non-credibility by the state court. The state court in that case apparently found the habeas testimony from Porter's brother, sister, neuropsychologist, and military commander to be true but held it was nevertheless "lacking in weight because of the specific facts presented." *Id.* at 37. The state court in this case, on the other hand, found some of the habeas testimony not credible. Such credibility determinations are upheld unless the petitioner shows they are unreasonable or the factual premise was incorrect by clear and convincing evidence. *Miller-El*, 537 U.S. at 340. As discussed above, Rodriguez has not shown that the credibility assessments are unreasonable. And Rodriguez presents no clearly established Supreme Court law requiring a state court to consider evidence it deems non-credible. The fact that some of Rodriguez's hearing testimony was rejected as non-credible does not mean the state court conducted an improper analysis under *Strickland*. If this were true, all habeas evidence would be taken at face value and there would be no need for an evidentiary hearing.

To the extent Rodriguez may be complaining that the state court addressed the prejudice prong of *Strickland* before it addressed deficiency, or did not articulate verbatim the *Strickland* and *Wiggins* standards for reviewing an investigation or weighing the totality of the evidence, this Court reviews only the state court's ultimate legal determination, not every link in its reasoning. *Charles v. Stephens*, 736 F.3d 380, 387-88 (5th Cir. 2013). Further, federal courts on habeas review are "determining the reasonableness of the state court's 'decision,'. . . not grading their papers." *Santellan*, 271 F.3d at 193. There is no requirement that the state court write an opinion, cite to Supreme Court cases, or even be aware of Supreme Court cases. *Richter*, 562 U.S. at 98. Moreover, *Strickland* does not establish mechanical rules. Although the opinion in *Strickland* discusses counsel's performance prior to discussing prejudice, "there is no reason for a court deciding an ineffective assistance claim to approach

the inquiry in the same order." *Strickland*, 466 U.S. at 697. The alleged shortcomings in the state court's written analysis therefore do not undermine the reasonableness of its ultimate decision.

Finally, Rodriguez argues that the state court improperly "screened" his mitigation evidence in violation of *Tennard*, 542 U.S. at 274. *Tennard* does not purport to establish standards for *Strickland* claims, however. It addresses the Eighth Amendment requirement that juries receive instructions that allow them to consider and give effect to constitutionally relevant mitigating evidence. *Tennard* held that low-IQ evidence is inherently mitigating and constitutionally relevant, irrespective of whether the defendant establishes a nexus between his low IQ and the crime. *Tennard,* 542 U.S. at 287. Rodriguez attempts to conflate the state court's credibility determination in this case with the nexus requirement rejected in *Tennard*, but the state court here applied no nexus test, nor does this case involve any evidence of mental impairment. Rodriguez's argument does not rely on clearly established federal law but, rather, seeks to expand federal law. The Court denies Claim 1.

CLAIMS 2-5: THE COUNSELED POLICE STATEMENT

The next four claims relate to Rodriguez's counseled, recorded statement in which he told the Lubbock police that he killed Baldwin in self-defense, a claim later refuted by the autopsy report showing Baldwin sustained multiple, severe injuries. Claim 4 asserts Albert rendered ineffective assistance by allowing Rodriguez to talk to the police without first conducting an adequate investigation into whether the autopsy report could support a self-defense theory. Claims 2 and 3 assert that, because Albert was ineffective, Rodriguez's statement was involuntary and not given freely, knowingly, and intelligently, in violation of the Fifth and Sixth Amendments. In Claim 5, he contends (a) Wardroup was ineffective for withdrawing a motion to suppress the confession based on Albert's alleged ineffectiveness, and (b) appellate counsel Wall was ineffective for failing to raise this issue on appeal

after partially developing the claim in a hearing on the motion for new trial. Respondent asserts the state court reasonably rejected all of these claims and that the police statement was constitutionally valid.

I. Albert's representation (claim 4)

A. Albert's investigation and strategy

The Court first addresses the contention that Albert's decision to allow Rodriguez to speak with the police was based on an unreasonable and incomplete investigation. As noted previously, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 691. *Strickland* also recognizes that "counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* at 691. More specifically, "when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, *the need for further investigation may be considerably diminished or eliminated altogether.*" *Id.* (emphasis added).

In general, counsel is not ineffective for failing to discover evidence that the defendant knows but withholds from counsel. *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997). And, where the accused instructs his attorney to engage in certain conduct, he will not be heard to complain later that his attorney's compliance with that request resulted in ineffective representation. *E.g., Schriro v. Landrigan*, 550 U.S. 465, 476-477 (2007) (holding that federal habeas court properly determined relief was barred on claim alleging counsel failed to present mitigating evidence where, among other things, defendant's behavior at trial indicated he would not have allowed counsel to present such evidence).

The evidence at the motion for new trial hearing indicates that Rodriguez took two knives from Baldwin in order to assert a self-defense claim to the police in case he was arrested. After his arrest, he insisted Albert get the knives from his father, give them to the police, and arrange the interview. He convinced Albert he was telling the truth about how Baldwin died. Albert had no reason to doubt Rodriguez, whom the record depicts as intelligent, articulate, solicitous, and convincing. Knowing that Albert was acting on the false information he provided, Rodriguez chose to speak to the police.

Rodriguez does not say why the state court ruling is unreasonable but rather re-argues that Albert did not investigate the autopsy report or "other aspects of the police investigation." (Pet. 132.) The record does not support this assertion. Albert's testimony on the new trial motion described his prior law enforcement experience as a homicide detective and an FBI agent. (40 RR 9-10.) Albert availed himself of the district attorney's open file policy and, because of his law enforcement background, conducted his own preliminary investigation "out in the community." (40 RR 15-17, 56.) On their first or second visit, Rodriguez told Albert he had killed Baldwin in self-defense and his father possessed the two pocket knives that Baldwin had attempted to use against him. (40 RR 23.) Rodriguez told Albert he kept the knives to show the police he had acted in self-defense. (40 RR 26.) Albert arranged to have the knives turned over to law enforcement, who tested them and found Baldwin's fingerprint on one of them. (40 RR 24-25.) Albert met the lead detective several times. He interviewed Margie Estrada, a prostitute, who identified the knives in photographs as Baldwin's and confirmed that Rodriguez looked for prostitutes on other occasions. Albert interviewed a tattooed man and another female prostitute, who also confirmed that Rodriguez was known to frequent

the area.[6] (40 RR 32-33.) Albert visited the hotel where the murder occurred and confirmed that Rodriguez was the only person in his Marine unit who was staying at that hotel. (40 RR 55.) He spoke with Joanna Rogers's father at some point. (40 RR 38.) He knew the facts supporting Rodriguez's arrest, had the police reports, and saw the video recording of Rodriguez buying the suitcase and loading it into the rented truck. (40 RR 15, 21, 53-54.) Albert did not have the autopsy report because the medical examiner was backlogged, but Albert scheduled an interview with the medical examiner's office. They reset the interview twice, however, and ultimately did not make themselves available. (40 RR 21-23.) Albert also knew Rodriguez had bruise marks and a scratch from the struggle, and Rodriguez had physically described to Albert what happened between him and Baldwin. (40 RR 27, 29, 58.)

Albert knew Rodriguez told the police at the time of arrest that he wanted to speak to them with an attorney present. (40 RR 55.) Rodriguez insisted that Albert set up an interview with Detective Breunig. (40 RR 33; 43 RR 14 (DX 1, letter to District Attorney); SX 253, time stamp 1:06:55 to 1:08:30 (explaining that Rodriguez always wanted to speak to the detective and even tried calling him from the jail.) Albert explained he did not delay the interview because Rodriguez could not get out on bail and he insisted it would resolve the matter. (40 RR 42.) Albert believed the State had strong evidence identifying Rodriguez as the perpetrator and, in his experience, self-defense claims are better when they are asserted almost immediately; otherwise they weaken to the point of looking like a ruse. (40 RR 51, 55, 67.) At the time Albert made this decision, there had been no capital murder indictment and no decision by the State on whether to seek a death sentence, and so Albert's strategy

[6]Albert was unable to provide some details, like the names of these witnesses, because he had turned his notes over to subsequent counsel and was testifying without his notes. (40 RR 32, 38, 44.)

also sought to remove the death penalty as an option if Rodriguez cooperated and everything was as Rodriguez stated. (40 RR 40, 59; 43 RR 13 (DX 1, letter to District Attorney.) Albert warned Rodriguez that the police also suspected him of murdering Joanna Rogers, but Rodriguez told him not to worry about that and insisted he was not involved. (40 RR 37, 41.) When challenged about the reasonableness of the self-defense theory, Albert replied, "Let me tell you, Counsel, your client is a very convincing person." Albert believed it could have been ineffective assistance **not** to provide Rodriguez the chance to assert self-defense. (40 RR 28-29, 35-36, 57.) He said he would not have allowed Rodriguez to give the statement if he had not believed there was a self-defense issue, but he believed what Rodriguez told him and relied upon what Rodriguez said. (40 RR 36, 39, 57.)

This testimony does not show an inadequate investigation. Although Albert did not have the autopsy report, he made reasonable efforts to interview the medical examiner and he had Rodriguez's version of how the murder happened (upon which he was entitled to rely). Albert knew the proof of identification was strong, and he knew the knives that Rodriguez gave him belonged to Baldwin. Albert reasonably believed a self-defense theory weakens the longer the accused waits to assert it, and he acted on his duty not to forfeit any defenses his client might have had. Albert's testimony supports the state court's conclusion that his decision did not fall below an objective standard of reasonableness, considering the circumstances. (5 SHCR 1455-56, ¶¶ 24-25.) It was reasonable for the state court to conclude, as it did, that given the strength of the evidence showing Rodriguez was the perpetrator, there was much to be gained and little to lose from making a statement to the police in which Rodriguez could explain or negate aspects of the crime, in the presence of counsel, in a setting that was more favorable than testifying at trial. (5 SHRR 1453, ¶ 16.)

An analysis of Albert's representation would not be complete without acknowledging that Albert's strategy to remove the death penalty from the table was ultimately successful. In June of 2006—after the autopsy report was issued and the State would have reason to know the self-defense story was questionable—the district attorney entered into a plea bargain agreement with Rodriguez. (35 RR 76; 44 RR 560 (CX 1); 6 SHRR 261.) Under this agreement, Rodriguez could have received a life sentence for Baldwin's murder as well as immunity for his involvement in Rogers's death. (44 RR 560 (CX 1).) On the day of the plea hearing, however, Rodriguez claimed he did not understand anything that was being told to him, and the plea consequently did not go forward. (2 RR 132-40.) But for Rodriguez's own actions, Albert's strategy of cooperation could have led to a life sentence.

In sum, Albert made reasonable investigatory efforts and reasonably relied on information from his client. Rodriguez, on the other hand, withheld the truth, gave counsel knives from the victim that tended to support his self-defense story, and insisted that counsel set up a meeting so he could make a false statement to police.[7] Under the circumstances, Albert's decision to allow Rodriguez to make a timely assertion of self-defense was not unreasonable. *See Lackey*, 116 F.3d at 152; *Landrigan*, 550 U.S. at 476-77. Rodriguez fails to show that the state court's ruling in this regard was unreasonable.

B. No prejudice

Alternatively, Rodriguez fails to show that the state court's prejudice determination was unreasonable. There is evidence other than Rodriguez's statement to police that strongly links him to the murder: he rented the hotel room where Baldwin's blood was found, store security cameras

[7]The weakness of the self-defense theory advanced by Rodriguez is not disputed. (5 SHRR 17; 6 SHRR 228-29.) Wardroup's pathologist would later describe the self-defense theory as "laughable." (7 SHRR 91.)

recorded him purchasing latex gloves and a suitcase identical to the one in which her body was found and loading it in his rental truck, he conducted internet searches about Baldwin soon after the murder, and he was linked to DNA found on the victim's anal swab and on latex gloves found in a hotel trash can. (5 SHCR 1463, ¶ 54; 34 RR 147, 159.) In addition, the complained-of police statement allowed Rodriguez to argue the following facts to the jury without having to testify: (1) Baldwin used a knife; (2) he acted in self-defense; (3) he was unaware of Baldwin's pregnancy; (4) the sex was consensual; and (5) (in conjunction with the autopsy report) Baldwin used crack cocaine. (5 SHCR 1462-63.)

Rodriguez complains that the state court ignored the fact that the police statement tethered Wardroup to a self-defense theory that the State easily refuted and from which Wardroup had to distance himself. The self-defense theory may have been weak, but its effect on the trial was not prejudicial. The self-defense theory did not conflict with trial counsel's other theories that the sex was consensual, that Rodriguez did not know Baldwin was pregnant, and that, due to Rodriguez's military combat training, he simply overreacted to her brandishing a knife after he took away her cocaine. While Rodriguez asserts Wardroup was forced to distance himself from the self-defense theory in his closing remarks, the remarks actually appear to boost the self-defense theory by pointing out that the State had sponsored the very evidence of the self-defense theory that the prosecutor argued for the jury to reject. (36 RR 13-14, 22-23.)

Rodriguez also complains that the state court overlooked the fact that the prosecution used the confession to argue that he was an untruthful person. But Rodriguez's lack of truthfulness was substantially established by other evidence in the record. Dean Threadgill, Chris Rodriguez, and Laura Davidson showed that Rodriguez lied about owning the new truck he was driving, lied about serving in Iraq, and gave false details relating to Iraqi prostitutes, sleeping with married women, and having

to kill a 5-year-old child. (32 RR 151-54, 187-88, 232-33.) The jury heard three of his rape victims testify that he secretly dated other women. (37 RR 20, 29, 32, 62, 82.) The mother of his child admitted that she had described him as a pathological liar. She also caught him chatting with young girls on the Internet and said she left him because he cheated and lied to her. (37 RR 366, 369.) Given the fact that there is other evidence establishing Rodriguez as an untruthful, deceitful person, the fact that he also lied to police does not undermine confidence in the verdict at either stage of trial. *See generally Romero v. Lynaugh*, 884 F.2d 871, 879 (5th Cir. 1989) (holding that counsel was not ineffective for failing to block evidence that was duplicative of evidence properly received). The Court denies Claim 4.

II. *Miranda* waivers and voluntariness of confession (claims 2 & 3)

Rodriguez asserts that his confession was involuntary under the Fifth and Sixth Amendments because it was given without the effective assistance of counsel. For the reasons already discussed, Albert did not provide ineffective assistance under the Sixth Amendment.

Moreover, the state court found that Rodriguez was read his *Miranda* rights, which he acknowledged and voluntarily waived (except for the right to counsel, which he asserted) and that Albert actively participated in the police interview by injecting comments and offering suggestions about what details should be addressed. The court found that Rodriguez spoke freely and openly without hesitation in the interview and expressed that it was always his desire to speak with the detectives. These findings are supported by Albert's testimony, discussed above, and the DVD recording. (SX 253, time stamps 00:01:47 (*Miranda* warnings) and 1:06:55 to 1:08:30 (acknowledgment that he always wanted to speak with police).)

The state court therefore reasonably concluded that Rodriguez's statement was "made intentionally, knowingly, intelligently, freely, and voluntarily," and that Rodriguez has never expressed otherwise. (5 SHCR 1456-57.) Rodriguez fails to demonstrate that the state court's conclusions are unreasonable under Fifth or Sixth Amendment jurisprudence. *See Patterson v. Illinois*, 487 U.S. 285, 296 (1988) (holding that waiver of Sixth Amendment rights will be considered knowing and intelligent when a defendant is admonished of his rights according to *Miranda* and agrees to waive those rights); *Moran v. Burbine*, 475 U.S. 412, 422-23 (1986) (holding that waiver of Fifth Amendment rights is valid "once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction"). The Court denies Claims 2 and 3.

III. Representation by Wardroup and Walls (claim 5)

Rodriguez contends that Wardroup provided ineffective assistance when he withdrew a pretrial motion (1 CR 400) in which he argued that the police statement should be suppressed because Albert was ineffective. Rodriguez contends that Wardroup withdrew the motion because he mistakenly "bought into" the State's overstatement of the scope of the waiver of the attorney-client privilege that would occur if the motion went forward. Rodriguez also contends appellate counsel Wall was ineffective because, after developing the issue on the motion for new trial, Wall failed to present the claim in his appellate brief.

The claims against Wardroup and Wall are derivative claims based on the allegation that Albert was ineffective with respect to Rodriguez's police statement. Because Albert was not ineffective, the state court concluded that Wardroup and Wall could not be ineffective for failing to pursue allegations of ineffectiveness against him. (5 SHCR 1468, ¶ 67.) Rodriguez fails to show that the

state court's conclusion as to Wardroup and Wall is unreasonable. *See Smith v. Robbins*, 528 U.S. 259, 278 (2000) (holding that an indigent's right to appellate counsel does not include the right to counsel for bringing a frivolous appeal); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) (holding that *Strickland* does not require counsel to make futile motions or objections). The state court also found that because Rodriguez did not offer *in camera* Albert's investigative notes and client communications—either at trial or in the habeas hearing—the court was unable to determine the scope of the attorney-client waiver. (5 SHCR 1460-61, ¶¶ 40-41.) Without knowing what Wardroup would have had to reveal, the court was unable to conclude that Wardroup's withdrawal of the motion prejudiced his client. (5 SHCR 1461-62, ¶¶ 44-46.) Rodriguez makes no effort to show that this conclusion was unreasonable. (Pet. 139-46.)

Further, the contention that Wardroup was ineffective because he did not understand the limits of the waiver of the attorney-client privilege is unsupported in the record. Rodriguez asserts that an attorney may divulge confidential information only to the extent it is reasonably necessary to address the issues raised by the ineffective assistance claims. (Pet. 142-43 (citing *United States v. Ballard*, 779 F.2d 287 (5th Cir. 1986), and *Laughner v. United States*, 373 F.2d 326 (5th Cir. 1967)). Wardroup's testimony indicates that he operated under a similar understanding. Wardroup testified that "just because you claim IAC doesn't mean you're entitled to the whole file," and that he believed he would have had to disclose Albert's investigative notes leading up to the police interview "because that's what [Albert] based his decision" on. (6 SHRR 224.) Wardroup chose not to press the motion because the information he would have had to divulge was something he "sure didn't want the State to have pretrial." (6 SHRR 225.) Rodriguez therefore fails to show that Wardroup interpreted the scope of the waiver more broadly than was reasonably necessary to protect Albert against the allegation.

Even if Wardroup overestimated what he would have had to divulge, he did not think his chances of winning the suppression motion were very good, based on what the recorded statement depicted. (6 SHRR 228, 258-61.) This assessment of the strength of a claim against Albert was obviously accurate. Rodriguez also asserts that Wardroup was "in the dark" about the actual contents of Albert's file, but this conflicts with Wardroup's testimony that he had spoken to Albert about his pre-statement investigation, and while he struggled to obtain Albert's file, he believed he did have it because he otherwise would not have known what Albert had done. (6 SHRR 225-27.) Wardroup's testimony was deemed credible and was accepted by the state court as true. (5 SHCR 1461, ¶ 43.) Finally, Rodriguez asserts that Wardroup did not discuss his decision with Rodriguez, but this assertion is unsupported by any citation to the record. (Pet. 144.)

As for Rodriguez's claims against appellate counsel, Rodriguez must show that Wall unreasonably failed to discover and brief a nonfrivolous issue and that, but for counsel's unreasonable failure, he would have prevailed on his appeal. *Robbins*, 528 U.S. at 285. Wall testified that the appellate record was not complete enough to raise the claim against Albert on appeal and so he decided to let habeas counsel have the opportunity to develop it further. Wall elaborated that, while he had obtained Albert's testimony on the motion for new trial (discussed above), he had been unable to take issue with it because Wall did not have Albert's file and Rodriguez refused to testify. (5 SHRR 19, 23-25, 42-45.) Wall did not have time to fully develop the claim in the seventy-five days allowed to file, hear, and rule on a motion for new trial. (5 SHRR 24.) Under the circumstances and with an incomplete record, Wall could not present a claim of solid merit. Rodriguez fails to show that effective appellate counsel would have pursued the issue on appeal under these circumstances. *Schaetzle v. Cockrell,* 343 F.3d 440, 445 (5th Cir. 2003) (citing *United States v. Williamson*, 183 F.3d 458, 463

(5th Cir. 1999) (holding that counsel need not raise every nonfrivolous ground on appeal but should present solid, meritorious arguments based on directly controlling precedent)). Rodriguez also fails to demonstrate that but for Wall's allegedly unreasonable failure to file the claim, he would have prevailed on his appeal with the record as it existed at the time.

For all these reasons, the state court's rejection of this claim was not unreasonable. The Court denies Claim 5.

CLAIMS 6-7: ALLEGED JUROR MISCONDUCT

In Claim 6, Rodriguez contends that the jury improperly considered facts that were not in evidence, particularly, that Joanna Rogers had been murdered, that Rodriguez had rejected a prior plea bargain with respect to her murder, and that several jurors had friends or relatives who worked as prison guards and there had been a recent prison break. In Claim 7, Rodriguez contends trial counsel Wardroup and direct appeal counsel Wall were ineffective for failing to investigate this claim. Respondent asserts that the state court reasonably rejected Claims 6 and 7 based on its review of statements from eleven jurors.

Rodriguez presented these claims in his state habeas application based on an unsworn statement from Juror Cole, which he signed for "a man and a woman who said that they were law students doing research on Rosendo Rodriguez." (1 SHCR 355, Ex. O; 2 SHCR 530.) The State subsequently interviewed Juror Cole as well as ten other jurors and received conflicting information. (2 SHCR 527, Appx. B.) In a sworn affidavit, Juror Cole explained that the law students presented the written statement for his signature based on what he told them, but that he was not as precise with the statement as he should have been. In his sworn affidavit, Cole states that the jury did not know about the Rogers plea bargain until *after* the punishment verdict, and the information about prisoner escape was properly

gleaned from testimony. (2 SHCR 530.) Substantially similar information was repeated in the sworn affidavits of ten other jurors. (2 SHCR 528, 532, 534, 536, 538, 540, 542, 545, 547, 549-50.)

While Rodriguez correctly cites the law that he is entitled to twelve impartial jurors, the state court did not unreasonably deny this claim. *See Parker v. Gladden*, 385 U.S. 363, 366 (1966). The unsworn statement, presented to Cole by law students working for Rodriguez, was refuted by Cole's later, sworn affidavit plus the statements of ten other jurors. The state court also based its ruling on its own recollection and observations at the trial. (5 SHCR 1423.) The trial testimony in fact contains information about two high-profile prisoner escapes. (37 RR 287, 294, 295-96.) The record also shows that Joanna Rogers's father was given the opportunity to provide a victim-impact statement after the punishment verdict and that the prosecutor was allowed to prepare the jury for it before hand, suggesting that this may be when the jurors learned about the earlier plea bargain. (38 RR 41.) Rodriguez does not demonstrate that the state court's decision to discount Cole's unsworn affidavit was unreasonable under the circumstances.

Further, because the allegations of ineffectiveness in Claim 7 are based on the rejected assumption that the jury engaged in misconduct, the Court also finds Claim 7 was not unreasonably denied. *Koch*, 907 F.2d at 527 (holding that counsel is not required to make futile motions or objections). The Court denies Claims 6 and 7.

CLAIMS 8-9: AUTOPSY PHOTOGRAPHS OF FETUS

Rodriguez argues in Claim 8 that his trial counsel rendered ineffective assistance by failing to lodge a relevance objection to the admission of autopsy photos depicting the victim's unborn child. In Claim 9, he contends appellate counsel rendered ineffective assistance by failing to challenge the trial court's admission of the photos over trial counsel's Rule 403 objection.

I. Background facts

In Texas, the intentional or knowing murder of more than one person during the same criminal transaction is capital murder. *See* Tex. Penal Code Ann. § 19.03(a)(7) (the "multiple murder" theory of capital murder). In 2003, the Texas legislature amended the Penal Code to include an unborn child in the definition of a person. Tex. Penal Code Ann. §§ 1.07(a)(26), (a)(38), (a)(49) (West 2003). Under case law in effect at the time of trial, the prosecution could establish a capital murder of more than one person by applying the doctrine of transferred intent to evidence showing the defendant intended the death of only one person but caused the death of two. *See Norris v. State*, 902 S.W.2d 428, 438 (Tex. Crim. App. 1995), overruled by *Roberts v. State*, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008).

In accordance with *Norris*, the jury charge permitted the jury to convict Rodriguez of capital murder if they found he intentionally or knowingly caused the death of Baldwin and that her death caused the death of a second individual, namely, her child in utero. (2 CR 547-48.) Several months after Rodriguez was convicted, however, the CCA overruled *Norris* to the extent it permitted a conviction for multiple-murder capital murder when the evidence showed only one intent to kill. *Roberts*, 273 S.W.3d at 331. Because Rodriguez did not know Baldwin was pregnant and therefore could not have intended the death of the child in utero, the State acknowledged on appeal that the evidence did not support conviction under the multiple-murder theory. *Rodriguez,* 2011 WL 1196871, at *5. The CCA held, however, that the evidence was sufficient to support the alternative theory of murder committed during the course of aggravated sexual assault, which was submitted to the jury in a separate charge. (2 CR 523); *see Rodriguez*, 2011 WL 1196871, at *5. The CCA also held that, assuming the trial court erroneously admitted photographs of the fetus during the punishment phase, it was harmless error. *Id.* at *8-9.

Rodriguez raised these claims in his habeas petition, arguing that Wardroup was ineffective for failing to make the proper objection to the fetus photographs, and that appellate counsel was ineffective for failing to challenge on appeal the ruling on the objection that Wardroup *did* make.

II. Claim 8 analysis

Rodriguez asserts that the fetus autopsy photographs, admitted during the guilt phase to show the cause of the fetus's death in the multiple murder, "turned out to be wholly irrelevant" and should have been excluded. He concludes Wardroup was ineffective for failing to lodge a relevance objection to the photographs because it forfeited a viable claim on appeal.

The state court rejected this claim on habeas review because the photographs were relevant at the time they were admitted, and the trial court would not have abused its discretion in overruling a relevance objection. (5 SHCR 1434-35.) Rodriguez fails to show that this ruling is an unreasonable application of clearly established federal law. Trial counsel's representation is judged in light of the circumstances that existed at the time of trial and not in light of subsequent changes in law. *See Lockhart v. Fretwell*, 506 U.S. 364, 371-72 (1993) (reaffirming *Strickland's* rule of "contemporary assessment of counsel's conduct" rather than in hindsight). At the time of trial, the law did not require exclusion of the photographs based on a relevance objection in cases like this one, where the fetus is the alleged victim. *Cf. Erazo v. State*, 144 S.W.3d 487, 493-94 (Tex. Crim. App. 2004) (holding that the admission of fetus autopsy photograph in trial for the murder of the mother was error, but distinguishing cases where the photo is relevant because the fetus is the alleged victim). The record supports the state court's ruling that the photographs were relevant to show how and when the fetus died. (35 RR 9-12, 43-46, 72-73). The state court was therefore not unreasonable in its conclusion that trial counsel was not ineffective for failing to lodge what would have been a futile objection.

See Johnson, 306 F.3d at 255 (holding counsel is not required to make futile motions or objections and citing *Koch*, 907 F.2d at 527). The Court denies Claim 8.

III. Claim 9 analysis

While Wardroup did not lodge an objection based on irrelevance, Wardroup did object under evidence rule 403 that the probative value of the fetus photographs was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403; (34 RR 169.) After several discussions on the record, the trial court ultimately overruled this objection. In Claim 9, Rodriguez argues his appellate counsel Wall was ineffective for failing to challenge the denial of the Rule 403 objection on appeal. The state habeas court denied the claim, finding that Wall reasonably chose more productive complaints on appeal because this claim could have provided only non-constitutional error and was not likely to change the outcome of the appeal. (5 SHCR 1438-40.)

Mr. Wall's testimony at the habeas hearing supports the state court's ruling. As stated earlier, counsel need not raise every nonfrivolous ground on appeal but should present solid, meritorious arguments based on directly controlling precedent. *Schaetzle,* 343 F.3d at 445. Wall testified that he considered raising the claim but rejected it in favor of what he believed to be stronger claims with constitutional dimension that could be pursued in federal court later on. Wall said he touched on the issue in other claims but did not raise it as a separate claim because he had limited space in his brief and it would be rare for the CCA to find reversible error based on the erroneous admission of evidence when the State had proceeded on two different theories of capital murder. (5 SHRR 28- 34, 47.) Wall believed that he had even consulted with state habeas counsel as well as Rodriguez before making his decision and no one thought his "reasoning was out of line." (5 SHRR 34.) Wall's appellate brief shows that he in fact raised related issues via a legal insufficiency claim, a claim of jury charge error,

and claims challenging the reliability and fairness of his death sentence. (*Appellate Brief*, p. 25, 81.) Thus, Wall did not overlook the issue but strategically chose not use limited pages of briefing to raise it in the form of mere evidentiary error.

Rodriguez fails to show that Wall ignored a claim that was clearly stronger than the forty-two he presented in his brief. As such, Rodriguez fails to show that the state court unreasonably rejected his argument that Wall was deficient in his choice of appellate claims. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (holding that indigent defendant has no right to compel appointed counsel to press nonfrivolous points on appeal if counsel, as a matter of professional judgment, decides not to present those points).

The state court also ruled that if Wall were deficient, the alleged deficiency did not cause *Strickland* prejudice, that is, a reasonable probability of a different outcome on appeal. (5 SHCR 1439-40.) Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by consideration of undue delay, or needless presentation of cumulative evidence.

Tex. R. Evid. 403. This rule favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (citing *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990)). To obtain reversal of Rodriguez's conviction based on Rule 403, Wall would have had to meet the onerous burden of first showing that the trial court's ruling was an abuse of discretion or outside the "zone of reasonable disagreement." *Id.* And even if the appellate court agreed that the photographs were unduly prejudicial and should have been excluded under Rule 403, the appellate court would not reverse the conviction unless the error affected a substantial right. *See* Tex. R. App. P. 44.2(b). This is because

non-constitutional error is disregarded if the court has a fair assurance that the error did not influence the jury or influenced them only slightly. *Hayes*, 85 S.W.3d at 816.

Here, the prosecution presented legally sufficient evidence supporting the alternative theory that Rodriguez intentionally murdered Baldwin in the course of committing aggravated sexual assault. As the CCA noted on direct appeal, the evidence showed "extensive damage to Baldwin's vagina, cervix, anus, and the surrounding external areas," including injuries consistent with her thighs being forced apart, and major blunt force trauma to her breasts and buttocks. *Rodriguez*, 2011 WL 1196871, at *4. Rodriguez rented the hotel room where Baldwin's blood was later found and purchased a suitcase identical to the one she was buried in. (32 RR 300; 33 RR 55-68; 34 RR 134-36, 150-51.) Rodriguez could not be excluded as the contributor to DNA found on the victim's anal swab and on latex gloves found in a hotel trash can. (34 RR 147, 159.) He admitted in his oral statement to police that he had sex with Baldwin and that he took her life, albeit accidentally. Moreover, there is no question the jury knew that Rodriguez *did not* know about the existence of the ten-week old fetus. (32 RR 222; 35 RR 73.) The State even conceded during argument it had no proof Rodriguez knew of the pregnancy (which was why the State had relied on transferred intent in the multiple-murder theory). (36 RR 10.) The sexual-assault theory was submitted to the jury in an entirely separate jury charge. (2 CR 523.) In short, Rodriguez fails to show that the fetus photographs somehow induced the jury to convict him of murder in the course of aggravated sexual assault when they otherwise would not have or that the State's proof of the sexual-assault theory somehow benefitted from the photographs. The state court could reasonably conclude that Rodriguez failed to show he would not have been convicted of capital murder absent the fetus photographs.

Analysis yields the same conclusion regarding the sentencing phase. As indicated above, Wall presented constitutional claims on appeal that the conviction under the multiple-murder theory infected the sentencing phase so as to render his death sentence impermissibly unreliable and to deny Rodriguez his due process rights. (*Appellate Brief*, 81). Those claims are addressed separately in Claims 10-12 below. But the CCA's reasoning is helpful to the resolution of this identical claim based on evidentiary, rather than constitutional, error. Specifically, the CCA noted that the State did not argue or attempt to show that Rodriguez would be a future danger based on his treatment of unborn children. The State's punishment case focused instead on extensive evidence about how he preyed on and sexually assaulted young women and manipulated people. The CCA held that the death of the fetus during the murder and sexual assault of Baldwin "added little, if anything to the large amount of negative evidence presented at punishment." *Id.* at *8-9. The CCA was persuaded, beyond a reasonable doubt, that the punishment verdict would have been the same if the jury had not convicted Rodriguez of killing the unborn child. *Id.* at 9.

The harmless error standard for the non-constitutional, evidentiary error allegedly overlooked by Wall in this claim is much lower. As noted, such error is disregarded by the CCA if it has a fair assurance the error did not influence the jury or influenced them only slightly. The facts above support the state habeas court's conclusion that Rodriguez failed to show prejudice from Wall's alleged deficiency. To reiterate, the State did not urge a future dangerousness finding based on the death of the fetus[8] and there was extensive negative evidence of Rodriguez's potential for future dangerousness toward young women such that the photographs of the fetus influenced the jury only slightly at

[8] The prosecutor made one apparent reference to the fetus when he pointed out that Rodriguez was the one who "stole that child's life." (38 RR 38.) This was not argued as a reason for the jury to find Rodriguez a future danger, however, but was a rebuttal to a defense argument suggesting that the jury would be responsible for any death sentence.

sentencing, if at all. Because the photographs were admissible at the time of trial and because they added little to the body of punishment evidence before the jury, Rodriguez fails to show that Wall's alleged deficiency caused prejudice such that the result of the appeal would have been different. More accurately, Rodriguez fails to show that the state court's ruling in this regard was an unreasonable determination under *Strickland*. Claim 9 is denied.

CLAIMS 10-12: RELIABILITY OF THE CONVICTION AND SENTENCE

In Claims 10 and 11, Rodriguez contends that his conviction and sentence violate due process, the right to a fair trial, and the Eighth Amendment because the jury considered evidence and convicted him using the transferred-intent provision with the multiple-murder theory that was later held invalid in *Roberts*. *Roberts*, 273 S.W.3d at 331. In Claim 12, he asserts Wall rendered ineffective assistance for failing to raise these issues on appeal. The state habeas court rejected these claims on the merits. (5 SHCR 1424-1432.)

These claims invoke both due process and the Eighth Amendment bar against cruel and unusual punishment. The Due Process Clause protects a defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)). Under this well known standard, a federal habeas court reviews the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319.

For capital sentencing, the Eighth Amendment requires a state's capital sentencing statute to (1) rationally narrow the class of death-eligible defendants (the "eligibility determination"), and (2) permit the jury to render a reasoned, individualized sentencing determination based on a death-

eligible defendant's record, personal characteristics, and the circumstances of his crime (the "selection determination"). *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006); *Barclay v. Florida*, 463 U.S. 939, 958 (1983). In Texas, the eligibility requirement is addressed through aggravating factors that elevate murder to a capital offense, which are enumerated in section 19.03 of the Penal Code. *See Adams v. Thaler*, 421 F. App'x 322, 325 n.1 (5th Cir. 2011); *Estrada v. State*, 313 S.W.3d 274, 285 (Tex. Crim. App. 2010) (citing *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976)).[9] Thus, the eligibility requirement in Texas is satisfied by a guilty verdict upon the elements of the charged capital offense. *See id.*

The instant claims appear to be based on the assertion that these due process and Eighth Amendment requirements were compromised because, after judgment was entered, the CCA handed down the opinion in *Roberts* that rendered legally insufficient under *Jackson* the evidence used to support the multiple-murder conviction. Rodriguez contends that the jury therefore should not have been able to consider the death of the fetus at the guilt phase or at sentencing. He cites to *White v. Thaler*, 610 F.3d 890, 912 (5th Cir. 2010), to support his assertion that a murder victim's pregnancy is irrelevant and prejudicial at the guilt phase in a trial for murder. But *White* addressed counsel's representation under the Sixth Amendment for failing to block the admission of the pregnancy evidence; it is not an Eighth Amendment case and it is not a death penalty case. Further, it is factually distinguishable for at least two reasons: Baldwin's pregnancy was relevant at the time of trial because the unborn child was a named victim in the indictment, and Rodriguez was not prejudiced because

[9] The future dangerousness special issue has the effect of further narrowing the class of defendants eligible for the death penalty. *See Estrada*, 313 S.W.3d at 285 n.11.

there was overwhelming evidence of his guilt on the alternative theory of murder committed in the course of sexual assault.

Although Rodriguez cites general holdings of the Supreme Court regarding the "heightened reliability" requirements for capital sentencing, he does not make an argument that the state court's decision under the facts of this case violate particular Supreme Court precedent. (Pet. 174-80.) Respondent asserts that the state court's ruling was not an unreasonable application of federal law because the jury returned two independent verdicts based on two clearly separate charges, and the CCA addressed under *Jackson* the sufficiency of the evidence to support the theory of murder-sexual assault, as well as the future dangerousness finding, and found the evidence for both to be sufficient. *Rodriguez*, 2011 WL 1196871, at *3-4, 8. Respondent also argues that evidence of the death of Baldwin's unborn child was admissible at punishment anyway and therefore did not unreliably skew the sentence. Alternatively, Respondent asserts that the evidence of the unborn child's death was harmless under *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993).

The Court agrees with Respondent. There is no uncertainty in this case about the theory upon which the capital murder verdict now rests, as the theories were presented in two entirely separate charges. (2 CR 122, 143.) For reasons already discussed, evidence of Baldwin's pregnancy did not induce conviction under the murder-sexual assault theory, which was supported by legally sufficient evidence of extensive internal damage and injuries consistent with her thighs being forced apart. *Rodriguez*, 2011 WL 1196871, at *4. Furthermore, evidence of Baldwin's pregnancy was admissible at sentencing even without the underlying conviction for multiple murder. *See* Tex. Code Crim. Proc. Ann. art. 37.071, §§ 2(b)(1) and (d)(1) (providing that, in answering future dangerousness issue, jury shall consider circumstances of the offense that militate for imposition of the death penalty); *see also*

Payne v. Tennessee, 501 U.S. 808, 825-27 (1991) (holding that Eighth Amendment erects no *per se* bar to evidence about the victim and the impact of the murder on the victim's family, and that for a jury to properly assess the defendant's moral culpability, the states may allow at sentencing evidence of the specific harm caused by the defendant).

Rodriguez fails to show the state court decision was an unreasonable application of federal law. *See Zant v. Stephens*, 462 U.S. 862, 885-89 (1983) (holding that conviction and death sentence under similar Georgia death penalty statute need not be vacated even though state court invalidated one of the aggravating circumstances after judgment, because jury separately found additional aggravating circumstance and the evidence supporting the invalidated aggravator was admissible at sentencing); *see also Brown v. Sanders*, 546 U.S. 212, 220 (2006) (holding that jury's consideration of an invalidated sentencing factor—whether an "eligibility" factor or not—does not render death sentence unconstitutional where sentencing factors enable the jury to give aggravating weight to the same facts and circumstances). Alternatively, if there is error, the evidence of Baldwin's pregnancy added nothing to the State's punishment case, which included the brutal facts of Baldwin's murder, the disappearance of a teenaged girl, and the sexual assault of five women who knew and trusted Rodriguez. *Brecht*, 507 U.S. at 638 (holding that habeas relief may not be granted for constitutional trial error unless court determines error had substantial and injurious effect or influence in determining the verdict). Because Rodriguez fails to demonstrate that the state court's rulings were unreasonable and fails to demonstrate prejudice, the Court denies Claims 10 and 11.

Finally, Rodriguez acknowledges that appellate counsel Wall did, in fact, raise this issue with respect to sentencing, but contends Wall *may* have been ineffective for failing to raise any remaining claims on appeal. The state habeas court essentially concluded that, given its analysis of the claims,

there was no basis to find deficient performance or prejudice under *Strickland.* (5 SHCR 1431-32.) Rodriguez fails to explain or demonstrate that the rejection of his ineffective assistance claim against appellate counsel was unreasonable. *See Schaetzle,* 343 F.3d at 445 (noting counsel need not raise every nonfrivolous ground on appeal but should present solid, meritorious arguments based on directly controlling precedent); *see also Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (holding that conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding). The Court denies Claim 12.

CLAIM 13: MEDICAL EXAMINER'S TESTIMONY

Rodriguez contends that he was denied the right to effective assistance of counsel because Wardroup failed to investigate, cross-examine, or otherwise challenge properly the medical examiner's testimony that Baldwin was alive when placed in the suitcase. This issue was raised and rejected in the state habeas court, which heard testimony from Dr. Natarajan, the medical examiner, and from trial attorneys Stangl and Wardroup. (5 SHCR 1442-48.) Rodriguez asserts the ruling was based on an unreasonable determination of facts and an unreasonable application of clearly established federal law.

I. Factual background

To be clear, the record does *not* show that the medical examiner testified Baldwin was alive when placed in the suitcase. Rather, Dr. Natarajan was not able to say whether Baldwin was dead or alive, but opined that, if she were alive, she would have died very quickly thereafter of positional asphyxiation. (35 RR 67-69). Dr. Natarajan summarized there was no "specific lethal event;" he could only say Baldwin suffered fifty-plus areas of blunt force trauma as well as "an asphyxial event." (35 RR 67-68, 95.) Stangl's cross-examination before the jury confirmed that Natarajan could *not*

say whether she was alive when placed in the suitcase. (35 RR 93.) Stangl then established there were two types of potential asphyxia present: one caused by Baldwin's compromised position in the suitcase and one cause by some sort of neck compression. The doctor could not tell the jury which one occurred. (35 RR 94-95.) Stangl then explored the likelihood that blunt force trauma was the sole cause of death based on injuries to the brain, and he elicited an admission that Dr. Natarajan could not reconstruct the events that led to Baldwin's death. (35 RR 95-99.)

At the habeas hearing, Dr. Natarajan repeated the same opinions he gave at trial. (4 SHRR 178-79, 187-88.) Stangl and Wardroup testified at the hearing that they were surprised by Dr. Natarajan's trial testimony that Baldwin may have been alive when placed in the suitcase. Stangl said Dr. Natarajan never offered such a possibility during their conversations before trial and it was not in the autopsy report. Stangl himself believed that Baldwin was not alive, given the marks on her neck and the length of time she was left alone in the room. (4 SHRR 192-93; 6 SHRR 231-32.) Nevertheless, even if they had known about the opinion before trial, Stangl said he had no reason to believe he could have changed Dr. Natarajan's belief that positional asphyxiation was a possibility. (4 SHRR 199.) Stangl agreed with habeas counsel that he could have explored the possibility that Rodriguez used some kind of chokehold besides the arm bar Rodriguez mentioned in his recorded confession (and for which there were no corroborating injuries). (4 SHRR 200.) Stangl agreed he could have emphasized circumstances that supported the proposition that she was already dead, like the length of time she was left alone, or he could have asked Dr. Natarajan which scenario was more likely. (4 SHRR 201.) But Stangl also agreed there was no purpose in Rodriguez leaving the hotel room to buy the suitcase in the first place if Baldwin had not been dead, and that it was better not to get a definitive answer and move on. (4 SHRR 205-06.) Wardroup testified that he did not believe

there was any way to exclude the medical examiner's testimony and that Stangl did "exactly the right thing" by not arguing about whether Baldwin was placed alive in the suitcase because that would have left an indelible imprint on the jury. (6 SHRR 262.)

II. Analysis

Rodriguez complains Stangl failed to explore whether blunt force trauma was equally likely to have caused Baldwin's death. The record shows, however, that Stangl explored the possibility that Baldwin died from blunt force trauma, and Dr. Natarajan refused to speculate under cross-examination as to whether she would have lived or died if the asphyxial event had not occurred. (35 RR 95-97.) Rodriguez also complains Stangl did not explore other possible ways in which a person can die of positional asphyxiation, such as by being strangled, dropped to the floor, and left there for up to an hour. While Stangl admitted he did not do this, his failure to argue with the medical examiner about how Baldwin could have died from positional asphyxiation outside of the suitcase was not an unreasonable strategy. Even if such a tactic could have caused the medical examiner to concede the possibility that she was already dead when placed in the suitcase, the doctor had already testified to this possibility, and the cross-examination would have simply emphasized the horror of Baldwin's last moments of life for no substantial gain.

Rodriguez also complains that his trial counsel failed to explore evidence that Baldwin "was actually dead by the time Mr. Rodriguez showed back up in the room with the suitcase." (Pet. 182.) The apparent implication here is that such cross-examination could have suggested Rodriguez used something less than deadly force because she survived for some amount of time. This sort of cross-examination would have been easily rebutted, however, by pointing out that Rodriguez's purpose

in leaving the hotel was to purchase a suitcase to dispose of her body, so he must have been confident she was dead or at least permanently incapacitated.

Finally, Rodriguez complains that trial counsel did not ask whether a layperson could determine whether a person was unconscious or actually dead. This line of questioning suggesting that Rodriguez, a lay person, did not kill Baldwin intentionally could have been easily rebutted with his own police statement in which he admits he received first-aid and CPR training in the military and that he checked Baldwin's breathing and pulse, but found none. This line of questioning would have had a negative impact by emphasizing that Rodriguez did not attempt CPR or even call for help on his cell phone, both of which he admits in the confession. (SX 253, time stamp 00:42:00 - 00:43:45.) Instead, he dressed and went to Walmart to buy a suitcase and gloves.

Rodriguez's allegations that trial counsel should have challenged the testimony that Baldwin "may" have been placed in the suitcase alive would have assured a more detailed discussion and consideration of her last moments of life, raising thoughts in the jurors' minds such as whether she was choked across the front of her neck or whether the blood vessels on the sides of her neck were compressed to cause unconsciousness; whether the lack of evidence of a struggle indicates the vicious sexual assault occurred while she was helplessly unconscious; whether she worried about the fate of her unborn child; whether she died from strangulation during the sexual assault or clung to life immobilized by the internal injuries; and whether she ever regained consciousness while alone in the room or inside the suitcase, only to realize her death, and her child's death, were imminent. While such a strategy could have led some jurors to conclude she was more likely dead when placed inside the suitcase, the timing of her death would have had no logical effect on the verdict, and reasonably effective counsel could have concluded there was nothing to be gained by such a detailed exploration

of the victim's last moments of life. *See Castillo v. Stephens*, ___ F. App'x ___, 2016 WL 491655, at *7 (5th Cir. Feb. 8, 2016) (petition for certiorari filed) (holding that speculating about the effect of tinkering with the cross-examination questions is exactly the sort of hindsight that *Strickland* warns against).

Rodriguez also fails to show that the state court's ruling as to *Strickland* prejudice was unreasonable. After extensive post-conviction litigation in state court and funding in this Court for a forensic pathologist, the record does not affirmatively show whether Baldwin was alive or dead when Rodriguez placed her in the suitcase. Rodriguez's own assertions on this point are conflicting; he told the police that she had no pulse when he left the room but he "stoutly argued" to appellate counsel that he did *not* believe she was dead when he put her in the suitcase.[10] (5 SHRR 49.) And while habeas counsel's examination of Dr. Natarajan explored different ways Baldwin could have received neck injuries that rendered her unconscious or dead, (4 SHRR 182-83), Dr. Natarajan maintained at the hearing that he could not definitively say she was dead when she received the injuries consistent with the positional asphyxia. In other words, he still did not rule out that she was placed in the suitcase alive. (4 SHRR 178.) The habeas testimony fails to show the trial result was affected in any way by counsel's chosen strategy to point out the uncertainty and move on, and Rodriguez fails to show that the state court ruling was unreasonable. The Court denies Claim 13.

CLAIMS 14-16: TEXAS' MITIGATION SPECIAL ISSUE

In Claims 14 through 16, Rodriguez asserts that the mitigation special issue submitted to the jury during the punishment phase violates the Constitution because (1) it does not assign a burden

[10] The possible revelation of this belief was one reason why appellate counsel did not want Rodriguez to testify at the hearing on the motion for new trial. (5 SHRR 49.)

of proof to the State, (2) the definition of "mitigating evidence" is too narrow and impermissibly restricts the jury's consideration of his mitigating evidence, and (3) Texas does not permit appellate review of the sufficiency of the evidence supporting the jury's answer to this issue. (Pet. 184-99.) These claims were rejected in the state habeas court and on direct appeal. (5 SHCR 1419-20); *Rodriguez*, 2011 WL 1196871, at *9, 23-24 (addressing Claims 32-34, 31, 35).

The relevant portions of the jury instructions state:

> You are instructed that when you deliberate on the questions posed in the special issues you are to consider all relevant mitigating circumstances, if any, by the evidence presented by the State or the defendant. *A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character, background, personal moral culpability, or circumstances of the crime which you believe could make a death sentence inappropriate in this case. . . .*
>
> * * * * *
>
> In answering Special Issue Number 2 *you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.*
>
> * * * * *
>
> **Special Issue Number Two**
>
> Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?

(2 CR 561-63, 567 (emphases added).)

As indicated above, the jury was instructed that a "mitigating circumstance" includes, but is not limited to, any aspect of the defendant or circumstances of the crime that the jury believed could make a death sentence inappropriate. Rodriguez's complaint that the "mitigating evidence" considered

by his jury was limited to evidence that reduces moral blameworthiness is not well-taken. (Pet. 190.) Furthermore, Rodriguez does not demonstrate that the mitigation evidence he introduced—that he grew up in a home with an abusive, alcoholic father but that he was otherwise a respectful, intelligent person who could adjust to serving a life sentence—falls outside of the statutory definition.

In any event, these claims do not attempt to show a violation of clearly established federal law but seek to change the existing law. *See Marsh*, 548 U.S. at 173 (recognizing that a state death penalty statute may place on the defendant the burden of proving that mitigating circumstances outweigh aggravating circumstances); *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) (rejecting argument that *Ring v. Arizona*, 536 U.S. 584 (2002), reshaped state's capital murder law or modified the elements of the offense); *Jones v. United States*, 527 U.S. 373, 381 (1999) (holding that Eighth Amendment does not require jurors be instructed as to the consequences of their failure to agree); *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1993) (recognizing that juries may be given unbridled discretion in determining whether to impose the death penalty once it is determined that the defendant is eligible to receive it); *Blue v. Thaler*, 665 F.3d 647, 665-66 (5th Cir. 2011) (rejecting argument that Texas definition of mitigating evidence is unconstitutionally narrow); *Granados v. Quarterman*, 455 F.3d 529, 536 (5th Cir. 2006) (rejecting argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required a Texas jury to find an absence of mitigating circumstances); *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005) (holding that no Supreme Court or circuit precedent requires that the mitigation issue be assigned a burden of proof and that circuit precedent rejects the argument that it be subject to appellate review); *Woods v. Cockrell*, 307 F.3d 353, 359-60 (5th Cir. 2002) (explaining that Texas death penalty statute is not constitutionally obligated to provide appellate review of mitigation special issue because jury may be given unbridled discretion to consider mitigating factors).

Given the existing Supreme Court precedent and the law of this Circuit, Rodriguez fails to show that the state court's ruling on Claims 14, 15 and 16 were unreasonable. § 2254(d). Furthermore, the arguments in Claims 14 and 16 seek to establish new rules requiring a burden of proof and appellate review of the mitigation special issue. Accepting these arguments would violate *Teague* because such rules did not exist when Rodriguez's conviction became final. *See Teague v. Lane*, 489 U.S. 288, 310 (1989). For all of these reasons, the Court denies Claims 14 through 16.

CLAIMS 17-21: LIMITATION OF VOIR DIRE EXAMINATION

In claims 17 through 20, Rodriguez contends that the trial court's refusal to permit him to question prospective jurors about their ability to consider mitigating evidence violated his rights to a fair and impartial jury, to due process, to effective assistance of counsel, and to not be subject to cruel and unusual punishment. In Claim 21, he contends trial and appellate counsel provided ineffective assistance by failing to properly object and raise these issues on appeal. These issues were, in fact, raised and rejected on direct appeal and/or on collateral review.

In its opinion on appeal, the CCA acknowledged that the constitutional guarantee of the right to an impartial jury includes a voir dire examination that is adequate to identify unqualified jurors subject to a challenge for cause. *Rodriguez*, 2011 WL 1196871, at *10 (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)). In a death penalty case, any juror to whom mitigating factors are irrelevant should be disqualified for cause because such juror has formed an opinion concerning the merits of the case without some basis in the evidence at trial. *Morgan*, 504 U.S. at 739. Peremptory strikes, on the other hand, are not required by the Constitution. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (rejecting notion that loss of peremptory challenge constitutes a violation of the constitutional right to an impartial jury and holding that so long as the jury is impartial, the fact that a defendant had to

use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated). It follows that questions which prompt a revelation useful only in the exercise of peremptory challenges are not compelled by the Constitution, so long as the failure to ask the question does not render the trial fundamentally unfair. *See Mu'Min v. Virginia*, 500 U.S. 415, 424-26 (1991).

Rodriguez argues that he should have been permitted to ask potential jurors two types of questions: (1) whether they could give meaningful consideration to particular types of evidence, specifically, that Rodriguez was raised in a household with an abusive and mentally ill father, that Rodriguez was a good father and husband, and that Rodriguez is capable of living confined for the rest of his life without incident; and (2) whether they would consider mitigation evidence notwithstanding that a person committed capital murder during the course of aggravated sexual assault in which a fetus was also killed. (Pet. 200-01.) The state court rejected the argument that the Constitution requires both types of questions. (5 SHCR 1420-21); *Rodriguez*, 2011 WL 1196871, at *10-12.

The first type of question attempted to secure a commitment that the juror would give mitigating effect to the evidence the defense intended to introduce in mitigation. The second type of question attempted to secure a commitment that the juror would not resolve the punishment issues on the basis of victim-impact evidence, specifically, the victim's circumstance of being in utero. The proposed questions therefore do not seek to identify *unqualified* jurors; the questions attempt to identify whether, given the proposed facts, the juror would favor the defense or the prosecution. Rodriguez provides no authority that these types of questions are required by the Constitution, and circuit precedent suggests otherwise. *See Soria v. Johnson*, 207 F.3d 232, 243-44 (5th Cir. 2000) (rejecting argument that Constitution was violated by trial court's refusal to allow voir dire question, "No matter what the other

evidence would show, could you consider [evidence such as youth or voluntary intoxication] as a mitigating factor in setting punishment?").

Citing *Morgan*, Rodriguez argues that a juror must be excluded if "his or her views on the imposition of a death sentence regardless of the other evidence in the case are such as they would prevent or substantially impair his or her ability to follow the law." (Pet. 209.) But this argument seeks to expand the holding in *Morgan*. The Supreme Court in *Morgan* held that any juror who would impose a death sentence *automatically upon conviction* cannot follow the dictates of the law and may be excluded for cause. *Morgan*, 504 U.S. at 735. Thus, a defendant on trial for his life must be permitted to ascertain whether prospective jurors who swear they can uphold the law nevertheless harbor such dogmatic beliefs about the death penalty that they would always vote to impose a death sentence. *Morgan* dictates that voir dire examination must go beyond simple questions of "Will you follow the law that I give you?" and "Do you have any prefixed ideas about this case at all?" *Morgan*, 504 U.S. at 735 n.9. But it does not suggest courts should permit inquiries into a potential juror's view of specific mitigating circumstances.

Here, the venire was told that the indictment alleges the murder of a woman who was pregnant at the time of her death. (14 RR 10-11.) Although Rodriguez was not permitted to ask whether they would consider mitigation evidence notwithstanding that the defendant committed murder in the course of a sexual assault in which a fetus was killed, he was permitted to ask about the potential juror's ability to consider mitigation when there is a death of more than one person and one of those persons is a child. (15 RR 164.) Rodriguez was also permitted to ask whether the potential jurors would automatically vote for the death penalty in every case where they found somebody guilty of capital murder. (17 RR 7.) The trial court also allowed Rodriguez to ask whether they would consider

mitigating circumstances, including the defendant's "background and character." (17 RR 7-8.) Rodriguez does not assert that any seated juror was unable to consider his mitigating evidence or was unable to assess a life sentence, nor does he demonstrate that the voir dire questions rendered the trial fundamentally unfair. He fails to show that the state court's rejection of these claims was unreasonable, and he fails to show actual prejudice. *See Brecht*, 507 U.S. at 638 (holding that habeas relief may not be granted for constitutional trial error unless court determines error resulted in actual prejudice). The Court overrules Claims 17, 18, 19, and 20.

In Claim 21, Rodriguez makes a global assertion of ineffective assistance against trial and appellate counsel. He acknowledges that trial counsel objected to the voir dire rulings and that appellate counsel challenged the rulings on appeal, but asserts that, if their efforts in preserving error and presenting these claims were insufficient, then Rodriguez is entitled to relief based on the ineffective assistance of counsel. Such conclusory allegations of ineffectiveness do not raise a constitutional issue in a federal habeas proceeding. *Miller*, 200 F.3d at 282. The Court overrules Claim 21.

CLAIM 22: CAUSE OF BALDWIN'S INJURIES

Rodriguez contends that Wardroup rendered ineffective assistance for failing to argue that Baldwin's blunt-force injuries were caused by a trash compactor rather than Rodriguez. He acknowledges that this claim is unexhausted and subject to a procedural bar. He asserts that the procedural bar does not apply, however, because state habeas counsel was ineffective for failing to litigate this claim in state court. Respondent asserts that the claim has no merit, state habeas counsel was not deficient, and therefore the claim is procedurally barred.

I. The law of exhaustion, procedural bars, and *Martinez*

When a claim has not been exhausted, and the state court to which the petitioner would be required to present his claim in order to meet the exhaustion requirement would now find the claims procedurally barred, the claim is defaulted for purposes of federal habeas review. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Williams v. Thaler*, 602 F.3d 291, 305 (5th Cir. 2010). For "substantial" claims of ineffective assistance against trial counsel only, the ineffective assistance of state habeas counsel may excuse a procedural bar. *See Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012). A claim is "substantial" if it has "some merit." *Martinez*, 132 S. Ct. at 1318. Finally, if a petitioner can make a showing of ineffective habeas counsel under *Trevino*, the deference under § 2254 is inapplicable, and a plenary or de novo review is appropriate. *Henderson v. Cockrell*, 333 F.3d 592, 598 (5th Cir. 2003); *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000).

II. Related facts

Wardroup retained a pathologist, Dr. Norton, to review Dr. Natarajan's forensic work in this case. Wardroup reported Dr. Norton's findings in an email to the trial team:

> [Dr. Norton] says the forensic work done in the case was very good and she doesn't believe that it can reasonably be argued that there wasn't a sexual assault. She said that no woman could walk around with those injuries, regardless of her desire for drugs. She said that the fetus was not viable and didn't amount to any more that [sic] the potential of life and that Summer would not have been showing so the only way for anyone to know that she was pregnant was for her to tell them. She says the offense didn't occur the way he describes in the statement he gave with [Albert] Rodriguez at his side, that the extent of the injuries was way more than would have been necessary to defend himself from "these cute little knives"–she is a knife collector. She says that it is laughable that this is self defense. She also believes that Ro III [Rodriguez] is a psychopath and should never hope to see the light of day. She opposes the death penalty but would want to see that

> Ro III didn't have the possibility of parole. She wonders whether there are other victims who haven't been discovered yet. I asked that she write us a letter so that we could show that there was another expert who corroborated the forensic work already done and she said that she was pretty much at the end of the $5000 that Lubbock County had paid so she wouldn't be preparing a long report but would send a letter. It is probably needless to say, we won't be calling her to testify.

(7 SHRR 91.)

At trial, Dr. Natarajan explained how to determine the timing of an injury in relation to someone's death based on the type of cells that arrive to the area during the healing process. (34 RR 194-95.) He testified that the majority of Baldwin's injuries were antemortem and a couple were post-mortem, caused by her body getting moved and banged around in the dumpster or compactor. (34 RR 196-98.) Baldwin had a broken right forearm and fractured ribs, for example, which Dr. Natarajan determined were post-mortem based on the lack of hemorrhage around them. (34 RR 204, 222.) On cross-examination, Stangl explored Dr. Natarajan's ability to differentiate microscopically between "hemorrhaging" that occurs before death (when the circulatory system is working) and the "extravasation" that occurs after death from crushing the tissue and forcing the blood out. (35 RR 83-84.) Stangl established that discoloration or bruising on the victim's upper back, left buttocks, left shoulder, right wrist, right chest, left arm, scalp, and right temporalis muscle did not contain an inflammatory cell population indicative of the healing process. (35 RR 86-92.)

III. Analysis

This record shows counsel recognized the need for an expert pathologist and relied on his expert's opinion that the medical examiner's work was high quality. Even so, Stangl's cross-examination gave the jury a reason to conclude that some of Baldwin's injuries were caused by impacts after her death because Dr. Natarajan found no microscopic evidence that the healing process had

begun. Moreover, Rodriguez obtained funding to hire a pathologist, Dr. Amy Gruszecki, to develop this claim for his federal petition. *See* Order on Motion for Funds 2, ECF No. 15. He presents no report or opinion from Dr. Gruszecki that Stangl overlooked any post-mortem injuries other than the ones mentioned during the cross-examination of Dr. Natarajan.

Under the circumstances, Rodriguez fails to show any merit to the claim that trial counsel was deficient for failing to investigate or argue that Baldwin's injuries were caused by a trash compactor. *See Dowthitt v. Johnson*, 230 F.3d 733, 747-48 (5th Cir. 2000) (holding, in the context of mental health, that counsel who recognizes the need for expert assistance and employs a defense expert is not ineffective for failing to canvass the field to find a more favorable expert), *overruled in part on other grounds*, *Lewis v. Thaler*, 701 F.3d 783, 790 (2012); *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (recognizing that the selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after a thorough investigation of the facts, is virtually unchallengeable); *Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997) (holding counsel not deficient for relying on expert who concluded defendant had no significant psychiatric disorders).

Even if the Court assumes trial counsel was deficient, Rodriguez fails to demonstrate *Strickland* prejudice. (Pet. 218.) Rodriguez argues that counsel's failure left the jury with the prejudicial impression that Rodriguez's personal brutality, rather than the trash compactor, was the source of the "great majority" of Baldwin's injuries. But there is no question that Rodriguez left her in the trash dumpster, the foreseeable and perhaps intended result of which was that she would be compacted like trash. The jury would thus simply conclude he caused some of the injuries by a means other than his hands. And the jury still would be left to consider strangulation and severe damage from the sexual assault that Rodriguez cannot attribute to a trash compactor. Rodiguez fails to establish as unreasonable

the trial court's ruling that he did not undermine confidence in the verdict. *See Salazar v. Quarterman*, 260 F. App'x 643, 648-49 (5th Cir. 2007) (holding counsel's failure to retain pathologist, if deficient, did not cause prejudice at guilt where pathologist's major disagreement with medical examiner was whether one out of ten bruises on the victim predated her murder).

Because the claim against trial counsel has no merit, habeas counsel was not ineffective for failing to raise it. *See Koch*, 907 F.2d at 527. Under these circumstances, Claim 22 is procedurally barred. *See Coleman*, 501 U.S. at 735 n.1 Alternatively, under the preceding *de novo* review, the Court concludes this claim should be denied on the merits. The Court denies Claim 22.

CLAIM 22a[11]: EXTENSION OF *MARTINEZ*

In Claim 22a, Rodriguez argues that the procedural-bar exception in *Martinez* should be extended to cases where initial-review collateral counsel (here, state habeas counsel Mansur) raises a claim of ineffective assistance against trial counsel but "fails to do anything of consequence to press those claims." Rodriguez specifically contends that Mansur, who presented live testimony from twelve witnesses, a deposition from another witness, and twenty exhibits or affidavits over the course of a six-day habeas hearing in state court, rendered ineffective assistance with respect to the *Wiggins* claim (Claim 1) by failing to conduct a reasonable investigation into "corroborating witnesses." (Pet. 222-23.) Rodriguez asks to return to state court to further investigate and litigate the *Wiggins* claim.

The authority cited for this expansion of *Martinez* is a statement respecting the denial of a writ of certiorari made by Justices Breyer and Sotomayor in *Gallow v. Cooper*, 133 S. Ct. 2730 (2013). Thus, the argument is not based on any controlling federal law. Authority in this Circuit provides that *Martinez* does not apply to claims (like Claim 1) that were fully adjudicated on the merits in state

[11] The Petition contains two claims numbered "22." For clarity, the Court numbers this claim "22a."

court because those claims are, by definition, not procedurally defaulted. *Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014). As Respondent correctly points out, he did not assert a procedural bar to Claim 1, and there is no procedural bar to overcome. Moreover, even if this Court were authorized to expand *Martinez* somehow to include claims fully litigated on the merits, Rodriguez makes only conclusory allegations about Mansur's failure to investigate and find witnesses, which are insufficient to raise a constitutional issue. *See Miller*, 200 F.3d at 282.

Although this claim is couched in terms of overcoming a procedural bar, in actuality it seeks relief based solely on the alleged ineffective assistance of state habeas counsel while litigating an exhausted claim in state court. Such claims are barred by statute. *See* § 2254(i) (providing that the ineffectiveness or incompetence of counsel during federal or state collateral post-conviction proceedings shall not be a ground for relief in a proceeding under § 2254). For all of these reasons, the Court denies Claim 22a.

CLAIM 23: TEXAS' FUTURE DANGEROUSNESS SPECIAL ISSUE

Rodriguez contends that the Texas future dangerousness issue violates the Constitution in that it fails to define the terms "probability," "continuing threat to society," and "criminal acts of violence." He concludes that his death sentence was based on an unconstitutionally vague aggravating element and that the jury was unable to give full consideration and effect to his mitigating evidence. This claim was rejected by the CCA on direct appeal. *Rodriguez*, 2011 WL 1196871, at *24 (rejecting Claims 38 and 39). Respondent asserts that the state court properly denied the claim based on established precedent. *See Sprouse v. Stephens,* 748 F.3d 609, 622-23 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 477 (2014) (holding that failure to define terms does not run afoul of *Maynard v. Cartwright*, 486 U.S. 356 (1988) or *Godfrey v. Georgia,* 446 U.S. 420 (1980)).

The Fifth Circuit has repeatedly rejected the argument that the Texas statute is unconstitutionally vague. *See Turner v. Quarterman*, 481 F.3d 292, 299 (5th Cir. 2007) (recognizing that the Circuit has rejected claims alleging vagueness of future dangerousness terms); *Woods v. Johnson*, 75 F.3d 1017, 1033-34 (5th Cir. 1996) (rejecting claim that Texas special issues are unconstitutionally vague); *James v. Collins*, 987 F.2d 1116, 1119-20 (5th Cir. 1993) (acknowledging that "[t]o the extent that the words strike distinct chords in individual jurors, or play to differing philosophies and attitudes, nothing more is at work than the jury system . . . . [S]uch words . . . ultimately mean what the jury says by their verdict they mean") (quoting *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984)). To the extent that Rodriguez urges this Court to adopt a new rule requiring Texas to define terms in the future dangerousness special issue, such a rule would also violate *Teague*. *See Teague*, 489 U.S. at 310 (holding, with two exceptions, that new constitutional rules of criminal procedure are not applicable to cases that became final before the new rule was announced). Rodriguez fails to demonstrate that the CCA's ruling runs afoul of clearly established federal law. The Court denies Claim 23.

CLAIM 24: TEXAS' 12/10 RULE

Rodriguez asserts that the Texas "12/10 Rule" violates the Eighth and Fourteenth Amendments by failing to instruct the jury that the vote of a single juror could result in a life sentence. Instead, the Texas jury is told that it may answer "no" to the future dangerousness issue or "yes" to the mitigation issue only if "10 or more jurors agree." *See* (2 CR 563.) In other words, the jury is told that answers in favor of a life sentence require ten votes and answers in favor of a death sentence require unanimity, but they are not told that if *less* than ten jurors vote in favor of a life sentence, the defendant will still be given a life sentence.

Rodriguez acknowledges Circuit precedent holding that this argument is *Teague*-barred. But he argues that the value of such precedent has been diminished by *Nelson v. Quarterman*, 472 F.3d 287, 297 (5th Cir. 2006) (en banc), which reinforces the rule that jurors must have a vehicle with which to give "full consideration and full mitigating effect" to the defendant's mitigation case. He argues that the 12/10 rule discourages lone or minority "life" voters by encouraging them to join the majority to form a unanimous verdict, and it does so by withholding from the jury the truth that only one vote is needed to prevent the imposition of a death sentence. Respondent argues that the state court's rejection of this claim on direct appeal was reasonable. *See Rodriguez*, 2011 WL 1196871, at *23-24.

The Supreme Court has specifically rejected the argument that the Eighth Amendment requires jurors to be instructed regarding the consequences of their failure to agree or on a breakdown in the deliberative process. *See Jones*, 527 U.S. at 382. A circuit opinion such as *Nelson* cannot mandate otherwise. *See Blue*, 665 F.3d at 670 (holding that *Jones* insulates the 12/10 rule from constitutional attack). Furthermore, *Nelson* does not even address the statute used in this case; it involved a previous statute that contained no mitigation special issue. *See Nelson*, 472 F.3d at 290. And, although the jury in this case was not told (and did not have to be told) that one juror's vote could prevent the imposition of a death sentence, the jury *was* told that the answers to the special issues resulting in a death sentence required unanimity. (2 CR 563.)

Rodriguez nevertheless argues that the 12/10 rule is akin to the "nullification" instruction that was struck down in *Penry II. Penry v. Johnson*, 532 U.S. 782, 804 (2001) (*"Penry II"*). Rodriguez asserts that the 12/10 rule misleads the jury into believing that ten votes are required for a life sentence when, in actuality, one juror in favor of life can cause a hung jury, which results in a life sentence. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g) (providing for life sentence if jury is "unable to

answer any issue submitted"). The result, Rodriguez contends, is that life-voters will change their votes and follow the majority upon the false belief that their one vote could make no difference. Rodriguez concludes that the rule impermissibly leads jurors to place their individual responsibility onto their fellow jurors. These arguments are unpersuasive for several reasons.

First, the court-made nullification mechanism for giving effect to mitigating evidence[12] was deemed unconstitutional because it rendered the jury charge internally inconsistent—in essence, it told the jurors to change an honest "yes" answer to the future-dangerousness special issue to "no" if they believed the mitigation evidence mandated a sentence less than death. *Id.* at 798-99. So jurors who wanted to answer the future-dangerousness issue falsely to give effect to the mitigating evidence would have had to violate their oath to render a "true verdict." *Id.* at 800. The 12/10 instructions, on the other hand, do not instruct the jurors to violate their oaths or change their honest answers.

Second, Rodriguez provides no support for his assertion that jurors in favor of a life sentence are more likely to change their vote to form a consensus than jurors in favor of a death sentence. Further, although Rodriguez's petition does not explicitly say so, his argument rests on the assumption that he has a constitutional right to a hung jury such that each juror must be informed that he can cause a life sentence by being the "single hold-out juror for life" or by refusing to deliberate. As noted, the Supreme Court has rejected the assertion that the jury must be told the consequences of a breakdown in the deliberative process. *See Jones*, 527 U.S. at 381-82 (noting that the very object of a jury system is to secure unanimity by a comparison of views and by arguments among the jurors).

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[12]The nullification instruction was created by Texas courts as a temporary cure for *Penry I* error while the state legislature amended the statute to include the distinct mitigation special issue that was used in this case. *See Smith v. Texas*, 550 U.S. 297, 301 (2007).

In his Reply, Rodriguez asserts that his claim is supported by *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989), which relied on *Mills v. Maryland*, 486 U.S. 367 (1988), in striking down jury instructions that misstated a unanimity requirement for finding mitigating evidence. This case is distinguishable on the facts. Here, the jury was specifically instructed that they need not agree on what particular evidence supports an answer in favor of a life sentence to either one of the special issues. (2 CR 562, 563.) Moreover, this Circuit has rejected the argument that *Kubat* and *Mills* render the 12/10 rule unconstitutional. *See Allen v. Stephens*, 805 F.3d 617, 632, 633 n.3 (5th Cir. 2015), *cert. denied*, 2016 WL 1134757 (May 23, 2016).

Rodriguez fails to show that the state court ruling violates clearly established federal law, and the jury instruction Rodriguez proposes would violate *Teague*. The Court therefore denies Claim 24.

CLAIM 25: MOTION TO SUPPRESS FINANCIAL EVIDENCE

Rodriguez's final claim is a Fourth Amendment claim. He argues that the state court wrongly overruled his motion to suppress financial information of his identity that was obtained in violation of a federal statute and the federal rules of criminal procedure. Respondent argues that Rodriguez fails to demonstrate that the state court ruling was unreasonable and that the Fourth Amendment challenge is barred from federal habeas review.

I. Background facts

Rodriguez moved the trial court to suppress financial evidence of his identity as a violation of the Constitution. (1 CR 115.) The prosecution challenged Rodriguez's standing to object. (1 CR 224.) The trial court held a pretrial hearing on the motion after which it ordered briefing from the parties. (2 RR 170-209.) In his brief, Rodriguez asserted that the information was inadmissible under article 38.23 of the Texas Code of Criminal Procedure because the Lubbock Police Department illegally

obtained the information from the FBI in violation of the federal Right to Financial Privacy Act ("RFPA"). *See* 12 U.S.C. § 3420; (1 CR 235-39.) Rodriguez also argued that all evidence seized via the subsequently-obtained search warrants was inadmissible as "fruit of the poisonous tree." (1 CR 239-40.) The State argued, among other things, that the RFPA is a purely civil statute that does not impact the suppression of evidence in a criminal case and that the evidence was admissible under the Texas exclusionary rule (article 38.23) because it was obtained lawfully by federal agents through a grand jury subpoena. (1 CR 298-309.) Rodriguez filed a reply clarifying his argument that the federal agents were not authorized to share the grand jury records with the Lubbock police under the RFPA, which allows grand jury information to be used only in accordance with Rule 6 of the Federal Rules of Criminal Procedure. *See* § 3420(a); (1 CR 325-34.)

The trial court denied the motion to suppress. In its written findings and conclusions, the court noted that the FBI was involved in the murder investigation because Baldwin was an informant in a federal prosecution against Richard Corder, who had become a suspect in Baldwin's death. (2 CR 632.) Furthermore, there was an ongoing federal grand jury investigation into Joanna Rogers's death. (2 CR 633.) The trial court held that the financial information was obtained lawfully for several reasons: (1) a Lubbock police officer was properly designated by the United States Attorney to assist in the investigation of a potential federal crime under Rule 6(e) of the Federal Rules of Criminal Procedure; (2) the violation of the RFPA, a civil statute, does not result in the suppression of evidence; and (3) the fruit-of-the-poisonous-tree doctrine only applies to evidence seized in violation of the Constitution. The trial court also ruled that the recorded police statement Rodriguez made with counsel present was admissible because it was sufficiently attenuated from the taint of the alleged illegality. (2 CR

636-648.) The trial court's findings were upheld by the CCA in a claim on direct appeal. *Rodriguez*, 2011 WL 1196871, at *25-26.

II. Analysis

Although Rodriguez's petition states a Fourth Amendment violation (Pet. 236), his argument does not brief or assert any Fourth Amendment law. Citing *United States v. Miller*, 425 U.S. 435 (1976), Rodriguez acknowledges that the Fourth Amendment does not protect a customer's banking records because a customer has no reasonable expectation of privacy in the bank records. Rodriguez also asserts the RFPA was passed by Congress in response to *Miller* and that his claim is therefore statute-based. (Pet. 240-41.) He further acknowledges that the RFPA does not authorize the suppression or exclusion of evidence. (Pet. 241.) Rather, his claim is made pursuant to the Texas exclusionary rule, which prohibits the use of evidence "obtained by an officer or other person in violation of any provisions of... the laws of the United States of America." Tex. Code Crim. Proc. Ann. art. 38.23(a). He contends that the state court's decision not to apply article 38.23 was incorrect because the Lubbock police are not "government personnel" as that term is defined by the legislative history of Rule 6. (Pet. 242-43.)

Rodriguez presents no federal claim for this Court to review. He acknowledges that, under these facts, neither the Fourth Amendment nor the RFPA are a basis for excluding the financial records. He instead challenges the reasoning underpinning the CCA's refusal to apply the Texas exclusionary rule. It is not the function of a federal habeas court to review a state court's interpretation of its own law. *See Charles v. Thaler*, 629 F.3d 494, 500 (5th Cir. 2011).

Alternatively, any Fourth Amendment claim is barred. The United States Supreme Court has held that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment

claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Stone v. Powell*, 428 U.S. 465, 494 (1976). The Fifth Circuit applies this bar as long as the state gives the defendant an opportunity to litigate the issue, whether or not the defendant takes advantage of the opportunity. *ShisInday v. Quarterman*, 511 F.3d 514, 525 (5th Cir. 2007) (citing *Janecka v. Cockrell*, 301 F.3d 316, 320-21 (5th Cir. 2002)). *Stone* forecloses review absent allegations that the processes provided by a state are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims on their merits. *Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006)(quoting *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980)).

Rodriguez does not contend that his opportunity to litigate this claim was deficient. He contends in his Reply that the *Stone* bar was abrogated by the passage of the AEDPA, citing *Carlson v. Ferguson*, 9 F. Supp. 2d 654 (S.D. W.Va. 1997). Rodriguez provides no Supreme Court opinion holding that the AEDPA abrogated the rule in *Stone*. Furthermore, this Circuit has continued to apply *Stone* after the AEDPA to capital cases. *E.g., Busby v. Dretke*, 359 F.3d 708, 722-23 (5th Cir. 2004); *Davila v. Davis*, ___ F. App'x ___, 2016 WL 3171870 at *23 (5th Cir. 2016); *see also Newman v. Wengler*, 790 F.3d 876, 878-79 (9th Cir. 2015) (rejecting argument made under *Carlson v. Ferguson* that AEDPA abrogated *Stone* doctrine). Accordingly, the Fourth Amendment claim is barred by *Stone*. For all of these reasons, the Court denies Claim 25.

CONCLUSION

For the reasons stated above, the Court finds:

1. Rodriguez has failed to demonstrate that the state court's adjudication of his claims was contrary to, or an unreasonable application, of Supreme Court law and the instant application for writ of habeas corpus should be **DENIED** and **DISMISSED with prejudice**.

2. All relief not expressly granted should be **DENIED** and all pending motions not previously ruled on should be **DENIED**.

3. Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), a certificate of appealability should be **DENIED**. For the reasons set forth herein, Rodriguez has failed to show that reasonable jurists (l) would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El*, 537 U.S. at 338.

4. Rodriguez may proceed in forma pauperis if he files a notice of appeal. 18 U.S.C. § 3006A(7).

SO ORDERED.

Dated August 1, 2016.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE