APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-67,208-03 and WR-67,208-04

EX PARTE ROBERT MITCHELL JENNINGS, Applicant

ON APPLICATIONS FOR POST-CONVICTION WRITS OF HABEAS CORPUS IN CAUSE NO. 506814 IN THE 208TH DISTRICT COURT HARRIS COUNTY

***Per curiam*. HERVEY, J., filed a concurring opinion in which KELLER, P.J., and KEASLER and NEWELL, JJ., joined. YEARY, J., filed a concurring opinion. ALCALA, J., filed a concurring and dissenting opinion in which WALKER, J., joined.**

ORDER

These are post-conviction applications for writs of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.

On July 13, 1989, a jury convicted applicant of the offense of capital murder. Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, the trial court sentenced applicant to death. Article 37.071(e).

This Court affirmed applicant's conviction and sentence on direct appeal. *Jennings v. State*, No. AP-70,911 (Tex. Crim. App. Jan. 20, 1993)(not designated for publication). On September 20, 1996, applicant filed his initial post-conviction application for a writ of habeas corpus in the convicting court. On June 16, 2001, applicant filed in the convicting court a "supplement" to that application.[1] This Court received the applications in March 2007.

After reviewing the cases, this Court filed and set two of the ineffective assistance claims from the initial writ application, and it filed and set the single claim raised in the subsequent application. The Court ultimately issued an opinion denying applicant relief. *Ex parte Jennings*, Nos. AP-75,806 and AP-75,807 (Tex. Crim. App. Nov. 26, 2008)(not designated for publication). Applicant filed his second subsequent application in the trial court on May 4, 2016.

In his second subsequent application, applicant asserts that: (1) the State destroyed, lost, or suppressed relevant mitigating evidence; (2) the unconstitutional "nullification" instruction prevented the jury from fully considering and giving effect to certain mitigating evidence; (3) trial counsel were ineffective in failing to discover and present certain mitigating evidence; and (4) the death penalty violates the constitutional prohibition against cruel and unusual punishment. After reviewing applicant's writ

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[1] Because the "supplement" to the application was filed after the time allowed in Article 11.071 for filing an initial application and because it raised a new claim, the "supplement" was designated a subsequent application.

application, we find that he has failed to make a *prima facie* showing of a *Brady*[2] violation, and he has otherwise failed to satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims. Art. 11.071 § 5(c).

On July 20, 2016, applicant filed in the trial court a pleading titled a "Supplement to Subsequent Application for a Writ of Habeas Corpus," in which he raises a claim that "the unconstitutional 'nullification' instruction prevented the jury from fully considering and giving effect to mitigating evidence of [his] remorse." After reviewing applicant's claim, we find that he has failed to satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss this subsequent application as an abuse of the writ without reviewing the merits of the claim. Art. 11.071 § 5(c).

IT IS SO ORDERED THIS THE 16th DAY OF MAY, 2018.

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-67,208-03 & WR-67,208-04

EX PARTE ROBERT MITCHELL JENNINGS, Applicant

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS IN CAUSE NO. 506814 IN THE 208TH DISTRICT COURT HARRIS COUNTY

HERVEY, J., filed a concurring opinion in which KELLER, P.J., KEASLER and NEWELL, JJ., joined.

CONCURRING OPINION

Robert Mitchell Jennings filed two subsequent writ applications arguing that he is entitled to a new trial on five different grounds. The Court stayed Jennings' execution to consider his writ applications, and today it properly dismisses them as subsequent. *Ex parte Jennings*, Nos. WR-67,208-03 & WR-67,208-04, 2016 WL 4637367 (Tex. Crim. App. Sept. 2, 2016) (per curiam, not designated for publication). I write separately to address two of those claims.

PENRY INSTRUCTION

Jennings argues that the mitigation instruction given by the trial court was constitutionally deficient and that he was entitled to a *Penry* instruction or additional special issue because he exhibited remorse for the capital murder that he committed. *Ex parte Jennings*, Nos. AP-75,806 & AP-75,807, 2008 WL 5049911, at *7–*8 (Tex. Crim. App. Nov. 26, 2008) (not designated for publication) (addressing the merits of, and rejecting, Jennings' *Penry* claim).

Subsequent Writ Bar

To overcome the subsequent-writ procedural bar, Jennings argues that there is a new legal basis for relief in the form of a decision from the Southern District of Texas. *Williams v. Davis*, 192 F. Supp. 3d 732 (S.D. Tex. 2016); *see* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1). He contends that, in that case, the district court held that the future-dangerousness special issue did not give the jury a meaningful vehicle through which it could give effect to Williams's evidence of remorse.

Before Williams filed a post-conviction writ application in federal court, this Court denied relief on his *Penry* claim. *Ex parte Williams*, No. AP-76,455, 2012 WL 2130951, at *15 (Tex. Crim. App. June 13, 2012) (not designated for publication). We reasoned, contrary to the district court, that Williams was not entitled to a *Penry* instruction based on the remorse evidence because the jury could have given effect to that evidence through the future-dangerousness special issue. *Id.*

After we issued our decision, Williams filed a writ application in federal court,

alleging that this Court's decision was an unreasonable application of federal law. The district court agreed and conditionally granted relief, ordering the State of Texas either to hold a new punishment hearing or to commute his sentence to life imprisonment. *Williams*, 192 F. Supp. 3d at 772.

Although Jennings makes the same claim as Williams, the decisions of federal district courts are not binding on this Court and *cannot* constitute a new legal basis for purposes of the subsequent-writ procedural bar.[1] *See In re Medina*, 475 S.W.3d 291, 304 (Tex. Crim. App. 2015) (noting that constitutional interpretations by federal district courts are not binding on this Court); *see also Ex parte Hood*, 211 S.W.3d 767, 775 (Tex. Crim. App. 2007) (holding that, to constitute a new legal basis, an applicant must prove that his claim could not have been reasonably formulated based on precedent from the United States Supreme Court, federal appellate courts, or state appellate courts). In fact, Section 5(d) of Article 11.071 speaks to only appellate courts; there is no mention of state or federal trial courts. TEX. CODE CRIM. PROC. art. 11.071, § 5(d). To entertain Jennings' already litigated *Penry* claim, the Court would need to overrule *Hood* and hold that a

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[1]Under Article 11.071,

> [A] legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

TEX. CODE CRIM. PROC. art. 11.071, § 5(d).

federal district court decision meets the dictates of Section 5(a)(1) of Article 11.071.[2] But such a conclusion would fly in the face of the plain language of the statute. *Id.*

Because Jennings cannot overcome the procedural bar preventing us from considering the merits of his renewed *Penry* claim, the Court properly dismisses it.[3] I note, however, that even if the Court were to reach the merits of his claim, it fails.

Merits of Penry Claim

The Tape

Jennings contends that he was entitled to a *Penry* instruction because the cassette tape recording of his post-arrest statement shows that he was remorseful for committing capital murder. He alleges that,

- he cried during portions of the interview;
- he said that he was "real upset" because he shot someone and did not know whether that person was alive or dead;
- when asked at the end of the interview if there was anything else he wanted to say, he responded, "Remorse in the way I feel about the incident that happened"; and that
- he said he wished he could "take it all back" and that he would "face

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[2]As Judge Yeary states, we have the authority to re-open a writ application on our own motion if there are "compelling circumstances" to do so, but I believe that this case does not present such circumstances. *Ex parte Moreno*, 245 S.W.3d 419, 423–28 (Tex. Crim. App. 2008) (reconsidering on its own initiative an applicant's previous writ application raising a *Penry* issue and granting relief).

[3]Jennings makes no argument that his *Penry* claim is based on new facts, nor has he proffered any new law which would allow him to satisfy other provisions of Section 5(a). TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1)–(3).

whatever punishment I have coming."

Having listened to the entirety of Jennings' recorded audio statement and having read habeas counsel's transcript exhibit, it is my opinion that neither contains mitigating evidence. With respect to Jennings' claims of crying, it is not clear to me that he actually cried during the interview. But even if he did, I understand him to be saying that he was scared because he had shot someone while perpetrating a robbery, that he did not know if the person was still alive, and that he was "real upset" and "hurting" because his accomplice unexpectedly shot him when he returned to the getaway car. He also explained that, because he was unable to find a permanent job after being released from TDC, and "his people" were already "hurting" when he got out, he started committing robberies so he could provide for them. He claimed that he used the money to buy clothes and other things. While it is true that he used the word "remorse" during his statement, when his comments are considered within the context of the entire interview, it seems he regretted only that the robbery was not routine as usual—meaning that they got the money without anyone getting hurt—and that he will no longer be able to provide for "his people" because he will be in prison. The following are the relevant excerpts,

> [OFFICER]: Why did you keep this wallet?
>
> [JENNINGS]: Probably cause I was hurting. It was in my pocket when David shot me and it come out the window and, and you know, it was happen real fast, right. I was, I was real scared cause I know I had shot somebody in his place, you know. I didn't know, and I was real upset and when, when David shot me, you know, that threw me, where I tried to get, run for my life and you know, it had me all upset, you know, and when I got

these people to my sister's house, I just took everything out of my pocket and put it in my drawer at the bottom of the dresser drawer.

* * *

[OFFICER]: [Jennings], anything (inaudible) that you would like to say?

[JENNINGS]: Remorse in the way I feel about the incident that happened. It was, I had been, we had been drinking, you know, and I had seen this, when I come in the place, right, it was just like we can do same or routine, like it had been going easy, you know, no problem and then all of a sudden, (inaudible), this dude come at me running, you know, and I wish I could take it all back, you know, I know how you said whatever punishment I get, if I could take it back, I would. But it is, it happened, so I'm going to face whatever punishment I have coming. Because if I'd been more patient, you know, everybody tell you be patient, be patient, be patient. But I thought that once I got out and went out and applied applications all over, everywhere for everything I knew how to do, driving, certified butcher, you know, all, all the skills I had, things I know that I can be comfortable with, things that I could do then nobody would call, you know, and then it get a little (inaudible) here and little (inaudible) there, like I didn't give it enough time to, to come before I had to go out and react. My people need and you know, they been needing before I got out this times. They was needing, you know.

[OFFICER]: Yea.

[JENNINGS]: And they got by, you know. Why couldn't I have waited?

[OFFICER]: Let me ask you this. You came out in May?

[JENNINGS]: Yes, sir.

[OFFICER]: What party of May?

[JENNINGS]: May the 13th.

[OFFICER]: May the 13th.

[JENNINGS]: Yes, sir.

> [OFFICER]: And you said here that you think you did your first robbery in the first part of June?
>
> [JENNINGS]: Yes, sir. (inaudible) and then can't wait for something to, to happen on his own. Always have to rush, rush, rush, rush. Like there was never enough time to do something. And I never like to see my people (inaudible) nothing, you know, if I can help, you know, I don't care what it was, you know. I don't know.

In my opinion, the recording contains no evidence that Jennings felt remorse for murdering a police officer, and the jury was able to give effect to his other mitigating evidence through the future-dangerousness special issue. Thus, a *Penry* instruction was not warranted.

BRADY

Jennings also claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing school records showing that he suffers from learning deficits, mental impairment, and a low IQ. Jennings spends most of his argument accusing the State of engaging in a wide-ranging conspiracy to suppress the school records, and he "predicts that, if this Court remands the case for an evidentiary hearing or stays the execution[4] until the State produces the [school] records, a habeas prosecutor or investigator will 'find' the record and provide a lame excuse for why they were not in the State's file." Jennings' argument goes like this: because the State subpoenaed the district for the records, it must have either received them or a "no records" affidavit; and since

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[4]As I noted earlier, after receiving Jennings' filings, this Court stayed his execution, and that stay is still in place.

the State will not produce the records or a "no records" affidavit, it must have the records and they must contain favorable evidence.

According to Jennings, we can consider the merits of this claim even though he already knew that the school records had been subpoenaed[5] because it was not until after the hearing setting his execution date that he discovered through an open-records request a document purportedly written by the investigator stating that,

> School Records ps # 733-9253. Custodian Mrs. Rector/only can testify to records. No personal knowledge. Also asst. principal states any major infractions or disciplinary actions would probably have been typed or entered on this report somewhere.

According to Jennings, this newly discovered note means that, when the investigator and records custodian spoke, they were both looking at Jennings' school records. As a result, he argues that we should remand for an evidentiary hearing to find out what happened to the records.

But at a hearing held by the habeas court, Jennings called the custodian of student records for the Houston Independent School District. The extent of her testimony was that a subpoena was personally served in 1989 and that, as a matter of course, the district would have produced the records if it had them or a "no records" affidavit if it did not. She also agreed, however, that there was no documentation of whether the district actually produced the records or a "no records" affidavit, and she could not locate the

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[5]According to habeas counsel, when he was initially appointed in 1995, he read the State's file for the first time, and it included the 1989 subpoena for the school records and the return.

records herself. According to her, there were at least two possible reasons she did not find the records or an affidavit. During the period Jennings attended HISD, student records were kept at the local schools, not with the district, and some records for students who did not go to high school, like Jennings, were destroyed in the school's incinerators in the early 1980s. Also, assuming the records were not incinerated, she said that there was a flood in the 1990s that could have destroyed them. Based on this, I conclude that the note adds nothing new to Jennings' *Brady* claim, and as a result, he cannot overcome the subsequent writ bar. TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

CONCLUSION

With these comments, I join the Court's order dismissing Jennings' subsequent writ applications.

Filed: May 16, 2018

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-67,208-03 & WR-67,208-04

EX PARTE ROBERT MITCHELL JENNINGS, Applicant

ON APPLICATIONS FOR A WRIT OF HABEAS CORPUS
IN CAUSE NO. 506814 FROM THE
208TH DISTRICT COURT OF HARRIS COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

Applicant was convicted of capital murder in 1989, and his punishment was assessed at death. On direct appeal, this Court affirmed his conviction and sentence in 1993. *Jennings v. State*, No. AP-70,911 (Tex. Crim. App. January 20, 1993) (not designated for publication). The applicant filed this initial application for writ of habeas corpus, brought pursuant to Article 11.071 of the Texas Court of Criminal Procedure, TEX CODE CRIM. PROC. art. 11.071, in September of 1996; and in 2001, he filed a subsequent writ application—his -02 writ application. We filed and set both his original application and his subsequent, and issued an opinion in 2008. *Ex parte Jennings*, Nos. AP-75,806 & AP-75,807, 2008 WL 5049911 (Tex.

Crim. App. Nov. 26, 2008) (not designated for publication). We addressed two of Applicant's claims: 1) whether his trial counsel provided ineffective assistance of counsel at the punishment phase of his trial in failing to adequately investigate mitigating evidence; and 2) whether the trial court erred in attempting to satisfy the Eighth Amendment dictates of *Penry v. Lynaugh*, 492 U.S. 302 (1989), by submitting a so-called "jury nullification" instruction. *Id.* at *1. With respect to the first claim, we held that any deficiency in trial counsel's punishment phase performance did not ultimately prejudice Applicant. *Id.* at *7. Regarding the second claim, we held that the punishment phase evidence did not include sufficiently significant mitigating evidence to invoke Applicant's right to a *Penry* instruction, so the trial court did not err in giving an insufficient *Penry* instruction. *Id.* at *7-8.

In July of last year, Applicant filed two additional subsequent post-conviction applications for writ of habeas corpus—his -03 and -04 writ applications. He requested a stay of his execution, scheduled to proceed on September 14, 2016, to allow him to pursue one or both of these subsequent applications. On September 2, 2016, this Court stayed Applicant's execution in a brief order that did not ultimately dispose of either of these additional post-conviction writ applications. Today, the Court dismisses both as abusive under Article 11.071, Section 5. TEX. CODE CRIM. PROC. art. 11.071, § 5. I agree that this is the proper disposition and therefore concur in the Court's order today to the extent that it dismisses them.

In his -04 writ application, Applicant essentially revisits the claim he made in his first

subsequent writ application—his -02 writ application—in 2001. He argues that the jury nullification instruction that the trial court gave (at his behest) was insufficient to satisfy *Penry*.[1] We disposed of this claim in the -02 writ application by observing that "[t]he *only* mitigating evidence presented at trial was [a jail chaplain's] testimony with respect to the applicant's behavior and demeanor in the jail" and concluding that the chaplain's testimony was capable of being put to "full and meaningful effect" under the statutory special issues. *Jennings*, 2008 WL 5049911, at *7-8 (emphasis added). Applicant now argues that there was more mitigating evidence than we accounted for in our -02 opinion, namely, evidence that he gave a statement to the police in which he showed remorse for his crime.[2]

Applicant did not bring this evidence to our attention in his brief in support of his -02 writ application.[3] Nor did he file a motion for rehearing to bring this oversight (if it was an

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[1] The trial court gave this instruction at Applicant's request. In our opinion disposing of Applicant's -02 writ application, we observed that "[w]e need not decide whether [Applicant] waived or invited any *Penry* error by requesting the nullification instruction. We conclude that the jury could give full and meaningful mitigating effect to the evidence that [Applicant] introduced at the punishment phase of his trial within the scope of the statutory special issues. " *Jennings*, 2008 WL 5049911, at *7.

[2] I have listened to the recording of Applicant's statement and conclude that a reasonable juror might find that it contains genuine expressions of remorse. But I also believe that, even had the jury regarded his statement in that light, it would not have made a difference in the outcome, even assuming that an appropriate *Penry* instruction had been given.

[3] This Court has often insisted that it is up to the litigants to point us in the direction of the evidence in the record that supports their claims. *E.g.*, *Russeau v. State*, 291 S.W.3d 426, 437 (Tex. Crim. App. 2009) ("It is not our obligation to pore through the voluminous record to verify that appellant preserved his state constitutional complaint for appellate review."); *Brasfield v. State*, 600 S.W.2d 288, 296 (Tex. Crim. App. 1980) ("The brief is deficient in that it does not point to the record where factual support of the contention may be found."), *overruled on other grounds*, *Janecka v. State*, 739 S.W.2d 813 (Tex. Crim. App. 1987).

oversight) to our attention following our 2008 opinion denying him relief. He apparently did not bring it to the attention of the federal courts in order to argue that this Court's adjudication of his claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). *See Jennings v. Stephens*, 537 F. App,x. 326, 328 (5th Cir. 2013) ("No other mitigation evidence was presented" at Applicant's trial beyond what this Court identified in its opinion disposing of Applicant's -02 writ application), *rev'd and remanded on other grounds*, 135 S. Ct. 793 (2015). Finally, he did not bring this evidence to our attention in his -03 writ application, filed only a few months before he filed his -04 writ application.

Therefore, I agree that we cannot entertain this claim in Applicant's third (the -04) subsequent writ application. There is no new binding legal holding to support his claim that evidence of remorse entitles him to a *Penry* instruction,[4] and there is nothing new about the

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[4] This Court has suggested that evidence of remorse has no mitigating value beyond the scope of the special issues. *See Ex parte Williams*, No. AP-76,455, 2012 WL 2130951, at *15 (Tex. Crim. App. June 13, 2012) ("That applicant was upset and apologetic after the incident could be relevant to show that he was remorseful, which can impact a jury's determination of future dangerousness, but applicant's reaction after the incident does not make him less blameworthy for what occurred."). Applicant submitted his -03 writ application to the convicting court on May 4, 2016. On June 28, 2016, the federal district court issued an opinion in Williams's case disapproving of this Court's holding that evidence of remorse would not justify a *Penry* instruction. *See Williams v. Davis*, 192 F. Supp. 3d 732, 769 (S.D. Tex. 2016) ("Williams' evidence of remorse required a specific instruction or special issue on mitigating evidence."). Applicant then submitted his -04 writ application to the convicting court in July of 2016. He claimed that the federal district court's opinion in *Williams* constituted new law entitling him to pursue a renewed *Penry* claim under Article 11.071, Section 5(a)(1). *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1) (relief may not be granted in a subsequent habeas application unless predicated on a factual or legal basis that was previously unavailable).

facts he now relies upon. TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1) & (2). He cannot show by clear and convincing evidence that, but for the lack of a proper *Penry* instruction, "no rational juror would have answered in the state's favor one or more of the special issues" under Article 37.071. *Id.* § 5(a)(3); TEX. CODE CRIM. PROC. art. 37.071, §§ 2(b) & 2(e)(1). There is no basis to permit him to proceed with this claim in a subsequent writ application.

Even now, Applicant has not suggested, alternatively, that we reopen his -02 writ application in order to reconsider his *Penry* claim in light of all of the mitigating evidence (including the evidence of remorse) that was presented at trial. Still, we are empowered to do so under "compelling circumstances." *Ex parte Moreno*, 245 S.W.3d 419, 428 (Tex. Crim. App. 2008). *Moreno* itself involved a *Penry* claim, the question being whether evidence of a troubled childhood required a separate mitigation instruction. *Id.* at 426. The Court could reopen Applicant's -02 writ application on its own motion, to decide whether our holding on original submission was premised on a faulty perception of the mitigating evidence at play

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I am personally sympathetic to the federal district court's view of the question whether evidence of remorse justifies a *Penry* instruction. But that does not render its opinion new law for purposes of Article 11.071, Sections 5(a)(1) and 5(d). TEX. CODE CRIM. PROC. art. 11.071, §§ 5(a)(1) & 5(d). If the Supreme Court's opinion in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), established nothing else, it was that Applicant's argument—that evidence with mitigating value beyond the special issues calls for a *Penry* instruction—could have been made at any time post-*Penry*. The claim that evidence of remorse has mitigating value beyond its relevance to future dangerousness could have been "reasonably formulated" in 2001, when Applicant filed his -02 writ but neglected to point out the evidence of remorse that he presently invokes. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(d) (the legal basis for a claim is "unavailable" if it was "not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state" before the date upon which an earlier writ application was filed).

during the punishment phase of Applicant's trial—that the *only* mitigating evidence produced was the jail chaplain's testimony regarding Applicant's attitude while incarcerated in the county jail. Ultimately, I would not reopen the -02 writ application, however. In my view, it could not reasonably be expected that Applicant's additional mitigating evidence would have made a difference to the jury's bottom line even if it had been given a *Penry* instruction.[5]

I concur in the Court's ruling to dismiss Applicant's -03 and -04 post-conviction writ applications.

FILED: May 16, 2018
PUBLISH

[5] I agree with Presiding Judge Keller's admonishment that "[r]econsidering an application for writ of habeas corpus after a significant passage of time should be a rare event[.]" *Moreno*, 245 S.W.3d at 431 (Keller, P.J., concurring). Reconsideration of Applicant's -02 claim would arguably satisfy both of Presiding Judge Keller's criteria: "First, the reconsideration must indeed involve a claim that was originally raised in the application. Second, an indisputable mistake of fact or law that the reconsideration seeks to rectify must have been made by this Court." *Id.* In my view, our opinion on original submission on the -02 writ application contains a mistake of fact. The jail chaplain's testimony was not the *only* mitigating evidence presented in the punishment phase of Applicant's trial. But the likelihood that Applicant's evidence of remorse would have made a difference is sufficiently remote that it does not ultimately justify disturbing our prior judgment in the -02 writ application.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-67,208-03 & WR-67,208-04

EX PARTE ROBERT MITCHELL JENNINGS, Applicant

ON APPLICATIONS FOR POST-CONVICTION WRITS OF HABEAS CORPUS IN CAUSE NO. 506814 IN THE 208TH DISTRICT COURT HARRIS COUNTY

ALCALA, J., filed a concurring and dissenting opinion in which WALKER, J., joined.

CONCURRING AND DISSENTING OPINION

Robert Mitchell Jennings, applicant, was sentenced to death about thirty years ago under the former capital sentencing scheme that did not include a mitigation special issue in its jury instructions.[1] The jury that sentenced him to death, therefore, was never permitted

[1] The current statute requires a jury to consider whether a defendant's life should be spared for capital murder due to his mitigating evidence. *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1) ("The court shall instruct the jury that if the jury returns an affirmative finding to [the future-dangerousness issue], it shall answer the following issue: Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.") (added by Acts 1991, 72nd Leg., ch. 838 § 1, eff. Sept. 1, 1991). When

to consider whether his life should be spared due to mitigating evidence that he was remorseful for causing the death of the victim. Because the federal Constitution requires that a jury consider this type of mitigating evidence, I would hold that this Court should remand this case to the habeas court for findings of fact and conclusions of law to evaluate whether applicant's evidence of remorse rises to the level that he is entitled to a new punishment hearing for another jury to ascertain whether his life should be spared due to his mitigating evidence. Accordingly, I would reopen applicant's -02 habeas application in which he argued that his death sentence should be vacated due to the jury's failure to consider his mitigation evidence. I conclude that reopening applicant's -02 application is appropriate here because I believe that this Court previously misapplied the applicable law and failed to fully consider the entire record in this case. I, therefore, respectfully dissent from this Court's implicit decision declining to reopen the -02 application. Because applicant presents essentially that same argument in the instant -04 writ application, I concur in this Court's judgment dismissing that application on the basis that it is procedurally barred as a subsequent application. Furthermore, I respectfully dissent from this Court's dismissal of applicant's -03 writ application because I would remand a portion of applicant's complaints to the habeas court for findings of fact and conclusions of law addressing applicant's challenge that his confinement for about thirty years awaiting the imposition of his death sentence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth

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applicant was tried for capital murder, this jury instruction did not exist.

Amendments. In this opinion, I do not decide the ultimate question of whether applicant should obtain relief from his death sentence. Rather, I conclude that applicant has presented adequate evidence to warrant a further evidentiary hearing in the habeas court with findings of fact and conclusions of law by that court. I explain my conclusion by addressing applicant's two complaints that his death sentence was obtained in violation of the federal Constitution due to the absence of a proper mitigation instruction and due to his extended confinement while awaiting the imposition of his sentence.

I. Constitutionality of Applicant's Death Sentence in the Absence of a Mitigation Instruction

Applicant asserts that, at the punishment stage of his trial, the court admitted a recording of his post-arrest statement to the police in which he expressed remorse for shooting the victim. Applicant suggests that he is entitled to a new punishment hearing because the absence of a proper mitigation instruction resulted in an invalid death sentence that was obtained by a jury that was never permitted to consider whether his life should be spared due to his remorse for his criminal conduct. I agree with applicant to the extent that this claim should be remanded to the habeas court for further proceedings. I explain my conclusion by discussing the applicable law for mitigation instructions at the punishment phase of a capital murder trial, the application of that law to applicant's evidence of remorse, and I then address how applicant's mitigation challenge fits within the procedural posture of the habeas proceedings at issue in this case.

A. Applicable Law for Mitigation Instructions

It is by now well established that a defendant is constitutionally entitled to a mitigation special issue when he presents relevant mitigating evidence during the punishment phase of a capital murder trial. Under those circumstances, the Supreme Court has held that the jury must be given instructions that allow the jurors to give full effect to that mitigating evidence and to express a reasoned moral response to it in deciding whether to impose the death penalty. *See Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989) (*Penry I*). The Supreme Court has explained, "[S]entencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246, 260 (2007). Thus, the sentencer must not have been "'precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry I*, 492 U.S. at 317 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). "[W]hen the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed." *Abdul-Kabir*, 550 U.S. at 264.

Ordinarily, for him to be entitled to a mitigation special issue, a defendant must merely have some small quantity of relevant evidence that a juror may have reasonably determined would have mitigated against the imposition of the death penalty. The Supreme

Court has explained that there is a low threshold with respect to what types of evidence may constitute relevant mitigating evidence in death penalty cases. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004). In *Tennard*, the Supreme Court explained that relevant mitigating evidence is "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Id.* at 284 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). Once this "low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285.

When a defendant is seeking a punishment retrial due to the absence of a mitigation instruction, he must further show that the entire jury instructions in the case did not permit the jury to express its reasoned moral response to his mitigating evidence. The Supreme Court has indicated that the question of whether resentencing is constitutionally required due to the absence of a specific mitigation instruction under Texas's former sentencing scheme depends on the nature of the mitigating evidence presented in the case. *See Abdul-Kabir*, 550 U.S. at 256-59, 263-65. In particular, the relevant question is whether the mitigating evidence presented in the case has relevance to a defendant's moral culpability that goes beyond the scope of the special issues, thus making the special issues an inadequate vehicle for the jury to express its reasoned moral response to that evidence and requiring resentencing with a proper mitigation instruction. *Id.* at 257. In *Abdul-Kabir*, the Supreme Court explained that a mitigation instruction was constitutionally required there because the

defendant's evidence "did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence." *Id.* at 259. Thus, it is constitutional error to have denied a mitigation instruction in any case in which "the defendant's evidence may have meaningful relevance to the defendant's moral culpability 'beyond the scope of the special issues.'" *Id.* at 252 n.14 (quoting *Penry I*, 492 U.S. at 322-23). Therefore, depending on the type of mitigation evidence that was introduced at a defendant's trial, the absence of a proper mitigation instruction could amount to a constitutional violation requiring resentencing if the jury was not provided an adequate vehicle for expressing its reasoned moral response to that evidence within the scope of the former special issues. *See id.*

So the question in a habeas proceeding, as here, where an applicant brings a complaint about the absence of a mitigation special issue under circumstances where the record shows evidence of his remorse, is whether the evidence of remorse constitutes relevant mitigation evidence, and if it does, whether the punishment instructions as a whole permitted the jury to give full, meaningful consideration to that evidence even in the absence of a mitigation instruction. Recently, a federal district court in Texas has addressed that precise question and held that remorse evidence may be properly considered as mitigation evidence and that, in the absence of a proper mitigation instruction, Texas's former special issues were inadequate to permit the jury to express its reasoned moral response to that evidence. *See Williams v. Davis*, 192 F. Supp.3d 732, 768-69 (S.D. Tex. June 28, 2016). In *Williams*, the federal

district court overturned this Court's denial of state habeas relief and granted federal habeas relief to a Texas capital defendant. *Id.* at 771. The federal district court determined that this Court had unreasonably applied federal law when it concluded that Williams' mitigating evidence of remorse could be given meaningful consideration by the jury within the scope of the former special issues. *Id.* at 768, 770. That court explained that evidence of remorse is "plainly relevant" mitigation evidence that speaks to a defendant's moral character and that a mitigation instruction was required. *Id.* at 768. The court continued by observing that the other special issues "provided no meaningful avenue for consideration" of that evidence of remorse. *Id.* at 770. That Court reversed this Court's prior holding that Williams was not entitled to a new punishment hearing, holding that this Court's determination disallowing the new punishment hearing was an unreasonable application of federal law. *Id.* at 768, 770. In holding that this Court had unreasonably interpreted federal law by rejecting Williams's mitigation-instruction claim, the federal court explained that "[t]estimony about remorse . . . [is a] species of good-character evidence" that was "plainly relevant," but could not be adequately considered within the scope of the future-dangerousness special issue. *Id.* at 768-69. It further explained,

> The Supreme Court, since at least 2000, has observed that a defendant "expressing remorse for his actions" is a factor that "might well have influenced the jury's appraisal of [an inmate's] moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000). Aside from merely forecasting future behavior, remorse "is something commonly thought to lessen or excuse a defendant's culpability." *Brown v. Payton*, 544 U.S. 133, 142-43 (2005). A trial attorney may rely on evidence of remorse to humanize his client in a manner which exceeds the inquiry used in deciding whether he may act

> violently in the future. Remorse may provide insight into humanizing qualities that do not necessarily relate to what an inmate has done or what he may do.

Id. at 770. The federal district court thus concluded that Williams's relevant mitigating evidence "'did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence.'" *Id.* It concluded that the omission of a mitigation issue required federal habeas relief, and it remanded the case for resentencing. *Id.* at 770-71 ("Because of the constitutional defect in the jury's ability to consider and give effect to all Williams' mitigating evidence, an additional special issue was required. The omission of a mitigating question requires federal habeas corpus relief.").

The federal district court's decision to grant relief in *Williams* was based on established precedent from the United States Fifth Circuit Court of Appeals that had applied Supreme Court precedent. In reaching its conclusion in *Williams*, the federal district court relied upon Fifth Circuit precedent holding that "good-character evidence 'is not encompassed by the [pre-1991] special issues.'" *Id.* at 769 (quoting *Pierce v. Thaler*, 604 F.3d 197, 210 (5th Cir. 2010)). That characterization of the applicable law was correct. In its recent summary of the applicable law, the Fifth Circuit indicated that, when some aspect of the good-character evidence presented at the punishment phase of a death penalty trial is "irrelevant to either deliberateness or future dangerousness, but [is] relevant to [a defendant's] general moral culpability and character," then a mitigation instruction is constitutionally required. *See Norris v. Davis*, 826 F.3d 821, 830 (5th Cir. 2016) (upholding

district court's conclusion that special issues were inadequate vehicle for jury to consider Norris's general good-character evidence of remorse and other good character evidence). In *Norris*, the Fifth Circuit explained that "Supreme Court case law clearly establishe[s] that general good character evidence requires an additional *Penry* instruction under Texas's capital sentencing scheme." *Id.* The Fifth Circuit reasoned that such a conclusion was compelled by the fact that "a majority of the [Supreme Court] Justices in *Franklin* [*v. Lynaugh*, 487 U.S. 164 (1988)] indicated" that good-character evidence "is not encompassed by the special issues" of Texas's scheme. *Id.* (citing *Pierce*, 604 F.3d at 210). Similarly, in *Pierce*, the Fifth Circuit upheld the district court's grant of federal habeas relief on a *Penry* claim based in part on its determination that the defendant's good-character evidence went beyond the scope of Texas's special issues. *See Pierce*, 604 F.3d at 210 ("[G]ood character evidence has meaningful relevance to moral culpability, which a majority of the Justices in *Franklin* indicated is not encompassed by the special issues. . . . [A]n additional instruction was required in order for the jury to consider and give effect to this mitigating evidence.").

B. Application of the Law

Having determined that the applicable law as properly set forth by the Supreme Court and the Fifth Circuit considers evidence of remorse to constitute relevant mitigating evidence, the pertinent question before this Court is whether applicant has presented evidence of remorse in his case. If he did present that type of evidence, the next question is whether the entire jury instructions in his particular case were adequate to permit the jury to

give full and meaningful effect to that mitigating evidence, given that the instructions did not include a mitigation special issue. After addressing that matter, I will discuss the particular posture of the three habeas applications applicant filed in this Court to explain why I conclude that this Court may address the merits of his challenge to the absence of the mitigation instruction.

1. The Evidence of Remorse

Applicant's statement after the offense expressly includes evidence of remorse. In response to a question from the investigator about why he kept the victim's wallet, applicant said,

> Probably cause I was hurting. It was in my pocket when [my co-defendant] shot me and it come out of the window and, you know, it was happen real fast, right. I was, I was real scared cause I know I had shot somebody in his place, you know. *I didn't know whether the dude was alive, whether he was dead, you know, and I was real upset* and when, when [my co-defendant] shot me, you know, and when I got to where my sister stayed, I got these people to my sister's house, I just took everything out of my pocket and put it in my drawer at the bottom of the dresser drawer.

(Emphasis added). Later, when asked by the interviewing officer at the end of the interview whether there was anything else he would like to say, applicant stated that he felt "remorse in the way I feel about the incident that happened," that he had been drinking, that he wished he could take it all back, and that he would accept his punishment. He indicated that he wished he could "take it all back" and he agreed to "face whatever punishment I have coming." Applicant's recorded statement showed signs of his sincerity in his remorse in that he cried during portions of the interview.

This Court's majority opinion appears to disregard these statements as not meeting the requirements for mitigation evidence under the theory that they do not actually show applicant's remorse. But that is an inappropriate standard of review. The question is whether a reasonable juror could examine applicant's statements and consider them to be evidence of his remorse. *See Tennard*, 542 U.S. at 284. I conclude that this evidence may meet that test and that the appropriate course of action is for this Court to remand this issue to the habeas court for it to make findings of fact and conclusions of law.

2. The Jury Instructions Were Inadequate to Address Remorse

Assuming that the habeas court would make an affirmative finding that applicant presented relevant mitigating evidence of his remorse, I conclude that the entire jury instructions were inadequate to permit the jury to consider its reasoned moral response to that evidence due to the absence of the mitigation instruction.

At his 1989 trial, applicant was given a nullification instruction rather than a mitigation instruction that was inadequate as a means for the jury to consider its reasoned moral response to his evidence of remorse. The nullification instruction informed the jury that, when deliberating about the special issues on future-dangerousness, provocation, and deliberateness, it should consider any mitigating circumstances and, if it found that any such circumstances warranted a life sentence rather than a death sentence, then it should answer "no" to the special issue under consideration. The Supreme Court later held that this type of nullification instruction is not a constitutionally adequate substitute for a proper mitigation

instruction. *See Penry v. Johnson*, 532 U.S. 782, 797, 804 (2001). Thus, the nullification instruction was inadequate as a vehicle for consideration of the jury's reasoned moral response to appellant's mitigation evidence.

The entirety of the instructions failed to permit the jury to consider its reasoned moral response to mitigation evidence of remorse. The jury instructions in applicant's case permitted the jury to determine that he had acted deliberately in shooting the police officer and that he posed a future danger to society given his criminal history. But these instructions would not reasonably permit the jury to meaningfully consider and give full effect to evidence of remorse. Under these circumstances, it appears to be reasonably likely that the absence of a mitigation special issue prevented the jury from giving meaningful consideration to whether applicant's remorse for his actions sufficiently reduced his moral culpability so as to warrant a life sentence rather than a death sentence. *See Abdul-Kabir*, 550 U.S. at 262 (finding constitutional violation where there was a "reasonable likelihood that the special issues would preclude [the jury] from giving meaningful consideration to such mitigating evidence, as required by *Penry I*"). Because the special issues likely did not provide the jury with an adequate vehicle for giving its reasoned moral response to evidence of remorse, the former statutory death-penalty scheme may have been unconstitutional as applied in this case. *See id.*

3. Procedural Posture of the Instant Proceedings

This opinion addresses applicant's -02, -03, and -04 habeas applications. In his -02 writ application, applicant asserted that "the trial court's submission of a nullification instruction violated the Eighth and Fourteenth Amendments" because that instruction constituted an inadequate vehicle for the jury's consideration of his mitigating evidence. After filing and setting his claim, this Court denied relief on the merits in 2008. *See Ex parte Jennings*, Nos. AP-75,806 & AP-75,807, 2008 WL 5049911, at *7-8 (Tex. Crim. App. Nov. 26, 2008). I would reopen the -02 application for two reasons. First, as discussed above, this Court misapplied Supreme Court precedent regarding mitigation evidence. Second, and perhaps more importantly, this Court did not fully consider the entire evidence introduced at applicant's trial. More specifically, this Court did not mention the evidence of applicant's expressions of remorse as constituting mitigation evidence. In discussing applicant's complaint about the absence of the mitigation instruction, this Court considered only a chaplain's testimony as the sole mitigation evidence, when instead we should have considered applicant's expressions of remorse as also constituting mitigation evidence. This Court stated, "We conclude that the jury could give full and meaningful mitigating effect to the evidence that the applicant introduced at the punishment phase of his trial within the scope of the statutory special issues. . . . The only mitigating evidence presented at trial was Chaplain Burrell's testimony with respect to the applicant's behavior and demeanor in the jail." *See id.* That analysis, however, should have but did not take into consideration the additional evidence that is at the center of applicant's present argument showing applicant's

remorse, which is properly considered as relevant mitigating evidence. This Court's previous analysis of applicant's claim presented in his -02 application was thus incomplete because it failed to consider the totality of the potentially mitigating evidence in the record in reaching its conclusion.

In sum, under these circumstances in which the correctness of this Court's prior holding has been called into question by Supreme Court precedent describing the applicable law, by federal courts' holdings in analogous cases suggesting that our analysis was erroneous, and by a more thorough examination of the record, the proper remedy is for this Court to reopen applicant's -02 habeas application on our own initiative to permit reconsideration of the merits of this claim. This Court has recognized that such an approach is warranted under extraordinary circumstances. *See Ex parte Moreno*, 245 S.W.3d 419, 420 (Tex. Crim. App. 2008) (reopening prior writ application on our own motion to reconsider applicant's claim that he was entitled to mitigation instruction because subsequent case law from the Supreme Court had "call[ed] into question the correctness" of this Court's prior analysis of that claim, and granting relief). I conclude that this Court's instant review of the -02 application reveals that it presents the type of extraordinary circumstances to warrant the reopening of a prior habeas application that was previously wrongly decided so that the proper applicable law may be correctly applied to a factually correct reading of the entire record. Accordingly, I would reopen the -02 application and remand it to the habeas court for further evidentiary development and findings of fact and conclusions of law.

In addition to remanding the -02 application, I would also remand the -03 application, in part, as discussed more fully in the next section. Furthermore, in light of all these considerations, I would dismiss the -04 application as procedurally barred as a subsequent habeas application.

II. Constitutionality of Death Penalty Based on Length of Time on Death Row

In his fourth ground presented in his -03 application, applicant contends that the death penalty now violates the constitutional prohibition against cruel and unusual punishment in light of evolving standards of decency. Applicant has been confined on death row for about thirty years, with much of that time being spent in solitary confinement while he awaits the imposition of the death penalty. Although I am undecided how I would rule on the ultimate merits of this complaint, I would remand it to the trial court for the parties to introduce their evidence and for findings of fact and conclusions of law by the habeas court.

In support of his claim, applicant cites to Justice Breyer's dissent in *Glossip v. Gross*, which states that "[t]he circumstances and the evidence of the death penalty's application have changed radically" so as to warrant a reexamination of whether the penalty remains constitutionally permissible in light of prevailing social norms. *See Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). Of particular relevance to his case, applicant cites Justice Breyer's statements addressing the "excessively long periods of time that individuals typically spend on death row, alive but under sentence of death." *Id.* at 2764. Applicant contends that the lengthy delay in his case—a delay of nearly three

decades—"aggravates the cruelty of the death penalty and undermines its jurisprudential rationale." In keeping with the views I expressed in my opinion in *Ex parte Murphy*, I would additionally permit applicant the opportunity to litigate this claim on its merits, particularly in light of the inexplicably lengthy delay of twelve years that occurred in this case in deciding applicant's initial habeas application. *See Ex parte Murphy*, 495 S.W.3d 282, 289-90 (Tex. Crim. App. 2016) (Alcala, J., concurring and dissenting) (urging Court to consider whether capital murderer's "decades-long confinement in a small individual cell with little human contact" constituted cruel and unusual punishment under the facts of that case); *see also Jennings*, 2008 WL 5049911, at *1 (observing that, although applicant filed his initial writ application in 1996, "inexplicably, the writ application did not make its way up to this Court until March of 2007").

This is a complicated subject that should require an extensive examination of the evidence because there are competing and valid arguments on both sides of the issue. On the one hand, challenges to the imposition of the death penalty should be permitted in a liberal and exhaustive manner to ensure that someone who is wrongfully convicted or sentenced is not executed. This type of appellate and habeas litigation may rightfully take many years or even more than a decade. On the other hand, solitary confinement in a small cell with extremely limited contact with other people or time outside of that cell appears to have serious psychological and physical effects on human beings. When the amount of time in

this type of confinement reaches about thirty years, as here, I can conceive of these conditions possibly becoming cruel and unusual punishment.

In addition to these concerns, I recognize that this claim may eventually result in a conclusion that it pertains to a complaint about conditions of confinement instead of a challenge to the imposition of the death penalty. But at this juncture, I am less persuaded by that argument. When a defendant is sentenced to death, it is clear that he will be confined for the remainder of his life and in Texas, in solitary confinement for the rest of his life. Given these circumstances, I would hold that that confinement is considered part of his punishment at death. Furthermore, because applicant's complaint that he has been confined for an extended period of time of about thirty years factually could not have become ripe until the instant application, I would not apply a procedural bar to the filing of this ground in the subsequent habeas application.

I, therefore, would remand applicant's -03 habeas application.

III. Conclusion

I would not deny applicant relief at this juncture. Instead, I would reopen and remand applicant's -02 writ application in order to reconsider his claim that the absence of a proper mitigation instruction at his trial violated the Eighth Amendment. In addition, I would remand the portion of applicant's -03 application that challenges the constitutionality of Texas's death-penalty scheme. Although I disagree with the Court's resolution of these matters, I agree with the Court's conclusion that applicant's -04 application is procedurally

barred and must be dismissed. I respectfully concur in part and dissent in part from this Court's judgment.

Filed: May 16, 2018

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JENNINGS, ROBERT MITCHELL Tr. Ct. No. 506814-A WR-67,208-02

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

RANDY SCHAFFER
ATTORNEY AT LAW
1021 MAIN ST. #1440
HOUSTON, TX 77002
* DELIVERED VIA E-MAIL *

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-67,208-02 & WR-67,208-03

EX PARTE ROBERT MITCHELL JENNINGS, Applicant

ON APPLICANT'S SUGGESTION FOR RECONSIDERATION OF APPLICATIONS FOR POST-CONVICTION WRITS OF HABEAS CORPUS IN CAUSE NO. 506814 IN THE 208TH DISTRICT COURT HARRIS COUNTY

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

For the reasons set forth in my concurring and dissenting opinion that issued in the writ applications styled WR-67,208-03 and WR-67,208-04, I would hold that this Court should, on its own motion, reopen the writ application in WR-67,208-02 filed by Robert Mitchell Jennings, applicant. *See Ex parte Jennings*, __S.W.3d__, Nos. WR-67,208-03 & WR-67,208-04, 2018 WL 2247764, at *7 (Tex. Crim. App. May 16, 2018) (Alcala, J., concurring and dissenting); *Ex parte Jennings*, Nos. AP-75,806 & AP-75,807, 2008 WL 5049911 (Tex. Crim. App. Nov. 26, 2008) (opinion denying relief on -02 writ application).

In his suggestion for reconsideration of this Court's prior ruling rejecting the -02 application, applicant has argued that his death sentence should be vacated due to the sentencing jury's inability to properly consider his mitigation evidence of remorse in the absence of a proper mitigation special issue. Because I would order the habeas court to address the merits of that claim, I respectfully dissent from this Court's decision declining to reopen the -02 writ application.

Filed: September 19, 2018

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