EXHIBIT A

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Wednesday, September 19, 2007

Printer Friendly

Media Advisory: Michael Richard Scheduled For Execution

AUSTIN – Texas Attorney General Greg Abbott offers the following information about Michael Wayne Richard, who is scheduled to be executed after 6 p.m. Tuesday, September 25, 2007. Richard was convicted and sentenced to death for the capital murder of Marguerite Dixon during a burglary of her Houston-area home in 1986.

FACTS OF THE CRIME

On the afternoon of August 18, 1986 and just two months after he had been paroled from prison, Michael Richard approached Marguerite Dixon's son, Albert, in front of the Dixon home in Hockley and asked if a yellow van parked outside the home was for sale. Albert said the vehicle belonged to his brother who was out of town and suggested that Richard come back another time. Richard left.

When Albert and his sister, Paula, left a few minutes later, Richard returned and entered the house. He took two television sets and put them in the yellow van, sexually assaulted Mrs. Dixon and shot her in the head with a .25 caliber automatic pistol.

Richard told police he ran out of the house and hot-wired the van, then drove to Acres Homes. Richard attempted to sell the televisions there, but ended up just giving the gun to a friend. He drove the van to another home, where it stopped working. He told his friend there that he would return shortly for the van, but never did; the owner of the house called a wrecker the next morning to pick up the vehicle, which led to the police being called when it was discovered the van had been stripped of several valuable items and had obviously been hot-wired to get to its present location.

Mrs. Dixon's children returned home around 9:30 p.m. on the day of the killing to find the sliding-glass door open and all the lights in the house turned off. Frightened by the condition of the house, they got a neighbor, who entered the house with a flashlight and a gun. They discovered Mrs. Dixon dead in her bedroom.

The next morning, the detective assigned to the case determined the missing van had been found and interviewed the owner of the home where Richard left the van and the man to whom Richard tried to sell the televisions. Based on that information, the police obtained a warrant for Richard's arrest. Police found Richard at his mother's home the next evening; Richard admitted he was involved in Mrs. Dixon's murder and offered to help find the murder weapon. Police found the weapon and testing revealed it to be the gun that fired the fatal shot.

PRIOR CRIMINAL HISTORY

During the punishment phase of his trial, the state presented evidence of Richard's two prior convictions for burglary of a habitation. Evidence was also presented of an auto theft charge, committed shortly after the second burglary, but not prosecuted. Richard murdered Mrs. Dixon less than two months after he was released on mandatory supervision for his second burglary conviction.

PROCEDURAL HISTORY

October 29, 1986 -- A Harris County Grand Jury indicted Richard for the capital murder of Marguerite Dixon.

September 4, 1987 -- A jury found Richard guilty of capital murder, and he was sentenced to death.

September 16, 1992 -- The Texas Court of Criminal Appeals reversed Richard's conviction because of a flaw in the jury instructions.

May 15, 1995 -- Richard's second trial began.

June 15, 1995 -- A second jury found Richard guilty of capital murder, he was sentenced to death.

June 18, 1997 -- The Texas Court of Criminal Appeals affirmed Richard's conviction and sentence on direct appeal.

April 3, 1998 -- Richard filed his first application for writ of habeas corpus with the state trial court.

June 26, 1998 -- The U.S. Supreme Court denied Richard's petition for writ of certiorari.

February 7, 2001 -- The Texas Court of Criminal Appeals denied Richard's state application for writ of habeas corpus.

February 7, 2002 -- Richard filed a federal petition for writ of habeas corpus in a Houston federal district court.

December 31, 2002 -- The Federal District Court denied Richard's petition.

June 20, 2003 -- Richard filed a successive state application for the writ of habeas corpus, alleging he was ineligible to be executed based on Atkins claim of mental retardation.

June 27, 2003 -- The 5th U.S. Circuit Court of Appeals denied Richard permission to appeal his first federal petition and affirmed the judgment of the federal district court.

March 21, 2007 -- The Texas Court of Criminal Appeals denied Richard's second state habeas corpus application.

March 28, 2007 -- Richard filed a motion for authorization to file a successive federal habeas corpus petition in the 5th U.S. Circuit Court of Appeals.

May 15, 2007 -- The 5th Circuit Court denied Richard's motion for authorization to file a successive habeas petition.

June 12, 2007 -- The trial court set Richard's execution date for Tuesday, September 25, 2007.

MISCELLANEOUS

For additional information and statistics, please go to the Texas Department of Criminal Justice website, www.tdcj.state.tx.us.

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL WAYNE RICHARD, Petitioner, JANIE COCKRELL, Director, Texas Department of Criminal Justice-Institutional Division, Respondent,	§	H-02-469

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT AND DENYING WRIT OF HABEAS CORPUS

This case is before the Court on Petitioner Michael Wayne Richard's Petition for Writ of Habeas Corpus, and Respondent Janie Cockrell's Motion for Summary Judgment. Having carefully considered the Petition, the Summary Judgment Motion, and the arguments and authorities submitted by counsel, the Court is of the opinion that Respondent's Motion for Summary Judgment should be GRANTED, and Richard's Petition for Writ of Habeas Corpus should be DENIED.

I. Background

Petitioner Michael Wayne Richard, currently in the custody of the Texas Department of Criminal Justice, filed this federal habeas corpus application pursuant to 28 U.S.C. § 2254. Because this is Richard's first application for federal habeas relief, a brief history of the case is appropriate.

Richard was originally convicted of capital murder and sentenced to death in September 1987 for the murder of Marguerite Dixon. That conviction was reversed by the Texas Court of Criminal

Appeals. *Richard v. State*, 842 S.W.2d 279 (Tex.Crim.App. 1992). Petitioner was retried in 1995, and was again convicted and sentenced to death. This petition arises out of Petitioner's second trial.

On February 10, 1993, Judge Patricia R. Lykos of the 180th District Court of Harris County, Texas, appointed Stephen C. Taylor, Esq., to represent Petitioner in his trial for capital murder. SHTr. at 40.[1] Mr. Taylor worked in the 180th District Court as part of an appointment system. During the first six months of 1993, Mr. Taylor worked on, investigated, and prepared Petitioner's case. His work included filing a number of pretrial motions. In late June, 1993, the 180th District Court hired a new Court Coordinator, and the court terminated its existing attorney appointment system. In October 1993, the Court Coordinator informed Taylor that he had to quickly "work out" his assigned cases or "give them back." SHTr. at 46-48. Taylor made appearances on Petitioner's behalf into May of 1994. On May 16, 1994, the Court set a trial date of November 7, 1994. Petitioner's Brief at 8.[2]

In July 1994, the Court Coordinator advised Taylor that Judge Lykos removed him from his capital murder cases, including Petitioner's case. The Coordinator instructed Taylor to prepare a motion to withdraw from each of these cases, and obtain his clients' signatures on, and file, the motions. Taylor prepared a motion to withdraw as Petitioner's counsel, and visited Petitioner in July, 1994. SHTr. at 43-45. Taylor explained to Petitioner that he was ordered to withdraw, that it was not his idea to withdraw, and that Petitioner did not have to consent to his withdrawal as counsel.

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[1] "SHTr." refers to the transcript of Petitioner's State habeas corpus proceedings.

[2] Petitioner's brief contains several citations to a "Supplemental Transcript" in support of factual assertions. It is unclear, however, to which document in the record that citation refers. While this Court cannot ascertain where in the record these assertions find support, the Court will accept Petitioner's factual assertions as true for purposes of this analysis.

Petitioner refused to sign the motion, and Taylor so advised the court. The Court Coordinator told Taylor to file the motion without Petitioner's signature, and that Petitioner would be brought to court at a later date. Taylor filed the motion without Petitioner's signature on July 22, 1994. His last contact with Petitioner occurred two days later. SHTr. at 46-48.

Petitioner appeared before Judge Lykos on August 25, 1994. While waiting in a holding cell, Petitioner met his newly appointed counsel, Christopher Goldsmith. Petitioner told Mr. Goldsmith that he did not want Goldsmith to represent him, and that he wanted to speak to Taylor. Goldsmith responded that they were going into court so that he could be appointed to represent Petitioner. *Id.* at 51.

In the courtroom, Judge Lykos informed Petitioner that Mr. Goldsmith would represent him. Despite the fact that Petitioner had not signed Taylor's motion to withdraw, Goldsmith questioned Petitioner as to whether he was threatened or forced to sign the motion. *Id.* at 55-58. Petitioner questioned Taylor's withdrawal, but Judge Lykos told him it was her decision to remove Taylor. *Id.* at 58-60. She also stated that Taylor had been appointed as the "No. 2 attorney" for Petitioner. SHTr. at 57. Judge Lykos explained her policy of appointing a "Number 2" attorney to handle many pretrial matters, but subsequently appointing lead trial counsel. *Id.* at 55.[3] Judge Lykos also told Petitioner that he had to sign Taylor's motion to withdraw. He declined to do so, but Goldsmith also told him he had to sign in order to have Goldsmith represent him. Though he did not want Goldsmith to represent him, Petitioner signed the document because he believed he would have no

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[3] Petitioner correctly notes that Judge Lykos stated that it was her policy to appoint lead counsel once the State announced its intention to seek the death penalty, but that the State so announced over a year before Judge Lykos appointed Goldsmith. *See* SHTr. at 47. Petitioner does not dispute, however, that Taylor was appointed to serve as his second chair trial counsel.

trial counsel unless he did so. SHTr. at 52. Goldsmith served as Petitioner's lead counsel at trial.

Jury selection commenced on May 17, 1995. 6 Tr. at 2.[4] Petitioner filed a "Motion To Voir Dire On Parole Law 20 Year Minimum" in which he sought permission to inform prospective jurors that, if convicted and sentenced to life imprisonment, he would be ineligible for parole until he served 20 years in prison. SHTr. at 63-68. The motion was denied. *Id.* at 69. Petitioner also requested jury instructions on parole eligibility. *Id.* at 70-92. These requests were also denied.

Testimony began on June 8, 1995, 30 Tr. at 4. The evidence presented at trial showed the following:

At approximately 3:20 p.m. on August 18, 1986, Albert Dixon, the deceased's son, saw Petitioner walk past the Dixon home, come back, and walk up the driveway to the house. *Id.* at 150. Petitioner asked Albert if one of the cars in the driveway was for sale. They conversed briefly, and Petitioner left. *Id.* at 152-53. Albert had never seen Petitioner before that moment. *Id.* at 150. Petitioner returned a short while later and asked Albert for a glass of water. *Id.* at 156. Albert invited Petitioner into the house to get a drink. *Id.* at 156-57. Petitioner waited in the family room while Albert got him a glass of water from the kitchen. Marguerite Dixon was also in the family room, and Petitioner had a brief conversation with her. *Id.* at 158. Five or ten minutes later, Albert and his sister Paula left the house to run some errands and pick up their other sister, Marijo, from her job. *Id.* at 161, 192. As they were driving away from the house, they saw Petitioner walking along the street about a hundred yards from the house. *Id.* at 179-80, 192. Both Albert and Paula positively identified Petitioner as the person who came into their house for a drink of water on

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[4] "Tr." refers to the transcript of Petitioner's trial. The number preceding "Tr." refers to the volume number of the transcript. For example, "6 Tr. at 2" refers to volume 6 of the trial transcript at page 2.

August 18, 1986. *Id.* at 165, 188-89.

Paula and Marijo left Albert at a friend's house. *Id.* at 163. At about 9:30 p.m., Marijo and Paula arrived back at the family home. Marijo found a sliding glass door open. *Id.* at 103-10. Albert closed that door before leaving the house earlier in the day. *Id.* at 160-61. A TV was missing from the house. *Id.* at 111. Marijo returned to the car and told Paula about the condition of the house. Paula and Marijo called two neighbors. The four of them walked through the house, and discovered Marguerite's body on her bed. *Id.* at 111-22, 195-97. In addition to the TV that Marijo originally noticed was missing, another TV was also missing from the house, and a blue van was missing from the driveway. *Id.* at 203, 31 Tr. at 12.

An autopsy revealed that Marguerite Dixon died from a gunshot wound to the right temple. The gun was touching her head when it was fired. *Id.* at 170-72, 178-79.

Petitioner's younger sister, Pat Williams, testified that she was living with Petitioner and their mother in Hockley, Texas on August 18, 1986. *Id.* at 44-45, 47. At some point after August 18, 1986, Ms. Williams noticed, and reported to the police, that a .25 caliber automatic pistol was missing from her home. *Id.* at 45. A .25 caliber bullet was recovered from Ms. Dixon's body. *Id.* at 66.

Petitioner's fingerprint was lifted from the crime scene, 30 Tr. at 62-63, and he was arrested for the Dixon murder two days later, *id.* at 10-11. He led police to the place where he left the murder weapon,[5] and admitted his involvement in the murder. 31 Tr. at 77-81, 121. Petitioner gave a written statement in which he confessed to stealing the television sets and van and killing Ms. Dixon,

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[5] Petitioner left the gun in the home of Lottie Cole. Ms. Cole did not want the gun in her house, and had her son remove it from the house. Petitioner brought the police to Ms. Cole's house, and Ms. Cole brought the police to the gun. 31 Tr. at 155-59.

though he claimed that the gun fired accidentally when she surprised him during the burglary. 32 Tr. at 109-17 and SX 36.[6] On August 22, 1986, two days after Petitioner's arrest, Albert and Paula Dixon both identified him in a police lineup. 30 Tr. at 166-72, 204-09, 32 Tr. at 17-18.

Subsequent tests of the recovered gun revealed that the gun's safety devices functioned properly, and the amount of pressure required to pull the trigger was normal for that type of weapon. *Id.* at 33-34. Tests also revealed that the bullet that killed Ms. Dixon was fired by the recovered gun. *Id.* at 35-40.

The jury found Petitioner guilty of capital murder for murder committed during the commission of a burglary. 37 Tr. at 3-4, 33 Tr. at 66. At the punishment phase of Petitioner's trial, the State reintroduced the evidence presented during the guilt/innocence phase, 34 Tr. at 4, and presented evidence of several prior burglaries committed by the Petitioner, *id.* at 14-24, 35 Tr. at 15-42, and his bad reputation for being peaceful and law abiding, *id.* at 44. The State also presented victim impact testimony by Ms. Dixon's son, Phillip. *Id.* at 75-86.

Dr. Fred Fason testified as an expert psychiatric witness for Petitioner, and opined that Petitioner had an antisocial personality disorder at the time of the offense, 36 Tr. at 8, but that this condition mitigated during Petitioner's incarceration, *id.* at 18-19. A colleague of Dr. Fason's diagnosed Petitioner as having passive aggressive or emotionally explosive disorder. *Id.* Dr. Fason still believed Petitioner to have antisocial personality disorder, though he found Petitioner less likely to act out than he was at the time of the murder. *Id.* at 37. Another defense expert, Dr. Jerome Banks Brown, opined that Petitioner became more stable and motivated following his incarceration and that he also began to express greater concern for other people. *Id.* at 73-75. Petitioner's mother

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[6] "SX" refers to the State's trial exhibits.

testified to the physically and emotionally abusive treatment Petitioner suffered at the hands of his father throughout his childhood. *Id.* at 156-70.

The trial court instructed the jury that it had to answer three special issues: (1) Whether Petitioner's conduct that caused the death of Ms. Dixon was committed deliberately and with the reasonable expectation that the death of Ms. Dixon or another would result, 37 Tr. at 16-17; (2) whether there is a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, *id.* at 17-18; and (3) Whether there were sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than death, *id.* at 19. The court also instructed the jury that "[t]he mandatory punishment for capital murder is death or confinement in the penitentiary for life." *Id.* at 6. The jury answered the first two special issues in the affirmative, and the third special issue in the negative. *Id.* at 84-86. Accordingly, the court sentenced Petitioner to death. *Id.* at 88-89.

The Texas Court of Criminal Appeals affirmed Petitioner's conviction and sentence on June 18, 1997, *Richard v. State*, No. 72,193 (Tex.Crim.App. June 18, 1997) (en banc), and the United States Supreme Court denied certiorari on July 3, 1998, *Richard v. Texas*, 524 U.S. 956 (1998). Petitioner subsequently filed a State application for post conviction relief, which was denied by the Texas Court of Criminal Appeals on February 7, 2001. Petitioner filed this federal habeas corpus petition on February 7, 2002. It appears, and Respondent does not dispute, that both claims raised in this petition were properly exhausted in the state courts and this petition is timely.

II. Discussion

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Anti-

Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "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); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 122 S.Ct. 194 (2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000)), *cert. denied*, 532 U.S. 915 (2001).[7]

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but

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[7] On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this Court will include the full name of the petitioner when citing to these two cases.

unreasonably applies it to the facts of the particular state prisoner's case" or "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." *Terry Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *pet. for cert. filed* (June 13, 2002). The solitary inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C.

§ 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. Procedural Default

The procedural default doctrine may bar federal review of a claim. "When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had 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 v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51), *cert. denied*, 523 U.S. 1125 (1998); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

C. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Insofar as they are consistent with established habeas practice and procedure, the Federal Rules of Civil Procedure apply to habeas cases. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district

court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Where a state prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *May v. Collins*, 955 F.2d 299, 310 (5th Cir. 1991), *cert. denied*, 504 U.S. 901 (1992); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). Consequently, where facts have been determined by the Texas state courts, this Court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

D. Summary Judgment in the Instant Case

Richard asserts that the trial judge's actions is removing his original counsel denied him his Sixth Amendment right to counsel, and that the trial court's denial of his requests to inform the jury on his parole eligibility if sentenced to life imprisonment denied him due process of law. These contentions are discussed below.

1. Removal of Counsel

Petitioner contends that the trial court's removal of Mr. Taylor as his counsel denied him due process of law and violated his Sixth Amendment right to counsel because he did not knowingly and voluntarily consent to the change in counsel. The petition cites several cases addressing a presumption in favor of a criminal defendant's right to *retained* counsel of his choosing, but admits

that this principal has never been applied by a federal court in the context of court-appointed counsel. *See* Petitioner's Brief at 6 ("Petitioner's first ground of relief raises a question of first impression in federal jurisprudence . . ."), *id.* at 7 ("in federal jurisprudence that presumption [in favor of a defendant's right to counsel of his choosing] has not been tested and ruled upon in the situation where an accused has been denied not his retained counsel of choice but had his counsel removed from him").

a. Retroactivity

In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court held that, except in very limited circumstances, a federal habeas court cannot retroactively apply a new rule of criminal procedure.[8] The Court explained that

> a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (emphasis in original). The AEDPA effectively codified the *Teague* non-retroactivity rule "such that federal habeas courts must deny relief that is contingent upon a rule of law not clearly established at the time the conviction becomes final." *Peterson v. Cain*, 302 F.3d 508, 511 (5th Cir. 2002) (citing *Terry Williams v. Taylor*, 529 U.S. 362, 380-81 (2000)).

The Supreme Court has held that the Sixth Amendment secures a criminal defendant's right

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[8] Respondent contends that this claim is procedurally defaulted. Because, however, analysis of the procedural default requires a detailed inquiry into possible cause for, and prejudice from, the default, and relief on Petitioner's claim is so clearly barred by the non-retroactivity rule of *Teague v. Lane*, it is unnecessary to address Respondent's procedural default argument. *See Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) ("[j]udicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law").

to the assistance of counsel in a trial for a serious crime. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). The Court has also noted, however, that the purpose underlying this constitutional requirement "is simply to ensure that criminal defendants receive a fair trial," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and that "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer, as such." *United States v. Cronic*, 466 U.S. 648, 657 n.21 (1984). Thus, "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

Courts have also recognized a defendant's right, subject to certain limitations, to retain counsel of his choosing, but note that such right is not "inexorable". *See, e.g., United States v. Hughey*, 147 F.3d 423, 428 (5th Cir.) (citing *Wheat*), *cert. denied*, 525 U.S. 1030 (1998). As the Fifth Circuit explained in *Hughey*, "[t]he Sixth Amendment right to counsel of choice is limited, and protects *only a paying defendant's* fair or reasonable opportunity to obtain counsel of the defendant's choice." *Hughey*, 147 F.3d at 428 (emphasis added). Indeed, both the Supreme Court and the Fifth Circuit have expressly held that indigent defendants only have the right to be represented by competent counsel, not by counsel of their choice. "[T]hose who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. '[A] defendant may not insist on representation he cannot afford.'" *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (quoting *Wheat*, 486 U.S. at 159) (second bracket in original); *see also Neal v. Texas*, 870 F.2d 312, 315 (5th Cir. 1989) ("there is no constitutional right to representation by a particular attorney").

It is true that the Fifth Circuit has also noted, in this context, that "arbitrary or unreasonable action that impairs the effective use of counsel of choice may violate a defendant's constitutional right to due process of law." *Hughey*, 147 F.3d at 429. However, in light of both the language in *Caplin & Drysdale* and *Hughey* limiting the right to counsel of choice to *paying* defendants, and the express holding in *Neal* that there is no constitutional right to particular counsel, it is clear that an indigent defendant only has a right to effective representation; he has no right to choose his counsel. Even if this Court construed the "arbitrary and unreasonable action" language in *Hughey* as creating ambiguity on the subject, it is simply not the case that such ambiguous existing precedent *dictates* the rule Petitioner seeks. Thus, any such rule would constitute a new rule of criminal procedure. Under *Teague*, it can provide no basis for relief on a petition for a writ of habeas corpus.

b. Due Process And The Right To Counsel

Even if, however, the rule Petitioner seeks did not constitute a "new rule," this claim would provide no basis for relief. The trial court made clear, and the State habeas court found, that Taylor was originally appointed to serve as second chair counsel for Petitioner. SHTr. at 130 ¶ 8. Under the AEDPA, this finding is entitled to deference. Taylor handled many pretrial matters, but was never appointed to serve as lead counsel. When Goldsmith was eventually appointed lead counsel, the trial court gave him the opportunity to select his own second chair. SHTr. at 132 ¶ 16. Thus, under any circumstances, Taylor would not have served as Petitioner's principal counsel.

Moreover, even if the trial court erred in removing Taylor, any such error was harmless. On federal habeas corpus review, an error is harmless unless it

> had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can

establish that it resulted in actual prejudice.

Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (internal quotation marks and citations omitted).[9]

While Petitioner complains that he wanted Taylor to represent him, he notably does not complain that Goldsmith's performance was in any way deficient. Having received competent representation, albeit not by the attorney of his choice, Petitioner cannot plausibly contend that either his Sixth Amendment right to counsel or his Fourteenth Amendment right to a fair trial was in any way abridged. *See, e.g., United States v. Izydore*, 167 F.3d 213, 221 (5th Cir. 1999) (rejecting a claim that forced recusal of counsel denied defendant's rights where, *inter alia*, "[t]here is no indication in the record that [counsel]'s representation was inadequate or in any way unsatisfactory . . ."). Accordingly, this claim provides no basis for relief.

2. Failure to Instruct the Jury on Parole Eligibility

Richard claims that his Fourteenth Amendment right to due process of law was violated by the trial court's failure to instruct the jury on parole eligibility if he received a sentence of life imprisonment. Respondent argues that this claim lacks merit, and that the ruling Richard seeks is barred by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

In support of his argument, Richard principally relies on the United States Supreme Court's

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[9] Petitioner contends that the trial court's actions constituted "structural error," *i.e.*, a "defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." *Brecht*, 507 U.S. at 629. *Brecht* explains, however, that "structural error" includes errors such as *deprivation* of the right to counsel. *Id.* They are "those [errors] that make a trial fundamentally unfair. . ." *Id.* at 640 (Stevens, J., concurring). Here, Petitioner does not contend that he was deprived of his right to counsel, or even that his counsel was ineffective. He simply complains that he was not permitted to proceed with his counsel of choice. As the performance of his counsel is certainly reviewable for its effectiveness, *i.e.*, whether counsel "function[ed] as the 'counsel' guaranteed by the Sixth Amendment," *Strickland v. Washington*, 466 U.S. 668, 687 (1984), this is not "structural error," and is clearly amenable to harmless error analysis.

decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). At the time of Simmons' conviction, South Carolina allowed for a sentence of life in prison without the possibility of parole upon conviction of a capital offense. In *Simmons*, the defense sought an instruction informing the jury that life imprisonment would carry no possibility of parole, but the trial court refused. The Supreme Court held that this refusal violated the defendant's right to due process of law. *Simmons*, 512 U.S. at 169 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

The *Simmons* court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a danger to society, the fact that the defendant may receive life without possibility of parole "will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Simmons*, 512 U.S. at 169. To hold otherwise would create a "false dilemma by advancing generalized argument regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." Id. at 171.

Simmons addresses very specific circumstances: (1) When the State seeks the death penalty at least in part on the grounds that the defendant will be a future danger to society; and (2) when the alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole.

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at 168-69 (internal quotation marks and citation omitted); *see also, Wheat v. Johnson*, 238 F.3d 357, 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001). While the State did seek a death sentence in this case partially on the basis that Richard would pose a continuing threat to

society, the jury's alternative was a parole-eligible life sentence, not, as in *Simmons*, life without parole. *Simmons*, 512 U.S. at 168 n.8.

a. Fifth Circuit Application of *Simmons*

The Fifth Circuit has repeatedly rejected precisely the claim raised by Richard.

> [T]he Supreme Court took great pains in its opinion in *Simmons* to distinguish states such as Texas, which does not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole eligibility . . . [T]he Fifth Circuit has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole.

Green v. Johnson, 160 F.3d 1029, 1045 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also*, *Wheat*, 238 F.3d at 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001)(finding *Simmons* inapplicable to the Texas sentencing scheme); *Soria v. Johnson*, 207 F.3d 232 (5th Cir.), *cert. denied*, 530 U.S. 1286 (2000)(finding that "reliance on *Simmons* to demonstrate that the Texas capital sentencing scheme denied [petitioner] a fair trial is unavailing"); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.) ("because Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* unavailing")(internal quotation marks and citation omitted), *cert. denied*, 531 U.S. 849 (2000); *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir.)(stating that a claim based on *Simmons* "has no merit under the law in our circuit"), *cert. denied*, 523 U.S. 1113 (1998); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995) (holding that *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole"), *cert. denied sub nom. Montoya v. Johnson*, 517 U.S. 1133 (1996); *Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994)(stating that "*Simmons* is inapplicable to this case"), *cert. denied*, 514 U.S. 1108 (1995);

Kinnamon v. Scott, 40 F.3d 731, 733 (5th Cir.) (refusing to "extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole"), *cert. denied*, 513 U.S. 1054 (1994). If these decisions left any doubt that *Simmons* provides no basis for the relief Petitioner seeks, the Supreme Court removed all such doubt in *Ramdass v. Angelone*, 530 U.S. 156 (2000). "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 169.

In this case, life without parole was not a possibility. Richard faced one of two sentences: Death, or life imprisonment with the possibility of parole at a future date. Therefore, as *Ramdass* and Fifth Circuit precedent make unmistakably clear, his case does not fall within the scope of *Simmons*.

b. The Rule Sought by Richard Would Constitute Retroactive Application of a New Rule of Criminal Procedure.

Insofar as Richard seeks an extension of *Simmons* to the Texas scheme, this Court is barred from granting habeas relief on that basis by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Wheat*, 238 F.3d at 361 (finding any extension of *Simmons* to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000)(same), *cert. denied*, 531 U.S. 1167 (2001); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir.) ("[r]elief based on *Simmons* is foreclosed by *Teague*"), *cert. denied*, 527 U.S. 1055 (1999). Thus, even if controlling precedent did not expressly hold that the *Simmons* rule does not apply to the Texas capital sentencing scheme, relief would be barred by *Teague*.

III. Evidentiary Hearing

This Court has discretion whether to conduct an evidentiary hearing. *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' intent to avoid unneeded hearings in federal habeas corpus"); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S.

1100 (1999). An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Id.* "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8 of the Rules Governing Section 2254 Cases.

Richard has not demonstrated any factual dispute that would entitle him to relief. Both of Richard's claims can be resolved by reference to the state court record, the submissions of the parties, and relevant legal authority. Accordingly, there is no basis upon which to hold an evidentiary hearing on these claims.

IV. Certificate of Appealability

Richard has not requested a certificate of appealability ("COA"), but this Court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates 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." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)), *cert. denied*, 520 U.S. 1122 (1997). However, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court has carefully considered both of Richard's claims. While the issues Richard raises are clearly important and deserving of the closest scrutiny, the Court finds that each of the claims is foreclosed by clear, binding precedent. This Court concludes that under such precedents, Richard has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court therefore concludes that Richard is not entitled to a certificate of appealability on his

claims.

V. Order

For the foregoing reasons, it is ORDERED as follows:

Respondent Janie Cockrell's Motion for Summary Judgment is GRANTED;

Petitioner Michael Wayne Richard's Petition for Writ of Habeas Corpus is in all respects DENIED, and Richard's Petition is DISMISSED;

No Certificate of Appealability shall issue in this case.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 30 day of Dec., 2002.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE