

Jamaal Howard

The Court Record

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Howard v. State

Court of Criminal Appeals of Texas, En Banc, No. 74,138, 153 S.W.3d 382 (October 13, 2004)

Jamaal HOWARD, Appellant, v. The STATE of Texas.

Before the court en banc.

Russell J. Wright, Silsbee, for appellant. David W. Barlow, Assist. DA, Kountze, Matthew Paul, State's Attorney, Austin, for state.

The appellant, Jamaal Howard, was convicted in April 2001 of capital murder,[1] an offense that was committed on May 12, 2000. Pursuant to the jury's answers to the special issues set forth in Code of Criminal Procedure Article 37.071, Sections 2(b) and 2(e), the trial judge sentenced the appellant to death.[2] Direct appeal to this Court is automatic.[3] The appellant raises nine points of error. We affirm.

In his sixth point of error, the appellant claims that the evidence is legally insufficient to support the jury's verdict on the issue of his future dangerousness. He argues that there was no evidence of premeditation to commit the instant murder and that he has no history of prior criminal violence. Following is a review of the relevant evidence in a light most favorable to the verdict. See *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1991).

The appellant stole a gun from his grandfather the night before the murder and hid it. Despite his family's efforts to persuade him to turn over the gun, the appellant refused. The following morning, the appellant retrieved the gun and walked several blocks from his house to the Chevron store. After peering in the windows, he entered the store, went into the secured office area where the victim was sitting, cocked the gun, and shot the victim in the chest. The appellant stole \$114.00 from the cash register and reached over the dying victim to steal a carton of cigarettes before leaving. The offense was recorded on videotape. The appellant denied committing the offense until he was told it was videotaped. He told the officer who took his statement that he was not sorry for committing the offense.

At the punishment stage of trial, the State presented evidence that the appellant demonstrated a disregard for authority and school rules despite the continued efforts of his mother and educators. During one incident, the appellant punched a pregnant teacher in the chest with his fist when she asked him to return to his seat. When the appellant was assigned to an alternative school, he refused to comply with its rules and standards, and he was defiant and disruptive. The State also presented evidence of the appellant's possession of controlled substances, his fighting with police officers and resisting arrest, his committing of several burglaries as a juvenile, and his fighting with other inmates. Dr. Edward Gripon testified for the State that the appellant was not suffering from schizophrenia, but rather was suffering from antisocial personality disorder.

The evidence is sufficient to support the jury's verdict. The appellant's actions in committing the crime were senseless and deliberate; his actions immediately following its commission were equally so. Given these actions, combined with his appellant's past history of assaultive conduct, disregard for authority and rules, drug offenses, and juvenile offenses, and the expert testimony that the appellant displayed an antisocial personality disorder, the jury rationally could have concluded beyond a reasonable doubt that the appellant would probably commit criminal acts of violence that would pose a continuing threat to society. Point of error six is overruled.

In his seventh point of error, the appellant claims that the evidence is insufficient to support the jury's verdict on the mitigation special issue. The appellant argues that this Court's refusal to review the jury's verdict denies him the right to a "meaningful appellate review." This Court has repeatedly declined to review the sufficiency of the mitigating evidence and has rejected the claim that it deprives a defendant of a meaningful appellate review. *Salazar v. State*, 38 S.W.3d 141, 146 (Tex.Cr.App.), cert. denied, 534 U.S. 855, 122 S.Ct. 127, 151 L.Ed.2d 82 (2001); *McGinn v. State*, 961 S.W.2d 161, 166 (Tex.Cr.App.1998), cert. denied, 525 U.S. 967, 119 S.Ct. 414, 142 L.Ed.2d 336 (1998). Point of error seven is overruled.

In his first point of error, the appellant claims that the trial court erred in overruling his objection to the prosecutor's jury argument at punishment. During the punishment stage, the prosecutor argued:

When he is not waiting for capital murder trial and not going to have to be on his best behavior, then what is he going to act like? Gang activity, 5-9 Hoover Crypts [sic], and Crypts [sic] are in prison, too. He will fall right in with his old buds; extortion, rape, drug trafficking-

The appellant's objection to the argument as outside the record was overruled.

Previously, however, during the prosecutor's argument at the punishment stage, the prosecutor made similar statements without objection. For instance, the prosecutor opened his argument, with no objection, as follows:

[U]ntil Dr. Laine's medical record came in through Dr. Fason and-I didn't know that the defendant had been stalking a girl and I didn't know that he had told Dr. Laine that he admitted to being a gang member, smoking marijuana, drinking alcohol, carrying a gun.

(Emphasis added). The prosecutor further argued, without objection, that the appellant would have the opportunity to join prison gangs and participate in their activities, if he chose to:

The gentleman from the prison prosecution unit told you also that drugs are a big factor with prison gangs, that they sell drugs to make money in prison gangs. So, this will be another indication that [the appellant] would have the opportunity, if he wants to, if he hadn't learned his lesson, that he is going to be a future danger.

In light of the jury's previous exposure to these similar arguments, suggesting the potential for the appellant's participation in gang-related activities in prison, any error is harmless. Cf. *Massey v. State*, 933 S.W.2d 141, 149 (Tex.Cr.App.1996) (holding that if defendant objects to admission of evidence but same evidence is subsequently introduced from another source without objection defendant waives earlier objection). Point of error one is overruled.

In his third point of error, the appellant claims that the trial court erred in overruling his objection to the prosecutor's jury argument at the punishment stage of trial. During closing argument, the prosecutor made the following comments:

[Prosecutor]: That's the type of person you're dealing with in Jamaal Howard. And since that time not one feeling of remorse, not one word of sorry. [Defense objection, overruled] [Prosecutor]: In fact, he told Ranger Wilson, "I'm not sorry." That's the type of person you are dealing with in Jamaal Howard.

Appellant claims the prosecutor's argument was a comment on his failure to testify, in violation of the Fifth Amendment to the United States Constitution, and could not be understood as based on his discussion with Ranger Wilson.

Texas Ranger L.C. Wilson took the appellant's written statement. Following is an excerpt from Wilson's testimony:

[Prosecutor]: Did [appellant] give any reason why he did it? [Wilson]: No. No, he never did. Q. Did he express any remorse to you? A. No, he didn't, you know, because right at the end of that statement I asked him, I said, "Jamaal, you know, in a year or so from now a jury is going to hear this and they are going to want to know why you did it. You know, now is your chance, you know. I'm asking you to explain to anybody." He didn't have a reason. I asked him, you know, "Do you have any remorse for this?" He said, "No." And I said, "You're willing to sign that statement? You have no remorse?" And he did.

On cross-examination, defense counsel asked Wilson if he had asked the appellant if he understood the meaning of the word "remorse." Wilson responded that he did not specifically remember asking the appellant if he understood the meaning of the word remorse, but he remembered asking him, "Do you feel sorry about what you did?"

This Court has held that a prosecutor's comment on a defendant's failure to show remorse is tantamount to a comment on his failure to testify. *Davis v. State*, 782 S.W.2d 211, 222 (Tex.Cr.App.1989) (citing *Dickinson v. State*, 685 S.W.2d 320, 324 (Tex.Cr.App.1984)), cert. denied, 495 U.S. 940 (1990). However, if there is evidence in the record supporting the comment, then no error is shown.[4] *Id.* (citing *Fearance v. State*, 771 S.W.2d 486, 514 (Tex.Cr.App.1988)). Here, Wilson testified that the appellant told him he had no remorse. The prosecutor's argument was therefore a proper summation of the evidence. See *id.* Point of error three is overruled.

In his second point of error, the appellant claims that "[a] procedure that permits the death penalty to be inflicted on defendants with mental retardation despite their diminished personal culpability violates the Eighth Amendment to the United States Constitution." The appellant argues that the Eighth Amendment requires that mentally retarded individuals, like himself, be excluded as a class from execution. As evidence of his mental retardation, he points to the testimony of Dr. James Duncan, who testified that the appellant had borderline to mildly impaired intellectual functioning. The appellant argues that an individual put to death must be able to rationally appreciate and evaluate the consequences of his actions. In a Supplemental List of Authorities, the appellant cites to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

In *Atkins*, the United States Supreme Court concluded that the execution of a mentally retarded individual is unconstitutionally excessive under the Eighth Amendment. *Id.*, at 321, 122 S.Ct. 2242. Recognizing that "not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus," the Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.*, at 317, 122 S.Ct. 2242.

As a stop-gap measure for cases that we must decide in the absence of legislation, this Court has set temporary guidelines for determining mental retardation in the death penalty context. *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex.Cr.App.2004). We apply the definition found in the "Persons with Mental Retardation Act" (Health & Safety Code, Chapter 591): "'Mental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." [5] This definition is essentially the same as the one utilized by the American Association of Mental Retardation (AAMR). [6] "Significantly subaverage general intellectual functioning" is defined as an IQ of 70 or below. [7] "'Adaptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." [8] The developmental period is understood to be the period before age 18. [9]

In this case, there was little testimony bearing on the issue of the appellant's limitations in adaptive behavior, other than the testimony about his lack of personal hygiene which was presented by the defense as indicative of the appellant's alleged schizophrenia. Although there was testimony that the appellant was unwilling to meet the rules imposed by the alternative school, this testimony was presented as bearing on the issue of whether the appellant was suffering from a mental illness, or whether his actions were, as the State contended, volitional.

Dr. Fred Fason, a defense expert, testified that when he first met with the appellant and began to administer one of the psychological tests, the appellant did not know some of the words in the first few questions. Fason testified that this caused him to conclude that the appellant could not read at the sixth grade level and to question whether the appellant was mentally retarded. However, upon questioning defense counsel, talking to the appellant's mother, and retrieving the appellant's school records, Fason discovered that the appellant had started out in school as a very bright student; the appellant was in the ninetieth percentile in math in the second grade, but had dropped to about the

thirtieth percentile in the fifth grade. Fason theorized that the appellant's declining performance in school was due to the onset of schizophrenia.

One of the court's independent experts, Dr. Duncan, reached a similar conclusion. At one of the appellant's competency hearings, Duncan testified that he gave the appellant portions of an I.Q. test and that the appellant tested in the borderline to mildly impaired range which Duncan said was the level of an eleven or twelve year-old. On cross-examination, however, it was emphasized that Duncan had given the appellant only portions of an I.Q. test on which he had based an estimate of the appellant's I.Q. The State's expert, Dr. Gripon, testified that the appellant's problems in school stemmed solely from his attention-deficit disorder which was addressed when he took his medication; when the appellant refused to take his medication, his grades declined and his behavior deteriorated. Gripon did not see any evidence that the appellant suffered from schizophrenia.

Although experts for both the State and the defense testified that the appellant's intellectual functioning and adaptive behavior were impaired to some degree, the testimony was not sufficiently developed to establish that appellant was "mentally retarded" under the guidelines we set in *Briseno*. Because the evidence does not support the appellant's claim that he is mentally retarded, we reject his Eighth Amendment claim. See *Stevenson v. State*, 73 S.W.3d 914, 917 (Tex.Cr.App.2002). Point of error two is overruled.

In his fourth and fifth points of error, the appellant claims that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution, respectively, when his trial counsel failed to introduce expert-witness testimony that he had an I.Q. in the range of 65 to 70.

The appellant claims that, during the hearing on his competency to stand trial, Dr. Duncan testified that he had assessed the appellant's I.Q. in the range of 65 to 70. At the guilt phase of trial, however, although Duncan testified about the appellant's "borderline to mildly impaired functioning," he neither testified specifically to his determination of the appellant's I.Q., nor was he questioned by the appellant's counsel about the I.Q. test he had administered. The appellant claims that his counsel was ineffective in failing to elicit Duncan's testimony about his I.Q. at the guilt or innocence phase.

To establish ineffective assistance of counsel, the appellant must meet the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Varelas*, 45 S.W.3d 627 (Tex.Cr.App.2001). First, the appellant must demonstrate that counsel's performance was deficient. *Id.*, at 629. Second, the appellant must show that counsel's performance prejudiced his defense at trial. *Id.* That is, he must show that there is a reasonable probability that the result of the proceeding would have been different but for the errors made by counsel. *Id.* Allegations of ineffectiveness must be firmly founded in the record as counsel is presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.*

The record from the competency hearing reflects that Duncan testified that he administered to the appellant only "some portions" of an I.Q. test in order to arrive at an "estimate" of the appellant's I.Q.:

[Duncan]: I gave [the appellant] some portions of an I.Q. test to arrive at that estimate, some of the verbal subtests of the Weschler [A]dult [I]ntelligence [S]cale.
* * * Q. Okay. And, so, were you able to arrive at a numerical I.Q. score? A. I would say in the range of 70; but because I didn't give the full test, that number would be-there would a range there. I would say that based on the-scoring the subtest that I gave and figuring out that number, would be a 65 to 70 kind of I.Q. range.

Given that Duncan administered only "portions" of an I.Q. test to arrive at an "estimate" of the appellant's I.Q., we presume that the appellant's defense counsel was exercising reasonable trial strategy by not eliciting such testimony from Duncan before the jury, in light of the speculative weight of the testimony and its susceptibility to cross-examination.[10] Moreover, the appellant has not shown that the outcome of the trial would have been different had the testimony been elicited. Points of error four and five are overruled.

In his eighth and ninth points of error, the appellant claims that his trial counsel was ineffective under the Sixth Amendment and Article I, Section 10 of the Texas Constitution, respectively, by failing to object to the prosecutor's argument that appellant had been "stalking" someone when he claims no such evidence was introduced at trial. During the punishment stage of trial, the prosecutor argued that the appellant "had been stalking a girl": "Then we find out that he was stalking a young lady. That's a threat of violence."

During the State's cross-examination of defense witness Dr. Fred Fason, the prosecutor questioned Fason about the factors he considered in making his diagnosis of the appellant:

[Prosecutor]: And subsequent to that, as an adult, having charges related to delivery of cocaine, possession of cocaine, would that be important in making that diagnosis? [Fason]: Well, it's something you take into consideration; but it wouldn't be-it's not pathognomonic of-of any social personality disorder. Q. And even the history that his mother gave you that he was stalking some young lady- A. Yes. Q. -would that be important in diagnosing antisocial personality? A. Not in the way it was presented, no. I mean it's significant. It's another-it's much like-arriving at a diagnosis, in a way, is kind of like working a jigsaw puzzle. You take a whole bunch of different pieces and you see how they fit together to come out with a picture; and that would be a piece of the puzzle. Q. And taking that all together, you know, a history from the age of 13, from theft, to 15, 16, dealing drugs, to stalking, to capital murder, all that taken together doesn't that kind of suggest that there may be an antisocial personality here?

(Emphasis added). Fason did not refute the suggestion that the appellant had reportedly stalked a girl. Rather, Fason affirmed the prosecutor's suggestion. Fason's affirmative response to the prosecutor's question made the suggestion become evidence, albeit slight. Thus, the prosecutor's argument referring to the evidence was not objectionable. Points of error eight and nine are overruled.

The judgment of the trial court is affirmed.

PER CURIAM.

MEYERS and HOLCOMB, JJ., dissent.

FOOTNOTES

[1] See Tex. Penal Code § 19.03(a).

[2] Tex. Code Crim. Proc. art. 37.071, § 2(g).

[3] Art. 37.071, § 2(h).

[4] The appellant did not complain at trial, nor does he complain in this appeal, about the admission of Wilson's testimony concerning the appellant's statements regarding his lack of remorse.

[5] Id., § 591.003(13) (quoted in *Briseno*, 135 S.W.3d, at 8).

[6] See *Briseno*, 135 S.W.3d, at 7.

[7] Id., at 7, n. 24.

[8] Id., at 7, n. 25 (quoting § 591.003(1)).

[9] Id., at 7 (discussing AAMR definition).

[10] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), discussed in connection with point of error two above, was decided on June 20, 2002. Appellant was tried and convicted in April 2001.

Ex parte Jamaal Howard

Texas Court of Criminal Appeals, No. WR-77,906-01 (December 12, 2012) (per curiam) (not designated for publication)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

WR-77,906-01

EX PARTE JAMAAL HOWARD

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 15114-A IN THE
356TH DISTRICT COURT OF HARDIN COUNTY

Per Curiam.

ORDER

This is an application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, Tex. Code Crim. Proc.

In April 2001, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Howard v. State*, 153 S.W.3d 382 (Tex. Crim. App. 2004).

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

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Additionally, we note that grounds for relief six, nine through fifteen, and seventeen are also procedurally barred because they could have been raised on direct appeal.^[1] Therefore, based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 12TH DAY OF DECEMBER, 2012.

Do Not Publish

[1] *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

Howard v. Davis

United States Court of Appeals for the Fifth Circuit, No. 19-70018, 959 F.3d 168 (May 11, 2020)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-70018

JAMAAL HOWARD, Petitioner-Appellant, versus LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.

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

Before SMITH, COSTA, and HO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Jamaal Howard, a Texas death-row inmate, moves for a certificate of appealability ("COA") to contest the denial of his petition for a writ of habeas corpus. Because reasonable jurists would not dispute the issues, we deny the motion.

I.

After a jury deemed Howard competent to stand trial, another jury convicted him of capital murder.[1] Based on the jury's answers to the special issues, the trial judge sentenced Howard to death.

Howard filed a state habeas application raising a bevy of claims, including the ineffective-assistance-of-counsel ("IAC") ones pressed in this motion. As relevant, Howard complained that his lawyer had failed to investigate and proffer evidence of his mental illness that would have (1) resulted in a life instead of death sentence; (2) persuaded the jury that he was incompetent to stand trial; and (3) shown that his Miranda waiver was neither knowing nor intelligent. The trial court recommended denying relief. The TCCA agreed. See *Ex parte Howard*, No. WR-77,906-01, 2012 WL 6200688, at *1 (Tex. Crim. App. Dec. 12, 2012) (per curiam) (unpublished).

Howard petitioned for federal habeas, raising the same claims.[2] The district court declined to issue the writ, holding that, though Howard had exhausted the claims, he had failed to show that the state courts unreasonably applied federal law. See 28 U.S.C. § 2254(d). Now Howard seeks a COA.[3]

II.

Howard deserves a COA only if he "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

He satisfies that standard by demonstrating that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further.[4]

"A court of appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims, and ask only if the District Court's decision was debatable." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) (cleaned up). Because Howard sits on death row, we resolve doubts in favor of issuing a COA. See, e.g., *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

To prove IAC, Howard must show that counsel's performance was objectively unreasonable and prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Courts strongly presume that the performance was good enough. *Rockwell v. Davis*, 853 F.3d 758, 761 (5th Cir. 2017). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Washington*, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances," but we still "apply[] a heavy measure of deference." *Id.* A lawyer's work can be deficient where he fails, at the punishment phase, to look into and present mitigating evidence of the defendant's life history or mental illness.[5]

Because Howard exhausted the relevant claims, the district court's job was to determine whether the state adjudications were contrary to, or unreasonably applied, clearly established federal law as determined by the Supreme Court, or unreasonably determined the facts. See 28 U.S.C. § 2254(d)(1)-(2). So, in this posture, we ask whether it's debatable that "there is any reasonable argument that counsel satisfied [Washington's] deferential standard." [6]

A.

Howard first seeks a COA for the issue of whether his lawyer failed to investigate, develop, and present mitigating evidence of Howard's life history and mental issues. "[T]he record is replete," he says, "with a picture of a bumbling attorney who was doing the bare minimum to get through a trial that could not end soon enough[.]" "Had counsel's performance not been deficient, there is a reasonable probability that Mr. Howard would have been sentenced to life instead of death."

More concretely, Howard urges that an effective attorney would have (1) hired an expert to examine Howard and gather a life history "for mitigation purposes";[7] (2) discovered records suggesting that Howard injured his head in 1997;[8] and (3) presented more witnesses and questioned them better.

The district court rejected Howard's theories, opining that the state courts had reasonably adjudicated them.[9] The court noted that "Howard's trial counsel did investigate and provide witnesses and records as to Howard's childhood background, educational struggles, depression, and mental health issues." The lawyer had called many "lay witnesses, consisting of close family

members, extended family, educators, coaches, neighbors, and friends to testify regarding his mental decline and odd behavior throughout the years." "[C]ounsel also [used] a trial investigator and obtained Howard's medical and school records."

Indeed, counsel started and finished the proceedings by highlighting Howard's mental issues. In his first remarks during guilt-phase opening arguments, the lawyer emphasized Howard's impairments. And in closing arguments at the punishment phase, the lawyer stressed that the jury should consider Howard's mental illness and give him life.

Howard's lawyer looped experts in, too, as the district court noted. Indeed, counsel hired a psychiatrist, Dr. Fred Fason, to conduct an examination. And twice counsel successfully moved the trial judge to appoint doctors to evaluate Howard's competency to stand trial.[10] Naturally, those examinations unearthed evidence about Howard's mental health. One of the evaluating psychologists, Dr. James Duncan, testified at the guilt phase[11] that Howard was impaired and possibly schizophrenic. And Dr. Fason testified at punishment about Howard's mental shortcomings, including that he may have been schizophrenic.

Howard's case is plainly distinguishable, the district court concluded, from those in which a lawyer totally fails to examine mental health and life history. See *Williams*, 529 U.S. at 395-97; *Lockett*, 230 F.3d at 714. Howard's lawyer pursued and presented many witnesses and experts who spoke about Howard's mental issues and history, so, the court opined, there is undeniably a reasonable argument that the lawyer satisfied Washington's deferential standard.[12] To say otherwise only second-guesses the lawyer's performance as a matter of degree.

Howard's protests of inadequate research fail to show a debatable issue when they are stacked against the lawyer's investigative efforts and the bountiful testimony concerning Howard's mental health.[13] "[C]umulative testimony generally cannot be the basis of an [IAC] claim." *Richards v. Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009). The suggestion that counsel should have gone even further, say, by finding evidence of a head injury[14] or by hiring yet another expert, does not show that the district court's conclusion was debatable.[15] Indeed, Howard's own state application admitted that his "trial lawyer did a fairly good job of presenting some type of mental deficiency."

B.

Howard's remaining arguments either do not show a debatable issue or are forfeited.

1.

Howard asks leave to appeal the claim that his lawyer "failed to seek timely and relevant evaluations of the mental condition of Mr. Howard regarding his competence to stand trial." After two trials on the matter, a jury found Howard competent. The district court decided that the state courts had reasonably held that Howard's lawyer adequately pursued the competency issue.

Howard points to several alleged omissions: His lawyer (1) "did not even consider competence until Dr. Fason urged him"; (2) failed to request an expert's review of competency until Fason

suggested; (3) "did not discuss" Duncan's report with Duncan "until the day [the lawyer] began opening his case on guilt"; and (4) failed to request a trial on competency but, instead, waited for the state to do so. Howard did not, however, press those omissions in his federal petition or contend that they proved ineffectiveness. Instead, as the district court recognized, the petition was "silent regarding how the state habeas court [wa]s unreasonable pertaining to its findings of fact and conclusions of law" and failed to explain how the lawyer's efforts as to competency were lackluster. We cannot grant a COA on an argument the district court had no chance to address. See Thompson, 916 F.3d at 460.

Howard's other tack is to renew his general investigation-of-mental-health contentions. Those were presented to the district court, but for reasons described, they do not raise a debatable issue or deserve to proceed.

2.

Howard demands a COA on whether his lawyer failed to scrutinize the knowingness and intelligence of his Miranda waiver and eventual confession. Howard's theory is that, if his lawyer had adequately explored his mental health, then the lawyer would have successfully contended that Howard lacked the capacity to waive his Miranda rights and confess.

Howard does not suggest that he would have been acquitted were the confession excluded. Instead, he complains that the prosecutors were able to use his Mirandized statement "to demonstrate that Mr. Howard was calculating and had no remorse, something that was highlighted time and again . . . in seeking a death penalty."

Howard does not explain how a better investigation of his mental health could somehow have led to a successful challenge to his confession. He fails to engage with the district court's reasoning that the evidence showed that Howard understood his rights and was not coerced into waiving them and confessing. Indeed, he offers no theory as to why the court's conclusion was debatable. Regardless, for reasons described, reasonable jurists could not debate that the state courts reasonably applied federal law in determining that counsel's investigation was good enough.

3.

Howard directly appeals the denial of an evidentiary hearing. See *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) (construing the same as a direct appeal). "Because [Howard's] constitutional claims fail, we need not address the merits of his evidentiary hearing claim." *Jackson v. Davis*, 795 F. App'x 939, 940 (5th Cir. 2020) (per curiam) (citing *Norman*, 817 F.3d at 234). But even if we do, see *Norman*, 817 F.3d at 234 (addressing the merits despite no need), there is no abuse of discretion, see, e.g., *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016).

* * * * *

The motion for a COA is DENIED. The order denying an evidentiary hearing is AFFIRMED.

FOOTNOTES

[1] In affirming the conviction, the Texas Court of Criminal Appeals ("TCCA") described the murder: "[Howard] stole a gun from his grandfather the night before the murder and hid it. Despite his family's efforts to persuade him to turn over the gun, [Howard] refused. The following morning, [Howard] retrieved the gun and walked several blocks from his house to the Chevron store. After peering in the windows, he entered the store, went into the secured office area where the victim was sitting, cocked the gun, and shot the victim in the chest. [Howard] stole \$114.00 from the cash register and reached over the dying victim to steal a carton of cigarettes before leaving. The offense was recorded on videotape." *Howard v. State*, 153 S.W.3d 382, 383-84 (Tex. Crim. App. 2004) (per curiam).

[2] The petition asserted other claims not before us. Separately, Howard moved for an evidentiary hearing, which the district court denied.

[3] The district court denied one.

[4] *Raby v. Davis*, 907 F.3d 880, 883 (5th Cir. 2018) (cleaned up), cert. denied, 139 S. Ct. 2693 (2019).

[5] See, e.g., *Williams v. Taylor*, 529 U.S. 362, 395-96, 398 (2000); see also *Lockett v. Anderson*, 230 F.3d 695, 711 (5th Cir. 2000) ("It is clear that defense counsel's failure to investigate the basis of his client's mitigation defense can amount to [IAC].").

[6] *Harrington v. Richter*, 562 U.S. 86, 105 (2011); see also *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.").

[7] In an aside, Howard notes that the Eighth Amendment requires that the defendant be permitted to submit mitigating evidence in seeking to avoid death. See, e.g., *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). True enough. But that jurisprudence establishes the state's obligation to permit Howard to submit such evidence, not his attorney's obligation to present it. See *id.*

[8] Howard points to other supposedly undiscovered evidence listed in his habeas petition, which he merely cross-references. But "a COA applicant waives claims by directing the appellate court to briefing before the district court to support his request for a COA." *McGowen v. Thaler*, 675 F.3d 482, 497 (5th Cir. 2012).

[9] Howard faults the district court for relying on state-court findings that "were prepared by the State for a different Judge eleven years after the trial and were signed off by the new Judge without a hearing." But Howard never told the district court that he had a problem with the state courts' method of factfinding, so his contention is forfeited. See, e.g., *Thompson v. Davis*, 916 F.3d 444, 460 (5th Cir. 2019) (holding that a COA petitioner could not press an argument that was not presented to the district court); *Garcia v. Davis*, 704 F. App'x 316, 321 n.2 (5th Cir. 2017) (same); see also *Carty v. Thaler*, 583 F.3d 244, 266 (5th Cir. 2009) (holding that, because defendant did not present a specific mitigation-evidence argument to the district court, she couldn't assert it on appeal).

[10] To be sure, Duncan was appointed to evaluate Howard's competency for trial and not (specifically) to gather mitigation evidence. But much of what his evaluation revealed also counted as mitigation evidence of Howard's mental issues. See, e.g., *Bell v. Cone*, 535 U.S. 685, 699-700 (2002) (observing that guilt-phase evidence relating to the defendant's failed insanity defense also served as mitigation evidence of mental illness at the punishment phase).

[11] The same jury sat for punishment after hearing lots of evidence during the guilt phase about Howard's mental health and odd behaviors. As noted in *Cone*, *id.*, because the same jury sat and little time separated the phases, the evidence presented at the guilt phase was necessarily and properly considered at punishment, too. See also, e.g., *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) ("[I]n most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase[.]"). Howard's lawyer repeatedly referred to that evidence in pleading for a life sentence.

[12] See *Richter*, 562 U.S. at 105 (requiring denial of habeas relief on an exhausted IAC claim if "there is any reasonable argument that counsel satisfied [Washington's] deferential standard").

[13] Howard asserts in passing that the district court erred in refusing to apply the American Bar Association's professional-standards guidelines. But he does not explain what the guidelines require or why they would make it debatable whether his attorney's performance was deficient. His conclusional contention is therefore waived for inadequate briefing. See, e.g., *Woods v. Cockrell*, 307 F.3d 353, 357 (5th Cir. 2002) (holding that a COA movant had waived an issue because it was briefed inadequately). Howard also claims that the district court erred in not applying Sixth Amendment caselaw that postdated his conviction. But, under professional standards from any era, reasonable jurists would not debate that the state courts reasonably applied federal law in holding that Howard had received effective assistance.

[14] Cf. *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002) ("[A]ny evidence about [the defendant's] alleged brain injury . . . is all 'double edged.' In other words, even if his recent claims about this evidence is true, it could all be read by the jury to support, rather than detract, from his future dangerousness.").

[15] See, e.g., *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999) ("Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing."); see also *Washington*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight[.]"). In addition, Howard only speculates that counsel would've obtained other evidence of mental illness, and jurists would not debate that that's not enough. See *Whitaker v. Quarterman*, 200 F. App'x 351, 355 (5th Cir. 2006) ("This court has often stated that a petitioner alleging [IAC] on the basis of a failure to investigate must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial." (quotation marks removed)).

Howard v. Lumpkin: Petition for a Writ of Certiorari

Supreme Court of the United States, No. 20-5996 (filed October 6, 2020; certiorari denied January 11, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-5996 (Capital Case)

JAMAAL HOWARD, PETITIONER, v. BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI (in forma pauperis)

DON BAILEY, ATTORNEY FOR PETITIONER, 309 N. Willow, Sherman, Texas 75090, (903) 892-9185

QUESTIONS PRESENTED

1. Did the Fifth Circuit err in considering the totality of three different trials, and excusing the District Court's erroneous conclusion regarding the proper standard, in considering the claim that Mr. Howard receive the ineffective assistance of counsel when his attorney failed to conduct a reasonable investigation of his life history and to have a mental health evaluation conducted in light of that history?
2. Did the Fifth Circuit err in considering the totality of three different trials and the District Court's erroneous legal conclusion when they denied Mr. Howard's claim that he was denied his Sixth & Fourteenth Amendment rights to effective assistance of counsel when his attorney failed to investigate Mr. Howard's psychosocial history thoroughly and failed to seek timely and relevant evaluations of the mental condition of Mr. Howard regarding: a. his competence to stand trial and whether his waiver of Miranda rights and subsequent confession were knowing and intelligent?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the caption of the case.

TABLE OF AUTHORITIES

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007); Atkins v. Virginia, 536 U.S. 304 (2002); Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981); Bell v. Ohio, 438 U.S. 637 (1978); Bouchillon

v. Collins, 907 F.2d 589 (5th Cir. 1990); Cuyler v. Sullivan, 466 U.S. 335 (1980); Eddings v. Oklahoma, 455 U.S. 104 (1982); Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004); Ex parte Howard, No. WR-77906-01, 2012 WL 6300668 (Tex. Crim. App. Dec. 12, 2012); Hitchcock v. Dugger, 481 U.S. 393 (1987); Howard v. Davis, 959 F.3d 168 (5th Cir. 2020); Howard v. State, 153 S.W.3d 382 (Tex. Crim. App. 2004); Howard v. Texas, 546 U.S. 1214 (2006); Lockett v. Ohio, 438 U.S. 586 (1978); Miranda v. Arizona, 384 U.S. 436 (1966); Moore v. Texas, 137 S.Ct. 1019 (2017); Penry v. Johnson, 532 U.S. 782 (2001); Penry v. Lynaugh, 492 U.S. 302 (1989); Powell v. Alabama, 287 U.S. 45 (1932); Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Smith v. Texas, 543 U.S. 37 (2004); Strickland v. Washington, 466 U.S. 668 (1984); Tennard v. Dretke, 542 U.S. 274 (2004); United States v. Cronin, 466 U.S. 648 (1984); United States v. Clark, 741 F.2d 699 (5th Cir. 1984); Woodson v. North Carolina, 428 U.S. 280 (1976); Wiggins v. Smith, 539 U.S. 510 (2003).

PETITION FOR A WRIT OF CERTIORARI

Jamaal Howard petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, denying a motion for certificate of appealability, is reported at Howard v. Davis, 959 F.3d 168 (5th Cir. 2020) and is attached as Appendix 1. The unpublished opinion of the District Court granting summary judgment is attached as Appendix 2.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 11, 2020.[1] The court of appeals had jurisdiction pursuant to 28 U.S.C. § 2254 and § 1291. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution allows that "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On May 12, 2000, Jamaal Howard, a young black young man with a history of mental health and intellectual impairment issues, killed a person in the course of committing robbery in Hardin County, Texas. Mr. Howard was subsequently convicted by an all-white jury and given the death penalty. He spent the next four years in and out of prison psychiatric hospitals and remains heavily medicated to this date for mental issues.

A. PROCEDURAL HISTORY

On June 13, 2000, a Hardin County Grand Jury indicted Mr. Howard for the capital murder of Vickie Swartout during the course of committing robbery. (ROA. 1313) Mr. Howard's family hired Tyrone Moncriste, an attorney from Houston, to represent Mr. Howard. (ROA. 1315) Mr. Moncriste never filed any document or pleading bringing up the three most important matters in this case, that is, competency, mental deficiency and insanity. In fact, as noted below, it was the state that moved for a competency trial after they had rested and Mr. Moncriste first introduced the issue during the opening witness of the defense case. In fact, as noted below, it was the state that moved for a competency trial after they had rested and Mr. Moncriste first introduced the issue during the opening witness of the defense case. Mr. Moncriste did not bring up insanity until March 15, 2001, halfway through individual voir dire, in an oral notice to the Court that he was changing the plea to not guilty by reason of insanity. (ROA. 2672) Mr. Moncriste never had Mr. Howard examined specifically for insanity by anyone. Mr. Moncriste moved orally for a competency evaluation on March 5, 2001, the day before jury selection was to start. (ROA. 1690-1691)

The state rested after just over one day of testimony on guilt-innocence. (ROA. 4280) At the conclusion of Dr. Duncan's testimony, the prosecutor, Mr. Roach moved for a competency trial. Something Mr. Howard's attorney never did. At 11:10 a.m. on the second day of trial, the court stood in recess to determine competency. (ROA. 4307-4309) Thus, pursuant to Tex. Code of Crim. Proc. Art. 46.02 § 2(b) the court sent the jury home to have a competency trial.

On April 11, 2001, the first competency trial commenced. (ROA. 4935) After hearing the witnesses, including Dr. Fason, the jury notified the court that they were deadlocked. The court instructed the jury to continue to deliberate and one hour and forty minutes later the jury again said they were deadlocked and the court declared a mistrial. (ROA. 5158-5159) The court ordered a new jury panel to be summoned for the following Monday, April, 16th. (ROA. 5161)

The second competency trial proceeded in much the same manner as the first with the exception that Mr. Howard's attorney failed to call his one expert witness, Dr. Fason. The all white jury found Mr. Howard competent in 47 minutes of deliberation on the second competency trial. (ROA. 5464-5465)

The punishment hearing consisted largely of state witnesses with a few of Mr. Howard's family and friends testifying about his mental issues. Dr. Fason also testified. Mr. Howard was given the death penalty.

Mr. Howard's direct appeal asserted nine potential errors. (ROA. 1203-1265) The State responded on December 13, 2002. (ROA. 1267-1303) The Texas Court of Criminal Appeals affirmed the conviction with two justices dissenting.[2] Howard v. State, 153 S.W.3d 382 (Tex. Crim. App. 2004) On February 27, 2006, the Supreme Court denied a petition for certiorari. Howard v. Texas, 546 U.S. 1214 (2006) (ROA. 6336)

On April 24, 2003, the application for writ of habeas corpus was submitted for Mr. Howard. (ROA. 6043-6145) Among the claims presented were intellectual disability (ROA. 6045-6061) and claims

of ineffective assistance of counsel in presenting competency and insanity (ROA. 6070-6073) There were also claims that Mr. Howard received the ineffective assistance of counsel due to the lack of presentation of mitigating evidence including the prior gunshot wound and the proper development of that issue as well as the failure to present evidence regarding intellectual disability. (ROA. 6116-6120) Nine years then passed in which the original state Judge (Plunk) was replaced with Judge Thomas. No evidentiary hearing was allowed.

On June 15, 2012, the trial court[3] signed off on the State's proposed findings and conclusions and forwarded to the Texas Court of Criminal Appeals without a hearing on the claims. (ROA. 6295-6313) On December 12, 2012, the Texas Court of Criminal Appeals denied the application for writ of habeas corpus. Ex Parte Howard, No, WR-77906-01, 2012 WL 6200668 (Tex. Crim. App. Dec. 12, 2012) (ROA. 6020)

B. FACTUAL HISTORY

The facts are that Mr. Howard's attorney did little to prepare for the issues that were important to the trial, that is intellectual disability, competency and insanity. When Mr. Moncriste called Dr. Duncan as his first witness, during guilt innocence, this came to the forefront when Mr. Moncriste confirmed with Dr. Duncan that they had never met or spoken prior to the current day of testimony, even though Dr. Duncan had been appointed to examine Mr. Howard for competency. (ROA. 4281-4283) Dr. Duncan conducted what he termed an extensive examination of Mr. Howard in mid-March to determine mental functioning, emotional functioning, concentration, memory and so forth. Dr. Duncan's stated that Mr. Howard's cognitive functioning was inconsistent because sometimes he could give coherent responses and other times his responses were unintelligible, mumbling in a low tone, that required repeated questioning. Mr. Howard would give inappropriate affect responses by suddenly smile or chuckle for no known reason. This concerned Dr. Duncan because he was left wondering what Mr. Howard was responding too. (ROA. 4284-4288) Dr. Duncan concluded that Mr. Howard's mental state was declining. Dr. Duncan also found Mr. Howard's mental competency questionable whether he could reasonably assist his attorney in his defense. (ROA. 4302-4305)

Dr. Duncan stated that he had evaluated and examined Mr. Howard pursuant to a court order. Consistent with previous testimony, Dr. Duncan talked about Mr. Howard's inappropriate affect and functioning that was not consistent. With regards to intellectual functioning Dr. Duncan gave Mr. Howard a series of exercises to help estimate his intellectual functioning that resulted in a borderline to mildly impaired range. Dr. Duncan explained that would be "at a borderline mentally retarded range. To give you an idea of what that would be like, it would be about at a maybe 11, 12 year old level." (ROA. 5000-5005) Based on the assessment and evaluation, Dr. Duncan had questions about Mr. Howard's ability to stand trial and the potential of schizophrenia or other organic factors being present resulting in Mr. Howard's erratic behavior. Dr. Duncan further explained about intellectual impairment that he had given the verbal portions of the Wechsler adult intelligence scale (WAIS) to come to a conclusion that Mr. Howard was in the 65-70 range in intellectual functioning. The prosecutor brought out that Mr. Howard could pass school

achievement tests when he was in the tenth or eleventh grade. Dr. Duncan stated that would indicate that there had been a deterioration or some slide in their ability. (ROA. 5006-5016)

Dr. Fred Fason, a psychiatrist, stated, in the first competency trial, that with regards to competency, Mr. Howard did not know what it meant that he could get the death penalty. Mr. Howard was laughing inappropriately and stated that by telling a staff member a more negative version of events regarding the crime he felt it could help him. Dr. Fason concluded after three interviews with Mr. Howard and the other testing and investigation, that he lacked a rational understanding of the charges against him and the consequences if convicted. (ROA. 5041-5045) What is evidence of ineffective assistance of counsel is that Counsel noted he was changing Mr. Howard's plea to not guilty by reason of insanity shortly before trial. However, during guilt innocence, Counsel did not present his one expert on mental illness, Dr. Fason. Thus, the opportunity to develop the issue was never pursued except through court appointed experts and the State's expert, Dr. Gripon.

Dr. Duncan, (ROA. 5268-5304), Shirley Howard, (ROA. 5305-5324) Joann Farrell, (ROA. 5334-5339) testified for the defense in the second competency trial. Sandra Johnson testified that she had known Mr. Howard all his life and she noticed that before the incident Mr. Howard would be dirty and would not seem to recognize her. Ms. Johnson noted that even in court, Mr. Howard did not seem to recognize her. (ROA. 5339-5349)

During guilt-innocence, Mr. Howard's lawyer did not present any experts regarding insanity, something he had brought out by asserting a claim shortly before trial that he was changing the plea to not guilty by reason of insanity. He called Dr. Duncan about competency, but that was quickly turned into the first competency trial, with a different jury. Dr. Fason and Dr. Duncan testified during the first competency trial, which resulted in a hung jury. The second competency trial Dr. Fason was not called and no explanation has ever been provided. Thus, at the conclusion of the guilt-innocence stage, Mr. Howard's attorney had brought up the issue of insanity, but had failed to provide the jury with the means by which they could agree.

What was presented at punishment, was that Shirley Harrison, a jailer in the Hardin County Jail, noted that Mr. Howard would do what he was told in the jail and she had never had a problem with him. (ROA. 4669-4670) Tyre Thomas, another jailer, testified that he known Mr. Howard since childhood. Mr. Thomas again noted that Mr. Howard was different now in that he talked to himself, had mood swings and did not pay attention to his personal hygiene. Mr. Howard had to be told to brush his teeth and take a bath but he would comply when told too. Mr. Howard did not give Mr. Thomas any problems in jail. (ROA. 4671-4673)

During punishment, Dr. Fred Fason, the defense psychiatrist, stated that in examining Mr. Howard he saw a confused, not very bright person who was impenetrable. Dr. Fason could not find out what Mr. Howard was thinking. What little information Mr. Howard would eventually volunteer did not make any sense. Mr. Howard could not complete the MMPI-2 because he did not understand basic words like mechanics and appetite. Dr. Fason noted that Mr. Howard intellectual functioning had declined dramatically after second grade, dropping over sixty percentile points in

match in a matter of seven years. (ROA. 4716-4726) During interviews, Mr. Howard would provide answers that did not make sense in conjunction with the question asked. Mr. Howard would also started laughing at inappropriate junctures in the interview. Dr. Fason concluded this inappropriate affect was one of the cardinal signs of schizophrenia. Dr. Fason's diagnosis of Mr. Howard was schizophrenia. (ROA. 4727-4736)

There were numerous witnesses that testified about Mr. Howard's declining mental health and his practice of talking to invisible people, poor hygiene and inappropriate behavior. However, Counsel for Mr. Howard did not develop the issues before the jury as noted above.

During the state habeas proceedings, among the exhibits submitted were several medical references that Mr. Howard had previously had a gunshot wound to his head. (ROA. 6149-6150, 6169)[4] There were also notes from a Dr. Guilette and notes from the jail which pointed to mental illness on the day of arrest that were not presented by Counsel. (ROA. 6072) Additionally, State Habeas Counsel presented records from the Jester IV unit, after Mr. Howard was admitted to that psychiatric prison unit on several occasions. On August 1, 2001, Mr. Howard was brought from the Polunsky unit after he was "urinating on the walls, was withdrawn and mute, and appeared to be deteriorating with very poor personal hygiene." Mr. Howard was given Haldol, Cogentin and Zooloft and his condition improved with a diagnosis of brief psychotic disorder. Mr. Howard was discharged on February 13, 2002, after five and a half months. (ROA. 6189-6190) Mr. Howard returned on July 15, 2002 to Jester IV as outpatient because he was not taking his medication. His diagnosis was schizophrenia, chronic. (ROA. 6193-6194) Mr. Howard stayed at Jester IV until he was discharged on September 4, 2002. Mr. Howard was now having rapid decompensation of mental illness by behavior problems, disruptive behavior and self-mutilation. No test were given but the record shows he had depression and schizophrenia. Mr. Howard's Haldol was increased from 5 mg to 15 mg with Prozac and Benadryl.[5] (ROA. 6191-6192) Mr. Howard returned to Jester IV on October 8-10, 2002. The report states that Mr. Howard has undifferentiated schizophrenia and psychomotor retardation. Mr. Howard continued to deny hallucinations and delusions but was taking Haldol, and had been previously treated with Haldol D and Cogentin. Mr. Howard could not provide much history, was disheveled and had "poverty of thought." The result of the examination was that the Haldol D was increased to the maximum dosage. (ROA. 6182-6185) Mr. Howard remains the same as his was the day of the crime, a mentally ill individual with likely intellectual disabilities based on the testimony of Dr. Fason, Dr. Gripon and Dr. Duncan.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit found that Mr. Howard's counsel had argued at both opening and closing regarding mental health and had "looped" in experts as needed. Howard v. Davis, 959 F.3d 168 at 172. Given that arguments are never evidence, what the Fifth Circuit should have focused on is what actually occurred during the presentation of evidence. Mr. Howard's attorney had raised insanity and competency. He presented no evidence during guilt innocence from his one mental health expert on insanity. He used Dr. Fason during the first competency trial, which resulted in a

hung jury, and then failed to call him for the second competency jury, which found Mr. Howard competent. He called Dr. Fason for punishment, even though Dr. Fason had told him he needed to get a mitigation expert to present punishment issues. These issues were never developed in state court and the findings of the state court are not entitled to any presumption because there was no fact finding, just simply the signing of the state's proposed findings and conclusions by a Judge who had no knowledge of the trial.

During the District Court's determination, the Court came to the erroneous conclusion regarding the professional norms for the development of mitigating evidence. The District Court determined that the requirements set out for counsel to investigate mitigation evidence in *Wiggins v. Smith*, 539 U.S. 510 (2003) was not a prevailing standard at the time of Mr. Howard's trial in 2001. The District Court further stated that many of the standards that are applicable "today were not available" in 2001. (ROA. 1656) This argument is simply not true based on two principles. First, there is no evolving standards of competence in regards to the representation of counsel. The standards of representation have changed little since 1984 when *Strickland v. Washington*, 466 U.S. 668 (1984) was decided. Second even if there were some evolving standards, in *Wiggins* the Supreme Court determined that Counsel was ineffective under the prevailing standards of 1989, when the trial took place, for not properly conducting a mitigation investigation. Additionally, the District Court asserts that the American Bar Association Guidelines of 1989, are merely guidelines and the District Court refused to apply them in considering the present claim. (ROA. 1088) The Supreme Court has held since *Strickland* that the ABA guidelines are "standards to which we have long referred as 'guides to determining what is reasonable'. *Strickland* at 688." *Wiggins v. Smith*, 539 U.S. at 524. Thus, the most prevalent proof in ineffectiveness was when Mr. Moncriffe did not hire or seek appointment of an expert to examine Mr. Howard and gather a life history for mitigation purposes, despite being told he needed to do so by his own expert Dr. Fason. (ROA. 6147) Further, as noted above in the proceedings, the record is replete with a picture of a bumbling attorney who was doing the bare minimum to get through a trial that could not end soon enough for him because he had only received 35,000 dollars to represent someone who had severe mental issues. Prejudice resulted in that a complete picture of Mr. Howard's mental illness and life history was not presented that would likely have resulted in a life sentence.

Ineffective Assistance of Counsel in General

The Supreme Court has long recognized that the right to the effective assistance of counsel under the Sixth Amendment means "the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932). The standard for judging the performance of counsel is the same for appointed versus retained counsel. *Cuyler v. Sullivan*, 466 U.S. 335, 334, 100 S.Ct. 1708, 1716 (1980).

The prevailing test for determining if a person received the effective assistance of counsel in a criminal proceeding is that set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), and the companion case of *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984). Thus, in order to prove the ineffective assistance of counsel, the *Strickland* Court held that: 1) to

establish ineffective assistance requiring reversal of a conviction, a defendant must show both a) that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment, and b) that the "deficient performance prejudiced the defense"; 2) the "proper standard for [measuring] attorney performance is that of reasonably effective assistance," as guided by "prevailing professional norms" and consideration of "all the circumstances" relevant to counsel's performance; 3) more specific guidelines in applying that standard are "not appropriate"; and (4) the proper standard for measuring prejudice is where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would be different." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Justice O'Connor in explaining this broad non-specific approach to reviewing claims of ineffectiveness noted that counsel must "consult with the defendant on important decisions and ...keep [him] informed of important developments." Id. at 688-90, 104 S.Ct. at 2064-66. Thus, the court must look at the attorney's performance to determine "whether in light of all the circumstances, the identified acts or omissions [of counsel] were outside the range of professionally competent assistance." It is the defendant's burden to overcome the presumption that counsel's conduct was trial strategy. Id. at 689, 104 S.Ct. at 2065; See also *United States v. Clark*, 741 F.2d 699 (5th Cir. 1984).

The Fifth Circuit's response to the District Court's failure to apply the correct standard was to simply allege the issue was not properly briefed. *Howard v. Davis*, 959 F.3d 168, 173. However, as set out above and in the motion for a certificate of appealability the issue was properly briefed but the Fifth Circuit refused to consider it. Mr. Howard's attorney failed to present evidence regarding the head injury due to a gunshot wound, failed to hire a mitigation expert as was suggested to him by his own psychological expert, and spent more time trying to get more money from the Court for himself than he did in any way investigating Mr. Howard's mitigation issues.

Ineffectiveness of Counsel in Investigating and Presenting a Mitigation Case

As noted in the federal amended petition, the questioning and presentation of witnesses at punishment by Mr. Moncriste demonstrated a lack of investigation and understanding of what to present. Mr. Moncriste asked several family members and friends if they knew Mr. Howard and then did nothing more than ask them if both families were hurting because of this.

The District Court repeatedly relied upon the state court findings and conclusions on State habeas, and did so in reviewing the current claim. (ROA. 1085-1086) As noted above, these findings and conclusions were prepared by the State for a different Judge eleven years after the trial and were signed off by the new Judge without a hearing. When reviewing these findings in light of the record present in 2012, there is no reason why a Judge would conclude in the manner it did if they had reviewed, or at least cursory glanced at, the record. The State court found in 2012 that Mr. Moncriste presented evidence concerning mental illness and mental retardation. The State Court found that Mr. Howard was not mentally ill. A finding that has been clearly rebutted in the state habeas presentation regarding repeated findings. The finding that trial counsel was not deficient

and he provided the effective assistance of counsel is clearly erroneous given the record.[6]

The Supreme Court has repeated in unqualified language for more than 30 years, the foundational rule that the Eighth Amendment requires in death penalty cases the admission of any mitigating evidence "that might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). Over that period, the Supreme Court has never invoked some evolving standards of competence or suggested that this relatively simple Eighth Amendment mitigation rule, stated in many cases,[7] should be subject to "harmless error" analysis. The reason for this rule is that a mandatory death penalty that leaves out consideration of mitigation is unconstitutional. Each juror at the mitigation phase of the proceeding must have the discretion to spare the defendant's life. The line of cases insists that the jurors should make that judgment based on considering all mitigating factors weighed against the aggravating factors. Each juror at the mitigation phase of the proceeding must have the discretion to spare the defendant's life. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).[8] The *Lockett* line of cases insists that the jurors should make that judgment based on considering all mitigating factors weighed against the aggravating factors.

The presentation of what could have been presented at mitigation is set out in the Federal Amended Petition. (ROA. 477-514) Additionally, State habeas counsel pointed out numerous issues that Mr. Moncriffe did not explore including the head injury, attributed to being shot, in 1997, and mental illness. (ROA. 1084-1085) It is clear that Mr. Moncriffe's theory on punishment was to ask each witness if both families were suffering and at one time Mr. Howard was a good kid.

That strategy, and the lack of investigation that went into that strategy was clearly deficient and resulted in prejudice to Mr. Howard. Mr. Howard is now on medication that controls his schizophrenia within the TDCJ. Had Mr. Moncriffe presented that picture, along with how a prior gunshot could have impacted Mr. Howard at the age of 17, the results could have certainly been different. There was no strategy or adequate preparation that Mr. Moncriffe can rely upon given the record in this case. Mr. Howard received the ineffective assistance of counsel at punishment and the District Court's determination on this matter is clearly wrong. A certificate of appeal should issue.

Ineffective Assistance Regarding Competence and Statement to Police

As a preliminary matter, the District Court found that this issue was properly exhausted before the State Courts. (ROA. 1129) Judge Thomas, the state judge who had taken over from Judge Plunk, signed off on the Prosecution prepared findings of facts and conclusion of law, eleven years after the trial. Those findings and conclusions are set out by the District Court in the memorandum denying relief. (ROA. 1130-1131) Those findings, which include that counsel was not ineffective, are not entitled to a presumption of correctness because they are simply wrong. Mr. Moncriffe did not even consider competence until Dr. Fason urged him to get a psychologist to review Mr. Howard for competence based upon what Dr. Fason saw. Mr. Moncriffe did ask for an examination

but did not review the material or talk to the appointed expert, Dr. Duncan, until the state had rested on guilt-innocence. With regards to the statement, Mr. Moncriste never attempted to challenge the statement in any form, including that Mr. Howard was not competent to give a knowing and voluntary waiver of rights. Thus, the state court findings are inapposite to what is contained in the record.

Mr. Howard was denied his Sixth & Fourteenth Amendment rights to effective assistance of counsel when his attorney failed to investigate Mr. Howard's psychosocial history thoroughly and failed to seek timely and relevant evaluations of the mental condition of Mr. Howard regarding his competence to stand trial and whether his waiver of Miranda rights and subsequent confession were knowing and intelligent.

As set out above in the facts section, Mr. Moncriste orally requested that an expert examine Mr. Howard only after Dr. Fason told him he needed to on March 5, 2001, despite an obvious history of mental illness and not being able to properly communicate. Dr. Duncan examined Mr. Howard and returned his report to the Court asserting that Mr. Howard was likely not competent. Mr. Moncriste did not discuss this report with Dr. Duncan until the day he began opening his case on guilt innocence. It was the State who finally had to ask the Court to conduct a competency hearing, for which Mr. Moncriste was woefully unprepared. What is set out in the record is a case where an attorney knew there was an issue of incompetency but did nothing beyond asking the Court to figure it out by appointing an expert. Likewise, Mr. Howard's lack of competence impacted his ability to give a knowing and intelligent waiver for purposes of Miranda. The statement that was gathered was used to demonstrate that Mr. Howard was calculating and had no remorse, something that was highlighted time and again by the prosecution in seeking a death penalty.

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." *Strickland v. Washington*, 466 U.S. at 491. Trial counsel provides deficient performance if he fails to investigate a defendant's medical history when he has reason to believe that the defendant suffers from mental health problems. See *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental health problems."); *Profitt v. Waldron*, 831 F.2d 1245, 1248-49 (5th Cir. 1987) (holding that counsel has duty to investigate mental health history of defendant who has been committed to a mental institution); *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981) (holding that counsel has duty to obtain medical records and speak with treating physicians). Further, seeking the aid of a court-appointed psychiatrist, in some circumstances, does not excuse the absence of further investigation. See *Profitt*, 831 F.2d at 1249 (finding that relying on opinion of court-appointed psychiatrist was not sufficient when counsel knew that defendant had escaped from a mental institution).

In this case, the record is clear that Mr. Moncriste did nothing regarding competency and the knowing and voluntary waiver of rights in regards to the statement. There was adequate knowledge on the part of Mr. Moncriste, through Dr. Fason and family, that there were serious questions about

competency in this case, and he did not follow up on that. It was the State that finally had to bring out the issue. Thus, deficient performance was present and prejudice resulted and this case should be remanded for a new trial.

CONCLUSION

For the foregoing the reasons the Court should grant the petition. The Fifth Circuit's determination on these issues is contrary to opinions by this Court. A writ of certiorari should be granted and the case remanded to the Fifth Circuit for further proceedings.

RESPECTFULLY SUBMITTED, Don Bailey, Attorney for Jamaal Howard, SBN 01520480, 309 N. Willow, 903-892-9185, 903-891-8304 Fax

FOOTNOTES

[1] Pursuant to the Supreme Court's March 19, 2020, COVID order, this petition is submitted within 150 days of the Judgment of the Fifth Circuit.

[2] There was no dissenting opinion so the basis of the dissent is unknown.

[3] The habeas judge was Judge Thomas, the trial judge was Judge Plunk.

[4] This case was tried pre-Atkins, although appellate counsel cited *Atkins v. Virginia*, 536 U.S. 304 (2002), as supplemental authority regarding a claim submitted of intellectual disability on direct appeal. (ROA. 1305) The Texas Court of Criminal Appeals rejected the claim under *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004). The *Briseno* holding was specifically rejected in *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1019 (2017). (ROA. 1196-1198)

[5] There was an early prison diagnosis, likely carried over from Dr. Gripon, of antisocial personality disorder. This diagnosis faded and schizophrenia was the consistent diagnosis thereafter by every Doctor that examined him.

[6] This finding is strange and could be the result that the Judge that made the finding did not preside over the trial. Mental retardation, or intellectual disability, was not an issue at the trial of Mr. Howard and *Atkins* was never brought out as a preventing factor until the direct appeal.

[7] *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264-65 (2007); *Smith v. Texas*, 543 U.S. 37, 45-48 (2004); *Tennard v. Dretke*, 542 U.S. 274, 286-88 (2004); *Penry v. Johnson*, 532 U.S. 782, 804 (2001); *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Bell v. Ohio*, 438 U.S. 637, 642 (1978).

[8] The Court in *Woodson* explained the mitigation requirement as follows: "In *Furman*, members of the Court acknowledge what cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson*, 428 U.S. at 303-04 (internal citations omitted).

Records Not Publicly Available

The following records exist but are not published online. Each must be requested from the office that holds it.

Trial record (Hardin County, Cause No. 15114-A, 2000 to 2001). This includes the clerk's record and reporter's record: Dr. James Duncan's competency report and testimony, Dr. Fred Fason's evaluation and testimony, Dr. Edward Gripon's testimony, transcripts of both competency trials, the school records and the 1997 gunshot-wound medical records. Held by the Hardin County District Clerk, the Texas Court of Criminal Appeals and Jamaal's counsel.

State habeas application (filed April 24, 2003) with exhibits. This filing assembled the psychiatric record, including the Jester IV admissions. The State's proposed findings, signed by the trial court on June 15, 2012, are part of the same file. Held by the Hardin County District Clerk, the Court of Criminal Appeals and Jamaal's counsel.

TDCJ psychiatric records. These include the Jester IV admissions from 2001 to 2002 and the full medication history. Held by TDCJ Health Services. Release requires Jamaal's signed authorization.

Federal district court opinion (Eastern District of Texas, 2019). Available through PACER. It is also Appendix 2 to the certiorari petition, filed as a separate document on the Supreme Court docket (No. 20-5996), along with the State's brief in opposition.