UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL HENRY BLUE,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. H-05-2726
	§	
RICK THALER,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

In 1995, a Texas jury convicted Carl Henry Blue ("Blue") of capital murder. A separate punishment hearing resulted in a death sentence. After unsuccessfully challenging his conviction and sentence in state court, Blue sought federal habeas review. In 2000, this Court granted a conditional writ of habeas corpus on Blue's claim that racial discrimination tainted his sentencing proceeding. A new punishment hearing in 2001 resulted in a second death sentence. After a second full round of post-conviction proceedings, Blue filed the instant federal petition for a writ of habeas corpus.

Blue raises eighteen claims of error, most of which relate to his second punishment hearing. Respondent Rick Thaler seeks summary judgment. This Court has considered the record, the pleadings, and the applicable law – placing particular emphasis on the application of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Pursuant to that review, the Court finds that Blue has not shown an entitlement to federal habeas relief.

FACTUAL BACKGROUND

Blue left his College Station apartment in the early morning hours of August 19, 1994. He walked seven miles to Bryan where the victim, his ex-girlfriend Carmen Richards-Sanders, lived. Blue entered a convenience store across the street from her apartment complex three

times: once to purchase a beer, once to pay for fifty cents worth of gasoline, and once to obtain a soda cup.

At the same time, the victim readied herself for work. She was not alone in the apartment; Larence Williams was an eyewitness to the events that would unfold. A few minutes before eight o'clock, the victim prepared to leave. As Mr. Williams wished her goodbye, she unlocked the door. Blue's eligibility for a death sentence depended on the events transpiring in the next few seconds. At trial, the State of Texas argued that, after the victim unlocked the door but before she could open it, Blue threw the door open from the outside.

Blue has never disputed his identity as the killer. In fact, only hours after the crime Blue turned himself into the police and confessed. During closing arguments at trial, his attorneys emphatically stated: "We're not going to suggest to you that Carl Blue did not murder Carmen Richards. He did. And I agree, it would be ridiculous for us to suggest that he did not." Tr. Vol. XVII at 713.[1] Blue's defense in the 1995 trial of his guilt instead focused on whether his crime amounted to a capital, rather than simple, murder. In essence, the defense argued that "he did not murder her in the course of a burglary." Tr. Vol. XVII at 713.

Texas law authorizes a capital prosecution only under limited circumstances, including a murder "in the course of committing or attempting to commit . . . burglary[.]" TEX. PENAL CODE § 19.03(a)(2). The parties at trial hotly disputed whether Blue entered the victim's apartment pursuant to a burglary, meaning that "without the effective consent of the owner" he "enter[ed] a habitation . . . with the intent to commit a felony . . . or an assault." TEX. PENAL CODE § 30.02(a). Here, the burglary precursor to Blue's conviction depended on (1) whether he had

[1] Attorneys John Quinn and Robertson Neal represented Blue in his initial trial. The Court will refer to Blue's attorneys conjunctively with the term "original trial counsel" or a similar phrase when necessary to differentiate them from the attorneys who represented him in his second trial.

permission to enter the victim's apartment and (2) whether he, not the victim, actually opened the door. Trial counsel's defensive strategy disputed both of those elements.

The parties disagreed as to whether Blue still had permission to enter the victim's apartment. Earlier that year, Blue and the victim had dated, though their relationship had been tumultuous.[2] While they had interacted after they broke up, the evidence did not imply that Blue had the victim's continuing consent to enter her apartment. Notwithstanding, the defense unsuccessfully argued that Blue had permission to be inside the apartment when he committed the murder.

The defense also argued that Blue did not force open the apartment door. In his confession to the police, Blue claimed that the victim had opened the door herself. At trial, Mr. Williams testified that he was standing in the kitchen when the victim went to leave. From his vantage point, he could see her unlock the door. The door "came open real fast like somebody had pushed or was leaning on the door[.]" Tr. Vol. XV at 286. The defense strenuously argued that Mr. Williams "lied . . . when he said that he could see the front door from where he was standing, inside that apartment[.]" Tr. Vol. XVII at 715-16. The jury found beyond a reasonable doubt that Blue forced his way into the apartment without permission.

The defense did not seriously question the events that transpired once Blue opened the door. Blue entered the apartment, doused the victim with gasoline, and set her on fire with a lighter. As Mr. Williams stepped out of the kitchen, Blue threw gasoline on him and also lit him

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[2] On his initial direct appeal, the Court of Criminal Appeals described their turbulent relationship:

> [Blue] and the deceased victim, Carmen Richard-Sanders (hereinafter Richards), lived together for four or five months during the early part of 1994. However, their relationship was apparently fraught with arguments. [Blue] even broke Richard's nose once at a family reunion after which he threatened her. "If you ever mess off on me, I'll kill you." [Blue] also threatened to beat Richard's sister. Richards broke off her relationship with [Blue] around early summer 1994 and moved into her own apartment in College Station. Soon after her move, Richards met and began dating the surviving victim, Larence Williams[.]

Blue v. State, N0. 72,106 at *1 (Tex. Crim. App. Dec. 4, 1996).

on fire. Blue then turned to the victim, emptied the last bit of gasoline from his cup, and said "I told you I'm gonna get you." Tr. Vol. XV at 288. Blue "threw the cup down on the . . . floor and left." Tr. Vol. XV at 292.

Mr. Williams rolled on the floor, but could not entirely put out the flames. He struggled to the bathroom shower and extinguished the remaining sparks. The victim, still burning, stumbled into the bathroom. Mr. Williams helped her into the shower. Because Blue's assault had also set the room aflame, Mr. Williams and the victim staggered from the apartment. Mr. Williams spent two weeks in the hospital recovering. Blue's assault caused second degree burns on 40% of the victim's body. She died 19 days later from multi-system organ failure resulting from her burns.

A jury convicted Blue of capital murder. After a separate punishment hearing, he received a death sentence.

PROCEDURAL HISTORY

The Texas Court of Criminal Appeals affirmed Blue's conviction and sentence on both direct appeal and habeas review. As previously noted, in 2000 this Court conditionally granted habeas corpus relief from Blue's sentence because an expert witness told his jury that a defendant's race should factor into deciding whether death is an appropriate punishment. (*Blue v. Johnson*, H-99-350, Docket Entry No. 29 at 15-17). The Court, however, also extensively considered and rejected several other challenges to both Blue's conviction and sentence.

The trial court held a new sentencing hearing in 2001.[3] The trial court instructed the jury that two special issue questions would determine Blue's sentence:

Special Issue No. 1

[3] Attorneys John E. Wright and William F. Carter represented Blue in the second trial of his punishment.

> Is there a probability that the defendant, Carl Henry Blue, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Special Issue No. 2
>
> 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 rather than a death sentence be imposed?

Clerk's Record at 796-97. The jury answered the special issues in a manner requiring the imposition of a death sentence. Blue unsuccessfully litigated a second round of state appellate and habeas relief.

In 2005, Blue filed a skeletal petition for a federal writ of habeas corpus. (Docket Entry No. 2). This Court stayed Blue's action for the state courts to decide whether mental retardation precludes his execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). (Docket Entry No. 5). After considering his pleadings and oral argument, the Court of Criminal Appeals refused to allow Blue to litigate his *Atkins* claim in a successive state habeas application. *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007).

Blue returned to federal court and filed a petition raising 18 grounds for relief. (Docket Entry No. 12). The Court condenses Blue's claims into the following categories:

1. Mental retardation precludes the State of Texas from executing Blue under *Atkins v. Virginia*, 536 U.S. 304 (2002) (claim one).

2. Texas' means of putting mitigation evidence before the jury violates the federal constitution because it requires the jury to disregard certain categories of evidence (claim two); it does not place a burden of proof on the State (claim ten); and the jury did not have to find the absence of mitigating factors beyond a reasonable doubt (claim thirteen).

3. Blue is actually innocent of his capital murder conviction (claim three).

4. The jury from Blue's second punishment hearing could not consider whether residual doubt remained from his conviction because the jury instructions gave no room to reconsider his guilt (claims four and nineteen) and the mitigation special issue fails to provide a vehicle for the consideration of any residual doubt about the commission of the crime or cause of death (claim nine).

5. The prosecution presented false and misleading testimony from witnesses (claim five).

6. The attorneys in the 1995 trial of Blue's guilt provided ineffective representation (claims six and fifteen).

7. Insufficient evidence supported the jury's decision that Blue would be a future danger to society (claim seven).

8. Blue's lawfulness after his second trial invalidates the jury's prediction that he would be a future societal danger. (claim eight).

9. Texas law unconstitutionally prevented the jury from knowing the effect a single holdout would have on the punishment verdict (claims eleven, twenty, and twenty-one).

10. The State of Texas denied Blue's right to a jury selected from a fair cross-section of society (claim twelve).

11. The indictment against Blue was defective because it failed to include the factors that the State would use to prove his deathworthiness (claim fourteen).

12. Racism tainted the tribunal that presided over Blue's sentence (claim sixteen).

13. The Court of Criminal Appeals does not meaningfully review the jury's answers to the special issues (claim seventeen).

14. The trial court improperly dismissed a potential juror for her views on the death penalty (claim eighteen).

Respondent initially filed an answer and a motion for summary judgment on November 19, 2007. (Docket Entry No. 15). Blue filed a request for additional examination into his possible mental retardation. This Court granted that request. (Docket Entry No. 19). As

unresolved issues became apparent, the Court denied the Respondent's initial summary judgment motion (Docket Entry No. 25).

On December 3, 2008, Blue reported that his expert had concluded the testing for mental retardation. (Docket Entry No. 31). The Court ordered the parties to provide renewed briefing based on the newly developed information. (Docket Entry No. 32). On September 21, 2009, Respondent filed briefing on the *Atkins* claim. (Docket Entry No. 41). Respondent filed a renewed answer and a new motion for summary judgment on December 14, 2009. (Docket Entry No. 45). Blue filed a reply on April 30, 2010. (Docket Entry No. 52).

Blue's case comes before the Court with a well-developed record. The AEDPA strictly confines factual development on federal habeas review. Within those limitations, the Court has allowed Blue to expand the factual support for his mental retardation claim. The Court has also allowed the parties sufficient opportunities to brief the issues. The Court finds that Blue has not shown that the AEDPA permits an evidentiary hearing in this case, *see* 28 U.S.C. § 2254(e)(2), or that one is necessary for a fair resolution of his claims. The issues are now ripe for adjudication.

GOVERNING LEGAL STANDARDS

Habeas corpus review provides the federal courts with an important, but limited, examination of state criminal judgments. Nevertheless, "[t]he States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982); *see also Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

Accordingly, principles of finality, comity, and federalism all underlie the limited scope of federal habeas review. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *see also Wright v. West*, 505 U.S. 277, 293 (1992). Recognizing "the profound societal costs that attend the exercise of habeas jurisdiction," *Smith v. Murray*, 477 U.S. 527, 539 (1986), "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The constricted nature of federal habeas review frames this Court's consideration of Blue's petition, both on procedural and substantive grounds.

I. Procedural Impediments to Full Federal Review

As a precursor to federal review of his conviction and sentence, Blue must show that he presents his claims in a procedurally adequate manner. Respondent argues that claims are before the Court in a procedurally improper posture. Federal law requires that an inmate exhaust his federal habeas claims in the highest state court before habeas relief becomes available. *See* 28 U.S.C. 2254(b)(2); *Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir. 1999); *Burns v. Estelle*, 695 F.2d 847, 849 (5th Cir. 1983). The related procedural bar doctrine, which embodies federal acquiescence to principles of comity and federalism, prevents consideration of habeas claims if an inmate has not properly exhausted his claims. *See Coleman v. Thompson*, 501 U.S. 722, 729, 732 (1991) (finding that federal courts will not consider a claim when "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance"); *Dretke v. Haley*, 541 U.S. 386, 392-93 (2004) ("[F]ederal courts will not disturb state court judgments based on adequate and independent state law procedural grounds."). Respondent argues that the procedural bar doctrine prevents federal consideration of several claims.

Judicial accommodation prevents a state procedural default from becoming an insurmountable barrier to federal review. The Supreme Court has held that

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

Coleman, 501 U.S. at 750.[4] A petitioner shoulders the burden of overcoming the procedural hurdles. *See McCleskey*, 499 U.S. at 494-95. The Court will consider the procedural adequacy of each challenged claim before addressing its merits.

II. Standards Governing Federal Review of the Merits

The AEDPA gives effect to many traditional limits on federal habeas review. Most notably, a deferential review of state court decisions exists "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002); *see also Woodford v. Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases and to further the principles of comity, finality, and federalism[.]"). To that end, the AEDPA forbids habeas relief on issues "adjudicated on the merits" in state court unless the state decision "was contrary to, or an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In practice, these standards generously defer to state adjudication. The Supreme Court has held that a state court decision is only "contrary to" federal precedent if: (1) the state court's

[4] A fundamental-miscarriage-of-justice exception exists "where a constitutional violation has 'probably resulted' in the conviction of one who is 'actually innocent[.]'" *Haley*, 541 U.S. at 393 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Blue does not rely on actual innocence to overcome any procedural bar.

conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 413 (2000); s*ee also Cone,* 535 U.S. at 698; *Early v. Packer*, 537 U.S. 3, 7-8 (2002). A state court unreasonably applies federal law (1) when it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or (1) "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams,* 529 U.S. at 407.

The AEDPA also affords significant deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2), "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A federal habeas court must presume the underlying factual determinations of the state court to be correct unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El*, 537 U.S. at 341.

Aside from the AEDPA standards, judicial tenets may preclude federal habeas relief. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) (noting that no Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]"); *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). Judicial doctrines,

such as the harmless-error doctrine and the non-retroactivity principle, constrict the habeas writ's availability. *See Thacker v. Dretke*, 396 F.3d 607, 612 n.2 (5th Cir. 2005).[5]

With those stands in mind, the Court turns to Blue's federal habeas claims.

ANALYSIS OF BLUE'S GROUNDS FOR RELIEF

I. Mental Retardation (claim one)

Blue claims that mental retardation makes him exempt from execution under the Eight Amendment. This Court has allowed significant latitude in the development of this claim, potential procedural hurdles notwithstanding. Respondent now argues that Blue has not put forth his *Atkins* claim in a procedurally actionable manner. In the alternative, Respondent contends that Blue has not shown that he is mentally retarded. As discussed below, the Court finds that Blue's *Atkins* claim is properly before the Court, but meritless nonetheless.[6]

A. Procedural Bar

Respondent argues that Texas law prevents this Court from reaching the merits of Blue's *Atkins* claim. As previously discussed, federal law respects the administration of state procedural rules. If an inmate fails to comply with well-established state requirements for attacking his conviction or sentence, and a state court thereby finds that he has defaulted consideration of that issue, a procedural bar also forecloses federal review. Respondent argues

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[5] The harmless-error doctrine allows relief only when trial errors "ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht*, 507 U.S. at 629); *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome."). The non-retroactivity doctrine flowing from *Teague v. Lane*, 489 U.S. 288 (1989), prevents federal courts from creating new constitutional law. *See Horn*, 536 U.S. at 272.

[6] Blue argues that this Court cannot deny relief on his *Atkins* claim because "[t]he absence of mental retardation is simply an element of proof necessary to support the imposition of death as a penalty," (Docket Entry No. 52 at 11), thus subject to the beyond-a-reasonable doubt burden under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). The Fifth Circuit has rejected the argument that the State must disprove mental retardation beyond a reasonable doubt. S*ee Williams v. Quarterman*, 293 F. App'x 298, 301 n.1 (5th Cir. 2008); *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003).

that the Court of Criminal Appeals' refusal to consider the merits of Blue's *Atkins* claim prevents federal review.

Blue first advanced an *Atkins* claim in federal court, even though the legal basis for that claim existed previously. Blue subsequently tried to raise his *Atkins* claim in a successive state habeas application. In a comprehensive opinion, the Court of Criminal Appeals found that the abuse-of-the-writ provision of Texas law, codified in TEX. CODE CRIM. PRO. art. 11.071 § 5(a), barred Blue from filing another habeas application on that basis. Under section 11.071§ 5(a) "a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing" one of three exceptions:

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

TEX. CODE CRIM. PRO. art. 11.071 § 5. Blue argued that the Court of Criminal Appeals could reach the merits of his successive pleading under section 5(a)(3) because mental retardation made him actually innocent of his death sentence.[7] Respondent maintains that the Court of

[7] Blue also argued that "because the Eighth Amendment prohibition against executing the mentally retarded is absolute, we should suspend all notions of waiver, forfeiture, procedural default, and abuse of the writ, and abandon any otherwise-valid interest the State may have in the finality of the judgment, and permit him to proceed with his claim, notwithstanding whatever statutory impediments exist to his raising the claim in a subsequent writ application." *Ex parte Blue*, 230 S.W.3d 151, 153 (Tex. Crim. App. 2007). The Court of Criminal Appeals rejected Blue's proposed exemption from state procedural law. Blue did not argue that new law allowed for successive habeas proceedings under section 5(a)(1). The Court of Criminal Appeals found that Blue would not qualify for the section 5(a)(1) exception because the legal basis for the *Atkins* claim was available during his first state habeas

Criminal Appeals' dismissal of Blue's successive application operates as an adequate and independent procedural bar to federal review.

The Court of Criminal Appeals' response to the *Atkins* decision, however, has been problematic for determining whether a federal procedural bar applies. Since 1994, the Fifth Circuit has found that a dismissal under 11.071 §5 will generally bar federal review. *See Barrientes v. Johnson*, 221 F.3d 741, 759 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195-96 (5th Cir. 1997); *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995). Recently, however, the Fifth Circuit has cautioned that a federal court must evaluate whether the state court "need[ed] to consider or decide the merits of [the inmate's] constitutional claims in reaching its decision to dismiss those claims as an abuse of the writ pursuant to Article 11.071, Section 5" or whether the "perfunctory dismissal of the claims that suggests that it actually considered or ruled on the merits." *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008).[8]

Here, the Court of Criminal Appeals asserted that it made a purely procedural decision when dismissing Blue's *Atkins* claim.[9] Nonetheless, the Court of Criminal Appeals arguably

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action. *See id.* at 156.

[8] One recent Fifth Circuit case would prevent any dismissal under 11.071 § 5(a) from barring federal review unless the Court of Criminal Appeals employs the phrase "abuse of the writ," *Balentine v. Thaler*, ___ F.3d ___, 2010 WL 2433243 (5th Cir. June 18, 2010), a duplicative requirement because "article 11.071 [is] a codification of the Texas abuse-of-the-writ doctrine[.]" *Barrientes*, 221 F.3d at 759.

[9] The Court of Criminal Appeals distinguished its threshold review of an *Atkins* claim's underlying facts from an adjudication of the merits:

> We do not construe Section 5(a)(3), however, to require that the subsequent applicant must necessarily convince this Court by clear and convincing evidence, at the threshold, that no rational factfinder would fail to find he is mentally retarded. Section 5(a)(3) of Article 11.071 does not authorize this Court to grant relief on a subsequent writ application, but only to review the adequacy of the pleading. The statutory scheme as a whole does not call upon us to make a determination of the merits of a subsequent writ application at this juncture. All we can do at this stage of the proceeding is to issue an order, either finding that the requirements under Subsection 5(a)(3) have been met, and the writ should issue and proceed in the ordinary course as an initial writ would, or that the requirements have not been met, and the writ should be dismissed. It would be anomalous to require the applicant to actually convince us by clear and convincing

intermixed a merits-based analysis into its review. The *Blue* court was reluctant to allow any capital inmate, regardless of intellectual ability, to claim that mental retardation made him actually innocent and thus able to proceed in a successive habeas action under 11.071 § 5(a)(3):

> We reject any assertion that, because the Eighth Amendment erects an absolute bar to executing the mentally retarded, an applicant must be permitted to proceed with subsequent writ application on no more than a bare allegation of mental retardation, whether or not he would be allowed to proceed under the express provisions of Article 11.071, Section 5(a)(3).

Blue, 230 S.W.3d at 159. To that end, the Court of Criminal Appeals held that "*some* threshold of proof of mental retardation is appropriate" to filter out completely meritless *Atkins* claims in the 5(a)(3) context. *Id.* at 159 n.36. The *Blue* court imposed a judicial gloss over the section 5(a)(3) requirements, forcing an inmate to bring clear and convincing evidence of retardation before proceeding in a successive state habeas action. The question before the Court is whether that *prima facie* showing is an operation of adequate and independent federal law or whether it is a review of the merits.

The Court of Criminal Appeals extensively discussed Blue's evidence and found that he did not make an adequate case for retardation. Nonetheless, the exact nature of the Court of Criminal Appeals' decision, whether procedural or merits-based, is not clear. In some cases, the Court of Criminal Appeals may treat an inmate's efforts to comply with section 5(a) as pleading requirement that only ascertains whether adequate facts encourage additional inquiry. Often, a summary dismissal by reference to section 5(a)(3) may not signal any review of the merits.[10]

> evidence at this stage. Indeed, if we were to require that the subsequent application actually convince us to that level of confidence, there would be no need to return the application to the convicting court for further proceedings.

Blue, 230 S.W.3d at 162-63.

[10] The Court does not hold that the subsection considered by the Court of Criminal Appeals, TEX. CODE CRIM. PRO. art. 11.071 §5(a)(3), cannot under other circumstances operate as an adequate and independent procedural bar to federal review.

Here, the detailed and extensive discussion, however, makes it appear that the Court of Criminal Appeals intertwined the merits of Blue's *Atkins* claim into its procedural ruling. *See, e.g., Ruiz v. Quarterman*, 504 F.3d 523, 528 (5th Cir. 2007). The Court of Criminal Appeals expansively reviewed, considered, and weighed the evidence from Blue's *Atkins* claim in a manner similar to an adjudication of the merits. Thus, the Court will assume that the Court of Criminal Appeals ruled on the merits of Blue's *Atkins* claim and that no procedural bar impedes federal review.[11]

B. Atkins *Jurisprudence*

In *Atkins v. Virginia*, 536 U.S. 304, 321(2002), the Supreme Court found under the Eighth Amendment's "evolving standards of decency" review that "death is not a suitable punishment for a mentally retarded criminal." The *Atkins* Court, however, declined to define which murderers would be exempt from execution. The Supreme Court left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)); *see also Bobby v. Bies*, ___ U.S. ___, 129 S. Ct. 2145, 2150 (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].'"); *Moore v. Quarterman*, 454 F.3d 484, 493 (5th Cir. 2006) ("[T]he *Atkins* Court did not adopt a particular criteria for determining whether a defendant is mentally retarded[.]").

[11] The absence of a procedural bar, however, does not necessarily entitle a petitioner to *de novo* review. The Fifth Circuit has found that such a dismissal is a "decision on the merits" and thus the "AEDPA's deferential standard of review applies," *Eldridge v. Quarterman*, 325 F. App'x 322, 324 (5th Cir. 2009), at least with respect to the information before the state court. However, "[c]ourts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review." *Berghuis v. Thompkins*, ___ U.S. ___, 2010 WL 2160784, at *14 (2010). This Court's adjudication would not be different under *de novo* review.

The Texas State Legislature has not enacted any statute that gives effect to the *Atkins* decision, leaving its interpretation to the courts. In *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), the Court of Criminal Appeals decided that "[u]ntil the Texas legislature provides an alternative definition of 'mental retardation' for use in capital sentencing," Texas courts will adjudicate *Atkins* claims under the framework established by the American Association on Mental Retardation ("AAMR"),[12] in conjunction with those standards contained in Texas' Persons with Mental Retardation Act ("PMRA"), TEX. HEATH & SAFETY CODE § 591.003(13).

As quoted in *Atkins*, the AAMR defines mental retardation as follows:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Atkins, 536 U.S. at 309 n.3 (quoting AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) ("AAMR 9th")).[13] Thus, three indispensable components underlie a finding of mental

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[12] The American Association on Mental Retardation (now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD")) currently uses the term "intellectual disability" instead of mental retardation. *See* Definition of Intellectual Disability, http://www.aamr.org/content_100.cfm?navID=21. This is only the most-recent terminology in the psychological community's evolving understanding of mental retardation. *See* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 20-23 (10th Ed. 2002) ("AAMR 10th") (outlining the various definitions of and terms for mental retardation used by the mental health community in the last century). For continuity and clarity, the Court will use the terms AAMR and mental retardation throughout this Memorandum and Order.

[13] The *Atkins* Court relied on the AAMR 9th edition's understanding of mental retardation. In May 2002, the AAMR released a 10th edition that slightly modified its definition: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AAMR 10TH at1 (10th Ed. 2002). In addition to the AAMR, the *Atkins* Court also referenced the American Psychiatric Association's ("APA") definition of mental retardation. *See Atkins*, 536 U.S. at 309 n.3 (quoting DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)). The *Briseno* opinion did not rely on the APA standards. The APA and the 10th Edition AAMR standards for mental retardation, however, contain substantially the same criteria for determining mental retardation as in *Atkins* *See Atkins*, 536 U.S. at 309 n.3 (noting the similarity between the professional standards). To date, the Fifth Circuit "has never distinguished between the AAMR 9th and the AAMR 10th." *Moore v. Quarterman*, 342 F. App'x 65, 72 n.6 (5th Cir. 2009). The PMRA, which differs only slightly from the

retardation: (1) substantial limitations in intellectual functioning; (2) significant limitations in adaptive skill areas; and (3) manifestation of those limitations before age 18 *See Clark v. Quarterman*, 457 F.3d 441, 446 (5th Cir. 2006). "Determination of whether [a petitioner] satisfies any of these elements is a question of fact." *Eldridge v. Quarterman*, 325 F. App'x 322, 325 (5th Cir. 2009).

Here, the state habeas court referenced the appropriate standards in adjudicating Blue's *Atkins* claim. This Court will review the evidence, including that interpreted by mental-health experts for the State of Texas and for Blue, to decide if the Court of Criminal Appeals unreasonably applied federal law in denying his *Atkins* claim.

C. Substantial Limitations in Intellectual Functioning

To qualify for a diagnosis of mental retardation, an individual must first show substantial limitations in intellectual functioning. The psychological profession recognizes IQ as a key indicator of mental retardation, defining significantly subaverage general intellectual functioning as "an IQ of about 70 or below (approximately 2 standard deviations below the mean)." *Briseno*, 135 S.W.3d at 7 n. 24; *see also Atkins*, 536 U.S. at 309 n.5. Because IQ tests typically have a five point standard error of measurement (also called a "confidence interval" or "confidence band"), a base IQ score actually represents a range that could be five points higher or lower. Accordingly, a test score of 70 may symbolize an IQ as high as 75 or as low as 65. *See* AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41-42 (Text Revision, 4th ed. 2000) (DSM-IV-TR) ("Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with

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AAMR statement, defines mental retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." TEX. HEATH & SAFETY CODE § 591.003(13).

an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning."); *Clark*, 457 F.3d at 445 ("[T]esting error, coupled with the differences between various IQ tests, mean[s] that in many cases an individual who tests as having an IQ above 70, the rough cut-off for mental retardation, may still be diagnosed as mentally retarded, and vice versa."). The psychological profession, therefore, sets 75 as the base score that may qualify for a diagnosis of mental retardation, given that the individual also meets the other two prongs of the relevant inquiry. A higher IQ score signifies borderline intellectual functioning, not mental retardation. [14]

While recognizing the standards established by professional organizations, *Atkins* did not set a threshold IQ score that would exempt inmates from execution. *See Atkins*, 536 U.S. at 317 (refusing to usurp the States' right to determine which inmates are "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus" against their execution). The Court of Criminal Appeals has questioned where to place the upper threshold of the *Atkins* protection, ultimately refusing to "answer that normative question without significantly greater assistance from the [Texas] citizenry acting through its Legislature." *Id.*[15]

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[14] The APA recognizes four categories of mental retardation: mild, moderate, severe, and profound. *See Briseno*, 135 S.W.3d at 5. Individuals with IQ scores between 55 and 70 – around 85% of the mentally retarded population – are classified as mildly mentally retarded if they satisfy the adaptive-functioning and age-at-onset criteria. *See* DSM-IV at 40-41; *see also* AAMR 10th at 31 (remarking that between 75% to 89% of the population with mental retardation is mildly mentally retarded).

[15] In *Briseno*, the Court of Criminal Appeals obsevred:

> Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt [from execution]. But, does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? Put another way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria? Is there, and should there be, a "mental retardation" bright-line exemption from our state's maximum statutory punishment?

Briseno, 135 S.W.3d at 6 (footnote omitted). Other states have provided varying responses to *Atkins*: some have not yet enacted legislation that codifies the *Atkins* decision, some explicitly adopted the standards established by professional organizations, some view an IQ of 70 as a cutoff, and others accommodate professional standards through legal analysis. *See Garcia Briseno v. Dretke*, 2007 WL 998743, at *10 (S.D. Tex. 2007) (reviewing extensively the various States' application of *Atkins*).

As a result, the Fifth Circuit has not sanctioned "a blind adherence to IQ." *Williams v. Quarterman*, 293 F. App'x 298, 311 (5th Cir. 2008) (noting that "*Briseno* itself recognizes that IQ alone is not determinative of mental retardation"). Courts take "a flexible approach to reading IQ scores," *id.* at 309, and do not require an "IQ test specifically, that is, entirely alone, at the core, or as any singular threshold, to provide the basis for a finding of mental retardation." *Morris v. Dretke*, 413 F.3d 484, 497 (5th Cir. 2005); *see also Hall v. Quarterman*, 534 F.3d 365, 395 (5th Cir. 2008) (cautioning not "to commit the ultimate decision of mental retardation to the experts" alone). Courts, therefore, look at the IQ scores in the context of all available evidence about an inmate's intellectual capacity, "based upon all of the evidence and determinations of credibility." *Gallo v. State*, 239 S.W.3d 757, 777 (Tex. Crim. App. 2007).

An inmate's IQ score, however, can disqualify him from *Atkins* protection. While the Fifth Circuit has specified that "mental retardation *can be found* in range of 70-75," *Moore v. Quarterman*, 342 F. App'x 65, 68 n.5 (5th Cir. 2009) (emphasis added), the Fifth Circuit has only granted relief on *Atkins* claims where an inmate presents at least one base score below 70.[16] The Fifth Circuit has denied relief when an inmate has IQ scores both under and over 70[17] and when all his scores fall above 70.[18] Even when an inmate has scored below 70, the Fifth Circuit

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[16] *See Moore v. Quarterman*, 342 F. App'x 65, 68 (5th Cir. 2009) (finding significantly subaverage intellectual functioning with IQ scores ranging from 66 to 76); *Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) (finding mental retardation with scores as low as 66).

[17] *See Hall v. Thaler*, 597 F.3d 746, 746-47 (5th Cir. 2010) (scores ranging from 67 to 84); *Thomas v. Quarterman*, 335 F. App'x 386, 388-89 (5th Cir. 2009) (three IQ tests scoring 67, 75, and 77); *Rosales v. Quarterman*, 291 F. App'x 558, 561 (5th Cir. 2008) (a pre-*Atkins* score of 82 and a post-*Atkins* scores of 61 and 73); *Moore v. Quarterman*, 517 F.3d 781, 784 (5th Cir. 2008) (finding no mental retardation with full-scale IQ scores of 63, 68, 72, 76, and 76); *Morris v. Quarterman*, No. 07-70012 (5th Cir. Apr. 17, 2008) (pre-*Atkins* score of 97 and post-*Atkins* scores of 53 and 64); *Perkins v. Quarterman*, 254 F. App'x 366, 369 (5th Cir. 2007) (scores ranging from 66 to 80); *Taylor v. Quarterman*, 498 F.3d 306, 307-08 (5th Cir. 2007) (pre-*Atkins* score of 75 and post-*Atkins* scores of 65 and 69); *Woods v. Quarterman*, 493 F.3d 580, 585-86 (5th Cir. 2007) (pre-*Atkins* scores of 78 and 80 and post-*Atkins* score of 68); *Clark v. Quarterman*, 457 F.3d 441, 445-46 (5th Cir. 2006) (pre-*Atkins* score of 74 and post-*Atkins* scores of 65 and 68).

[18] *See Pierce v. Thaler*, ___ F.3d ___, 2010 WL 1532738, at *13 (5th Cir. 2010) (WAIS-III score of 70); *Williams v. Quarterman*, 293 F. App'x 298, 310-11 (5th Cir. 2008) (three different IQ tests scoring a 70 or 71);

has found no mental retardation if the circumstances show that the inmate has exaggerated his deficits.[19] In sum, "subaverage intellect . . . is typically established by looking to IQ tests such as the Wechsler Adult Intelligence Scale (WAIS) and finding a score of 70 or below." *Thomas v. Quarterman*, 335 F. App'x 386, 388 (5th Cir. 2009). With that background in mind, the Court finds that Blue has not shown any base score falling within the range eligible for a diagnosis of mental retardation.

1. Blue's evidence

Concerns about Blue's possible intellectual disability first arose after the *Atkins* decision. Before that time, no mental health professional had identified that he may be mentally retarded. When Blue filed a successive state habeas application, he did not support his claim with IQ testing. To show subaverage intelligence, Blue instead relied on (1) his poor academic achievement in school; (2) unnotarized statements from family members suggesting that Blue was not intelligent; and (3) a statement by Dr. James Patton who opined that the anecdotal evidence could support an *Atkins* claim. *See Blue*, 230 S.W.3d at 164-65. To that point, the only evidence of Blue's IQ came from the trial transcript. At his 2001 punishment trial the defense called Dr. Windell Dickerson as a witness to rebut the claim that Blue would be a future societal danger. After performing "a few subtests in the Verbal portion of the original WAIS test," Dr. Dickerson estimated that Blue had an IQ of between 75 and 80.[20] Given that record, the Court of Criminal Appeals found that Blue did not raise a threshold question about mental retardation: "Even unchallenged by evidence from the State, [Blue's] proof, even if true, is insufficient

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Eldridge v. Quarterman, 325 F. App'x 322, 325 (5th Cir. 2009) (scores ranging from 72 to 112).

[19] *See Moreno v. Dretke*, 450 F3d 158, 165 (5th Cir. 2006) (post-*Atkins* score of 64 with substantial testimony that it underestimated his abilities).

[20] While the Texas Court of Criminal Appeals did not mention that information, Dr. Walter Quijano testified in Blue's 1995 trial that he suffered from a moderate learning disability, but was not retarded.

reasonably to convince us that no rational factfinder would fail to conclude he was mentally retarded to a level of confidence by clear and convincing evidence." *Blue*, 230 S.W.3d at 166.

After Blue's return to federal court, this Court liberally authorized additional development of his *Atkins* claim. (Docket Entry No. 19). As a result, Dr. Gilda Kessner, a psychologist licensed to practice in Texas, has examined Blue on two occasions. In February 2008, Dr. Kessner administered the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III") test to Blue. While "IQ tests differ in content and accuracy," *Briseno*, 135 S.W.3d at 7 n.24, the *Atkins* court recognized the WAIS-III as "the standard instrument in the United States for assessing intellectual functioning[.]" *Atkins*, 536 U.S. at 308 n. 5; *see also Thomas*, 335 F. App'x at 391 ("[T]he WAIS-III [was] the current 'gold standard' for assessing intellectual abilities."). Blue achieved a Full Scale IQ score of 76. He scored a 76 on the Verbal Scale and a 79 Performance Scale, which placed him in the 5th to 8th percentile. (Docket Entry No. 26, Exhibit A).[21] None of Blue's WAIS-III test scores without adjustment would support a diagnosis of mental retardation.

A few months after Dr. Kessner's initial testing, a new version of the WAIS test – the WAIS-IV – became available for use by the psychological profession. Dr. Kessner recommended reevaluating Blue with the revised instrument. This Court authorized the testing. (Docket Entry No. 27). In November 2008, Dr. Kessner administered the new WAIS-IV. The second round of testing resulted in Full Scale score of 77, with the following numbers on

[21] Dr. Kessner also administered three additional testing instruments. On the Wide Range Achievement Test – Fourth Edition ("WRAT-4"), a "widely used instrument for measuring academic skills, Blue's scores "reflect[ed] very low academic functioning." Dr. Kessner reported that her administration of the Kauffman Functional Academic Skills Test ("K-FAST") – a "relatively short, individually administered nationally normed measure of competence in reading and arithmetic as applied in daily life" – resulted in scores "consistent with the scores obtained on the WRAT-4 and the WAIS-III." Her administration of the Mini-Mental State Examination ("MMSE"), "a brief standardized screening instrument intended to sample a limited number of cognitive functions," did not conclusively suggest cognitive impairment.

subtests: Verbal Comprehension Index – 78, Perceptuial Reasoning Index – 86, Working Memory Index – 80, and Processing Speed Index – 81. Dr. Kessner reported the confidence interval for this testing as between 72 and 81.[22]

Dr. Kessner had expected that Blue's scoring on the WAIS-IV would be lower than on the WAIS-III. Instead, Blue scored one point higher. Dr. Kessner cautioned that "[t]he increase in scores does not reflect improvement per se but is due to the fact that the person has previously taken the same or a similar test so that there is a risk of inflation in the score from the second administration" due to the influence of "practice effect." (Docket Entry No. 31, Exhibit A at 4-5).[23] Nonetheless, Dr. Kessner considers Blue to be mentally retarded, largely because she estimated that his WAIS-IV score should have been around 73.

Blue also supports his *Atkins* claim with a declaration recently produced by Dr. Stephen Greenspan. Dr. Greenspan did not examine Blue, but instead bases his conclusions "entirely on [his] perusal of the various documents and reports [already submitted to the Court] and on [his] knowledge and expertise in the field of mental retardation." Dr. Greenspan opines that Blue's IQ scores on the WAIS-III may serve as a predicate for mental retardation because of the "Flynn Effect (the need to correct for IQ norm obsolescence)." Dr. Greenspan concurs that Dr. Kessner formed a "plausible hypothesis" in suggesting that Blue's WAIS-IV score underreported his true IQ. Even without adjusting Blue's scores, Dr. Greenspan advocates that Blue's WAIS-III score

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[22] Dr. Kessner also performed other testing in November 2008. Dr. Kessner administered the Wide Range Achievement Test – Fourth Edition, Green Form (WRAT-4). The WRAT-4 results for each subtest were as follows: Word Reading - 77, Sentence Composition – 81, Spelling – 67, Math Computation – 63, Reading Composite – 77. These scores, each having a broad confidence level that extended well-above 70, showed that Blue scored in the first to tenth percentile. Also, Dr. Kessner gave Blue the Kaufman Functional Academics Skills Test in which he scored 69 and 70 on the subtests, placing him in the second percentile of the population. Dr. Kessner opined that these scores were consistent with the WAIS-IV and WRAT-4 results. Her testing of the Mini-Mental State Examination resulted in a 25/30, above the cut-off for significant mental impairment.

[23] The record does not show that, aware of and fearing the practice effect, Dr. Kessner asked to postpone her testing until lingering influence from the WAIS-III had dissipated.

of 76 and his WAIS-IV score of 77 "are sufficiently close to the usual clinical ceiling of 75, that one should not reach a conclusion that prong one was not met, in such a high stakes context as a death penalty case, on the basis of only 1 or 2 IQ points." (Docket Entry No. 53, Exhibit A).[24]

2. Respondent's evidence

Respondent, in turn, has submitted an affidavit by Dr. J. Randall Price, a psychologist who reviewed trial testimony, Dr. Kessner's two psychological examinations, and other information but did not examine Blue personally. Dr. Price stated:

> Based on my analysis of the results of the WAIS-III and the WAIS-IV, it is my opinion that Mr. Blue's IQ consistently falls with the range of borderline intellectual functioning (IQ between 70 and 84) with specific abilities ranging from impaired to average. Individuals with mild mental retardation do not evidence such variability in specific abilities. It is my opinion that Mr. Blue's intelligence test results are inconsistent with mild mental retardation.

Moreover, Dr. Price opined that Blue's increase of one IQ point between the February and November testing was not an example of practice effect, but merely a score falling within the confidence interval for the first test. Dr. Price opines that adjusting Blue's IQ scores based only on an examiner's subjective expectation violates standard psychological practices. (Docket Entry No. 41, Affidavit of J. Randall Price, dated September 14, 2009, at 7).

3. Analysis

Blue has not provided strong evidence supporting the first prong of the *Atkins* analysis. Taken at face value, none of Blue's IQ scores fall within the potentially broad range that allows for a finding of mental retardation. When considered at their empirically purest, no test results placed Blue's IQ in the range that would possibly make him eligible for that diagnosis. As previously noted, the Fifth Circuit has not granted *Atkins* relief when an inmate does not present

[24] Dr. James R. Patton evaluated Blue for adaptive deficits, but did not give any opinion about Blue's level of intellectual functioning.

a base IQ score below 70. *See Eldridge*, 325 F. App'x at 325-26 (reviewing cases in which *Atkins* relief was unavailable to inmates whose IQ scores fell above 70). Blue's briefing, nonetheless, relies on three theories to adjust his IQ score downward into the range qualifying for a diagnosis of mental retardation: (1) the "Flynn Effect" requires modification of his WAIS-III score, rendering it a 72; (2) Dr. Kessner's opinion that his true IQ falls within the borderline range which, if skewing his score downward through the standard error of measurement, may allow for a diagnosis of mental retardation; and (3) Dr. Greenspan's personal opinion that psychological principles should allow a diagnosis of mental retardation in a "high stakes context" such as capital punishment. None of these arguments makes Blue eligible for relief under *Atkins*.

Blue argues that a psychological principle called the "Flynn Effect" requires modification of his WAIS-III score in a way that would place it in a range eligible for a diagnosis of mental retardation. "The Flynn Effect . . . posits that, over time, the IQ scores of a population rise without corresponding increases in intelligence and thus the test must be re-normalized over time." *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007). The Court of Criminal Appeals refuses to apply the Flynn Effect in *Atkins* cases. *Blue*, 230 S.W.3d at 166 ("This Court has never specifically addressed the scientific validity of the Flynn Effect. Nor will we attempt to do so now. Rather than try to extrapolate an accurate IQ by applying an unexamined scientific concept to an incomplete test score, we will simply regard the record as it comes to us as devoid of any reliable IQ score."). This comports with the federal jurisprudence stating that the Flynn Effect "has not been accepted in [the Fifth] Circuit as scientifically valid[.]" *Mathis*, 443 F.3d at 433 n.1 (citing *In re Salazar*, 443 F.3d 430, 433 n.1 (5th Cir. 2006)). The Court will not apply the Flynn Effect to lower the results of Blue's IQ scores. *See Thomas*, 335 F. App'x at 391

(finding that a state court was reasonable in its decision not to apply the Flynn Effect to IQ scores).

Blue also relies on Dr. Kessner's opinion that his IQ should actually fall within the range eligible for a diagnosis of mental retardation. Psychology apparently acknowledges that the "practice effect" – improvement from recent familiarity with a testing instrument – may artificially inflate test scores. *See Hall v. State*, 160 S.W.3d 24, 30 (Tex. Crim. App. 2004) ("The 'practice effect' occurs where a subject's knowledge of a previous IQ test affects the results of a test administered shortly thereafter."). Dr. Price, however, disputes the practice effect's influence in this case on several grounds. For instance, Dr. Price states that no research yet recognizes a practice effect between administrations of the WAIS-III and the WAIS-IV. Also, Dr. Price explains that the practice effect only applies when there is a short interval between tests. The nine-month period here should have dispelled any lingering effect from the first test. Finally, the one-point IQ difference does not necessarily mean that the practice effect improved his score, as the second score falls within the confidence interval for the WAIS-III testing.

Even taking the practice effect into consideration, Blue original WAIS-III score did not fall below 75, the cut-off for mental retardation. Assuming that Blue learned from his WAIS-III test and thereby improved the intellectual measurement in his WAIS-IV test, Dr. Kessner has not shown what established psychological principle would allow her to assume that his WAIS-III score did not represent his "true IQ."[25]

[25] Even placing Blue's IQ at 72 with the Flynn effect or 73 with Dr. Kessner's personal opinion, however, does not guarantee protection under *Atkins*. True, "sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded[.]" *Briseno*, 135 S.W.3d at 7 n. 24. Nevertheless, the Fifth Circuit has not held that a score falling within the confidence band of 70-75 guarantees a diagnosis of mental retardation. *See Clark*, 457 F.3d at 446 ("The court was not required to find Clark to be mentally retarded merely because the low end of Clark's confidence band was below 70, just as it would not be required to find that Clark could be executed on the basis that the high end of this band fell above 70."); *Morris v. Dretke*, 413 F.3d 484, 497 (5th Cir. 2005) (finding

Finally, Dr. Greenspan urges this to Court grant the habeas writ because Blue's scores are close to that required for a diagnosis of retardation, which should be enough in the capital context. Dr. Greenspan lessens the credibility of his expert opinion when he dilutes psychological principles because this is a death penalty case. Science operates independent from the process of law. Blue's IQ scores should qualify him for a diagnosis of mental retardation based on objective factors, not an expert witness's perspective on capital punishment. Here, Dr. Greenspan's focus is not on Blue's level of mental ability, but on his punishment. Dr. Greenspan's advocacy for malleable psychological standards depending on his personal view of sentencing methods lessens his credibility. The *Atkins* Court left to the States, not the psychologists, the task of defining the class of offenders who should be exempt from execution.

Blue's IQ scores do not qualify him for a diagnosis of mental retardation. As the Court will discuss in the section that follows below, Blue's IQ scores that show low intelligence, but not retardation, comport with a broader review of his life. While Blue shows some impairment in his life skills, he has not shown that the etiology is mental retardation, rather than a learning disability, a lack of effort, substance abuse, or various other sources. Because Blue has not produced an IQ score within the parameters serving as a precursor to a diagnosis of mental retardation, and "all three elements [must] exist to establish mental retardation," his *Atkins* claim fails. *Clark*, 457 F.3d at 444, In the interests of justice, however, the Court will briefly address the adaptive-deficits prong of the *Atkins* inquiry.

D. Adaptive Deficits

Even if Blue could prove that his IQ fell within the range of scores allowing for mental retardation, "clinical definitions of mental retardation require not only subaverage intellectual

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that there is "no binding authority that requires an IQ test specifically, that is, entirely alone, at the core, or as any singular threshold, to provide the basis for a finding of mental retardation").

functioning, but also significant limitations in adaptive skills[.]" *Atkins*, 536 U.S. at 318. Blue bases his argument for the existence of adaptive deficits on the expert opinion of Dr. Patton.[26] When Blue filed his federal petition and subsequently sought successive state habeas relief, Dr. Patton opined that a review of Blue's life supported, but at that stage did not yet establish, the existence of mental retardation. Dr. Patton examined school records and declarations made by those who knew Blue when he was young. Based on that review, Dr. Patton found that what Blue could not do suggested that he probably suffered from adaptive deficits. Dr. Patton, however, opined that "[o]nly a full and thorough assessment, however, [could] answer [the] question" of whether Blue was mentally retarded. [Successive State Habeas Record] at 36-37.

The Court of Criminal Appeals looked sceptically on Dr. Patton's opinion that Blue's life showed adaptive deficits:

> [Blue] has attached statements from family members, an older friend who grew up around [Blue], and one of [his] former employers. They provide sketchy, anecdotal evidence and opinions to the effect that [Blue], even from earliest times, was gullible and susceptible to getting into trouble at the instigation of others, could barely read, could not follow any but the simplest instructions, could not manage or even count money, could not fill out job applications on his own, was capable of only the most menial jobs, which he did not hold for long, and was generally incapable of planning ahead, thinking for himself, or getting by day-to-day without assistance. [Blue] does not include results from any of the available standardized scales for assessing adaptive deficits.
>
> Dr. Patton concludes that this anecdotal evidence would "support a claim of mental retardation." Conceding once again that "there are other possible explanations for these problems," he asserts that "mental retardation certainly cannot be ruled out and indeed, is strongly suggested by this pattern of adaptive deficits." But, as we have noted, [Blue] has produced little to indicate that his adaptive deficits, if any, are related to significantly subaverage general intellectual functioning.

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[26] Dr. Patton focused on Blue's adaptive abilities because, as he is not a psychologist or psychiatrist, he cannot diagnose mental retardation. "Although James Patton has authored a number of books and articles focusing on mental retardation, he cannot, for purposes of a Texas trial, diagnose someone as having mental retardation." *In re Hearn*, 376 F.3d 447, 468 (5th Cir. 2004). His inability to provide a clinical diagnosis of mental retardation, however, does not exclude his opinion as a lay witness. *See In re Hearn*, 418 F.3d 444, 446 (5th Cir. 2005).

. . .

> Dr. Patton (who nowhere in his declaration addresses [Blue's] IQ score, or lack thereof) concludes:
>
> > Viewed in isolation, none of these factors would be dispositive; taken as an overall pattern, mental retardation is strongly suspected. Only a full and thorough assessment, however, can answer that question.
>
> However, without an IQ score that is indicative of significant sub-average intelligence, the only proof [Blue] has offered is his poor school performance, which Patton admits could be the result of other factors. Without more compelling proof, we cannot readily infer that [Blue's] apparent adaptive deficits are related to significant sub-average general intellectual functioning. Such evidence, even inasmuch as it may support a strong suspicion, nevertheless falls short of evidence that could reasonably support a firm belief or conviction that [Blue] is mentally retarded. Even unchallenged by evidence from the State, [Blue's] proof, even if true, is insufficient reasonably to convince us that no rational factfinder would fail to conclude he was mentally retarded to a level of confidence by clear and convincing evidence.

Blue, 230 S.W.3d at 165-66 (footnotes omitted).

On federal review, Blue has amplified his evidence with a new affidavit from Dr. Patton. Since the conclusion of state review, Dr. Patton met with Blue once but did not perform any testing or administer any instrument that would measure his level of adaptive behavior. Instead, Dr. Patton bases his augmented opinion that Blue suffers from adaptive deficits on his discussion with Blue, interviews with seven people who knew Blue in his youth, and Blue's school records.[27]

From those interviews, Dr. Patton surmised that Blue had difficulty learning, was perceived to be unintelligent, could not follow directions, and had problems reading. Blue could not make change, had difficulty with math, and could not measure things. Blue was a gullible follower. He could not follow rules and was easily angered. Blue could not take care of himself;

[27] Dr. Patton interviewed Blue's mother, JoAnn Blue; his brothers, Londell and George Blue; his friend Oscar Davenport; a former employer, Wayne Blanford; and two former teachers, Hayward Peterson and Paul Peterson.

he had difficulty cooking, doing laundry, and running errands. While Blue held jobs, they did not require sophisticated skills but consisted mostly of physical labor.

From the school records, Dr. Patton noted that Blue attended special education classes in the elementary grades and throughout his schooling. Blue had significant difficulties meeting the requirements of his classes. Blue had to repeat one grade and was often socially promoted to the next grade level. He failed many classes in middle school and received low scores in others. One test he took in middle school placed his functioning at the third grade level. Blue dropped out of the eighth grade when he was sixteen years old. Based on his review, Dr. Patton found that "Blue demonstrated *significant* limitations in adaptive functioning prior to and after age 18 . . . in all three of the major areas of adaptive behavior: conceptual, social, and practical." (Docket Entry No. 31, Exhibit C).[28]

Respondent's expert Dr. Price disputes the evidence showing adaptive deficits. Dr. Price reviewed significant record information, including TDCJ records, prison correspondence, affidavits provided by former teachers, Blue's police statements, trial transcripts, and other material. (Docket Entry No. 42). Dr. Price found that not all the information about Blue was negative or pointed toward mental retardation. In response to Dr. Patton's observations, Dr. Price observed that Blue "(1) was capable of doing better work than he did; (2) was not considered to be mentally retarded when he was in school; (3) did not take school seriously and made little effort; and (4) was not in special education but was in reading classes for those reading below grade level." While engaged only in menial jobs, Dr. Price opined that Blue was a trustworthy and dependable employee. Dr. Price placed special emphasis on his review of 1733

[28] Dr. Greenspan reviewed the same material and Dr. Price's response. He briefly mentions the adaptive deficits prong, largely to show his disagreement with Dr. Price and to express the need for additional testing.

pages of letters Blue wrote while on death row.[29] Based on his review, Dr. Price stated that "insufficient evidence exists to support a conclusion that Mr. Blue had *significant* limitations in adaptive abilities *related* to significantly subaverage intellectual functioning." While he showed academic deficiencies, "the etiology of Mr. Blue's difficulties in that area is unclear." (Docket Entry No. 41, Affidavit of J. Randall Price, dated September 14, 2009).

While better developed than the *Atkins* claim he advanced in state court, Blue has still not made a convincing showing that he suffers from significantly subaverage adaptive limitations. Courts struggle with *Atkins*' second prong because the adaptive behavior criteria are "'exceedingly subjective.'" *Rivera v. Quarterman*, 505 F.3d 349, 363 (5th Cir. 2007) (quoting *Briseno*, 135 S.W.3d at 8); *see also Ex parte Chester*, 2007 WL 602607, at *3 (Tex. Crim. App. 2007) ("[T]he second factor-adaptive functioning . . . due to its inherently subjective nature, is consistently the most problematic issue for factfinders to resolve when dealing with these types of claims.").[30] Nevertheless, federal cases indicate that the adaptive limitations inquiry requires an expansive look at an inmate's full range of abilities and deficits. Expert witnesses provide the

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[29] Dr. Price specifically noted:

> Compared to the other cases I have reviewed, the voluminous nature of these letters suggests that Mr. Blue is a very prolific writer. The extent of help he has received from other inmates is not known, but it is unlikely that Mr. Blue was able to receive[] significant help on this many letters. Many of the letters reveal his opinions about his case, his death sentence, and his understanding of the nature of his appeal on the basis of *Atkins*.

[30] One judge on the Court of Criminal Appeals has observed:

> As school children we were taught that King Solomon weighed all of the evidence before him and made a reasoned decision; Nero divined merit on a whim and just pointed his thumb up or down. I fear that, under *Atkins* and the subjective legal definition of the "adaptive deficits" prong of mental retardation, we are moving farther from King Solomon and closer to Nero.... I fear there is no such bright line. There is, on the contrary, broad agreement among mental health experts that determining whether a person suffers from the type and level of "adaptive deficits" that qualifies for a mental retardation diagnosis is highly subjective and largely a matter of individual judgment.

Ex parte Rodriguez, 164 S.W.3d 400, 406 (Tex.Crim.App.2005) (Cochran J., concurring).

most assistance in this analysis when they address adaptive deficits without ignoring competent life skills. Specifically, the Fifth Circuit has found the *Atkins* inquiry should not be so narrow to ignore that which an inmate can do, even if the psychological profession approaches the issue differently. *See Williams*, 293 F. App'x at 314; *Clark*, 457 F.3d at 447; *United States v. Webster*, 421 F.3d 308, 313 n. 15 (5th Cir. 2005). The "exceedingly subjective" *Atkins* question is not myopic and must take into account the whole of an individual's capabilities.

No expert has evaluated Blue's life skills with normed scientific instruments based on objective principles. Instead, Blue's *Atkins* claim depends on interpreting various records, such as school transcripts, and evaluating lay opinions of how he functions in society. As in state court, Blue relies on "sketchy, anecdotal evidence and opinions," which cherry-pick some deficiencies in life skills without presenting a comprehensive view of his abilities. *Blue*, 230 S.W.3d at 165. Dr. Patton looked at the selected incidents in Blue's life and, without providing any reconciliation for conflicting information, used that narrow view to find adaptive deficits. Dr. Patton considered, for instance, problems with Blue's employment history without considering how dependable and trustworthy he was as an employee. Dr. Patton took at face value the accounts that Blue cannot read or write competently, but paid no attention to his voluminous letters from prison that suggested otherwise. He assumed that poor school performance flowed from mental retardation without searching for another reason for scholastic underachievement. Other factors such as early onset substance abuse, a lack of motivation, and bad behavior could have been the source of the factors that Dr. Patton indentified as adaptive deficits.

Dr. Patton's opinion insufficiently accounts for the whole of Blue's life.[31] Blue has shown some impairment in his ability to adapt to the world around him. But, as noted by the only teacher to remember Blue specifically, he "was capable of doing better than he had done." She recalled that he "simply did not take school seriously and made little effort." She explained: "I did not consider [Blue] to be mentally deficient and I did not suspect him to be retarded." (Docket Entry No. 42, Ex. E1-Schrodeder.pdf).

Constant underachievement seemed to be a common theme in Blue's life, though not conclusively attributable to retardation. In contrast to the opinion of those who knew Blue in his formative years, the record which has developed since his incarceration suggests that he does not suffer any intractable mental deficiency. Blue's own words discount any finding of mental retardation. The record contains several opportunities to evaluate Blue's ability to communicate, reason, and engage in logical thinking. The police transcribed his interview after the murder. Blue's statements demonstrate that he followed the questioning, understood the circumstances he faced, and provided relevant answers. Blue's testimony in the punishment phase of his first trial does not hint at any mental deficiency.

Blue has been a prolific writer while incarcerated. His letters reveal that, while not highly educated or intelligent, he can communicate adequately. His letters follow the rudimentary rules of grammar, spelling, and sentence structure. Typographical errors fill his writings, but do not disturb a logical flow of thoughts. Blue's writings do not facially manifest serious intellectual impairment, and do not reveal an inability to function in the world about him,

[31] Another judge in this District has found that the over-inclusive nature of Dr. Patton's testimony weakens his credibility as a witness. *Morris v. Dretke*, 4:03-cv-2186, Doc. Entry No. (S.D. Tex.) ("As zealous advocates of the mentally retarded, the court understands their desire to define that category broadly and protect those possibly borderline individuals whom the law may otherwise not find mentally retarded. *See Briseno*, 135 S.W.3d at 6. Yet focusing the mental retardation inquiry on selective information may insert subjectivity and a degree of capriciousness into the capital punishment process . . . Dr. Patton's inflexibility in light of the strong evidence that Morris successfully adapted to the world around him made [his] testimony not credible.").

but exhibit a reasoning ability much higher than would be expected of one having mental retardation.

With most relevance to the issues before the Court, Blue fully understands the legal issues he faces and the consequences of being found mentally retarded. As he described in one letter: "Now you ask about the 'Atkins claim.' Well this claim means if the judges rules in my favor and I have all the test's come out in my favor . . . they will have to throw out my death sentence and give me a "Life Sentence." Ok. But I'm truely not guilty of a Capital Crime in the first place[.]" (Docket Entry No. 42, Exhibit A10 – TDCJ_Mail_1369.pdf, letter dated May 21, 2008). After taking his initial IQ test, he worried about the results: "I took an IQ test on February 11th. And its been a month and 3 weeks and 2 days since I've taken this test and I've yet to hear anything from my Lawyer's about how I done on the test[.]" (Docket Entry No. 42, Exhibit A07 – TDCJ_Mail_0873.pdf, letter dated April 3, 2008). While waiting for his IQ scores, he asked one individual to renew a subscription to a newspaper because: "it's a truely big help to me[.] it helps me keep up with what's going on in those courtrooms in Bryan, Tx. And if something comes up about my case, I can read about it first hand ok. I don't know the score yet because my attorney's haven't talk to me since I took the test in (February 11th.) So I have no idea whatsoever what's going on at this time ok. But as soon as I hear something, I will share it with all you all ok." (Docket Entry No. 42, Exhibit A10– TDCJ_Mail_1369.pdf, letter dated April 9, 2008). Blue's understanding of his legal situation and the implications of his *Atkins* claim strongly discounts mental retardation.[32]

Without a full review of Blue's weaknesses and strengths, Dr. Patton's finding of adaptive deficits does not credibly support his *Atkins* claim. Blue operated with competency in

[32] Also, TDCJ library logs show Blue often checking out reading material that would require a sophisticated level of comprehension. (Docket Entry No. 42, Exhibit B10, B11).

the free world. He has not shown any difficulty adapting to prison life. Blue has not reconciled his voluminous letters, whose content calls into question Dr. Patton's findings, with his claims of mental retardation. Blue has not explained how his strengths are consistent with mental retardation. In short, a broad review of the record evidence does not make Blue's claim of adaptive deficits believable. Blue has not made a convincing showing that he suffers from significant adaptive deficits that would serve as a predicate for mental retardation.

E. Onset Before Age 18

For the same reasons that Blue has not shown that he falls within *Atkins*' protection against execution, he has not established the onset of mental retardation before age 18.

F. Conclusion of Blue's Atkins *Claim*

Atkins prevents the execution of inmates with mental retardation, though the Supreme Court left the exact parameters of that exemption for the States to define. After a preliminary review of Blue's life and aptitudes, the Court of Criminal Appeals found that his *Atkins* claim did not warrant further inquiry. While Blue proved that he was of low intelligence, he did not make a compelling case that he was mentally retarded under traditional psychological principles. Even in light of the more-nuanced record developed on federal review, Blue has not shown that he falls within the class of offenders *Atkins* meant to protect. Most important, Blue does not have a low enough IQ to qualify for a diagnosis of mental retardation. Yet his life also does not manifest the characteristics that *Atkins* identified as making mentally retarded offenders less culpable:

> Because of [mentally retarded offenders'] impairments . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a

> premeditated plan, and that in group settings they are followers rather than leaders.

Atkins, 536 U.S. at 318 (footnote omitted). Blue's life indicates that he can learn from experience, communicate effectively, generally suppress his impulses, and adapt successively to the world around him. His crime was premeditated and contemplated as he walked several miles before assaulting the victim. Blue's intellectual and adaptive functioning, while unquestionably low, does not bear the characteristics that would render his sentence a cruel and unusual punishment. The *Atkins* decision does not prevent Texas from carrying out its otherwise-valid judgment against him. The Court, therefore, will deny Blue's *Atkins* claim.

II. Texas' Mitigation Special Issue (claims two, ten, and thirteen)

Blue raises three challenges to Texas' statutory manner of placing mitigating evidence before a capital jury. After the punishment jury found Blue to be a future societal danger under the first special issue, TEX. CODE. CRIM PRO. art. 37.071 §2(e)(1) required the jury to answer the following question:

> 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 rather than a death sentence be imposed?

Clerk's Record at 797. Following Texas law, *see* TEX. CODE. CRIM PRO. art. 37.071 §2(f)(4), the trial court charged the jury: "You are instructed that the term 'mitigating evidence,' as used herein, means evidence that a juror might regard as reducing the defendant's *moral blameworthiness*." Clerk's Record at 797 (emphasis added). The trial court, however, also specified that the jury should "consider all evidence submitted to you during the whole trial as to defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty." Clerk's Record at 795.

Blue's arguments attack Texas' mitigation special issue along two paths. First, Blue argues that the supplemental definition of "mitigating evidence" as that which "reduc[es] the defendant's moral blameworthiness" unconstitutionally limits the jury's consideration of several factors that could make him less culpable (claim two). Second, Blue relies on several legal theories, but placing particular emphasis on the jurisprudence flowing from *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), to argue that Texas violates the Constitution by not allocating a burden of proof for the mitigation special issue. Blue argues that the prosecution should confirm the absence of mitigating circumstances beyond a reasonable doubt. (claims ten and thirteen).

Relying on numerous cases rejecting identical arguments, the Court of Criminal Appeals summarily denied Blue's claims on direct review from his second punishment hearing. *Blue v. State*, 125 S.W.3d 491, 505 (Tex. Crim. App 2003). Blue has not shown that the state court decision was contrary to, or an unreasonable application of, federal law.

Blue first argues that Texas' mitigation special issue does not take in all the evidence that may militate against a death sentence. Particularly, Blue fears that the Texas statute precludes the jury from considering factors, such as a lack of violence while incarcerated, low intelligence, and good work history, which do not necessarily touch on a defendant's "moral blameworthiness." The Fifth Circuit has repeatedly found that Texas' statutory definition for mitigating evidence broadly passes constitutional muster. *See Robles v. Thaler*, 344 F. App'x 60, 63-64 (5th Cir. 2009); *Cantu v. Quaterman*, 341 F. App'x 55, 60-61 (5th Cir. 2009); *Roach v. Quarterman*, 220 F. App'x 270, 277 (5th Cir. 2007); *Jackson v. Dretke*, 181 F. App'x 400, 413-14 (5th Cir. 2006); *O'Brien v. Dretke*, 156 F. App'x 724, 735-36 (5th Cir. 2005); *Beazley v. Johnson*, 242 F.3d 248, 260 (5th Cir. 2001). The Fifth Circuit has held that Texas' current

special issue for mitigating evidence "encompasses 'virtually any mitigating evidence.'" *Roach*, 220 F. App'x at 277 (quoting *Beazley*, 242 F.3d at 260); *see also Jackson*, 181 F. App'x at 412; *O'Brien*, 156 F. App'x at 735. In rejecting similar claims, the Fifth Circuit has held that "*all* mitigating evidence can be given effect" under the statutory definition. *Beazley*, 242 F.3d at 260.

No clearly established Supreme Court precedent calls the Texas statute into question. "Far from rejecting the current scheme regarding mitigation, . . . the Supreme Court [has] implicitly endorsed it." *Oliver v. Quarterman*, 254 F. App'x 381, 387 (5th Cir. 2007) (citing *Penry v. Johnson*, 532 U.S. 782 (2001)). The Supreme Court has called the new statute "[a] clearly drafted catchall instruction on mitigating evidence" and a model of "brevity and clarity." *Penry*, 532 U.S. at 802. Elsewhere, the Supreme Court itself has used the term "moral blameworthiness" to describe that which a jury considers in effectuating the mitigation inquiry. *See Schriro v. Landrigan*, 550 U.S. 465, 499 (2007); *South Carolina v. Gathers*, 490 U.S. 805, 818 (1984). Specifically, the Supreme Court has used that phrase to describe how a jury gives effect to good character evidence that is not "directly relevant" to a crime. *Gathers*, 490 U.S. at 818. Supreme Court case law does not suggest that Texas' current vehicle for the consideration of mitigating evidence is impermissibly narrow.

Even if some deficiency existed in the statutory mitigation special issue, Blue has not shown error in this case. Here, the trial court supplemented the "moral blameworthiness" language with an instruction that told the jury to look at all Blue's evidence for its mitigating quality. Because the jury had before it instructions that allowed for a broad review of Blue's evidence, the Court will deny Blue's second ground for relief.

Blue's tenth and thirteenth claims assert that the prosecution must prove beyond a reasonable doubt that no mitigating circumstances justify a life sentence. Here, the State proved

the elements of a capital-murder charge beyond a reasonable doubt in the original guilt/innocence phase. The trial court's instructions also informed the jury that the State had the responsibility of proving future dangerousness beyond a reasonable doubt. Texas law does not explicitly specify which party bears the burden of proof on the mitigation special issue. *See Blue*, 125 S.W.3d at 501. "No burden of proof exists for either the state or the defendant to disprove or prove the mitigating evidence. Thus, each juror individually and subjectively determines what evidence, if any, is sufficient to mitigate against the imposition of the death penalty." *Woods v. Cockrell*, 307 F.3d 353, 359 (5th Cir. 2002) (citation omitted). Nevertheless, the mitigation special issue *implicitly*, and logically, allocates a burden to the defendant to *produce* mitigating evidence and to convince the jury of its significance. *See Lawton v. State*, 913 S.W.2d 542, 557 (Tex. Crim. App. 1995) ("[T]he burden is implicitly placed upon [the defendant] to produce and persuade the jury that circumstances exist which mitigate against the imposition of death in his case."). Any burden implicitly transferred to the defense by the second special issue logically corresponds to trial counsel's Sixth Amendment obligation to investigate and prepare mitigating evidence.

The Fifth Circuit has repeatedly found that the Constitution does not force the prosecution to disprove mitigating circumstances. *See Paredes v. Quarterman*, 574 F.3d 281, 292 (5th Cir. 2009); *Varga v. Quarterman*, 321 F. App'x 390, 398 (5th Cir. 2009); *Berkley v. Quarterman*, 310 F. App'x 665, 673 (5th Cir. 2009); *Scheanette v. Quarterman*, 482 F.3d 815, 828-29 (5th Cir.2007); *Oliver v. Quarterman*, 254 F. App'x 381, 385 (5th Cir. 2007); *Ortiz v. Quarterman*, 504 F.3d 492, 504-05 (5th Cir. 2007); *Granados v. Quarterman*, 455 F.3d 529 (5th Cir. 2006); *Martinez v. Dretke*, 173 F. App'x 347, 354 (5th Cir. 2006); *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005); *Lewis v. Cockrell*, 58 F. App'x 596 (5th Cir. 2003); *McWilliams v.*

Cockrell, 74 F. App'x 345, 349-50 (5th Cir. 2003). Requiring the prosecution to disprove mitigating evidence "ignores the distinction the [Supreme] Court has often recognized between facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 490 (citations omitted). Supreme Court authority anticipates that

> [s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Walton v. Arizona, 497 U.S. 639, 650 (1990). Supreme Court precedent does not contain "any hint" that the prosecution must disprove mitigating evidence. *Id.* at 688. Accordingly, the Fifth Circuit has held that "no Supreme Court or Fifth Circuit authority requires" the "absurd circumstance of requiring prosecutors to prove the absence of mitigating circumstances beyond a reasonable doubt." *Rowell*, 398 F.3d at 377-78. This Court could not rule otherwise except by creating a new rule of constitutional law.

The Court denies Blue's second, tenth, and thirteenth claims.

III. Actual Innocence (claims three and eight)

Blue argues that he is actually innocent of his capital conviction and death sentence. Blue contends that he was not guilty of burglary, thus removing the precursor that made his a capital crime. Blue marshals evidence and argument, primarily relating to the credibility of eyewitness Larence Williams but also relying on his interpretation of other trial evidence, to undercut the validity of his capital conviction. (claim three) Moreover, Blue argues that his good behavior while incarcerated since 2001 invalidates the jury's finding that he would be a future societal danger, making him actually innocent. (claim eight) Federal habeas relief is not available for Blue's actual-innocence claims.

A person who stands trial enjoys a presumption of innocence, and the State must prove his guilt beyond a reasonable doubt. "Society's resources have been concentrated at [a criminal trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977); *see also McFarland v. Scott*, 512 U.S. 849, 859 (1994) (stating that a "criminal trial is the 'main event' at which a defendant's rights are to be determined"). But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399 (1993). Thus, by the time an inmate invokes federal habeas jurisdiction he "comes before the habeas court with a strong – and in the vast majority of the cases conclusive – presumption of guilt." *Schlup v. Delo*, 513 U.S. 298, 326 (1995); *see also Herrera*, 506 U.S. at 399-400 (stating that a petitioner "does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law"); *Bosley v. Cain*, 409 F.3d 657, 664 (5th Cir. 2005) ("[T]here is no presumption of innocence at a habeas proceeding.").

Accordingly, the Supreme Court has not accepted actual innocence as a cognizable ground for habeas corpus relief. In *Herrera*, the Supreme Court stated that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Similarly, in *Schlup*, the Supreme Court reiterated that a petitioner's "claim of innocence does not by itself provide a basis for relief." 513 U.S. at 315. Following that reasoning, the Fifth Circuit has repeatedly and unequivocally held that the Constitution does not endorse an independent actual-innocence ground for relief. *See Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir.

2003); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000); *Graham v. Johnson*, 168 F.3d 762, 788 (5th Cir. 1999); *Robison v. Johnson*, 151 F.3d 256, 267 (5th Cir. 1998); *Lucas v. Johnson*, 132 F.3d 1069, 1074-75 (5th Cir. 1998).

Notwithstanding Blue's protestations of innocence, "[f]ederal courts are not forums in which to relitigate state trials." *Barefoot*, 463 U.S. at 887. The Court would note, however, that Blue does not present a compelling case that he is innocent. Granted, the factual scenario providing the precursor for a capital conviction was a narrow one: Blue's act in forcing his way into the victim's apartment provided the basis for the burglary conviction. Blue argues that a comparison between Mr. Williams' testimony in 1997 and that in 2001 shows that he was untruthful in describing the events that transpired. Blue points to minor differences in his testimony to allege that Mr. Williams lied when he said that Blue broke into the apartment. Whatever inconsistencies may exist between Mr. Williams' accounts, he has never retreated from his testimony that Blue pushed the door open. As the state habeas court found, "the 1995 testimony does not materially differ from his 2001 testimony, with respect to [Blue's] non-consensual entry to [the victim's] apartment." Second State Habeas Record at 528. Also, the state habeas court found that "[Mr.] Williams' 2001 testimony does not recant his 1995 testimony, but continues to allege that [Blue] entered the apartment without the [victim's] consent." Second State Habeas Record at 495. As Blue has not shown that testimony was false, nor otherwise proven that he was not responsible for the victim's death, he has not made a persuasive case for actual innocence from his conviction.

Likewise, Blue cannot show actual innocence of his death sentence. The jury had a full opportunity to consider whether he would pose a future societal threat and whether mitigating circumstances favored a life sentence. The fact that he has apparently not subsequently been

violent does not invalidate the jury's punishment phase verdict, particularly since the rigid structure and heightened security of death row limits his ability to commit violent acts. As Blue has shown neither a legal nor factual basis for habeas relief, the Court will summarily deny Blue's actual-innocence claims.

IV. Residual Doubt (claims four, nine, and nineteen)

Blue complains the jury that considered his punishment should have been able to reconsider the validity of his underlying capital conviction. As previously discussed, the indictment charged Blue with "intentionally and knowingly entering the habitation without the effective consent of [the victim]." Clerk's Record at 1. On his initial direct appeal, the Court of Criminal Appeals rejected Blue's complaint that the evidence insufficiently showed that he had committed a burglary by forcing the apartment door open. *Blue*, No. 72, 106 at *1-5. At that point, Blue's conviction became final.

Nonetheless, Blue attempted to cast doubt on his conviction during the retrial of his punishment. Blue's attorneys returned to the strategy used by his original trial attorneys by trying to prove that he did not commit a burglary. As the centerpiece of that theory, Blue's attorneys undermined Mr. Williams' credibility by pointing out that: he had lied about what clothes he had been wearing and about his drug use with the victim, Tr. 2 Vol. 7 at 57, 101-03; he had not been clear in his initial police statement that Blue had opened the door, Tr. 2 Vol. 7 at 59 at 61; and he possibly could not have seen the doorway from where he was standing, Tr. 2 Vol. 7 at 103-04. Trial counsel argued that the jury should reevaluate whether Blue actually committed a burglary.

Blue asserts that the structure of the second punishment hearing short-circuited his attorneys' efforts. The opening paragraph of the jury charge stated that Blue had been convicted of burglary:

> The defendant, Carl Henry Blue, is guilty of the offense of capital murder in that on/or about August 19, 1994, in Brazos County, Texas, Carl Henry Blue did then and there intentionally cause the death of an individual, Carmen Richards Sanders, by pouring gasoline on her and setting her on fire, and the said Carl Henry Blue was then and there in the course of committing the offense of Burglary of a habitation by intentionally and knowingly entering the habitation without the effective consent of Carmen Richards Sanders, the owner thereof, and committing the aggravated assault of Larence Williams.

Tr. 2 Vo. 11 at 97. Trial counsel argued that this instruction conflicted with the mitigation special issue which required the jury to evaluate "his personal culpability, that's a circumstance of the crime[.]" Tr. 2 Vol. 11 at 39. Trial counsel complained that the instruction "sets up an ambiguity of – a law-abiding, intelligent juror reading this entire charge will not know what he can do with this evidence about – that has to do whether [Blue] had consent to enter that apartment. Must he disregard it? Or can he take it into effect[?]" Tr. 2 Vol. 11 at 39. In essence, trial counsel argued that "[t]here needs to be something that says that if they have some reason to doubt . . . that [Blue] was actually guilty of capital murder that they can take it into account in considering his punishment, and we don't have that." Tr. 2 Vol. 11 at 54.

The trial court rejected Blue's attempt to use residual doubt to mitigate his sentence:

> The law favors finality in judgments. And I trust that . . . the issue as to whether he was guilty was fully and amply and ably litigated on the first appeal. And so . . . for me to accept your position on that would essentially be to say, "Well, in spite of all the litigation that took place – all the appellate litigation that took place wherein court have held and concluded that there was no error in the guilt/innocence phase, we're going to give a new jury a second crack at it," and basically say, "Well, if y'all disagree with the first jury and all those courts of appeals and still think there's a reasonable doubt there, then you can take that into account."

Tr. 2 Vol. 11 at 55. Trial counsel's closing argument, nonetheless, encouraged the jury to take Mr. Williams' credibility into account as they answered the special issue questions.

Blue's fourth, ninth, and nineteenth claims assert that various constitutional theories allow a sentencing jury to reconsider a defendant's guilt. Specifically, Blue's fourth claim argues that the jurors could not consider the mitigating effects of residual doubt because the judge "listed, as indisputable truth, all the acts petitioner was supposed to have committed, and instructed the sentencing jury that petitioner was actually guilty of the capital murder." (Docket Entry No. 12 at 27). Blue's ninth claim alleges that the trial court erred in not telling the sentencing jury that it could evaluate two factors: "1) the crime [was] not committed the way that the State alleged, and 2) other causes contributed to the death of the victim." (Docket Entry No. 12 at 54). In his nineteenth claim, Blue alleges that the *Apprendi*/*Ring* jurisprudence allows a sentencing jury to revisit the facts underlying a conviction.[33]

Each of these claims finds common ground in Blue's theory that residual doubt about a defendant's guilt should mitigate a capital sentence. The Constitution condemns a capital sentencing "process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense [when] fixing the ultimate punishment of death[.]" *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); *see Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death[.]"). The Supreme Court, however, has not designated residual doubt as a form of

[33] Blue's claims briefly mention that his second sentencing jury could not reevaluate whether additional or intervening medical issue contributed to or caused the victim's death. He has not adequately developed that claim for judicial consideration.

mitigating evidence. The Supreme Court has "never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing[.]" *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251 (2007); *see also Franklin v. Lynaugh*, 487 U.S. 164, 173 n.6 (1988) (finding it "quite doubtful" that a right to present residual doubt exists); *Holland v. Anderson*, 583 F.3d 267, 283 (5th Cir. 2009) ("[T]he Supreme Court has not recognized a constitutional right to argue 'residual doubt' at sentencing."); *United States v. Jackson*, 549 F.3d 963, 981 (2008) (finding that a criminal defendant has no right to a residual doubt instruction at a sentencing hearing). [34] Two primary reasons underlie the Supreme Court's refusal to find a constitutional right to present sentencing evidence of residual doubt. First, "sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime." *Oregon v. Guzek*, 546 U.S. 517, 526 (2006). Accordingly, residual doubt inserts irrelevant details into the proceedings: "*whether*, not *how*, he did so." *Id*. at 526. Second, "the parties previously litigated the issue to which the evidence is relevant -- whether the defendant committed the basic crime. The evidence thereby attacks a previously determined matter in a proceeding at which, in principle, that matter is not at issue. The law typically discourages collateral attacks of this kind." *Id*. (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). The Supreme Court has recognized that allowing a jury to condition its sentencing decision on residual doubt is "arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence -- but not the underlying conviction -- is struck down on appeal." *Franklin*, 487 U.S. at 173, n. 6; *see also Holland*, 583 F.3d at 283. Given the finality of his conviction, the

[34] Blue presents an affidavit from a juror who deliberated in his second punishment hearing. The juror expresses some doubt about whether Blue's actions amounted to a burglary. The juror laments that the jury instructions prevented her from giving any effect to her doubts. The state habeas court found that TEX. R. EVID. 606(b) prevented any inquiry into jury deliberations. Second State Habeas Record at 528. Concomitantly, "Rule 606(b) of the Federal Rules of Evidence prohibits the use of such evidence to determine the effect any particular thing might have had on the outcome of a verdict." *Villegas v. Quarterman*, 274 F. App'x 378, 383 (2008).

Constitution no longer required the jury to presume him innocent of capital murder, only of a death sentence.

Blue had already unsuccessfully challenged his conviction on appellate and collateral review. Blue's second punishment hearing was not a retrial of his guilt. A jury had already found him guilty of capital murder beyond a reasonable doubt, and state and federal courts had upheld that determination. Renewed opportunities to invalidate Blue's conviction would have amounted to another collateral attack on an already-decided issue. The time for challenging the integrity of the conviction had long passed when Blue faced a second jury that would consider his sentence.[35] Because "neither the Supreme Court nor the Fifth Circuit has held that a defendant is entitled" to present evidence of residual doubt, *United States v. Jackson*, 549 F.3d 963, 981-82 (5th Cir. 2008), the trial court's instructions affirming the validity of his capital-murder conviction did not violate his constitutional rights. The Court denies Blue's fourth, ninth, and nineteenth claims. *See* 28 U.S.C. § 2254(d)(1).

V. False Testimony (claim five)

Blue's fifth claim accuses the prosecution of purposefully presenting false testimony against him. Mr. Williams changed some of his testimony between the first trial and the retrial of his guilt. The prosecution's direct questioning in the retrial candidly showed that Mr. Williams previously lied about some details, such as the fact that he was only wearing a towel

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[35] Even then, Blue made his residual-doubt argument before the jury. "[N]ot only was [Blue] permitted to make the argument; he made the argument he wanted." *Blue*, 125 S.W.3d at 503. The Court of Criminal Appeals found that, even if the trial court had given the jury Blue's requested instruction, it would not have changed the outcome:

> after making a common-sense evaluation of the record, particularly the overwhelming evidence that [Blue] did not have the victim's consent to enter her apartment, we cannot say that there is a reasonable likelihood that the trial court's failure to submit [Blue's] requested instructions, coupled with the instructions actually submitted by the trial court, prevented the jury from considering constitutionally relevant mitigating evidence.

Id. at 503.

when Blue entered the apartment. Mr. Williams testified that he lied to hide the fact that he had a sexual relationship with the victim. He said: ". . . the lady I was with at the time, we had been together about 12 years. I didn't want her to know that I was messing around with another lady." Tr. Vol. 7 at 11. Blue also assumes other witnesses also lied when saying that he no longer had a romantic relationship with the victim. Blue alleges that the prosecution knew about, and encouraged, witnesses to present false testimony.

"The Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate*, 386 U.S. 1, 7 (1967). The Supreme Court has "made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). "To obtain relief on his claim that the state knowingly introduced false testimony, [the petitioner] bears the burden of establishing that the evidence was false, that the false testimony was material, and that the prosecution offered the testimony knowing it to be false." *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000); *see also Boyle v. Johnson*, 93 F.3d 180, 186 (5th Cir. 1996).

Mr. Williams was unquestionably dishonest about some matters during the first trial. In the second punishment phase, Mr. Williams admitted that he had lied. For instance, he had previously testified that he had been wearing pants when Blue burst into the apartment. In the second punishment hearing, he admitted that he was wearing only a towel. He had lied to hide the affair he was carrying on with the victim. Notwithstanding these falsehoods, Blue has never shown that Mr. Williams' dishonesty extended to his testimony that made his a capital crime. Nothing has shown that Mr. Williams lied about seeing the apartment door swing open, providing the critical action underlying the burglary convictions.

Importantly, Blue has not shown that the State knew that Mr. Williams, or any other witness, was lying in the first trial. Blue asserts: "Further investigation will likely produce similar results: the state did not disclose all impeaching and mitigating evidence in the hands of the prosecution team." (Docket Entry No. 12 at 32). Blue, however, has not confirmed this allegation with any evidence. When Blue raised his *Brady* claim in state court, the state habeas court found that he "admitted during [an] evidentiary hearing that he had no evidentiary support" for this claim. Second State Habeas Record at 498. The state habeas court found Blue's accusations against the prosecution have "no basis in the record" and are "completely meritless." Second State Habeas Record at 529. Blue does not present a stronger case on federal review. Blue has not shown that the prosecution knowingly adduced false testimony that threatened the fundamental fairness of his trial. The Court will deny habeas relief on this claim.

VI. Ineffective Representation in the 1995 Guilt Trial (claims six and fifteen)

Blue claims that his attorneys provided ineffective assistance during his 1995 guilt/innocence trial. Blue summarily asserts that, had his initial trial attorneys trial made a deeper investigation, they could have shown that "the relationship of Mr. Blue to the victim was strong, long-lasting, and ongoing," that the State exerted "improper influence upon the testimony of the victim's family," and that Larence Williams had an extensive criminal history and a poor reputation for truth. (Docket Entry No. 12 at 33). Blue's petition does not provide any substantive legal or factual argument with respect this claim, but only conclusively alleges that trial counsel made insufficient efforts to defend against a capital conviction.

Blue attacked his original attorneys' representation in his initial state and federal habeas proceedings, though he did so on other grounds. When he raised these allegations after his second punishment hearing, the state court found that he abused the habeas writ. Specifically,

the state court found that "[s]ince the instant [habeas] application does not contain specific facts establishing that [his ineffective-assistance] claim could not have been presented in his 1997 application . . . he is procedurally barred from asserting such contention in this subsequent habeas application." Second State Habeas Record at 531 (citing TEX. CODE CRIM. PROC. art. 11.07, §5(a)). In the alternative, the state habeas court extensively reviewed the merits, ultimately concluding that trial counsel made a probing investigation into the crime. The state habeas court found no deficiency in trial counsel's efforts to champion Blue's cause in the guilt/innocence phase. Second State Habeas Record at 513-16, 531-32.

Respondent argues that this Court cannot consider the merits of Blue's attacks on the performance of his original trial attorneys.[36] The state habeas court found that Blue abused the writ by not raising this claim in his initial state habeas action. That procedural ruling bars federal habeas review unless Blue makes an adequate procedural showing. Blue makes no attempt to overcome the procedural bar of his two claims and, in fact, did not reply to the pending summary judgment motion on this point. This Court cannot consider the merits of Blue's sixth and fifteenth claims.

Even if the Court could consider the merits, Blue has not made a sufficient showing of ineffective representation. Blue attacks his initial attorneys' efforts in a single paragraph of argument. Blue's superficial allegations do not show deficient performance or prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984). The attorneys in his first trial zealously defended him. Blue has not made a sufficient showing that the attorneys' efforts in the

[36] Respondent does not argue that these claims abuse the writ because Blue should have brought all challenges to the trial of his guilt in his initial federal habeas proceedings under 28 U.S.C. § 2244(b), or that their insertion into these proceedings, years after the finality of his conviction, violates the AEDPA's limitations period under 28 U.S.C. § 2244(d).

trial of his guilt fell below constitutional expectations. Even if the Court could reach the merits, Blue's efforts to show a constitutional deprivation fall far short of requiring habeas relief.

VII. Insufficiency of the Evidence (claims seven)

Blue's seventh claim, while facially claiming error on the part of the Court of Criminal Appeals in the appeal from his second punishment phase, in fact challenge Texas' means of assessing a death sentence. Blue faults "the Texas Court of Criminal Appeals' decision that the evidence supporting an affirmative finding to the special issue inquiring about 'future dangerousness' was sufficient[.]" (Docket Entry No. 12 at 33-34). At its heart, however, this claim attacks the manner in which Texas imposes a death sentence.

Federal courts review insufficiency-of-the-evidence claims under a deferential standard. Under *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court asks, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact would have returned a verdict unfavorable to the defendant beyond a reasonable doubt. Blue reviews the evidence in his case, though not in the same light required by *Jackson*, hoping to show that the evidence insufficiently supported the jury's answers to Texas' special issues.

In habeas sufficiency-of-the-evidence claims, the constitutionally deferential *Jackson* standard converges with the statutorily mandated federal habeas standards to create a most daunting burden for federal petitioners. *See Garcia v. Carey*, 395 F.3d 1099, 1103 (9th Cir. 2005) (noting that the AEDPA "adds a second level of deference" to the *Jackson* standard)*; Torres v. Mullin*, 317 F.3d 1145, 1151 (10th Cir. 2003) ("[The] AEDPA ha[s] added an additional degree of deference to state courts' resolution of sufficiency of the evidence questions."). A prisoner must not only show that a rational juror could not have convicted him of capital murder, he must show that the state court was unreasonable in its assessment of his

arguments. The doubly deferential standard utilized in habeas insufficiency claims creates a high, though not insurmountable, barrier to federal habeas relief. The Court, therefore, reviews the state court's prosecution-friendly *Jackson* analysis not for error, *per se*, but to decide if the Court of Criminal Appeals unreasonably applied *Jackson* to Blue's case or if it refused to extend *Jackson* to the operative facts of the case. *See Williams*, 529 U.S. at 407.

On direct appeal from his second punishment hearing, the Court of Criminal Appeals held:

> The evidence from the new punishment hearing showed that, pursuant to a pre-meditated plan, [Blue] burst into his former girlfriend's apartment, threw gasoline on her and set her on fire. She died nineteen days later from the extensive burns that she suffered. The evidence also showed that [Blue] has a history of violence, especially toward current and former girlfriends. . . .
>
> [Blue] presented some good character evidence and evidence that he had a drug and alcohol problem at the time of the offense. [Blue] also presented evidence from various prison employees that he had no record of violence during the seven years he was incarcerated on death row after his first trial. The prosecution responded to this through cross-examination with, among other things, evidence that [Blue's] nonviolent behavior on death row could have been due to the fact that death row inmates are limited in their movements and spend most of the time locked in their cells.
>
> The prosecution presented evidence that [Blue] was a disciplinary problem while he was incarcerated in the county jail for the new punishment hearing. This evidence showed that [Blue] was "pounding and screaming" at county jail personnel after he refused their instructions to come out of his cell to get ready for court. . . .
>
> On cross-examination, [Blue's] psychiatric expert testified that a free [Blue] would be "at an increased position for something bad." This expert also recognized that the "future dangerousness" special issue makes no distinction between "prison and real life." . . .
>
> During closing jury arguments, [Blue] claimed that he would not be dangerous in prison if he received a life sentence which meant that he would not be eligible for parole until he had served 40 years. The prosecution responded that [Blue] is dangerous and that a life-sentenced [Blue] would be dangerous in prison.

Blue, 125 S.W.3d at 493-94.

Blue has not shown that the state court's adjudication of this claim was contrary to, or an unreasonable application of, federal law. While certain elements in Blue's case may indicate that he may not pose a future threat, and he has not acted particularly violently in prison, sufficient evidence before the jury supported their answers to Texas' special issue questions. Under *Jackson*'s deferential scheme, the jurors could reasonably find that his history, his violence in committing the murder, and the projections of his future behavior would all support a death sentence.[37]

Nonetheless, Blue's seventh claim extends beyond the question of whether he is a future danger. Blue spends a considerable amount of time describing what he feels a jury should take into account when assessing a death sentence. The thrust of Blue's seventh claim seems to be that both the future dangerousness issue itself, and the Court of Criminal Appeals' interpretation of its language, is insufficient to survive constitutional scrutiny. [38]

The Fifth Circuit and the Supreme Court have repeatedly rejected similar attacks to the integrity of Texas' sentencing scheme. Texas places the aggravator that makes a crime death-eligible in the guilt/innocence phase. The guilt/innocence phase of a Texas capital trial then adequately narrows the class of death-eligible defendants as required by the Constitution. *See Woods v. Johnson*, 75 F.3d 1017, 1033-34 (5th Cir 1996); *James v. Collins*, 987 F.2d 1116, 1119

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[37] Blue seeks to sidestep the application of *Jackson* in his case by referring to cases in which the Court of Criminal Appeals has found the evidence of future dangerousness insufficient. On that basis he alleges that the Texas court failed to reconcile its own case law. (Docket Entry No. 12 at 44-45). This Court's concern on federal review, however, is not the consistency of state law, but the application of the *Jackson* standard. Under that highly deferential review, the Court finds that the Court of Criminal Appeals' decision was not contrary to, or an unreasonably application of, federal law, particularly given Blue's propensity toward committing violent acts on girlfriends.

[38] In his eighth claim, which this Court has already discussed with respect to his other actual-innocence claim, Blue argues that "death may not be imposed where the 2001 jury prediction of a continuing threat to society has been undermined by post-verdict evidence of corrigibility and rehabilitation[.]" (Docket Entry No. 12 at 52). His eighth claim then attempts to make the jury's finding of future dangerousness impermanent, subject to later reconsideration if contracted by good behavior while incarcerated. As with his other attacks on the special issue, no merit exists to his theory that post-verdict actions should invalidate a jury's sentencing decision.

(5th Cir. 1993). The future dangerousness issue broadly revisits aggravating circumstances and needs no additional definition. *See e.g. Jurek v. Texas*, 428 U.S. 262 (1976); *Rowell*, 398 F.3d at 379. Insofar as Blue's seventh claim in an attack on the constitutionality of Texas' capital sentencing scheme, he only raises issues that courts have soundly rejected many times before. This Court, therefore, denies Blue's insufficiency-of-the-evidence claim.

VIII. The Possibility of Holdout Jurors (claims eleven, twenty, and twenty-one)

Blue alleges that Texas violated his constitutional rights when it concealed from his punishment jury the effect of failing to answer the special issues. Blue complained at trial that Texas law unfairly prevented the jury from knowing the effect of a single holdout juror. To wit, TEX. CODE CRIM. PRO. art. 37.071(g) prohibited the parties and the trial court from instructing the jury that, should any juror refuse to answer the special issues in unanimity with the others, he would receive a life sentence. Accordingly, the trial court instructed the jury: "In the event that the jury is unable to agree to an answer to this Special Issue under the conditions and instructions given herein, the Presiding Juror will not sign either form of answer to the Special Issue. The jurors shall not discuss nor consider the effect of the failure of the jury to agree on the answer to the Special Issue." Clerk's Record at 797.

The trial court did not inform the jury that a failure to reach the required consensus in answering the special issues would automatically result in a life sentence. The trial court instead told the jury: "You may not answer the issue 'No' unless all jurors agree to such answer and you may not answer such issue 'Yes' unless ten (10) or more jurors agree to such an answer." Clerk's Record at 795. In Texas, this is commonly called either the "10-12" or "12-10" Rule. *See Resendiz v. State*, 112 S.W.3d 541, 548 (Tex. Crim. App. 2003); *Prystash v. State*, 3 S.W.3d

522, 536 (Tex. Crim. App. 1999). Blue contends that this instruction misled the jury and violated his constitutional rights.

The non-retroactivity principle established in *Teague v. Lane*, 489 U.S. 288 (1989), bars this Court from granting relief on Blue's "12-10 rule" claim. The Fifth Circuit has previously addressed virtually indistinguishable claims and found them to violate *Teague*. *See Roach*, 220 F. App'x at 276-77; *Alexander v. Johnson*, 211 F.3d 895, 897 (5th Cir. 2000); *Davis v. Scott*, 51 F.3d 457, 466 (5th Cir. 1995); *Webb v. Collins*, 2 F.3d 93, 95-96 (5th Cir. 1993). The Fifth Circuit has found that nothing in Supreme Court precedent requires Texas to inform a capital jury about the effect of any non-unanimous or holdout jurors. *See Turner v. Quarterman*, 481 F3d 292, 300 (5th Cir. 2007); *Alexander*, 211 F.3d at 897; *Webb*, 2 F.3d at 95-96. Blue does not show the applicability of any exception to the *Teague* doctrine or otherwise distinguish the Fifth Circuit's binding precedent. Accordingly, *Teague*'s non-retroactivity bar forecloses relief on Blue's "12-10 rule" claim.

The Fifth Circuit has also expressly found similar claims to be without merit. *See Alexander*, 211 F.3d at 897 n.5; *Miller v. Johnson*, 200 F.3d 274, 288-89 (5th Cir. 2000); *Jacobs v. Scott*, 31 F.3d 1319, 1328-29 (5th Cir. 1994). Finding support in the Supreme Court case of *Jones v. United States*, 527 U.S. 373 (1999), the Fifth Circuit recognizes that the Constitution creates no right to instruct a jury on potential deadlock. *See Alexander*, 211 F.3d at 897 n.5. Blue fails to distinguish the binding federal precedent rejecting the merits of this claim.

Blue's eleventh, twentieth, and twenty-first claims are *Teague*-barred and without merit. The state court's rejection of these claims, therefore, was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

IX. Fair Cross-Section of Jurors (claim twelve)

Blue claims that the he was denied the right to a jury selected from a fair cross-section of the community in his 2001 punishment hearing. Blue claims that, for some indefinite reason, jury pools in Brazos County underrepresented African American potential jurors. "It has long been established that racial groups cannot be excluded from the venire from which a jury is selected." *Holland v. Illinois*, 493 U.S. 474, 478 (1990). In *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975), the Supreme Court emphasized that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *See also Holland*, 493 U.S. at 481 ("The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis."). The Supreme Court has fashioned a tripartite test to determine whether defendant makes "a *prima facie* violation of the fair-cross-section requirement":

> the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979); *see also United States v. Williams*, 264 F.3d 561, 568 (5th Cir. 2001). Once the defendant meets his prima facie burden, the government must point to "a significant state interest [that is] manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Duren*, 439 U.S. at 367-68.

When Blue raised this claim in state court, he did not provide any evidence that African-American citizens had been excluded from his, or any other, jury panel. Instead, he based his

claim on information he received from lawyers who practice in Brazos County and from courthouse personnel. According to Blue, those individuals told him that many African-Americans often do not show up for jury service or are disqualified for various reasons. Blue did not, however, secure any affidavits or other competent evidence to support his claim.

The state habeas court found that Blue did not raise any objection to the array at trial. Second State Habeas Record at 523. Accordingly, the state habeas court found that he was "procedurally barred from asserting that he was denied his right to a venire chosen from a fair cross-section of the community" because he "failed to challenge the array pursuant to TEX. CODE CRIM. PRO. art. 35.06 and 35.07." Second State Habeas Record at 532. In the alternative, the state habeas court found that Blue had not met the *Duren* factors to prompt further inquiry because he "utterly fail[ed] to show that African-Americans were actually underrepresented in the instant case by producing any statistical or other evidence in support of his contentions . . . and where he also fails to show that underrepresentation was due to systematic exclusion of the group in the jury selection process." Second State Habeas Record at 533. The state habeas court found "that [Blue] simply offered no evidence that the selection process operated in any way to systematically exclude African-Americans from the panel." Second State Habeas Record at 523 (quotation omitted).

Respondent argues that the state procedural bar forecloses federal consideration of his fair cross-section claim. In the alternative, Respondent argues that Blue has not brought forth any evidence that would trigger an inquiry into the jury-selection practice in Brazos County. Because Blue's response to the summary judgment motion does not address this claim, he does not show that he can overcome the procedural bar. Also, he does not show how he can verify the allegations in his petition with competent evidence. Blue has not proven that any group has been

systematically excluded from jury service in Brazos County, but only presents unverified allegations to that effect. As Blue procedurally defaulted his claim in state court and has not made an effort to support his claim with any evidence, the Court denies habeas relief on this issue.

X. Defects in the Indictment (claim fourteen)

Relying on the *Apprendi*/*Ring* line of cases, Blue argues that Texas' capital sentencing system violates the Sixth Amendment because it does not require the indictment to notify him of what evidence the State intends to introduce in the punishment phase. Blue argues that the *Apprendi*/*Ring* jurisprudence has made any punishment-phase aggravating circumstances equivalent to elements of the offense. Thus, he reasons, any indictment is defective unless it outlines the facts the State will rely on when seeking a death sentence.

The Court of Criminal Appeals has repeatedly held that (1) the special issue questions are not elements of a capital offense and (2) neither *Apprendi* nor *Ring* require the State to allege the special issues in the indictment. *See Williams v. State*, 273 S.W.3d 200, 214 (Tex. Crim. App. 2008); *Gallo v. State*, 239 S.W.3d 757, 779 (Tex. Crim. App. 2007); *Joubert v. State*, 235 S.W.3d 729, 732 (Tex. Crim. App. 2007); *Roberts v. State*, 220 S.W.3d 521, 535 (Tex. Crim. App. 2007); *Renteria v. State*, 206 S.W.3d 689, 709 (Tex. Crim. App. 2006); *Russeau v. State*, 171 S.W.3d 871, 885-86 (Tex. Crim. App. 2005); *Rayford v. State*, 125 S.W.3d 521, 533 (Tex. Crim. App. 2003). In all the numerous and repeated challenges to Texas' capital sentencing scheme by federal petitioners, it does not appear that the Fifth Circuit has yet considered this twist. Nonetheless, the Court summarily denies this claim.

The Supreme Court has approached the application of issues implicated in the *Ring* and *Apprendi* decisions from several different legal angles. But neither *Apprendi* nor *Ring* held that

an indictment must include the aggravating factors in a state capital case. *See Appr*endi, 530 U.S. at 477 n. 3 (refusing to address the indictment issue because the petitioner did not raise it); *Ring*, 536 U.S. at 597 n. 4 (noting that petitioner did not allege constitutional defects in the indictment); *see also United States v. Bourgeois*, 423 F.3d 501, 507 (5th Cir. 2005) (noting that the Supreme Court has yet to hold that aggravating factors must be charged in the indictment). As this Court discussed with respect to Blue's other *Ring*/*Apprendi* claims, Texas allows the jury to find those aggravating factors that elevate a crime to death sentence status, in the guilt/innocence phase of trial, to become eligible factors for the punishment phase. The jury makes this determination based on the factors alleged in the indictment. The special issues in the punishment phase, accordingly, do not serve to identify those eligible for a death sentence, but to narrow the jury's discretion in making the ultimate decision whether to impose the death penalty. *See Jurek*, 428 U.S. at 279. Thus, as Texas has long held, the special issues are not elements of the offense that the State must allege in the indictment and then prove beyond a reasonable doubt. For that reason, the Court of Criminal Appeals' denial of Blue's claim of error in the indictment was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

XI. Racism in the Punishment Phase (claim sixteen)

Blue claims that an attitude of racism permeated his trial proceedings. Blue bases his claim on an affidavit that the court reporter at his first trial, Debbie Lynn Cotie, prepared in 2003. Ms. Cotie explains that a racist attitude prevailed in the first trial. She claims that "racial prejudice . . . was practiced and accepted by Brazos County personnel, the court, its staff, the district attorney's office and the non-minority community as a whole." Ms. Cotie made broad allegations, such as that it "appeared the district attorney's office did not want minorities to be

included as jurors" and trial counsel was "not focused nor . . . aware of the significance of many of the events taking place[.]" However, she only mentioned two specific incidents: (1) on more than one occasion she smelled alcohol on the breath of one of Blue's trial attorneys; and (2) the trial bailiff used a racial epithet when opining that Blue was guilty. Ms. Cotie claimed that, when she brought up these concerns to the trial judge, he disregarded her. Based solely on Ms. Cotie's affidavit, Blue argues that he did not receive a trial in front of a fair tribunal.

The state habeas court found that, since Blue did not raise these claims in his first habeas corpus proceeding, a procedural bar prevented him from raising them in that case. In the alternative, the state court rejected Blue's claim on the merits. The state court's denial took two paths. First, the state habeas court found that Ms. Cotie was not a credible affiant. The state habeas court found that Ms. Cotie "is one of five people on [Blue's] list of those who may visit him at the Polunsky Unit. . . . . The list asks [Blue] to provide his reason for wanting to see Cotie. [Blue] wrote: 'She love me and have not seen me in 5 years and she would like to visit me and, I love her and I would like to see her.'" Second State Habeas Record at 516. The state habeas court also observed that she had visited Blue in prison and "began to cry in front of the jury during [Blue's] 1995 trial." Second State Habeas Record at 516. On that basis, the state habeas court found that Ms. Cotie "had a biased, personal relationship in favour of [Blue], which was not revealed in her affidavit" and that her affidavit "is not credible evidence." Second State Habeas Record at 516.

Second, the state habeas court considered affidavits from both trial attorneys, the trial judge, the bailiff, and the prosecutors that flatly denied the allegations made by Ms. Cotie. The state habeas court found no factual basis for Blue's allegations that racism or other improprieties tainted his trial.

Blue's response to the summary judgment motion does not provide any argument on this claim. The state habeas court made explicit, binding factual findings which found that Ms. Cotie was not credible and that racism did not taint his trial. Both trial attorneys disclaimed that any racist attitude, comment, or atmosphere infected the trial proceedings. The trial judge explicitly stated that he observed nothing that would indicate any trial participant was prejudiced against Blue or any group of individuals. Other trial participants affirmed that they did not observe anything that would question the fairness of the trial proceedings or the character of Blue's attorneys. Blue's allegations lack any credible factual support.

Simply, Blue has not made any effort to show that the state habeas court was unreasonable in finding that Ms. Cotie was not credible or that his claim lacked factual merit. For those reasons, Blue's allegation of racism is procedurally barred and, alternatively, without merit.

XII. Meaningful Appellate Review (claim seventeen)

Blue asserts that the Texas Court of Criminal Appeals violated his right to meaningful review of his sentence by not revisiting the jury's answer to the mitigation special issue. Traditionally, the Court of Criminal Appeals refuses to reconsider a jury's evaluation of a capital defendant's mitigating evidence. Because the Texas appellate courts will not reweigh the mitigating evidence, Blue argues that an "automatic rule of affirmance" exists which violates due process. (Docket Entry No. 12 at 109).

The Supreme Court has repeatedly emphasized that a State must provide meaningful appellate review of death sentences. *See Parker v. Dugger*, 498 U.S. 308, 321 (1991) ("[M]eaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."); *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) ("[S]tate appellate courts [must]

give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime."). "[M]eaningful appellate review" in capital cases "serves as a check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 195, 206 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The Fifth Circuit, however, has repeatedly rejected claims that the Court of Criminal Appeals must reconsider a jury's evaluation of mitigating evidence. *See Rowell*, 398 F.3d at 378; *Johnson v. Cockrell*, 306 F.3d 249, 256 (5th Cir. 2002); *Woods*, 307 F.3d at 359-60; *Beazley*, 242 F.3d at 261; *Moore v. Johnson*, 225 F.3d 495, 506-07 (5th Cir. 2001); *Hughes v. Johnson*, 191 F.3d 607, 621-23 (5th Cir. 1999). True, an appellate court must make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *see also Parker*, 498 U.S. at 321. This appellate review, however, must give way to the Supreme Court's "much more explicit directives" that respect a jury's "narrowly cabined but unbridled discretion to consider any mitigating factors submitted by the defendants and weighed as the jury sees fit . . . ." *Moore*, 225 F.3d at 506-07. The Supreme Court has held that

> [o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. Indeed, the sentencer may be given unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.

Tuilaepa v. California, 512 U.S. 967, 971-72 (1994). Accordingly, the Court of Criminal Appeals allows the jury unbridled discretion in its evaluation of mitigating circumstances and refuses to review whether sufficient evidence supported the jury's answers to the mitigation special issue. *See, e.g., McFarland v. State*, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996) ("Because the weighing of 'mitigating evidence' is a subjective determination undertaken by

each individual juror, we decline to review that evidence for 'sufficiency.'").[39] By bestowing upon the jury the narrowly cabined, but unbridled, discretion to consider mitigating evidence, Texas has "followed Supreme Court instructions to the letter." *Moore*, 225 F.3d at 506. Accordingly, "[n]o court could find that Texas had acted contrary to federal law as explained by the Supreme Court, and no benefit will arise from further consideration of the obvious." *Id*; *see also Woods*, 307 F.3d at 360.

No clearly established Supreme Court law creates a right to independent review of mitigating factors on direct appeal or collateral review. *See Beazley*, 242 F.3d at 260; *Hughes*, 191 F.3d at 623.[40] The state court's rejection of this claim withstands AEDPA review. *See* 28 U.S.C. § 2254(d)(1).

XIII. Dismissal of a Potential Juror (claim eighteen)

Blue claims that the trial court violated his right to an impartial jury when it granted the State's challenge for cause to a prospective juror who expressed concern about imposing the death penalty. During jury selection for the second punishment hearing, the parties extensively questioned jurors about their ability to answer the special issue questions in a manner that would result in a death sentence. Blue claims that the trial court should not have excused Rosa Mata for cause when she expressed reservations about the death penalty.

Exclusion of prospective jurors "hesitant in their ability to sentence a defendant to death" without any limitations violates the Fourth and Fourteenth amendments. *Morgan v. Illinois*, 504

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[39] While a Texas statute, TEX. CRIM. PRO. art. 44.251, facially requires the Court of Criminal Appeals to perform an appellate mitigation review, "the proper interpretation of state law is not cognizable in federal habeas proceedings." *Beazley*, 242 F.3d at 261 (refusing to consider whether TEX. CRIM. PRO. art. 44.251 implicated federal constitutional concerns).

[40] In addition, Blue's meaningful-appellate-review claim anticipates the creation of a new rule that would violate *Teague*'s non-retroactivity principle. *See Woods*, 307 F.3d at 360; *Beazley*, 242 F.3d at 263.

U.S. 719, 732 (1992); *see also Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968). The State must demonstrate through questioning that the potential juror it seeks to exclude lacks impartiality, and the judge must then determine the propriety of the State's challenge. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985). This standard . . . does not require that a juror's bias be proved with 'unmistakable clarity.'" *Wainwright*, 469 U.S. at 424. A federal court's review of the resultant colloquy focuses on "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams*, 448 U.S. at 45). Because the exclusion of potential jurors is a question of fact, *see McCoy v. Lynaugh*, 874 F.2d 954, 960 (5th Cir. 1989); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984), the Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

The parties' briefing provides lengthy quotes from the examination of Ms. Mata. Through extensive questioning, the parties attempted to ascertain whether Ms. Mata could answer the special issues. Ms. Mata's answers on her jury questionnaire showed that she could never consider a death sentence. Questioning by the prosecution resulted in conflicted answers which both reaffirmed that entrenched position but also suggested that she may be able to apply the law and deliver a death sentence in some situations. Trial counsel did not ask Ms. Mata any questions about capital punishment. Having overseen the questioning, and having asked Ms. Mata to clarify her position, the trial court came to the conclusion that Ms. Mata could not follow the juror's oath. In the end, the trial court stated: "I'm satisfied to the extent that she's answering these questions in such a way where 'Sure, I can follow my oath.' I think she's simply saying what she thinks the Court or the attorneys want to hear, and I don't believe her, so the challenge

will be granted." Tr. Vol. 4-F at 51. The Court of Criminal Appeals found that the trial court was in the best position to evaluate Ms. Mata's state of mind, particularly given her persistent uncertainty about her ability to follow the law and her vacillating, contradictory answers. *See Blue*, 125 S.W.3d at 499.

Blue provides long quotations from the examination of Ms. Mata, but does not provide any argument about why the state trial or appellate court was incorrect in its view of her conflicted testimony. Because the trial court clearly could have been "left with the definite impression that [the prospective juror] would be unable to faithfully and impartially apply the law," *Witt*, 469 U.S. at 426, the trial court had a reasonable basis for granting the State's challenge for cause. *See Granviel v. Lynaugh*, 881 F.2d 185, 187 (5th Cir. 1989) (stating that "[b]ecause of the difficulty of divining a prospective juror's state of mind, particularly on a cold record, we pay deference to the trial court's factual determination"). The Court will deny this claim.

CERTIFICATE OF APPEALABILILTY

The AEDPA bars appellate review of a habeas petition unless a district or circuit court certifies specific issues for appeal. *See* 28 U.S.C. § 2253(c); FED.R.APP.P. Rule 22(b). Blue has not sought a Certificate of Appealability ("COA"), though this Court can consider the issue *sua sponte*. *See Alexander*, 211 F.3d at 898. The Court must address whether the circumstances justify an appeal before issuing a final judgment. *See* Rule 11, Rules Governing Section 2254 Cases in the United States District Courts.

A COA may issue when "[a petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Settled precedent forecloses relief on Blue's claims. Under the appropriate standard,

Blue has not shown that this Court should authorize any issue for appellate review. This Court will not certify any issue for consideration by the Fifth Circuit.

CONCLUSION

Blue has not met the high standards required for federal habeas corpus relief. The Court **GRANTS** Respondent's motion for summary judgment and **DENIES** Blue's petition for a writ of habeas corpus. The Court will not issue a Certificate of Appealability.

SIGNED at Houston, Texas this 19th day of August, 2010.

Kenneth M. Hoyt
United States District Judge