

Petitioner also claims trial counsel's presentation of the genetic evidence violated his due process right to not be criminally sentenced based on his immutable characteristics, i.e., his race and genetics.[34] Petitioner's reliance on *Buck v. Davis* is misguided, as the decision has no bearing on the due process attack advanced by Petitioner against trial counsel's presentation of Dr. Bernet's testimony. 580 U.S. 100 (2017). *Buck* involved an IAC challenge to trial counsel's actions, not a due process attack leveled against the fairness of the entire proceedings. *See id.* at 118. Furthermore, Petitioner's allegation boils down to nothing more than mere post-hoc disagreement with trial counsel's strategy, which does not equate to a deprivation of fair sentencing proceedings. *Lane*, 738 F.2d 863, 864-65. Petitioner's attempt to Monday morning quarterback his trial counsel is not a cognizable due process claim.

Assuming *arguendo* that the Court *has* been presented with a legitimate constitutional claim, the allegations underlying it are still groundless. For one, Petitioner fails to show he was harmed by the genetic evidence. Petitioner hangs his hat on mere juror declarations[35] that are inadmissible under the Federal Rules of Evidence. *See* FED. R. EVID. 606(b). Additionally, Petitioner's claim is barred by *Teague* nonretroactivity doctrine because no precedent constitutionally proscribes the presentation of genetic information along the same lines as what was presented to the jury here. The Court declines the invitation to announce a "new rule of constitutional law" for the

[34] Amend. Pet. at 110-11 (citing *Buck v. Davis*, 580 U.S. 100, 123-25 (2017)).

[35] Pet. at 111–12.

sake of bailing Petitioner out of an otherwise fair capital sentencing. *Caspari*, 510 U.S. at 389-390; *Teague*, 489 U.S. at 301. Thus, the Court does not find any merit to this allegation underlying the due process claim, either.

Accordingly, the Court holds that this claim does not entitle Petitioner to habeas relief from his conviction and sentence and should therefore be **DENIED**.

4. Constitutionality of Capital Punishment & Post-Conviction System (Claim Eight)

Petitioner raises an eighth claim for habeas relief that seeks to declare the entire system for capital sentencing and post-conviction relief in the State of Texas "unconstitutional under the Eighth and Fourteenth Amendments."[36] Petitioner puts forth a whole host of underlying challenges in support of this penultimate claim. The Court finds none of them remotely convincing.

i. Capital Sentencing Special Issues

Under this umbrella, Petitioner first argues that key terms of the Texas capital sentencing special issues are unconstitutionally vague and unconstitutionally narrow the scope of mitigating evidence. *See* Tex. Code Crim. Proc. art. 37.071.[37] Specifically, Petitioner contends that the lack of statutory definitions for terms such as "probability" and "criminal acts of violence" make the future dangerousness special issue unconstitutionally vague, while the statutorily prescribed scope of evidence in the mitigation special issue—i.e., evidence "reducing the defendant's moral blameworthiness"—unconstitutionally precludes the

[36] Amend. Pet. at 114-17.

[37] Amend. Pet. at 114-15.

sentencing authority's consideration of relevant mitigating evidence. Petitioner's state habeas petition raised IAC claims for trial and appellate counsel's failure to challenge the future dangerousness special issue and trial counsel's failure to challenge the mitigation special issue.[38] Petitioner did not otherwise raise constitutional challenges to these special issues as a separate standalone claim. According to Petitioner, it was objectively unreasonable and prejudicial for trial and appellate counsel to have conceded these issues, and the state habeas court's findings to the contrary were unreasonable or contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). The Court finds no merit to these assertions.

For starters, the Fifth Circuit has repeatedly rejected constitutional vagueness attacks on the future dangerousness special issue terms in Texas's capital sentencing scheme. *See, e.g.*, *Sprouse v. Stephens*, 748 F.3d at 622–23 (5th Cir. 2014) (denying a constitutional-vagueness challenge to the terms "probability," "criminal acts of violence," and "continuing threat to society" in the Texas capital sentencing charge); *Paredes v. Quarterman*, 574 F.3d 281, 294 (5th Cir. 2009) (holding that the terms "probability," "criminal acts of violence," and "continuing threat to society" were not unconstitutionally vague); *Turner v. Quarterman*, 481 F.3d 292, 299–300 (5th Cir. 2007) (rejecting claims that the terms "probability," "criminal acts of violence," and "continuing threat to society" were so vague as to preclude a capital sentencing jury's consideration of relevant mitigating evidence). Secondly, the Fifth Circuit has affirmed the constitutionality of the mitigation special issue in Texas's capital sentencing scheme. *See Hummel v. Davis*, 908

[38] State Pet. at 327-28, 331, 349-350.

F.3d 987, 994 (5th Cir. 2018). So too, the Supreme Court specifically commended Texas's current capital sentencing scheme for its "brevity and clarity" and its inclusion of a "clearly drafted catchall instruction on mitigating evidence." *Penry v. Johnson*, 532 U.S. 782, 802– 03 (2001). And on top of that, the Fifth Circuit has firmly repudiated the contention that—based on the scope of the evidence prescribed by the mitigation special issue—Texas's capital sentencing scheme unconstitutionally precludes from consideration categories of evidence that a sentencer may consider to be relevant mitigating evidence. *See Sprouse*, 748 F.3d at 622; *Blue v. Thaler*, 665 F.3d. 647, 663–68 (5th Cir. 2011).

Of further noteworthiness is that Petitioner's conviction and sentence became final under *Teague* no later than February 17, 2021. This reflects the date in which Petitioner's time window for filing a certiorari petition with the U.S. Supreme Court had expired, which was the ninety-first day following the affirmation of his conviction and sentence by the Texas Court of Criminal Appeals on November 18, 2020. *See Caspari*, 510 U.S. at 390; Rule 13.1, Rules of the Supreme Court of the United States (providing that the deadline for filing a certiorari petition is ordinarily 90 days from the date of the judgment for which certiorari review is sought).

Since controlling federal law affirms the constitutional validity of the future dangerousness and mitigation special issues, and no clearly established Supreme Court precedent points in the opposite direction as of the date of Petitioner's final conviction and sentence, *Teague* bars this Court from accepting Petitioner's challenges to the Texas capital sentencing special issues. *See Scheanette v. Quarterman*, 482 F.3d 815, 827 (5th Cir. 2007) (citing *Teague v. Lane*,

489 U.S. 288 (1989)). This is so regardless of whether they are packaged within an IAC claim or brought as an independent standalone claim against the entire capital sentencing scheme. And even assuming *arguendo* that these *de novo* findings are not fatal to Petitioner's challenges, Petitioner *himself* even concedes that binding circuit precedent forecloses them on the merits.[39]

The Court therefore finds that Petitioner's constitutional attacks on the Texas capital sentencing special issues are baseless.

ii. Twelve/Ten Rule

Petitioner next argues that the twelve/ten rule in Texas's capital sentencing scheme is unconstitutional. *See* Tex. Code Crim. Proc. art. 37.071.[40] Specifically, Petitioner contends that the rule is invalid for inclusion of an instruction to reach a unanimous or ten-person vote on special issues and for want of an instruction on the effect of a hung jury. Petitioner's state habeas petition raised an IAC claim for appellate counsel's failure to challenge the twelve/ten rule on appeal.[41] Petitioner did not otherwise raise an independent constitutional claim along these lines. Petitioner maintains that it was objectively unreasonable and prejudicial for appellate counsel to not have raised this issue on appeal, and that the state habeas court's contrary finding was unreasonable or contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). But even under another *de novo* inquiry, the Court finds no merit to this, either.

[39] Amend. Pet. at 114 n. 38 (citing *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001)).

[40] Amend. Pet. at 115.

[41] State Pet. at 360-68.

To begin with, the Fifth Circuit has already rejected this exact constitutional attack on the twelve/ten rule time after time again. *See Sprouse*, 748 F.3d at 623; *Blue*, 665 F.3d at 669–70; *Druery v. Thaler*, 647 F.3d 535, 542-45 (5th Cir. 2011); *see also Johnson v. Lumpkin*, 593 F. Supp. 3d 468, 504-08 (N.D. Tex. 2022), *aff'd*, 74 F.4th 334 (5th Cir. 2023). *A fortiori*, the Supreme Court has also disposed of carbon-copy arguments to those put forth by Petitioner, albeit in the federal capital sentencing regime. *See Jones v. United States*, 527 U.S. 373, 381-84 (1999) (holding that the Constitution does not require the provision of a capital sentencing jury instruction on the effect of a "breakdown in the deliberative process"). In a clear rebuke of Petitioner's precise contention here, the Supreme Court posited that the omission of such an instruction does *not* mislead capital sentencing jurors regarding their role in the sentencing process. *See id.* Rather, the *inclusion* of such an instruction would instead serve to undermine the State of Texas's "strong governmental interest" in having Petitioner's sentencing jury "express the conscience of the community on the ultimate question of life or death." *Id.* (cleaned up). Petitioner's reliance on *Mills v. Maryland*, 486 U.S. 367 (1988), *McKoy v. N.C.*, 494 U.S. 433 (1990), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) is inapposite and of no moment in this context, either. For binding circuit precedent has categorically disposed of all attempts at shoehorning these holdings into meritorious Eighth and Fourteenth Amendment challenges to the Texas twelve/ten rule. *See Johnson*, 593 F. Supp. 3d at 505-06, *aff'd*, 74 F.4th 334 (collecting and discussing cases).

Upon review, the Court finds that federal law clearly establishes the constitutionality of the Texas twelve/ten rule with respect to its instruction on

reaching a unanimous or ten-person vote on special issues and its lack of an instruction on the result of a hung jury. Bereft of any clearly established supporting authorities, Petitioner's argument to the contrary would have the Court "adopt a new rule of constitutional criminal procedure" in order for the petitioned habeas corpus writ to issue. *Blue*, 665 F.3d at 670. Under the non-retroactivity principle of *Teague*, then, this challenge to Texas's capital sentencing scheme is similarly barred. *See id.* (citing *Teague v. Lane*, 489 U.S. 288 (1989)). These *de novo* findings are also dispositive of Petitioner's argument that the state habeas court unreasonably denied his IAC claim against appellate counsel, which is based on the same underlying challenge.

As such, the Court finds Petitioner's constitutional attack on the Texas twelve/ten rule to be meritless.

iii. Application of the Death Penalty

Petitioner puts forth yet another argument against the validity of Texas's capital sentencing scheme—this time that Texas administers the scheme with arbitrariness and caprice.[42] Specifically, Petitioner contends that the death penalty is issued arbitrarily along geographic and racial lines within the State in violation of the constitutional requirement that capital sentencing schemes be "'controlled by clear and objective standards so as to produce nondiscriminatory application.'"[43] Petitioner's state habeas petition raised an IAC claim based on appellate counsel's failure to bring an arbitrary application challenge on appeal.[44] Petitioner did not otherwise

[42] Amend. Pet. at 115.

[43] *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 198 (1976)).

[44] State Pet. at 398-411.

raise this as a standalone constitutional claim. Once again, Petitioner maintains it was objectively unreasonable and prejudicial for appellate counsel to not have raised this issue on appeal, while the state habeas court's opposite finding was unreasonable or contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). But under *de novo* review once again, the Court finds this to be without arguable merit.

At the outset, the Fifth Circuit and Supreme Court do not recognize a constitutional prohibition against the imposition of a capital sentence merely because the capital punishment regime more broadly is enforced against capital murders in a geographically disparate manner. *Allen v. Stephens*, 805 F.3d 617, 628-631 (5th Cir. 2015), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018) ("[N]o Supreme Court case has held that the Constitution prohibits geographically disparate application of the death penalty due to varying resources across jurisdictions."). Conversely, the Supreme Court has affirmatively acknowledged that capital punishment is constitutionally permissible notwithstanding its lack of unform application brought about by varying prosecutorial discretionary considerations and law enforcement resources and capabilities. *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 307 n.28 (1987)).

With respect to racially discriminatory application of capital punishment, the Fifth Circuit and Supreme Court require Petitioner to show "'that the decisionmakers in *his* case acted with discriminatory purpose.'" *Kelly v. Lynaugh*, 862 F.2d 1126, 1135 (5th Cir. 1988) (quoting *McCleskey*, 481 U.S. at 291-98). In this regard, "alleged racial discrimination in the decision to prosecute a criminal defendant for capital murder and in the decision to impose a sentence of

death are essentially complaints of selective prosecution." *Johnson*, 593 F. Supp. 3d at 509, *aff'd*, 74 F.4th 334 (citing *Broadnax v. Davis*, No. 3:15-CV-1758-N, 2019 WL 3302840, at *14 (N.D. Tex. July 23, 2019) (Godbey, J.), *aff'd sub nom. Broadnax v. Lumpkin*, 987 F.3d 400 (5th Cir. 2021)). A selective prosecution inquiry "necessarily begin[s] with a presumption of good faith and constitutional compliance" on the part of the decisionmakers. *Broadnax*, 2019 WL 3302840, at *14, *aff'd sub nom.*, 987 F.3d 400 (citing *United States v. Armstrong*, 517 U.S. 456, 463-64 (2006)). The general rule of thumb is that so long as there was "probable cause to believe that [Petitioner] committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file" presumptively rested within the decisionmaker's discretion. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Thus, if Petitioner's crime fits within Texas's definition of capital murder and that definition is constitutionally sound, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" unless the selection was "deliberately based upon . . . race." *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

Here, the killing spree committed by Petitioner constitutes a murder crime for which the Constitution of the United States and the laws of the State of Texas sanction capital punishment. *See McCleskey*, 481 U.S. at 297. There can be no doubt, therefore, that the decision to pursue and impose the death penalty against Petitioner fell squarely within the decisionmakers' legitimate discretion here. *See Bordenkircher*, 434 U.S. at 364; *Oyler*, 368 U.S. at 456. Petitioner then fails to rebut this "presumption of good faith and constitutional compliance" on the part of the prosecutorial and sentencing authorities in-

volved in his case. *Broadnax*, 2019 WL 3302840, at *14, *aff'd sub nom.*, 987 F.3d 400. Petitioner proffers no evidence and alleges no specific facts to suggest that any racially discriminatory motive or purpose played a role in the decisions to pursue a capital murder prosecution and impose a capital sentence against him for a murder spree that took the lives of a pregnant mother and her baby, a mother, and a ten-year-old child. *See Broadnax v. Lumpkin*, 987 F.3d 400, 414 (5th Cir. 2021); *Johnson*, 593 F. Supp. 3d at 509, *aff'd*, 74 F.4th 334. Instead, Petitioner's argument on this front is altogether conclusory. Consequently, Petitioner fails to establish that the decisionmakers in his case arbitrarily applied Texas's capital sentencing scheme on the basis of race. *See Johnson*, 593 F. Supp. 3d at 509-511, *aff'd*, 74 F.4th 334; *White v. Thaler*, 522 F. App'x 226, 235 (5th Cir. 2013); *Kelly*, 862 F.2d at 1135.

Absent any on-point Supreme Court precedent to support this particular challenge to Texas's capital sentencing scheme, it is precluded under *Teague* for asking the Court "adopt a new rule of constitutional criminal procedure." *Blue*, 665 F.3d at 670. These *de novo* findings are also dispositive of Petitioner's argument that the state habeas court unreasonably denied his IAC claim against appellate counsel, which is based on the same underlying challenge.

As a result, the Court finds no arguable merit to Petitioner's constitutional attack on the application of Texas's capital sentencing scheme.

iv. Post-Conviction Proceedings

Petitioner advances one last argument under the umbrella of this substantive constitutional claim—namely, that Texas's state habeas proceedings unfairly deprived him of the opportunity to be heard in con-

formance with due process of law.[45] Specifically, Petitioner contends that the state habeas court failed to protect his due process rights by refusing to hold a live evidentiary hearing. Reviewing *de novo* yet again, the Court finds the allegation of a constitutionally defective post- conviction relief process to be incognizable.

As the Fifth Circuit has recurringly affirmed, "[i]t is axiomatic that infirmities in state habeas proceedings under state law are not a basis for federal habeas relief." *Wiley v. Epps*, 625 F.3d 199, 207 (5th Cir. 2010) (citing *Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004) (per curiam)); *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir. 1997). The reasoning behind this well-entrenched principle is that an attack on the validity of a state habeas proceeding "is an attack on a proceeding collateral to the detention and not the detention itself," and thus has no bearing on the validity of the underlying state conviction and sentence. *Rudd v. Johnson*, 256 F.3d 317, 319- 320 (5th Cir. 2001). The other main reason is that "a state has no constitutional duty to provide post-conviction remedies" in the first place. *Millard v. Lynaugh,* 810 F.2d 1403, 1410 (5th Cir. 1987). Conversely then, federal habeas courts "look only to the trial and direct appeal" proceedings at the state level for potential constitutional infirmities. *Duff–Smith v. Collins,* 973 F.2d 1175, 1182 (5th Cir. 1992).

Under the same controlling authorities, there can be no doubt that a constitutional due process attack on a state's post-conviction relief process falls squarely within this categorical bar to federal habeas corpus relief. *See Kinsel v. Cain*, 647 F.3d 265, 273, n. 23 (5th Cir. 2011) (applying the "no state habeas infirmi-

[45] Amend. Pet. at 116-17.

ties" rule to preclude federal habeas review of a due process claim against a state appellate court's post-conviction proceedings); *Hallmark*, 118 F.3d at 1080 ("Insofar as [petitioner] raises a due process challenge to the state habeas proceedings, his claim fails because infirmities in state habeas corpus proceedings do not constitute grounds for relief in federal court." (citing *Duff–Smith*, 973 F.2d at 1182)). Even more directly on point to the argument advanced here, Fifth Circuit habeas panels have uniformly applied this categorical rule to dispose of procedural due process claims predicated upon a state court's failure to hold a live evidentiary hearing on a post-conviction application. *See, e.g.*, *Mathis v. Dretke*, 124 F. App'x 865, 871-72 (5th Cir. 2005); *Tercero v. Stephens*, 738 F.3d 141, 147-49 (5th Cir. 2013); *Rockwell v. Davis*, 853 F.3d 758, 761 n. 5 (5th Cir. 2017).

Here, Petitioner *himself* concedes as much.[46] But even assuming otherwise, this Court is nonetheless bound by circuit precedent to defer to the state habeas court's findings under the no state habeas infirmities rule. *Ibid*. Moreover, due process of law "does not require a full trial on the merits" in the habeas context anyway, but merely that Petitioner has an "opportunity to develop his claim." *Rivera v. Quarterman,* 505 F.3d 349, 358 (5th Cir. 2007). With this understanding, allegation that the state habeas court trampled over his right to be heard collapses under its own weight. Petitioner was able to submit thousands of pages of thorough briefing and supporting exhibits throughout the state habeas process that the state habeas court comprehensively reviewed and rejected. This was more than an "ample opportunity to 'develop his claims'" in the state habeas proceedings.

[46] Amend Pet. at 116 n. 39, 117.

Rockwell v. Davis, 853 F.3d at 761 n. 5 (quoting *Tercero*, 738 F.3d at 148). In multiple facets then, Petitioner's argument seeks a "new rule of constitutional criminal procedure" that is *Teague*-barred. *Blue*, 665 F.3d at 670.

For the foregoing reasons, the Court finds that Petitioner's constitutional attack on the post- conviction relief process provided by Texas fails to raise a cognizable claim for relief.

Accordingly, the Court holds that this claim does not entitle Petitioner to habeas relief from his conviction and sentence and should therefore be **DENIED**.

5. Constitutionality of Death Penalty (Claim Nine)

Petitioner asserts that the death penalty *itself* is "unconstitutional under the Eighth and Fourteenth Amendments," and thus the sentence should be entirely vacated on that basis.[47] The Court is wholly unmoved by Petitioner's ninth and final claim.

The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted." U.S. CONST. AMEND. VIII. This was made applicable to the States through the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 666 (1962). It is deeply enshrined in our legal tradition that "capital punishment is constitutional" for the crime of murder. *Baze v. Rees*, 553 U.S. 35, 47 (2008) (citing *Gregg v. Georgia*, 428 U.S. 153, 176-77 (1976)). For since "the time of the adoption of the Constitution and the Bill of Rights" and long beyond, execution has been a widely accepted—and more often than not, the preferred—administration of justice for those convicted of slaughtering innocent human life. *See Glossip v.*

[47] Amend. Pet. at 117-18.

Gross, 576 U.S. 863, 867-69 (2015); *Gregg*, 428 U.S. at 168-172, 176-78.

To that end, the Constitution "reserve[s] for the people and their representatives" this determination regarding the proper course of justice for murderers. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122-23 (2019). Following thousands of years of Western legal tradition, the people of the State of Texas have duly determined that under the law, Petitioner's decision to deliberately deprive other human beings of innocent life within a single killing spree should render the deprivation of his own. *See* TEX. PENAL CODE §§ 19.03(a)(7), 19.02(b)(1). That is their prerogative under the Constitution. *See Bucklew*, 139 S. Ct. at 1122-23; *Glossip*, 576 U.S. at 869; *Gregg*, 428 U.S. 153. Very simply then, even when reviewing *de novo*, Petitioner's last-ditch attempt at preventing the justice that is due falls entirely flat.

Accordingly, the Court holds that this claim does not entitle Petitioner to habeas relief from his conviction and sentence and should therefore be **DENIED**.

6. Ineffective Assistance of Trial Counsel (Claims Two, Three, & Five)

The second, third, and fifth claims in the Amended Petition allege that trial counsel rendered ineffective assistance in violation of Petitioner's Sixth and Fourteenth Amendment rights.[48] In particular, Petitioner contends that trial counsel: (1) conceded the future dangerousness special issue; (2) failed to investigate Petitioner's post-traumatic stress disorder ("PTSD"), mental health, history of childhood sexual abuse, and background; (3) failed to present all available mitigating evidence; (4) failed to rebut the prosecution's evi-

[48] Amend. Pet. at 40-107.

dence of *mens rea* with evidence that Petitioner suffered from PTSD and a psychotic break at the time of his capital offense; (5) failed to challenge for cause or exercise a peremptory challenge against a venire member and eventual juror who could not serve impartially; (6) failed to offer and get the full and complete videotape recording of Defense Exhibit 84A admitted into the record; (7) made racially charged comments about Petitioner during trial; and (8) rendered cumulative ineffective assistance.

The Court reviews all of Petitioner's ineffective assistance allegations *de novo* in light of the evidence presented during Petitioner's capital murder trial and sentencing, state direct appeal, and state habeas corpus proceedings, as well as all novel evidence presented for the first time in federal habeas proceedings. For the reasons discussed at length below, none of Petitioner's complaints about the performance of trial counsel satisfy the constitutional standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) under a *de novo* standard of review.

i. Legal Standard

To prevail on an ineffective assistance of counsel claim, a petitioner bears the burden of demonstrating that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

(1) To satisfy the deficiency prong, a petitioner must establish that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Counsel's performance is objectively unreasonable where "no competent attorney" would have taken the action that counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011). In

order to meet his burden, a petitioner must overcome the "strong presumption" of adequate assistance, i.e., that counsel's conduct fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689-90. (2) To satisfy the prejudice prong, a petitioner must establish a "reasonable probability" that, but for the objectively unreasonable conduct of counsel, "'the result of the proceeding would have been different.'" *Wiggins*, 539 U.S. at 534 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is one that is "'sufficient to undermine confidence in the outcome'" of the proceeding at issue. *Id*. To reemphasize, *Strickland* demands that courts supply a substantial degree of deference to the reasoned professional judgments and decisions of trial counsel. *See id.* at 523; *Strickland*, 466 U.S. at 690.

ii. Concession of Future Dangerousness Special Issue

Insofar as Petitioner argues that his trial counsel conceded future dangerousness by presenting evidence that Petitioner was genetically predisposed toward violence, Petitioner is in error. The state habeas court found as a matter of fact, and the Court agrees after an independent review of the entire record of state proceedings, that Petitioner's trial counsel did not concede the future dangerousness special issue in the punishment phase of the capital murder trial.

Petitioner's trial counsel did present double-edged evidence showing that Petitioner's genetic makeup, combined with Petitioner's history of an abusive and traumatic childhood, rendered Petitioner more likely than other people to react violently in response to a stressful situation. The state trial court excluded for lack of scientific foundation the vast majority of the defense's proposed expert testimony on other genetic aspects of the defense's case in mitigation. Neverthe-

less, trial counsel was able to present some evidence demonstrating that these genetic factors in combination with childhood trauma reduced Petitioner's moral blameworthiness for his horrific capital offense.

Generally, it is objectively reasonable for trial counsel to make an *informed* decision on whether to proceed with a particular strategy that has the potential for a double-edged outcome. *See Mejia v. Davis*, 906 F.3d 307, 316 (5th Cir. 2018) (informed decision to forego a lesser- included offense instruction when defendant was entitled to same); *Chanthakoummane v. Stephens*, 816 F.3d 62, 70 (5th Cir. 2016) (informed decision to not present testimony from defendant's family out of concern for opening the door to evidence of gang affiliation and violent history); *St. Aubin v. Quarterman*, 470 F.3d 1096, 1103 (5th Cir. 2006) (informed decision not to present evidence that could be construed by jury as both mitigating and aggravating); *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) (informed decision not to present evidence showing the defendant suffered from child abuse, family instability, poor education, low intelligence, gunshot injuries, and family history of severe and chronic mentally illness).

It cannot be overemphasized that Petitioner' capital offense included fatally shooting a ten- year-old boy repeatedly *after* already fatally shooting the boy's eight-month pregnant sister and their mother. There was no evidence to suggest that Petitioner's final victim, E.M., had engaged in any aggressive behavior toward Petitioner at the time Petitioner fired multiple fatal shots directly into the ten-year-old body, including one to the head. Nor can the Court ignore the fact that Chanice Reed's unborn male child of eight months had been declared viable at the time of his death by the medical examiner testifying at Petition-

er's trial. Petitioner was thus responsible for taking the lives of four innocent human beings on July 1, 2013.

The Court also finds that trial counsel presented a substantial case in mitigation. In addition to the experts testifying to Petitioner's genetic predisposition for violence, the defense also presented numerous fact and expert witnesses testifying to the unstable, traumatic nature of Petitioner's childhood upbringing. Trial counsel was restricted from presenting further mitigating evidence via Petitioner's own express directives. Specifically, Petitioner instructed trial counsel not to proffer any evidence indicating either that Petitioner had been the victim of multiple instances of childhood sexual abuse, or that Petitioner's daughter showed signs of emotional or mental problems (including acts of violence at school).

The Court finds that under the arduous circumstances surrounding Petitioner's case, trial counsel's mitigation strategy on future dangerousness was objectively well-reasoned professional advocacy. Based on that finding, this IAC claim satisfies neither *Strickland* prong under a *de novo* examination and thus does not warrant federal habeas relief.

iii. Failure to Investigate Petitioner's PTSD & Childhood Abuse

The Court finds that trial counsel thoroughly investigated Petitioner's upbringing and became well aware of his childhood history of instability and traumatic abuse, including that he had been sexually abused. Trial counsel also became well aware of Petitioner's family history of emotional issues and mental illness, including his mother's extreme narcissism and daughter's emotional outburst at school. The expansive mitigation case actually presented at trial

belies Petitioner's claim that trial counsel failed to adequately investigate his background.

Trial counsel cannot reasonably be faulted for failing to present evidence from Petitioner's background that would have been cumulative or duplicative of the already-extensive mitigation case presented during the punishment phase of the capital murder trial. *Howard v. Davis*, 959 F.3d 168, 173 (5th Cir. 2020) (citing *Richards v. Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009)); *Norman v. Stephens*, 817 F.3d 226, 233 (5th Cir. 2016) (holding that a defendant is not prejudiced by the failure of trial counsel to present cumulative evidence).

Under *de novo* review, this conclusory IAC claim fails to satisfy either prong of the *Strickland* test necessary to warrant federal habeas relief.

iv. Failure to Present All Available Mitigating Evidence

For similar reasons, neither prong of *Strickland* is satisfied by the conclusory allegation that trial counsel failed to present all available mitigating evidence.

The Court finds that trial counsel rendered objectively reasonable assistance to Petitioner in presenting a comprehensive mitigation case. While it did not include evidence of Petitioner's childhood sexual abuse, trial counsel's decision in that respect was the product of Petitioner's own directives. Trial counsel cannot reasonably be faulted for following the express instructions of a client when it comes to the presentation of mitigating evidence. *Wood v. Quarterman*, 491 F.3d 196, 203 (5th Cir. 2007) ("Neither the Supreme Court nor this court has ever held that a lawyer provides ineffective assistance by complying with the client's clear and unambiguous instructions to not present evidence.").

Petitioner fallaciously asserts that trial counsel was required to exhaustively interview and present testimony from even more of Petitioner's acquaintances and family members. But trial counsel was not obligated to engage in an endless fishing expedition for every conceivable source of information that might potentially benefit the defense. *See Thomas v. Lumpkin*, 995 F.3d 432, 456 (5th Cir. 2021) (holding that duty to investigate does not force defense lawyers to "scour the globe on the off chance something will turn up." (quoting *Rompilla*, 545 U.S. at 383)). Rather, trial counsel in capital cases have a duty to make *reasonable* investigations or decisions that make certain investigations unnecessary. *See Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020); *Bobby*, 558 U.S. at 11-12. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Andrus*, 140 S. Ct. at 1881 (cleaned up). Here, the Court does not second guess the reasonable investigatory decisions taken pursuant to trial counsel's thorough mitigation case.

The Court also finds no reasonable probability that, but for the failure of trial counsel to present all of the "new" mitigating evidence identified in the Amended Petition, the outcome of Petitioner's capital sentencing would have been any different. The horrific details of Petitioner's merciless killing spree, on their own, established beyond any doubt that Petitioner posed a real and substantial threat of future violence both inside and outside of prison. Petitioner's brutal assault of another inmate while awaiting his capital murder trial in jail only reaffirms that conclusion. The subsequent recantation of Petitioner's inmate victim proves little to nothing. *See Summers v. Dretke*, 431 F.3d 861, 872 (5th Cir. 2005) (recanting

affidavits are viewed with extreme suspicion); *Spence v. Johnson*, 80 F.3d 989, 1003 (5th Cir. 1996) (recanting affidavits and testimony are disfavored and must be compared to the trial record to determine if they are worthy of belief).

Furthermore, Petitioner's "new" evidence pales in comparison to the type and scope of new evidence sufficient to satisfy the prejudice prong of *Strickland*. In the context of punishment phase mitigation in capital cases, the Supreme Court has held that it is unreasonable to not investigate further when information is made available to counsel that suggests additional mitigating evidence of circumstances such as mental illness or childhood abuse may be attainable. *See Porter*, 558 U.S. at 39-40; *Wiggins*, 539, U.S. at 524-26; *Williams*, 529 U.S. at 395-96.

Here, Petitioner's *Wiggins* claim fails to satisfy the prejudice prong of *Strickland* for two reasons. First, much of the "new" evidence identified in the Amended Petition was *not* available to trial counsel during the punishment phase proceedings because Petitioner *himself* directed trial counsel *not* to present these types of mitigating evidence. *See Wood*, 491 F.3d at 203. Second, much of the "new" evidence identified in the Amended Petition was largely cumulative or duplicative of the already-extensive mitigation case that trial counsel presented during the punishment phase proceedings. *See Norman*, 817 F.3d at 233. Much more than that, Petitioner's capital offense involved the brutal and senseless slaughtering of four innocent human beings, including a ten-year-old child, a pregnant woman and her mother, and a viable baby. Petitioner fired direct headshots into three of his victims as well as shooting multiple rounds into each of them. These were not just murders, but brutal executions. The Court finds no "new" evidence in the Amended

Petition that would serve mitigate this any further than what trial counsel presented.

Petitioner's claim satisfies neither prong of *Strickland* when examined under *do novo* review and does not warrant federal habeas relief.

v. Failure to Rebut *Mens Rea* Evidence at Guilt-Innocence Phase

To the extent that Petitioner alleges trial counsel should have attempted to rebut the prosecution's *mens rea* evidence of his intent to murder the four victims on July 1, 2013, Petitioner misconstrues applicable state law. The State of Texas does not recognize a diminished capacity defense in murder cases unless the evidence of diminished capacity rises to the level of legal insanity. Presently, this is limited to evidence establishing that a defendant suffered from a mental disease or defect so severe as to rebut or disprove the culpable mental state for the offense. *See Ruffin v. State*, 270 S.W.3d 586, 593 (Tex. Crim. App. 2008) ("Insanity is the only 'diminished responsibility' or 'diminished capacity' defense to criminal responsibility in Texas."). Section 8.01(a) of the Texas Penal Code provides that it is "an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." *Battaglia v. State*, 537 S.W.3d 57, 61 n.3 (Tex. Crim. App. 2017).

Petitioner does not identify with specificity any opinion or conclusion from the numerous mental health experts who evaluated him that indicates the availability and willingness to testify at trial that Petitioner was legally insane during the commission of the murders. It is undisputed that immediately following his arrest, Petitioner was able to describe the

events leading up to his capital offense in excruciating detail to law enforcement. So too, it is also undisputed that Petitioner telephoned his former girlfriend immediately after the offense to report that he had killed three people. These facts belie Petitioner's contention that he was unconscious at the time he fatally gunned down four innocent people. On top of that, Dr. McGarrahan's pretrial report to trial counsel indicated that Petitioner had no history of psychotic episodes. Based on this record, it is overwhelmingly clear that trial counsel acted objectively reasonable in deciding to refrain from presenting a defense based on Petitioner's lack of *mens rea* to commit capital murder.

A fortiori, any attempt on the part of trial counsel to rebut Petitioner's *mens rea* in the guilt- innocence phase of the capital murder trial would have been futile. *See Coble v. Quarterman*, 496 F.3d 430, 437-38 (5th Cir. 2007) (holding that "counsel was not ineffective for failing to present a diminished capacity defense because diminished capacity is not cognizable in Texas"). Under the current Texas Penal Code, any such evidence of diminished responsibility falling short of legal insanity is now applicable only in the punishment phase of trial, not the guilt-innocence phase. *See Jackson v. State*, 160 S.W.3d 568, 573 (Tex. Crim. App. 2005) (citing *Wagner v. State*, 687 S.W.2d 303 (Tex. Crim. App. 1984)). Thus, the decision *not* to present the mental health evidence and defense theory that Petitioner claims trial counsel should have presented in the guilt-innocence phase of trial was objectively reasonable.

Based on the foregoing *de novo* review, this IAC claim fails to satisfy either prong of *Strickland* and is therefore unwarranting of federal habeas relief.

vi. Failure to Challenge for Cause or Peremptorily Challenge Venire Member

Petitioner alleges that trial counsel should have either challenged for cause or used a peremptory challenge against a venire member and eventual juror who lacked the capacity to sit impartially on Petitioner's case.[49] This IAC claim fares no better.

The individual at issue was a non-native English speaker and immigrant who expressed his support for the death penalty in his jury questionnaire "because if you kill somebody, he or she must be killed, too."[50] After the prosecution explained the presumption of innocence and the operation of the Texas capital sentencing special issues, the venire member testified that he could apply the presumption of innocence.[51] The venire member then responded that: he understood the burden of proof was on the prosecution to prove future dangerousness beyond a reasonable doubt; he would not automatically vote to impose the death penalty on a defendant found guilty of murdering two people; and he understood the meaning of the terms included in the mitigation special issue.[52] When questioned by trial counsel, the venire member repeatedly testified that he would answer the special issues based upon the evidence.[53]

The selection of a jury is more of an art than a science. *Romero v. Lynaugh*, 884 F.2d 871, 878 (5th Cir. 1989) (recognizing that "the selection of a jury is, in-

[49] Amend. Pet. at 89.

[50] 17 R.R. 19.

[51] 17 R.R. 23–26.

[52] 17 R.R. 26–37, 42-46.

[53] 17 R.R. 55–65.

evitably, a call upon experience and intuition" where trial counsel "must draw upon his own insight and empathic abilities"). A trial counsel's actions during voir dire are considered to be a matter of trial strategy; such decisions cannot be the basis for an IAC claim unless trial counsel's tactics are shown to be so ill-chosen that they permeate the entire trial with obvious unfairness. *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995). As for the bias of a prospective juror, such does not constitutionally disqualify him or her from sitting on a case "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

Here, trial counsel explained in affidavits furnished to the state habeas trial court that the decision not to exercise a peremptory challenge against this venire member was borne out of a concern for running out of peremptory strikes prematurely, which might have required trial counsel to accept an even less desirable venire member as a juror later on in the proceedings. Having independently reviewed the entirety of the venire member's voir dire examination, as well as the venire member's answers to the jury questionnaire, the Court finds it was objectively reasonable for trial counsel to pass on a for-cause or peremptory challenge against him. The juror questionnaire responses of a venire member unfamiliar with the Texas capital sentencing scheme do not establish an irrebuttable presumption of disqualifying bias. Rather, the venire member's sworn testimony during individual voir dire offers a far more illuminating insight into the views and mindset of a potential juror. Rather than am insistence on imposing the death penalty in all cases of multiple murderers, this venire member's voir dire responses revealed his abil-

ity to set aside personal views, following applicable law, and answer the capital sentencing special issues in accordance with the evidence presented. This is all that the Constitution requires from a potential juror. *See Irvin v. Dowd*, 366 U.S. at 722. Thus, the voir dire testimony of this venire member clearly established that he was not subject to a for-cause challenge. It was likewise objectively reasonable for Petitioner's trial counsel to believe that exercising a peremptory strike against this venire member might have led to the seating of an even less desirable juror later.

Petitioner has not alleged any specific facts showing a reasonable probability that, but for the failure of trial counsel to successfully challenge the venire member at issue, the outcome of either phase of Petitioner's capital murder trial would have been different. Therefore, the Court finds the decision of trial counsel not to challenge the venire member to have been a perfectly reasonable voir dire strategy that did not infect the trial with unfairness. *See Teague v. Scott*, 60 F.3d at 1172. This claim fails to satisfy either prong of *Strickland* under *de novo* review and does not warrant federal habeas relief.

vii. Failure to Have the Entirety of Defense Exhibit 84 Admitted into the Record

The Court has independently reviewed every videotape recording submitted by the parties on federal habeas review, including the full version of Exhibit 84A at issue in this IAC claim. The exhibit in question contains rank hearsay in that it records a post-arrest conversation between Petitioner and a media representative. For the reasons set forth in Section III(A)(1)-(6) of this opinion, the exclusion of Exhibit 84A during Petitioner's trial did not render his trial fundamentally unfair. Moreover, after independently

reviewing Exhibit 84A in its entirety, the Court finds there to be absolutely no possibility, much less a reasonable probability that but for the failure of trial counsel to offer or convince the trial court to admit the entirety of Exhibit 84A into the record for the jury to review, the jury would not have sentenced Petitioner to death.

The question confronting the jury during the punishment phase of Petitioner's capital murder trial was not whether Petitioner's somber demeanor on July 2, 2013 was sufficiently redeeming to warrant a life sentence. Rather, the court was confronted with a defendant who refused to discuss the details of his capital offense during his time on the witness stand. The sentencing jury had ample opportunity during Petitioner's punishment phase testimony to examine his demeanor first-hand and determine whether he was sincerely contrite and genuinely remorseful for his merciless killing spree of four innocent lives. Petitioner's teary-eyed statements made during the television interview in Exhibit 84A were not under oath or subject to any diligent fact- checking, nevermind a full cross-examination. In all reasonable likelihood, Petitioner's sentencing jury would have seen these teary-eyed statements for what they were—a collection of self-serving drivel voiced by a convicted murderer who brutally butchered four innocent, vulnerable human beings with multiple point-blank gunshots, including two children.

The reason behind Petitioner's murderous rampage was obvious from his own descriptions of the events leading up to it: Petitioner was outraged that Chanice Reed had asked him to consider giving up his parental rights to their unborn child of eight months. Petitioner could not contain his rage and, as he had previously done on several occasions to both

Reed and prior paramour Brooks, Petitioner lashed out at his pregnant girlfriend with extreme violence. The Court concludes there is no reasonable probability that, but for the failure of trial counsel to get the full version of Exhibit 84A admitted, the jury would not have sentenced Petitioner to death after watching his entire teary- eyed, self-promotional media appearance with the press. This claim fails to satisfy either prong of *Strickland* under a *de novo* standard of review and does not warrant federal habeas relief.

viii. Racially Charged Commentary

Petitioner's fifth claim contends that trial counsel rendered ineffective assistance by making racially derisive comments before the sentencing jury. Petitioner specifically complains that trial counsel: stated "young black kids with guns is probably not a good situation" in a question posed to a witness on cross-examination; failed to object to the prosecution's remark that Petitioner "[n]ever became a gang member, although he could have" in closing argument; and referred to Petitioner as "the gangster" in closing argument.[54] Though these comments may appear inappropriate in isolation, they do not amount to constitutionally ineffective assistance when assessed in context.

First, a cursory glance at the exchange on cross-examination makes clear that the focus of the parties' questioning regarding Petitioner's firearm possession was Petitioner's age—not his race.[55] Neither trial counsel's questions nor the witness's answers expressly linked or attempted to link Petitioner's race with a propensity for future violence. For constitu-

[54] Amend. Pet. at 103-07.

[55] 45 R.R. 213–15.

tional purposes, it was not suggested to the sentencing jury "that the color of [Petitioner's] skin made him more deserving of execution." *Buck*, 580 U.S. at 119. On the other hand, it is very well settled that a defendant's youth can be a mitigating factor in capital sentencing. *See Johnson*, 509 U.S. at 368. This was the core aim of trial counsel's line of questioning containing the complained-of remark. Petitioner's disagreement with this mitigation strategy is not demonstrative of trial counsel's deficiency. *See Yarborough v. Gentry*, 540 U.S. 1, 9 (2003).

Second, the prosecution's unobjected-to remarks at closing were a mere acknowledgment of trial counsel's mitigation case. The prosecution stated that the jury could "fairly find mitigating" that Petitioner was "born into tough circumstances" and did not become "a gang member, although he could have."[56] The record clearly shows that these were mitigating circumstances of which trial counsel purposely had witnesses testify to.[57] This is a not a legitimate basis for Petitioner to complain of a failed objection and thereby allege trial counsel's deficiency. *See Nixon v. Epps*, 405 F.3d 318, 328 (5th Cir. 2005) (finding no deficiency under *Strickland* for a fruitless objection).

Lastly, with respect to trial counsel's reference to Petitioner as "the gangster" on the heels of the prosecution's closing argument, the Court can only infer that trial counsel made this reference with a sarcastic tone or with intent to illuminate the defense's key mitigation fact that Petitioner never *did* become a gang member. The Court applies *Strickland*'s strong presumption of competence to trial counsel's advocacy here. *See Cullen v. Pinholster*, 563 U.S. 170, 196

[56] 46 R.R. 32-33.

[57] *See, e.g.*, 44 R.R. 177, 224-25; 45 R.R. 113-14.

(2011) (holding that the presumption requires courts to not only extend counsel the benefit of the doubt, but "to affirmatively entertain the range of possible" reasons for counsel's actions).

The Court notes that the evidence of Petitioner's guilt and propensity for future violence was overwhelming and practically established as a matter of law by the monstrous details of his capital offense, the testimony regarding his long history of domestic violence, and his pretrial jailhouse assault on another inmate. The jury also had its own opportunity to examine firsthand Petitioner's demeanor and professions of remorsefulness. Under these circumstances, the Court similarly finds no reasonable probability that, but for trial counsel's inappropriate comments, the outcome in Petitioner's capital murder trial would have turned out any different.

The Court independently concludes that the comments in question did not rise above the level of harmless error. *See Brecht v. Abrahamson*, 507 U.S. 619, 623-24 (1993) (the test for harmless error in federal court is "whether the error had a substantial and injurious effect or influence in determining the jury's verdict"). Under *de novo* review, then, this claim also fails to satisfy the prejudice prong of *Strickland* necessary for federal habeas relief.

ix. Cumulative Ineffective Assistance

Petitioner also tacks on a conclusory cumulative IAC claim as part of his second claim in the Amended Petition.[58] The cumulative error doctrine requires a showing that constitutional error occurred during the petitioner's state court trial. *See Young v. Stephens*, 795 F.3d 484, 494 (5th Cir. 2015) (holding that a peti-

[58] Amend. Pet. at 94-96.

tioner fails to satisfy cumulative error doctrine if the petitioner fails to demonstrate any constitutional error committed during trial); *Coble v. Quarterman*, 496 F.3d 430, 440 (5th Cir. 2007) (noting that cumulative error doctrine only affords habeas relief for errors that are of a constitutional dimension); *Miller v. Johnson*, 200 F.3d 274, 286 n.6 (5th Cir. 2000) (explaining that absent constitutional error, there is nothing to cumulate). Cumulative error doctrine does not provide federal habeas relief unless the constitutional error "so infected the entire trial that the resulting conviction violate[d] due process." *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (cleaned up); *Jackson v. Johnson*, 194 F.3d 641, 659 n.59 (5th Cir. 1999).

For the reasons discussed above, all of Petitioner's complaints regarding the performance of trial counsel fail to satisfy the prejudice prong of *Strickland*. All but one of these IAC claims fail to satisfy the deficiency prong of *Strickland.* Thus, under the cumulative error doctrine recognized in the Fifth Circuit, there is nothing for the Court to cumulate. "Twenty times zero equals zero." *Derden*, 978 F.2d at 1458 (quoting *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987)). The Court therefore finds that, even under *de novo* review, Petitioner's cumulative IAC claim is without arguable merit and unwarranting of federal habeas relief.

Accordingly, the Court holds that claims two, three, and five do not entitle Petitioner to habeas relief from his conviction and sentence insofar as they allege ineffective assistance of trial counsel and should therefore be **DENIED** to that same extent.

7. Ineffective Assistance of Direct Appellate Counsel (Claims Three & Four)

The third and fourth claims of the Amended Petition allege that direct appellate counsel rendered ineffective assistance in violation of Petitioner's Sixth and Fourteenth Amendment rights.[59] Petitioner specifically contends that on direct appeal, appellate counsel failed to raise a point of error challenging the state trial court's exclusion of video-recorded interviews between Petitioner and various members of the media, as well as the full eight-hour video of Petitioner talking to himself, repeatedly denying responsibility for his capital offense, and sleeping soundly following his arrest. Petitioner also maintains that appellate counsel failed to present the entire seven-minute version of the Exhibit 84A recording as part of the state appellate record.

i. Legal Standard

Strickland's two-pronged approach to evaluating IAC claims against trial counsel applies to the performance of direct appellate counsel as well. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). Thus, the standard for evaluating the performance of counsel on appeal requires an inquiry into: (i) whether appellate counsel's performance was deficient, i.e., objectively unreasonable under the then-current legal standards; and (ii) whether appellate counsel's allegedly deficient performance "prejudiced" the petitioner, i.e., a reasonable probability that, but for the deficient performance, the petitioner would have prevailed on appeal. *Id*. Where, as here, appellate counsel presented, briefed, and argued one or more non-frivolous grounds for relief on direct appeal and did

[59] Amend. Pet. at 97-103.

not seek to withdraw his representation, the petitioner must satisfy *both* prongs of the *Strickland* test in connection with his IAC claim against appellate counsel. *See Roe v. Flores- Ortega*, 528 U.S. 470, 477, 482 (2000) (holding the dual prongs of *Strickland* apply to claims of IAAC and recognizing that in cases involving "attorney error," the claimant must show prejudice); *Smith v. Robbins*, 528 U.S. at 287-89 (holding that petitioner must satisfy both prongs of *Strickland* to succeed on an IAAC claim for failure to file a merits brief).

Appellate counsel need not and should not raise every nonfrivolous claim or argument in merits briefing on appeal. *Id.* at 288; *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983). Rather, effective appellate counsel should select from among them so as to maximize the likelihood of success on appeal. *Davila v. Davis*, 582 U.S. 521, 533 (2017); *Smith v. Murray*, 477 U.S. 527, 536 (1986). This process of winnowing out weaker issues and focusing on those more likely to prevail on appeal is the hallmark of effective appellate advocacy. *Id.*; *Jones v. Barnes*, 463 U.S. at 751-52. Appellate counsel's decision not to raise a claim or argument on direct appeal, therefore, does not give rise to deficient performance unless that claim or argument was plainly stronger than those actually presented to the appellate court. *Davila*, 582 U.S. at 533; *Smith v. Robbins*, 528 U.S. at 288. "In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved ones." *Davila*, 582 U.S. at 533.

ii. Deficient Performance Regarding Defense Exhibits 81A-84A

For the reasons discussed at length in Section III(A)(1)-(6) of this opinion, the Court concludes there is no reasonable probability that, but for the failure of

appellate counsel to challenge the state trial court's exclusion of the videos in Defense Exhibits 81A-84A and to offer Defense Exhibit 84A into the state appellate record, the outcome of Petitioner's direct appeal would have turned out any differently than it did. *See Smith v. Robbins*, 528 U.S. at 285. The videos in question depict Petitioner giving multiple self-serving interviews with local media, and spending eight hours in police custody denying that he killed four people and self-muttering in isolation.[60] The state courts reasonably concluded that the exclusion of these videos was harmless at best, and the Court agrees. *See Wells*, 611 S.W.3d at 409-23. The Court further concludes that in all reasonable likelihood, requiring a jury to watch the entire eight-hour recording of Petitioner refusing to confess his murder culpability—followed by hour after hour of Petitioner muttering to himself alone—as well as each of Petitioner's self-promotional media appearances, would have had the counterproductive effect of alienating that jury away from the defense. It certainly impacted the Court in such a way here. And it is very unlikely that any jury would have had the patience to stomach watching Petitioner's exercise in self-absorption any more than did this Court. As a result, Petitioner's IAAC claims fail to satisfy the prejudice prong of *Strickland* and thereby fail to warrant federal habeas relief.

Accordingly, the Court holds that claims three and four do not entitle Petitioner to habeas relief from his conviction and sentence insofar as they allege ineffective assistance of direct appellate counsel and should therefore be **DENIED** to that same extent.

[60] D.X. 81A-84A.

8. Ineffective Assistance of State Habeas Council (Claim Three)

The third claim of the Amended Petition also alleges that state habeas counsel rendered ineffective assistance.[61] Specifically, Petitioner contends that state habeas counsel failed to ensure that the entire seven-minute version of the Exhibit 84A recording was made a part of the record during Petitioner's initial post-conviction relief proceeding, rather than the four-minute version actually entered into the state habeas record. The Court finds this IAC claim to be legally frivolous.

AEDPA statutorily precludes allegations of ineffective assistance of state post-conviction counsel from serving as a basis for federal habeas corpus relief. *See* 28 U.S.C. § 2254(i). Infirmities in a state post-conviction proceeding, including ineffective assistance of state habeas counsel, do not furnish an independent basis for federal habeas corpus relief. *Gilkers v. Vannoy*, 904 F.3d 336, 346 n.60 (5th Cir. 2018). The Fifth Circuit has consistently applied this rule in various contexts. *See, e.g.*, *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008) (rejecting alleged ineffective assistance by initial state habeas counsel); *Elizalde v. Dretke*, 362 F.3d 323, 331 (5th Cir. 2004) (noting that Supreme Court precedent does not recognize a general right to effective assistance in state post-conviction proceedings); *Morris v. Cain*, 186 F.3d 581, 585 n.6 (5th Cir. 1999) (explaining that an attack on a state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself, and thus does not furnish a basis for federal habeas relief).

[61] Amend. Pet. at 97-102.

Very simply then, Petitioner's IAC challenge to state habeas counsel proffers no cognizable claim for federal habeas relief. It is vacuous of arguable merit under a *de novo* standard of review.

Accordingly, the Court holds that claim three does not entitle Petitioner to habeas relief from his conviction and sentence insofar as it alleges ineffective assistance of state habeas counsel and should therefore be **DENIED** to that same extent.

Altogether, the Court holds that claims two, three, four, and five do not entitle Petitioner to habeas relief from his conviction and sentence and should therefore be **DENIED**.

9. Request for Continuation of Stay of Execution

At the end of the Amended Petition for a writ of habeas corpus, Petitioner makes a cursory request for the Court to grant a continuation of a stay of execution.[62] But there currently does not exist a pending execution date for Petitioner. As such, there currently does not exist a stay of Petitioner's execution, either. The Court itself has not entered a stay of execution up to this point in time despite its jurisdiction to do so. *See McFarland v. Scott*, 512 U.S. 849, 859 (1994). Nevertheless, the Court is unaware of—and the Amended Petition does not proffer—any valid basis for entering one at this point in time.

Accordingly, the Court holds that this request does not entitle Petitioner to a continuation of a stay of execution and should therefore be **DENIED**.

10. Request for Federal Evidentiary Hearing

In a similar vein, Petitioner buries another per-

[62] Amend. Pet. at 118.

functory request at the bottom of the Amended Petition that prays for the Court to grant a federal evidentiary hearing.[63] With respect to any new factual allegations, evidence, or legal arguments Petitioner advances pursuant to claims receiving *de novo* review, the Court finds that Petitioner is not entitled to an evidentiary hearing in these federal habeas proceedings.

The Court has already undertaken *de novo* judicial review of all of Petitioner's claims contained in the Amended Petition. In the course of that review, with the exception of assertions refuted by the state court records now before it, the Court assumed the factual accuracy of: (i) all specific facts alleged by Petitioner in support of his claims; and (ii) any documents Petitioner presented in support of his claims. And yet despite the exceptionally broad scope of the Court's federal habeas corpus review here, it has independently concluded that none of Petitioner's claims possess any arguable merit.

When the truth of every novel factual allegation in support of a petitioner's claims is assumed and the claims are still unwarranting of federal habeas relief, the petitioner is not entitled to a federal evidentiary hearing, either. *See Schriro v. Landrigan*, 550 U. S. 465, 474 (2007). A petitioner lacks entitlement to an evidentiary hearing in federal habeas proceedings with respect to every claim that the Court reviews and denies under a *de novo* standard. *Richards v. Quarterman*, 566 F.3d 553, 563 (5th Cir. 2009) (quoting *Schriro*, 550 U.S. at 373)). It should also be made clear that a criminal trial "is the 'main event' at which [Petitioner's] rights are to be determined, and the Great Writ is an extraordinary remedy that

[63] Amend. Pet. at 118.

should not be employed to 'relitigate state trials.'" *McFarland*, 512 U.S. at 859 (internal citation omitted).

Here, an exhaustive review of the pleadings and state court records has led the Court to conclude that Petitioner is barred from obtaining a federal writ of habeas corpus pursuant to any of the claims set forth in his Amended Petition. From that conclusion, the Court finds that Petitioner is likewise without any entitlement to an evidentiary hearing in this federal habeas court. *See Richards*, 566 F.3d at 563. The Court refuses to enter into the business of relitigating Petitioner's entire state capital murder trial under the guise of a federal habeas proceeding. *See McFarland*, 512 U.S. at 859.

Accordingly, the Court holds that this request does not entitle Petitioner to a federal evidentiary hearing and should therefore be **DENIED**.

11. Request for Federal Discovery

Petitioner tacks on yet another cursory request to the very bottom of the Amended Petition for a writ of habeas corpus—this time for the Court to grant full federal discovery on the matter.[64]

Under Rule 6 of the *Rules Governing Section 2254 Cases in the United States District Courts*, discovery is permitted in a federal habeas proceeding upon a finding of "good cause." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997); *Murphy v. Davis*, 901 F.3d 578, 590 (5th Cir. 2018) (when specific allegations before a federal habeas court establish a reason to believe that the petitioner may, if facts are fully developed, demonstrate his entitlement to relief, the petitioner may be entitled to discovery); *Jones v. Davis*, 890

[64] Amend. Pet. at 118.

F.3d 559, 573 (5th Cir. 2018). On the other hand, federal habeas courts need not allow fishing expeditions. *Murphy*, 901 F.3d at 590; *United States v. Webster*, 392 F.3d 787, 802 (5th Cir. 2004). And it is especially worth reiterating that a state criminal trial "is the 'main event' at which [the petitioner's] rights are to be determined," whereas a federal writ of habeas corpus is "an extraordinary remedy that should not be employed to 'relitigate state trials.'" *McFarland*, 512 U.S. at 859 (internal citation omitted).

Here, Petitioner's allegations are nowhere near the universe of "good cause." The Court has already undertaken *de novo* review of every constitutional claim underlying the Amended Petition, including all novel factual allegations, evidence, and legal claims submitted by Petitioner in support of same. In doing so, the Court has treated as factually accurate all specific factual allegations in the Amended Petition that the state trial and habeas corpus record do not otherwise refute. Yet despite the exceptionally broad nature of the habeas corpus review undertaken here, the Court still arrived at the conclusion that all claims contained within the Amended Petition not only lack merit but are bereft of any potentially arguable merit, too. There are no facts that require even more development beyond the thousands of pages of briefing and evidence that have already been thoroughly developed through multiple state capital murder and post-conviction proceedings leading up to federal habeas corpus.

The Court therefore has no business entertaining Petitioner's dubious invitation to embark on a fishing expedition for mitigating or exculpating evidence that simply does not exist. *See Murphy*, 901 F.3d at 590; *Webster*, 392 F.3d at 802. If otherwise, the Court would be effectively reopening and relitigating Peti-

tioner's state criminal trial through federal habeas just so that he may have an extra bite at the apple for a lesser sentence. *See McFarland*, 512 U.S. at 859. Under these circumstances, Petitioner is far from entitled to opening federal discovery at this juncture.

Accordingly, the Court holds that this request does not entitle Petitioner to federal discovery and should therefore be **DENIED**.

* * *

The Court concludes that all of Petitioner's underlying claims and requests for federal habeas relief fail on the merits. In view of that conclusion, the Court holds that the Amended Petition for Writ of Habeas Corpus (ECF No. 58) should be and is hereby **DENIED**.

B. MOTION TO STAY PROCEEDINGS

A stay and abeyance to permit exhaustion of state court remedies on unexhausted claims for relief is not appropriate in the context of a pending federal habeas corpus proceeding unless a district court determines that: (1) there is "good cause" for the petitioner's failure to exhaust his claims in state court; (2) the unexhausted claims are not plainly meritless; and (3) the petitioner has not engaged in abusive litigation tactics or intentional delay. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005); *Haynes v. Quarterman*, 526 F.3d 189, 196 (5th Cir. 2008).

Here, all of Petitioner's claims for habeas corpus relief are plainly meritless. As explained at length above, the Court has undertaken *de novo* review of every constitutional claim underlying the Amended Petition, including all novel factual allegations, evidence, and legal claims submitted by Petitioner in support of same. The Court has treated as factually

accurate all specific factual allegations in the Amended Petition that the record from Petitioner's state trial and habeas corpus proceedings do not completely refute. The Court nonetheless concluded that all claims contained within the Amended Petition not only lack merit but are bereft of any arguable merit as well. So too under these circumstances, Petitioner is likewise not entitled to a stay of the proceedings, either.

Based on the foregoing, the Court holds that the Motion to Stay Proceedings (ECF No. 60) should be and is hereby **DENIED**.

C. CERTIFICATE OF APPEALABILITY

Under AEDPA, the petitioner must obtain a Certificate of Appealability ("CoA") before appealing the denial of a writ of habeas corpus petitioned under § 2254. *Miller-El*, 537 U.S. at 335–36; 28 U.S.C. § 2253(c)(2). A CoA is granted or denied on an issue-by-issue basis, limiting appellate review of a habeas corpus petition to those specific issues on which a CoA is granted. *Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002); 28 U.S.C. § 2253(c)(3). A grant of a CoA shall not warrant unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). To clear this persuasive hurdle, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, Petitioner falls well short of demonstrating that reasonable minds would disagree with the Court's conclusion that each and every one of the constitutional claims underlying the Amended Petition are meritless. The Court therefore concludes that Pe-

titioner is not entitled to a CoA on any of the issues presently before it.

In light of the foregoing, the Court holds that a Certificate of Appealability (ECF Nos. 80, 81) should be and is hereby **DENIED** for all claims and issues before the Court.

IV. CONCLUSION

Accordingly, it is **ORDERED** that the Amended Petition for Writ of Habeas Corpus (ECF No. 58), the Motion to Stay Proceedings (ECF No. 60), and the Certificate of Appealability (ECF Nos. 80, 81)—as well as all relief prayed therein—are hereby **DENIED**.

SO ORDERED on this **2nd day** of **November, 2023**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES
DISTRICT JUDGE

APPENDIX C

No. 4:21-CV-013834-O

(Capital Case)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMOS J. WELLS III,

Petitioner,

v.

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

Respondent.

[FILED January 5, 2024]

MEMORANDUM OPINION & ORDER

Before the Court are Petitioner Amos J. Wells III's Motion to Alter or Amend Judgment and Memorandum of Law in Support of the Motion (ECF Nos. 89, 90), filed November 30, 2023; Respondent Bobby Lumpkin's Response in Opposition to the Motion (ECF No. 91), filed December 21, 2023; and Petitioner Amos J. Wells III's Reply in Support of the Motion (ECF No. 92), filed January 4, 2024. For the reasons set forth herein, the Court **DENIES** the Motion to Alter or Amend Judgment.

I. BACKGROUND

Amos J. Wells III ("Petitioner") petitioned the Court for a federal writ of habeas corpus under 28 U.S.C. § 2254, seeking relief from his November 2016 conviction for capital murder and sentence to capital punishment in Tarrant County. The Texas Court of Criminal

Appeals opinion affirming Petitioner's conviction and sentence on direct appeal contains a detailed exposition of the facts of the capital murder offense and the evidence of such presented at Petitioner's capital murder trial. *See Wells v. State*, 611 S.W.3d 396 (Tex. Crim. App. 2020). For purposes of this Order, it suffices to recount that on July 1, 2013, Petitioner fatally shot his eight-month-pregnant girlfriend Chanice Reed and her viable baby, her mother Annette Reed, and her ten-year-old little brother E.M. There are no genuine disputes as to these facts.

On November 2, 2023, the Court issued an Opinion and Order denying Petitioner's Amended Petition for Writ of Habeas Corpus and Motion to Stay Proceedings. Mem. Op. & Order, ECF No. 87. A certificate of appealability was also denied for each of the underlying claims and requests for relief sought by Petitioner. *Id.* Pursuant to this November 2, 2023 Opinion and Order, the Court entered Final Judgment dismissing the action with prejudice that same day. Final J., ECF No. 88. Petitioner now moves the Court under Federal Rule of Civil Procedure 59(e) to alter or amend its Final Judgment. *See* FED. R. CIV. P. 59(e). In support of this instant Motion, Petitioner contends that the Court committed manifest errors of law and fact in the resolution of Petitioner's first, second, and seventh claims for federal habeas relief and concomitant requests for certificate of appealability.

II. LEGAL STANDARD

A Rule 59(e) motion to alter or amend judgment "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). To that end, it is well-established that

Rule 59(e) reserves the alteration or amendment of a federal court's judgment *only* for the narrow purposes of either: (1) accommodating an intervening change in controlling law; (2) accounting for newly discovered evidence; or (3) correcting a manifest error of law or fact. *Trevino v. City of Fort Worth*, 944 F.3d 567, 570 (5th Cir. 2019). Inversely, Rule 59(e) "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet*, 367 F.3d at 479.

Absent a showing of any manifest error of law or fact, newly discovered yet previously unavailable evidence, or intervening change in controlling law, Rule 59(e) will not avail a movant of any post-judgment relief. *Jennings v. Towers Watson*, 11 F.4th 335, 345 (5th Cir. 2021); *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182 (5th Cir. 2012); *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). To establish manifest error, a movant must demonstrate that the federal court committed an error that "is plain and indisputable" and "amounts to a complete disregard of the controlling law." *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (cleaned up). Overall, the standards governing Rule 59(e) determinations "favor the denial of motions to alter or amend a judgment." *S. Constructors Grp., Inc. v. Boudreaux*, 2 F.3d 606, 611 (5th Cir. 1993).

III. ANALYSIS

Upon review of the parties' briefing, evidence, and applicable law, the Court finds that Rule 59(e) does not entitle Petitioner to alteration or amendment of the Final Judgment or Certificate of Appealability ("COA") on any underlying claim or request for relief sought in this federal habeas corpus action.

Specifically, Petitioner fails to make out a single manifest error in the denial of collateral attacks to his conviction and sentence premised upon: (A) unconstitutional exclusion of video mitigation evidence; (B) ineffective assistance of trial counsel ("IATC") for (1) conceding the future dangerousness special issue and presenting evidence of genetic predisposition for violence, (2) failing to challenge a partial venire member and eventual juror, and (3) failing to fully and adequately investigate and present mitigation evidence for capital sentencing; and (C) deprivation of due process of law for presenting evidence of genetic predisposition for violence.

A. Petitioner Fails to Establish Manifest Error in the Denial of Claim One

In the first claim put forth in the Amended Petition, Petitioner argued that the state trial court's exclusion of Defendant's Exhibits 81A-84A deprived him of his right to present mitigating evidence in capital sentencing proceedings under the Eighth and Fourteenth Amendments. Reviewing de novo, the Court denied this claim, holding that it lacked any serious merit entitling Petitioner to collateral relief from his conviction and sentence. *See* Mem. Op. & Order 13-17, ECF No. 87. The Court's holding was predicated on findings that the exhibits were properly excluded for hearsay at trial, that the exclusion of the exhibits was harmless, and that this claim was procedurally defaulted in state court on independent and adequate state grounds. *Id.* In the instant Motion, Petitioner now contends that this holding was manifestly erroneous. But this contention falls well short of the persuasive hurdle erected by Rule 59(e).

Rather than attempting to properly allege a manifest error in accordance with the standards governing Rule 59(e) motions, Petitioner merely raises the same

theories and arguments for claim one that were previously raised—and briefed at length—in his Reply in Support of the Amended Petition for Writ of Habeas Corpus. *Compare* Pet.'s Mot. 1-7, ECF No. 90 (contending that the videos were admissible despite any hearsay, that the exclusion of the exhibits was not harmless, and that there was no procedural bar to claim one), *with* Pet.'s Reply 1-14, ECF No. 80 (same). While Petitioner's arguments certainly identify his disagreements with the Court's rejection of these prior adjudicated theories, Petitioner's mere disagreements do not identify a single "plain and indisputable" error in the resolution of claim one. *Guy*, 394 F.3d at 325 (cleaned up). Motions to alter or amend a final judgment are "not the proper vehicle for [such] rehashing" of stale legal theory and exhausted argumentation. *Templet*, 367 F.3d at 479. And Rule 59(e) makes no exception for the one brought by Petitioner. On this basis alone then, Petitioner's Motion with respect to his first claim summarily fails.

Having merely rehashed the same "evidence, legal theories, [and] arguments . . . raised before entry of judgment" without presenting "an error that undermined the correctness of [that] judgment," the Court **DENIES** Petitioner's Motion insofar as it requests alteration or amendment of the Final Judgment denial of habeas corpus relief on claim one of the Amended Petition. *Templet*, 367 F.3d at 479; *Jennings*, 11 F.4th at 345.

B. Petitioner Fails to Establish Manifest Error in the Denial of Claim Two

Petitioner's second claim in the Amended Petition alleged that trial counsel rendered ineffective assistance in violation of his Sixth and Fourteenth Amendment rights. Having reviewed the plethora of supporting arguments advanced by Petitioner under a de novo

standard, the Court denied this IATC claim in full. *See* Mem. Op. & Order 36-51, 54, ECF No. 87. In the Rule 59(e) Motion before the Court, Petitioner now alleges that the Court manifestly erred in several respects when it denied claim two on the merits. *See* Pet.'s Mot. 7-22, ECF No. 90.

Specifically, Petitioner submits that the Court committed manifest error by misapplying *Strickland* to reject arguments that trial counsel rendered ineffective assistance for: (1) conceding the future dangerousness special issue and presenting expert testimony that Petitioner was genetically predisposed to violence; (2) failing to challenge for cause or peremptorily strike a partial member of the jury venire who later served on the jury; and (3) failing to fully and adequately investigate and present mitigation evidence for capital sentencing. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

However, Petitioner's Motion with respect to this IATC claim fails at the outset for merely rehashing the same evidence, theories, and arguments that he already raised—and the Court already reviewed, adjudicated, and disposed of—prior to entry of judgment. *Compare* Pet.'s Mot. 7-22, ECF No. 90, *with* Pet.'s Reply 14-40, ECF No. 80; *see Templet*, 367 F.3d at 479. On top of that, Petitioner also fails to identify *any* error—never mind manifest error—in the Court's resolution of his second claim for federal habeas relief on any of the grounds asserted. *See Jennings*, 11 F.4th at 345.

Legal Standard. To prevail on an IATC claim, Petitioner bears the burden of demonstrating that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the petitioner's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

(1) To satisfy the deficiency prong, Petitioner must establish that counsel's representation "'fell below an objective standard of reasonableness.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Counsel's performance is objectively unreasonable when "no competent attorney" would have taken the action that counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011). In order to meet his burden, Petitioner must overcome the "strong presumption" of adequate assistance, *i.e.*, that counsel's conduct fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

(2) To satisfy the prejudice prong, Petitioner must establish a "reasonable probability" that, but for the objectively unreasonable conduct of counsel, "'the result of the proceeding would have been different.'" *Wiggins*, 539 U.S. at 534 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is one that is "'sufficient to undermine confidence in the outcome'" of the proceeding at issue. *Id*. To reemphasize, *Strickland* demands that courts supply a substantial degree of deference to the reasoned professional judgments and decisions of trial counsel. *See id.* at 523; *Strickland*, 466 U.S. at 690.

1. Concession of Future Dangerousness Special Issue and Presentation of Expert Testimony to Petitioner's Genetic Predisposition for Violence

Petitioner first argues that the Court manifestly erred in rejecting Petitioner's allegation that trial counsel rendered ineffective assistance for conceding the future dangerousness special issue. *See* Pet.'s Mot. 7-14, ECF No. 90. Yet Petitioner identifies no "plain and indisputable" error amounting to a "complete disregard of the controlling law" in the Court's rejection of this argument under *Strickland*. *Guy*, 394 F.3d at

325 (cleaned up). In stark contrast, this IATC claim satisfies neither *Strickland* prong under a de novo examination and thus does not warrant federal habeas relief. *See* Mem. Op. & Order 38-40, ECF No. 87.

The Court correctly found that Petitioner's IATC claim fails to the extent it alleged that trial counsel conceded future dangerousness by presenting evidence that Petitioner was genetically predisposed toward violence. The state habeas court found as a matter of fact, and the Court agreed after its own independent review of the entire record of state proceedings, that Petitioner's trial counsel did not concede the future dangerousness special issue in the punishment phase of the capital murder trial. *Id.* at 38.

Petitioner's trial counsel did present double-edged expert testimony suggesting that Petitioner's genetic makeup, combined with his history of an abusive and traumatic childhood, rendered Petitioner more at risk than *other people* to react violently in response to a stressful situation. However, this proposition deriving out of the double-edged testimony was clearly distinct from any suggestion that Petitioner was more likely than *not* to be violent in the future. *See* 43 RR 118 (expert testimony that Petitioner's risk factors for violence did not "mean it's more likely than not that he's going to be violent in the future; it just means he's more at risk than a regular person"). The presentation of that double-edged testimony therefore did not amount to a concession of the future dangerousness special issue. *See* Tex. Code Crim. Proc. art. 37.071 § 2(b)(1) (requiring the capital sentencing jury to determine "whether there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society").

Petitioner asserts that the Court erroneously deferred to the state court's findings with respect to this

IATC claim because the Texas Court of Criminal Appeals denied it without analysis. *See* Pet.'s Mot. 9, ECF No. 90. To start with, Petitioner neglects the reality that the Court of Criminal Appeals had adopted the findings of the state habeas trial court, which included the finding that trial counsel's decision to present the double-edged testimony was reasonable. *See Ex parte Wells*, WR-86,184-01, 2021 WL 5917724, at *2 (Tex. Crim. App. Dec. 15, 2021); 1 Supp.SHCR-01 at 483-84. But even assuming otherwise, the Court still concluded based upon its own de novo review that trial counsel made an objectively reasonable and informed decision— which Petitioner agreed to—to present double-edged evidence regarding his genetic predisposition to violence. *See* Mem. Op. & Order 38-40, ECF No. 87; *see* 4 SHCR-01 at 1573.

Petitioner nonetheless insists that the Court committed a manifest error in its de novo conclusion that trial counsel made an objectively reasonable and informed decision to present the double-edged evidence. *See* Pet.'s Mot. 10, ECF No. 90. But accepting Petitioner's argument would have the Court flout well-entrenched, binding precedent requiring significant judicial deference to the informed strategic decisions of trial counsel. As that precedent makes clear, the Constitution sanctions trial counsel to make "conscious and informed" strategic decisions, *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009) (citation omitted); *see Woodward v. Epps*, 580 F.3d 318, 329 (5th Cir. 2009), while such decisions are further characterized as "virtually unchallengeable." *Rhoades v. Davis*, 852 F.3d 422, 434 (5th Cir. 2017). The Court's supplication of such deference owed to the decision of Petitioner's trial counsel to present the double-edged testimony in the punishment phase of trial comes nowhere close to an error, let alone a manifest one. *See*

Guy, 394 F.3d at 325 ("Manifest error is one that is plain and indisputable, and that amounts to a complete disregard of the controlling law." (cleaned up)).

Petitioner further insists that even if trial counsel had not actually conceded future dangerousness, the Court nonetheless erred in rejecting Petitioner's IATC claim insofar as it alleged that trial counsel should not have presented the expert testimony on Petitioner's genetic predisposition to violence. *See* Pet.'s Mot. 11-12, ECF No. 90. However, the Court also correctly rejected Petitioner's IATC claim to that extent. *See* Mem. Op. & Order 38-40, ECF No. 87.

For starters, the Court properly contextualized Petitioner's allegation as merely challenging the strategic decisions of his trial counsel, which Petitioner did not demonstrate to have fallen below the hyper-deferential standard applicable to this IATC claim. *Id.* at 38-39. Furthermore, the precedent relied upon by Petitioner tends toward supporting the decision of trial counsel to introduce the expert testimony on his genetic predisposition to violence. *See id.* at 22-23 (citing *State v. Yepez*, 483 P.3d 576, 584 (N.M. 2021); *People v. Adams*, 336 P.3d 1223, 1241-42 (Cal. 2014)). On the other hand, there is simply no basis to the notion advanced by Petitioner that trial counsel should not have presented the expert testimony because it appealed to racial stereotypes. *See* 1 Supp.SHCR-01 at 481–82 (state court finding that the genetic evidence was "without any indication of the racial stereotypes or eugenics" alleged by Petitioner). Ultimately, the crux of this IATC allegation is that Petitioner merely insists that the Court disagreed with his characterization of the genetic evidence, which is nowhere near the universe of "manifest error." *See Guy*, 394 F.3d at 325 (requiring a "plain and indisputable" error that also "amounts to a complete disregard of the controlling

law" (cleaned up)).

Lastly, Petitioner urges that the Court manifestly erred in not finding that he was prejudiced by trial counsel's introduction of the expert testimony on his genetic predisposition to violence. *See* Pet.'s Mot. 12-14, ECF No. 90. But Petitioner identifies no error in the Court's determination that he was not prejudiced in light of the substantial mitigation case presented by trial counsel, as well as the aggravating evidence regarding his long history of domestic violence against women and his jailhouse assault on another inmate. *See* Mem. Op. & Order 39-40, 49, ECF No. 87. Petitioner's assertion that the Court conflated the deficiency and prejudice prongs of *Strickland* is inapposite to establishing error here, for it is incognizable that Petitioner was prejudiced by actions of his trial counsel that were not deficient in the first place. *Cf. United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) ("Our clear precedent indicates that ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions.").

The Court reaffirms that this IATC claim satisfies neither prong of *Strickland* when examined under de novo review and does not warrant federal habeas relief. Mem. Op. & Order 40, ECF No. 87.

2. Failure to Challenge for Cause or Peremptorily Strike Venire Member

Petitioner next argues that the Court manifestly erred in rejecting Petitioner's allegation that trial counsel rendered ineffective assistance for agreeing to seat a partial juror. *See* Pet.'s Mot. 14-17, ECF No. 90. As an initial matter, this argument is a rehash of Petitioner's pre-judgment briefing and should be denied on that basis alone. *Compare id.*, *with* Pet.'s Reply 32-40, ECF No. 80; *see Templet*, 367 F.3d at 479. *A*

fortiori, Petitioner fails to establish a "plain and indisputable" error that "amounts to a complete disregard of the controlling law" in the disposition of this prior adjudicated IATC issue. *Guy*, 394 F.3d at 325 (cleaned up). Under de novo review, this IATC claim fails to satisfy either prong of *Strickland* necessary to warrant federal habeas relief. *See* Mem. Op. & Order 44-46, ECF No. 87.

Petitioner asserts that it was unreasonable for trial counsel to agree to seat juror Hazikimana despite his purported partiality toward imposing the death penalty. *See* Pet.'s Mot. 15-16, ECF No. 90. Petitioner reasons that because Hazikimana was challengeable for cause, any decision on the part of trial counsel to refrain from exercising a peremptory strike against him does not render their agreement to seat him as a juror reasonable. *Id.* However, the Court concluded that Hazikimana was *not* subject to a for-cause challenge. Mem. Op. & Order 45-46, ECF No. 87. That finding necessarily precludes Petitioner from demonstrating that trial counsel rendered ineffective assistance here. *See Harper v. Lumpkin*, 64 F.4th 684, 692-93 (5th Cir. 2023). Petitioner's mere protestation with the Court's de novo assessment of the record is, again, nowhere near the universe the "manifest error." *See Guy*, 394 F.3d at 325 ("Manifest error is one that is plain and indisputable." (cleaned up)). The Court concludes the same with respect to Petitioner's argument that it erred in declining to address Hazikimana's inadmissible post-conviction affidavit. *See Young v. Davis*, 835 F.3d 520, 529 (5th Cir. 2016).

Petitioner also contends it was erroneous for the Court to rely on *Teague v. Scott* to conclude that he was not prejudiced by trial counsel's agreement to seat Hazikimana. Pet.'s Mot. 17, ECF No. 90 (citing 60 F.3d 1167, 1172 (5th Cir. 1995)). Petitioner's attempt to

distinguish *Teague* rests on the premise that Hazikimana had actually been a biased prospective juror. *Id.* But Hazikimana was not a biased juror, nor an objectionable one for that matter. Mem. Op. & Order 44-46, ECF No. 87. Petitioner thus fails to allege that a biased or objectionable juror sat on his jury, and therefore cannot show any error in the Court's assessment of prejudice under *Strickland*.

The Court reaffirms that this IATC claim fails to satisfy either prong of *Strickland* under de novo review and does not warrant federal habeas relief. Mem. Op. & Order 46, ECF No. 87.

3. Failure to Fully and Adequately Investigate and Present Mitigation Evidence

Petitioner presses one last argument under claim two: that the Court manifestly erred in its rejection of the IATC claim that trial counsel failed to fully investigate mitigating evidence and present an adequate mitigation case for the punishment phase of trial. *See* Pet.'s Mot. 17-22, ECF No. 90. But here too, Petitioner simply rehashes his pre-judgment briefing in support of the Amended Petition for this exact IATC claim. *Compare id.*, *with* Amend. Pet. 59-86, ECF No. 58, *and* Pet.'s Reply 23-31, ECF No. 80. Petitioner's attempt to couch this mere "rehashing [of] evidence, legal theories, [and] arguments . . . raised before entry of judgment" as a properly pled allegation of manifest error requiring alteration or amendment fails on this basis alone. *Templet*, 367 F.3d at 479. As a result of his attempted rehash, Petitioner therefore fails to make out any "plain and indisputable" error in the Court's *Strickland* assessment of this prior adjudicated IATC claim that amounted to a "complete disregard of the controlling law." *Guy*, 394 F.3d at 325 (cleaned up). Nevertheless, far from any error, this conclusory IATC claim satisfies neither prong of the *Strickland* test

when examined under de novo review. *See* Mem. Op. & Order 40-43, ECF No. 87.

The Court reaffirms that this IATC claim satisfies neither prong of *Strickland* when examined de novo and thus does not warrant federal habeas relief. Mem. Op. & Order 40-43, ECF No. 87.

* * * *

By virtue of Petitioner's failure to demonstrate any "error that undermined the correctness of the judgment," as well as his numerous attempts to rehash the same "evidence, legal theories, [and] arguments . . . raised before entry of judgment," the Court **DENIES** Petitioner's Motion insofar as it requests alteration or amendment of the Final Judgment denial of habeas corpus relief on claim two of the Amended Petition. *Jennings*, 11 F.4th at 345; *Templet*, 367 F.3d at 479.

C. Petitioner Fails to Establish Manifest Error in the Denial of Claim Seven

Petitioner's seventh claim posited that the introduction of expert testimony on his genetic predisposition toward violence deprived him of his due process right to not be criminally sentenced based on impermissible factors. But upon de novo review, the Court did not find any merit to this collateral attack on Petitioner's conviction and sentence and denied it accordingly. *See* Mem. Op. & Order 22-25, ECF No. 87. The Court denied this due process claim on account of Petitioner's inability to demonstrate that his sentencing was the product of unreliable information or an immutable characteristic. *Id*. Petitioner now argues in his Motion to Alter or Amend Judgment that the Court manifestly erred in this determination. Yet Petitioner once again identifies *no* error—let alone a manifest one—in the decision to deny his seventh claim for federal habeas relief.

Petitioner asserts that the Court manifestly erred in distinguishing Supreme Court precedent proscribing criminal sentencing based on impermissible factors and thereby holding that this claim is barred by principles of non-retroactivity. *See* Pet.'s Mot. 22-24, ECF No. 90 (citing *Buck v. Davis*, 580 U.S. 100, 123-24 (2017); *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

Quite to the contrary, the Court properly analyzed this claim as a mere reformulation of Petitioner's post-hoc disagreement with his trial counsel's strategy. *See* Mem. Op. & Order 23, 25, ECF No. 87. Even so, the Court still found that Petitioner's sentencing had not been the product of any inaccurate or unreliable information anyway. *Id.* at 23-24. On this basis alone, the Court properly held that the Supreme Court precedent relied upon by Petitioner simply does not apply. *Id.* at 24 (citing *Renteria v. Davis*, 814 F. App'x 827, 833-34 (5th Cir. 2020)). So too, to the degree that Petitioner relied upon the Supreme Court's decisions in *Buck* and *Zant*, the Court also properly found such reliance to be misplaced. *Buck* involved an ineffective assistance claim regarding the actions of trial counsel, as opposed to a due process attack leveled against the fairness of the entire proceedings at play here. *Id.* at 25. In any event, *Buck* and *Zant* are still inapplicable because Petitioner again failed to demonstrate that his sentence had been predicated upon his race. *Id.* For these reasons, the Court properly held that *Teague* non-retroactivity doctrine bars Petitioner's attempt to expand the holdings in *Buck* and *Zant* to the point of establishing a new rule of constitutional law that proscribes the presentation of genetic information as mitigation evidence. Mem. Op. & Order 25, ECF No. 87 (citing *Caspari v. Bohlen*, 510 U.S. 383, 389-390 (1994); *Teague v. Lane*, 489 U.S. 288, 301 (1989)).

Having thus failed to present "an error that undermined the correctness of the judgment," while instead rehashing the same "evidence, legal theories, [and] arguments . . . raised before entry of judgment," the Court **DENIES** Petitioner's Motion insofar as it requests alteration or amendment of the Final Judgment denial of habeas corpus relief on claim seven of the Amended Petition. *Jennings*, 11 F.4th at 345; *Templet*, 367 F.3d at 479.

D. Petitioner Fails to Establish Manifest Error in the Denial of COA

Petitioner is not entitled to a COA on any issue advanced in the Amended Petition because the Court found each claim and request for relief meritless under a de novo standard of review. *See* Mem. Op. & Order 55-59, ECF No. 87. Moreover, based on the Court's de novo conclusions set forth in this Order, *supra*, Petitioner is likewise not entitled to a COA on any issue raised in the Motion to Alter or Amend Judgment. Because Petitioner's Rule 59(e) Motion amounts to little more than a mere attempt at "rehashing evidence, legal theories, [and] arguments that could have been offered or raised before entry of judgment," the Court further **DENIES** Petitioner's Motion insofar as it requests alteration or amendment of the Final Judgment denial of a COA on the Amended Petition and issuance of a COA on the instant Motion. *Templet*, 367 F.3d at 479.

* * * *

IV. CONCLUSION

Accordingly, it is **ORDERED** that the Motion to Alter or Amend Judgment (ECF Nos. 89, 90) and all relief requested therein should be and is hereby **DENIED**; that a Certificate of Appealability should be and is hereby **DENIED** on all claims, arguments, and

requests for relief contained in the Amended Petition for Writ of Habeas Corpus (ECF No. 58); and that a Certificate of Appealability should be and is hereby **DENIED** on all claims, arguments, and requests for relief contained in the Motion to Alter or Amend Judgment (ECF Nos. 89, 90).

SO ORDERED on this **5th day** of **January, 2024**

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES
DISTRICT JUDGE

APPENDIX D

No. 24-70002

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMOS WELLS,

Petitioner-Appellant,

v.

ERIC GUERRERO, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent-Appellee.

[Filed] August 19, 2025

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

USDC No. 4:21-CV-1384

ON PETITION FOR REHEARING EN BANC

Before Stewart, Graves, and Oldham, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P.40 and 5th Cir. R.40), the petition for rehearing en banc is DENIED.