NO. 18A521 (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

TEDDRICK BATISTE,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Tab 1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 6, 2018
Lyle W. Cayce
Clerk

No. 17-70025

TEDDRICK BATISTE,

Petitioner–Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:15-CV-1258

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Teddrick Batiste was convicted of capital murder in Texas state court and sentenced to death. He sought post-conviction relief, alleging that his state trial counsel rendered ineffective assistance during sentencing. The state habeas court rejected the claim on the merits. Batiste subsequently filed for habeas relief in federal court. The district court, after extensive analysis,

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

denied relief and declined to issue a certificate of appealability (COA).[1] Batiste now applies for a COA from this court. For the reasons given below, we deny his application.

I

At trial, the State established, based in part on Batiste's confession, that he killed Horace Holliday while trying to steal tire rims from Mr. Holliday's Cadillac. The district court observed that the killing "was particularly brutal and senseless. Batiste repeatedly shot into the victim's car on the freeway to steal the rims from his car. Once they both stopped, Batiste could have stolen the victim's car and left the injured man lying on his stomach bleeding and pleading for his life. Instead, Batiste repeatedly shot him."[2] Further pertinent to this federal habeas matter, the district court quoted the Texas Court of Criminal Appeals' summary of the punishment phase of Batiste's trial:

> During the punishment phase, the State offered evidence that, on March 23, 2009 (a little more than three weeks before killing Horace Holiday), appellant robbed Walter Jones, his wife, Kari, and David McInnis, at the Phat Kat Tats tattoo shop. A little before 11:00 p.m., appellant parked his Buick in front of the Shipley's Donuts shop in the strip center where the tattoo shop was located. Then he and two cohorts marched into the shop, wearing blue bandanas over their faces and carrying semi-automatic pistols. Appellant screamed, "This is a fucking robbery!" Each of the robbers grabbed one of the three adults, and each put a gun to that person's head. Walter Jones, the owner of Phat Kat Tats, noticed that these robbers were well organized and likely had done this before. Kari, very afraid that their five-year-old son might come into the shop from the next room, pleaded with the robbers not to shoot him if he did so. One of the robbers started yelling at her, "Shut up, bitch, I'll kill you, I'll kill you. Shut up." The robbers made them empty out their pockets. Disappointed with the result, the robbers then scooped up two laptops, several cell phones, a digital camera, and three tattoo machines. They ran

[1] *Batiste v. Davis*, 2017 WL 4155461 (S.D.Tex. Sept. 19, 2017).
[2] *Id.* at *12.

out of the shop and fled in appellant's Buick. The surveillance camera at the nearby Shipley's Donuts caught appellant, his cohorts, and the Buick, on tape.

Two weeks later—shortly after midnight on April 8, 2009—appellant drove his Buick through the strip-mall center where the Black Widow tattoo parlor was located. He was "casing" it for a robbery. He backed his Buick into a parking slot in front of the shop, and then he and two other men walked into the tattoo parlor. Steve Robbins, the shop's owner, was tattooing Joshua's arm, while two of Joshua's friends—Anthony and Christie—were napping on the couch. Two of the robbers held Anthony and Christie at gunpoint, while the third robber went toward the back where Steve was tattooing Joshua. Appellant and the other two robbers were yelling and "cussing" at everyone, demanding money and wallets. When Steve told the robbers that they had gotten all the money and they should leave because the store had surveillance cameras, appellant turned back to him and said, "What, motherfucker?" and began shooting Steve. Appellant and another robber shot a total of sixteen bullets before they finally fled in appellant's Buick. Steve died.

The State also introduced evidence of appellant's long criminal history, his gang-related activities, and his various acts of violence and intimidation while in jail.

Horace Holiday's mother, Lisa Holiday Harmon, gave the jurors a brief glimpse into her son's life and how he had saved up the money to buy the special rims for his Cadillac just two weeks before his death. She told the jury that, after the murder, Horace's grandmother moved into Horace's old room to be closer to his memory. Horace's grandmother testified that, after Horace's death, the "whole family fell apart."

During his punishment case, appellant called a dean from the University of Houston to testify to the TDCJ inmate classification system and life in prison. He also called a high-school track and football coach who said that appellant was a gifted athlete in middle school, but that he "disappeared" after he got into trouble for car thefts. Appellant's former boss testified that appellant worked at Forge USA for over six months as a helper on the forging

crew. He never had any problems with appellant. Appellant's girlfriend, Stephanie Soliz, testified that she and appellant lived together with her two children, one of whom was fathered by appellant. Appellant was "the best" father. Stephanie admitted that they smoked a lot of marijuana at home and that appellant had a second job as a "fence" for stolen property. She was "okay" with appellant selling stolen property, as long as he wasn't doing the stealing himself.

Appellant's younger brother, Kevin Noel, testified that appellant was "a very caring and loving brother." He did not try to get Kevin to commit crimes or join the Crips gang, but Kevin did join the Line Five Piru Bloods gang and has the gang's tattoos. Kevin would pick appellant up from work and bring him back to his apartment where Kevin smoked dope with appellant and Stephanie. Appellant would write him letters from jail suggesting various new gang tattoos and bragging about having sex with a nurse in the infirmary. Appellant also wrote a letter from the jail to a friend telling him that he had broken his hand fighting with "a white guy from the military." When that man had interfered with appellant's phone call, appellant broke his jaw.

Darlene Beard testified that appellant was her "favorite grandson." She took care of him until he was nine years old. After that, she saw him every Thanksgiving, and sometimes on her birthday or Mother's Day. She never saw appellant do anything bad. "I can only tell you about the good things that I know concerning my grandchild." Mrs. Beard said that appellant has a "huge" family and does not have any conflict with any member of that family. Appellant's mother testified that she was barely sixteen when appellant was born, so her mother took care of him while she finished high school. He was a healthy, happy, church-going child without any mental-health or learning problems until he started getting into trouble in middle school. She knew that appellant was sent to TYC for stealing cars, but he never told her about his other crimes, being in a gang, or having gang tattoos.

Appellant testified that he had a happy childhood, but when he was in middle school, he began selling Ritalin because he wanted to make money. After he was caught, he was sent to an alternative school for the rest of eighth grade and half of ninth grade.

> Appellant said that, after TYC, he committed crimes "just like to keep money in my pocket, keep everything I needed." Appellant stated that he spent some of his money on marijuana for Stephanie and himself, but he didn't commit crimes to get drug money. He said that he really loves his two boys, Kash and Alex, and would guide them and tell them "what's right, what's wrong."
>
> Appellant testified that he could be a positive influence on people in prison, and he would distance himself from the Crips members "and just pick different goals." Appellant stated that he had followed the jail rules "[t]o the best of my ability.... Everytime, it's always mutual combat. It's never been where I just hit somebody. I hit them back." But appellant did admit that, when faced with the choice to show empathy and help Horace Holiday, who was bleeding to death on the concrete, appellant made the choice to shoot him several more times and steal his car.
>
> When appellant was in jail, Stephanie tried to move on with a new boyfriend, Aaron. Appellant wrote rap lyrics about shooting him: "But Aaron ain't crazy, man. That nigga respect my game. He's a target up in my range. Extended clip to his brain." Appellant admitted that his jailhouse rap lyrics could be seen as glorifying capital murder ("I popped and he dropped"), the gangster lifestyle, and violence in general. Appellant agreed that he recruited the gang members for the Phat Kat Tats robbery and told them what to do. He admitted that he was the leader in the Black Widow capital murder as well. And he said that those were not his first robberies.[3]

After considering this evidence, the jury sentenced Batiste to death.

As noted, the Texas Court of Criminal Appeals affirmed Batiste's conviction and sentence. While the direct state court appeal was pending, Batiste filed a state habeas application, which included an ineffective-assistance-of-trial-counsel (IATC) claim asserting that Batiste's trial counsel did not adequately investigate and develop mitigating evidence relating to his hospitalization for bacterial meningitis when he was less than one year old.

[3] *Batiste v. State*, No. AP-76600, 2013 WL 2424134 (Tex. Crim. App. June 5, 2013).

The state habeas court considered the claim and recommended that relief be denied. The Texas Court of Criminal Appeals agreed and denied relief without separate analysis.

Batiste subsequently filed a federal habeas petition. The Director of the Criminal Institutions Divisions of the Texas Department of Criminal Justice (Director) moved for summary judgment and the district court granted the motion, and also denied Batiste a COA. Batiste has applied for a COA from this court.

II

For a state prisoner seeking federal habeas relief, the issuance of a COA is a jurisdictional prerequisite to appellate review.[4] We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right,"[5] meaning that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."[6] Stated another way, we are restricted to "ask[ing] 'only if the District Court's decision was debatable;'" if not, a COA may not issue.[7] This standard allows a COA to issue "even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."[8]

The Supreme Court has cautioned that, at this threshold stage, we are to refrain from "full consideration of the factual or legal bases adduced in support of the claims."[9] Our focus must remain on the limited inquiry as to

[4] *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).
[5] 28 U.S.C. § 2253(c)(2).
[6] *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).
[7] *Id.* (quoting *Miller-El*, 537 U.S. at 348).
[8] *Id.* (quoting *Miller-El*, 537 U.S. at 338).
[9] *Id.* (quoting *Miller-El*, 537 U.S. at 336).

whether a COA should issue and avoid the merits of the appeal as a means to justify a denial of a COA.[10] In a capital case, should any doubt remain after this inquiry as to the propriety of a COA, we resolve those doubts in the petitioner's favor.[11]

III

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), federal habeas relief is available to petitioners "in custody pursuant to the judgment of a State court" on the basis of "any claim that was adjudicated on the merits in State court"[12] when the state proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[13] or if the decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[14]

Batiste objects to the state habeas court's resolution of the merits of his IATC claim. To be entitled to relief, he must "show both that his counsel provided deficient assistance and that there was prejudice as a result."[15] This standard is "highly deferential."[16] For trial counsel's performance to be deficient, it must fall below an objective standard of reasonableness such that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[17] There is "a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional

[10] *Id.* (quoting *Miller-El*, 537 U.S. at 336-37).

[11] *United States v. Bernard*, 762 F.3d 467, 471 (5th Cir. 2014) (quoting *Ramirez v. Dretke*, 398 F.3d 691, 694 (5th Cir. 2005)).

[12] 28 U.S.C. § 2254(d).

[13] *Id.* § 2254(d)(1).

[14] *Id.* § 2254(d)(2).

[15] *Harrington v. Richter*, 562 U.S. 86, 104 (2011).

[16] *Id.* at 105 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

[17] *Id.* at 104 (quoting *Strickland*, 466 U.S. at 687).

assistance."[18] To establish prejudice, Batiste must do more than "show that the errors had some conceivable effect on the outcome of the proceeding."[19] Rather, he must show "a reasonable probability"—that is, "a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[20] For a COA to issue, jurists of reason must be able to debate whether Batiste established both deficiency and prejudice.[21]

The district court found the state court habeas resolution of this issue to be reasonable, and we agree without reaching the issue of prejudice. Batiste challenges the finding that he failed to establish that trial counsel performed deficiently by not discovering and then presenting neuropsychological testing that Batiste's meningitis as an infant may have caused "frontal lobe damage that resulted in executive functioning deficits for which Batiste bears no blame."[22] Batiste acknowledges that trial counsel secured multiple mental health experts, and that the jury heard evidence of his early hospitalization as well as his risk-taking, impulsive and violent behavior during his life, but Batiste nonetheless contends that "trial counsel provided no expert medical testimony or other context for the significance of Batiste's hospitalization as a nine-month-old for bacterial meningitis."[23]

The Supreme Court has observed that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste,"[24] and "when a defendant has given counsel reason to believe that

[18] *Id.* (quoting *Strickland*, 466 U.S. at 689).
[19] *Id.* (quoting *Strickland*, 466 U.S. at 693).
[20] *Strickland*, 466 U.S. at 694.
[21] *See Buck v. Davis*, 137 S. Ct. at 773.
[22] Application, at 27.
[23] *Id.* at 26-27.
[24] *Id.*

pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."[25] Here, the state habeas court considered affidavits from both trial counsel[26] and also Batiste's expert, Dr. Underhill,[27] pertaining to the issue

[25] *Strickland v. Washington*, 466 U.S. at 691. Batiste's further reliance on the Supreme Court's ineffectiveness ruling in *Rompilla v. Beard*, 545 U.S. 374 (2005), is unavailing. The Supreme Court in *Rompilla* required "reasonable efforts to obtain and review material counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." 545 U.S. at 377; *see Escamilla v. Stephens*, 749 F.3d 380, 389 (5th Cir. 2014). The directive in *Rompilla* did not set a particular level of investigation in every case--"reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," *Rompilla*, 545 U.S. at 383—and, regardless, Batiste identifies no aggravation evidence offered by Texas that counsel did not obtain prior to the sentencing. *See also Timberlake v. Davis*, 418 F.3d 702 (7th Cir. 2005). Indeed, *Rompilla* is further distinguishable because, there, in view of the prosecution's forewarning, trial counsel had a duty to investigate the file readily available at the courthouse in preparation for the sentencing hearing and for possible leads to mitigation evidence. 545 U.S. at 383–886. The Supreme Court explained that counsel did not "look at any part of that file, including the transcript, until warned by the prosecution a second time." *Id.* at 384. Had counsel looked, he would have discovered "a range of mitigation leads that no other source had opened up." *Id.* at 390. Comparison of Batiste's case with *Rompilla* indicates that the state habeas court did not unreasonably apply *Strickland*'s deficiency prong by concluding that Batiste's trial counsel performed an adequate mitigation investigation.

[26] Defense counsel's habeas affidavit, asserting *inter alia* that "I have been trying death penalty cases since 1976 and have tried quite a few and have tried them from both sides of the table…. One of the realities of death penalty litigation that all experienced defense attorneys will admit is this: if you use mental health evidence, short of proving actual insanity, you run the risk of making the defendant look even more dangerous to the jury, and frankly it is generally true, because they are more dangerous…. We had no information from any source, be it a family member, friend, our experts or investigators, or any record that would indicate a frontal lobe disorder, or any mental disorder. He was sharp and I personally saw him make decisions. I am very careful not to call witnesses, especially experts, who on cross examination can destroy our case."

[27] Affidavit of James Underhill, asserting *inter alia* that "Mr. Batiste's frontal lobe functioning with regard to risk taking is impaired…. Mr. Batiste's brain impairment renders him unlikely to stop risky behavior once it has begun, and in fact, causes him to behave in a way that actually increases the risk associated with a given situation despite being aware of the costs…. There are several possible etiologies of the brain dysfunction that Teddrick Batiste demonstrates on neuropsychological testing. The impairment can result from head trauma or illness…[and] contributing factors…could have been the result of a lack of pre-natal care his mother received during her pregnancy and/or her diet while pregnant. Furthermore, the meningitis Mr. Batiste was reported to have suffered from as [sic] a neonate could have contributed to or been the direct cause of Mr. Batiste's impairment."

of meningitis frontal lobe damage, and then credited the former that "counsel had no information from any expert, investigator, record, family member, or friend indicating that the applicant had any indicia of frontal lobe disorder," and discredited the latter as to the inference that such damage caused Batiste's "risk taking behavior." Furthermore, the state habeas court noted that evidence of impulsivity and poor cognitive function was presented yet also that other evidence disproved that Batiste was unable to control his behavior.

We agree with the district court that reasonable jurists could not debate whether the state habeas court was unreasonable in finding that trial counsel lacked reason to investigate further and develop that Batiste's cognitive deficit may have been caused by frontal lobe damage due to meningitis in infancy. None of trial counsel's three mental health experts identified this as necessary neuropsychological mitigation inquiry, even though two experts extensively interviewed Batiste.[28] Additionally, as the state habeas court observed and the district court elaborated, Dr. Underhill's affidavit supporting Batiste's habeas contention was vague and inconsistent in its suggestion that Batiste's risky behavior traced to the meningitis he was treated for.

Conclusion

On review of the state court's denial of Batiste's mitigation ineffectiveness claim, jurists of reason could not debate whether the state habeas court acted contrary to or unreasonably applied *Strickland* in concluding that Batiste failed to make "a substantial showing of the denial of a constitutional right"[29] because Batiste's trial counsel acted in an objectively

[28] We have highlighted the relevance in IATC claims of counsel's decision to *disregard* expert recommendations actually given to counsel to seek more testing. *See, eg. Lockett v. Anderson*, 230 F.3d 695, 711-714 (5th Cir. 2000).

[29] *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

reasonable manner in investigating, selecting and presenting mitigation evidence.

* * *

For the foregoing reasons, Batiste's request for a COA is DENIED.

Certified as a true copy and issued as the mandate on Jul 06, 2018

Attest:

Clerk, U.S. Court of Appeals, Fifth Circuit

Tab 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70025

TEDDRICK BATISTE,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 7/6/18, 5 Cir., ________, ________ F.3d ________)

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority

of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 24, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-70025 Teddrick Batiste v. Lorie Davis, Director
USDC No. 4:15-CV-1258

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _______________________
Monica R. Washington, Deputy Clerk
504-310-7705

Mr. Jefferson David Clendenin
Mr. Kenneth W. McGuire
Ms. Kate Pumarejo

Tab 3

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

TEDDRICK BATISTE,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION H-15-1258
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION & ORDER

Teddrick Batiste, an inmate on Texas' death row, has filed a federal petition for a writ of habeas corpus challenging his capital conviction and death sentence. Dkt. 9. Respondent Lorie Davis moves for summary judgment. Dkt. 22. After considering the record, the pleadings, and the applicable law, the Court finds that Batiste has not shown an entitlement to habeas relief. Accordingly, the Court will GRANT Respondent's motion for summary judgment and DENY Batiste's habeas petition. The Court will not certify any issue for appellate review.

I. BACKGROUND

On direct appeal, the Texas Court of Criminal Appeals described the facts underlying the murder of Horace Holiday as follows:

> In the early morning hours of April 19, 2009, [Batiste], a member of the Five Deuce Hoover Crips, was at home getting some tattoos, when he looked in the mirror, thinking about all of his bills. He asked his friend, Loc, to "ride around" in his Buick with him looking for something to steal because "that's the way you get money." After fruitlessly cruising the streets for a while, they ended up at an after-hours club on Veteran's Memorial Drive on the north side of Houston. [Batiste] saw a white Cadillac coming out of the parking lot, and he decided that he wanted the Cadillac's fancy rims. "I just look at the rims, and I know what the rims are worth. . . . I could get $3,000 on the streets."

> [Batiste] started following the Cadillac, and they drove for miles down the freeway. Eventually the driver must have noticed him, because the Cadillac began "swanging" from the right to the left lane and back again. [Batiste] was scared because the driver was acting "street smart," but he didn't want to show any fear because he and Loc were Crips, so he told Loc to lean back while [Batiste] pulled up even with the Cadillac and started shooting at the driver through Loc's passenger window. He shot the driver four or five times with his nine-millimeter, semi-automatic Glock pistol.
>
> The Cadillac exited the freeway, pulled into an Exxon station, and ran into one of the gas pumps. [Batiste] drove into the station and saw the badly wounded driver slowly come out of the Cadillac, crying "Help, help, help." The man collapsed on the concrete. [Batiste] thought, "[M]an, this is my chance. I got to get those wheels. . . . And I got my gun, and I put my hat on, and I had a ski mask." He told Loc to drive the Buick to [Batiste's] wife's apartment, and then [Batiste] ran over to where Mr. Holiday, the driver, was lying on the ground. When he saw the man move, he shot him several more times in the back and head. Mr. Holiday died.[1]
>
> [Batiste] jumped into the Cadillac and drove out of the Exxon station and back onto the Eastex freeway, heading north. He soon noticed a police car behind him and realized that he would be caught, but first he led the pursuing officers on a high-speed chase for about twelve miles.[2] It was not until officers placed a spike strip across the road and [Batiste] ran over it, destroying the Cadillac's passenger-side tires, that he was finally forced to stop.
>
> [Batiste] was taken into custody and placed in a patrol car. One officer, who had noticed a great deal of blood on the Cadillac's steering wheel and driver's seat, came over to ask [Batiste] if he needed medical attention. [Batiste] told him that he was "fine"; it wasn't his blood, it "belongs to the guy I took the car from." After [Batiste] was taken to the homicide division, he gave officers a recorded statement confessing to the capital murder of Horace Holiday. He then gave two more confessions – one to a second capital murder and one to a separate aggravated robbery.

Batiste v. State, No. AP-76,600, 2013 WL 2424134, at *1 (Tex. Crim. App. June 5, 2013) (footnotes added) (hereinafter "Opinion on Direct Appeal at ___").

[1] The victim's body "had fifteen gunshot wounds, including fatal gunshot wounds to the brain, liver, gall bladder, and stomach." S.H.R. at 938.

[2] A police officer "observed a handgun and a ski mask being thrown out of the driver's side of the Cadillac" during the pursuit. S.H.R. at 937. "The bullets recovered from the [victim's] neck and back were consistent with being fired from [Batiste's] Glock recovered on the freeway." S.H.R. at 938.

In 2011, Batiste stood trial in the 174th District Court of Harris County, Texas.[3] The defense did not call any witnesses or present evidence in the guilt/innocence phase. One of Batiste's trial attorneys conceded in a habeas affidavit that "[t]he guilt phase was indefensible." S.H.R. at 811.[4] The jury found Batiste guilty of capital murder.

A Texas jury decides a capital defendant's fate by answering special issue questions at the conclusion of a separate punishment hearing. Here, the instructions asked jurors to decide (1) whether Batiste would be a future societal danger and (2) whether sufficient circumstances militated against the imposition of a death sentence. C.R. at 1712-13. The Court of Criminal Appeals summarized the punishment portion of Batiste's trial as follows:

> During the punishment phase, the State offered evidence that, on March 23, 2009 (a little more than three weeks before killing Horace Holiday), [Batiste] robbed Walter Jones, his wife, Kari, and David McInnis, at the Phat Kat Tats tattoo shop. A little before 11:00 p.m., [Batiste] parked his Buick in front of the Shipley's Donuts shop in the strip center where the tattoo shop was located. Then he and two cohorts marched into the shop, wearing blue bandanas over their faces and carrying semi-automatic pistols. [Batiste] screamed, "This is a fucking robbery!" Each of the robbers grabbed one of the three adults, and each put a gun to that person's head. Walter Jones, the owner of Phat Kat Tats, noticed that these robbers were well organized and likely had done this before. Kari, very afraid that their five-year-old son might come into the shop from the next room, pleaded with the robbers not to shoot him if he did so. One of the robbers started yelling at her, "Shut up, bitch, I'll kill you, I'll kill you. Shut up." The robbers made them empty out their pockets. Disappointed with the result, the robbers then scooped up two laptops, several cell phones, a digital camera, and three tattoo machines. They ran out of the shop and fled in [Batiste's] Buick. The surveillance camera at the nearby Shipley's Donuts caught [Batiste], his cohorts, and the Buick, on tape.

[3] R. P. "Skip" Cornelius and Gerald Bourque represented Batiste at trial. The Court will refer to the defense attorneys collectively as "trial counsel."

[4] The state court proceedings in this case resulted in a voluminous record. The Court will cite the Clerk's Record containing trial court motions and docket entries as C.R. at ___. The reporter's record containing the trial court proceedings will be cited as Tr. Vol. ___ at ___. The Court will refer to the record from Batiste's state habeas proceedings as S.H.R. at ___.

Two weeks later – shortly after midnight on April 8, 2009 – [Batiste] drove his Buick through the strip-mall center where the Black Widow tattoo parlor was located. He was "casing" it for a robbery. He backed his Buick into a parking slot in front of the shop, and then he and two other men walked into the tattoo parlor. Steve Robbins, the shop's owner, was tattooing Joshua's arm, while two of Joshua's friend–Anthony and Christie–were napping on the couch. Two of the robbers held Anthony and Christie at gunpoint, while the third robber went toward the back where Steve was tattooing Joshua. [Batiste] and the other two robbers were yelling and "cussing" at everyone, demanding money and wallets. When Steve told the robbers that they had gotten all the money and they should leave because the store had surveillance cameras, [Batiste] turned back to him and said, "What, motherfucker?" and began shooting Steve. [Batiste] and another robber shot a total of sixteen bullets before they finally fled in [Batiste's] Buick. Steve died.

The State also introduced evidence of [Batiste's] long criminal history, his gang-related activities, and his various acts of violence and intimidation while in jail.

Horace Holiday's mother, Lisa Holiday Harmon, gave the jurors a brief glimpse into her son's life and how he had saved up the money to buy the special rims for his Cadillac just two weeks before his death. She told the jury that, after the murder, Horace's grandmother moved into Horace's old room to be closer to his memory. Horace's grandmother testified that, after Horace's death, the "whole family fell apart."

During his punishment case, [Batiste] called a dean from the University of Houston to testify to the TDCJ inmate classification system and life in prison. He also called a high-school track and football coach who said that [Batiste] was a gifted athlete in middle school, but that he "disappeared" after he got into trouble for car thefts. [Batiste's] former boss testified that [Batiste] worked at Forge USA for over six months as a helper on the forging crew. He never had any problems with [Batiste]. [Batiste's] girlfriend, Stephanie Soliz, testified that she and [Batiste] lived together with her two children, one of whom was fathered by [Batiste]. [Batiste] was "the best" father. Stephanie admitted that they smoked a lot of marijuana at home and that [Batiste] had a second job as a "fence" for stolen property. She was "okay" with [Batiste] selling stolen property, as long as he wasn't doing the stealing himself.

[Batiste's] younger brother, Kevin Noel, testified that [Batiste] was "a very caring and loving brother." He did not try to get Kevin to commit crimes or join the Crips gang, but Kevin did join the Line Five Piru Bloods gang and has the gang's tattoos. Kevin would pick [Batiste] up from work and bring him back to his apartment where Kevin smoked dope with [Batiste] and Stephanie. [Batiste] would write him letters from jail suggesting various new gang tattoos and bragging about having sex with a nurse in the infirmary. [Batiste] also wrote a letter from the jail to a friend telling

him that he had broken his hand fighting with "a white guy from the military." When that man had interfered with [Batiste's] phone call, [Batiste] broke his jaw.

Darlene Beard testified that [Batiste] was her "favorite grandson." She took care of him until he was nine years old. After that, she saw him every Thanksgiving, and sometimes on her birthday or Mother's Day. She never saw [Batiste] do anything bad. "I can only tell you about the good things that I know concerning my grandchild." Mrs. Beard said that [Batiste] has a "huge" family and does not have any conflict with any member of that family. [Batiste's] mother testified that she was barely sixteen when [Batiste] was born, so her mother took care of him while she finished high school. He was a healthy, happy, church-going child without any mental-health or learning problems until he started getting into trouble in middle school. She knew that [Batiste] was sent to TYC for stealing cars, but he never told her about his other crimes, being in a gang, or having gang tattoos.

[Batiste] testified that he had a happy childhood, but when he was in middle school, he began selling Ritalin because he wanted to make money. After he was caught, he was sent to an alternative school for the rest of eighth grade and half of ninth grade. [Batiste] said that, after TYC, he committed crimes "just like to keep money in my pocket, keep everything I needed." [Batiste] stated that he spent some of his money on marijuana for Stephanie and himself, but he didn't commit crimes to get drug money. He said that he really loves his two boys, Kash and Alex, and would guide them and tell them "what's right, what's wrong."

[Batiste] testified that he could be a positive influence on people in prison, and he would distance himself from the Crips members "and just pick different goals." [Batiste] stated that he had followed the jail rules "[t]o the best of my ability. . . . Every time, it's always mutual combat. It's never been where I just hit somebody. I hit them back." But [Batiste] did admit that, when faced with the choice to show empathy and help Horace Holiday, who was bleeding to death on the concrete, [Batiste] made the choice to shoot him several more times and steal his car.

When [Batiste] was in jail, Stephanie tried to move on with a new boyfriend, Aaron. [Batiste] wrote rap lyrics about shooting him: "But Aaron ain't crazy, man. That nigga respect my game. He's a target up in my range. Extended clip to his brain." [Batiste] admitted that his jailhouse rap lyrics could be seen as glorifying capital murder ("I popped and he dropped"), the gangster lifestyle, and violence in general. [Batiste] agreed that he recruited the gang members for the Phat Kat Tats robbery and told them what to do. He admitted that he was the leader in the Black Widow capital murder as well. And he said that those were not his first robberies.

Opinion on Direct Appeal at 2-4. The jury answered Texas' special issue questions in a manner requiring the imposition of a death sentence.

Batiste challenged his conviction and sentence on appeal.[5] The Texas Court of Criminal Appeals issued an unpublished opinion affirming the judgment in 2013. *Batiste v. State*, No. AP-76,600, 2013 WL 2424134 (Tex. Crim. App. June 5, 2013).

Batiste filed a state habeas application during the pendency of his direct appeal.[6] In 2015, the trial-level state habeas court entered findings of fact and conclusions of law recommending that the Court of Criminal Appeals deny his habeas application.[7] On April 29, 2015, the Court of Criminal Appeals adopted the lower court's recommendation and denied habeas relief.

Federal review followed. Batiste filed a timely federal petition raising the following grounds for relief:

1. Trial counsel provided ineffective representation by:

    - not investigating, preparing, and presenting evidence of Batiste's brain dysfunction.
    - not calling an expert witness to rebut the State's testimony concerning Batiste's gang involvement.

[5] Patrick F. McCann represented Batiste on appeal.

[6] The Texas Office of Capital Writs represented Batiste on habeas review.

[7] The trial court signed the State's proposed findings and conclusions without alteration. Batiste unsuccessfully asked the Court of Criminal Appeals to remand his case to force the trial court to make independent findings. Batiste argues that this Court should not apply AEDPA's presumption of correctness to the state habeas court's factual findings because the trial judge signed the State's proposed findings and conclusions. Dkt. 38, pp. 29-32. In another context, the Supreme Court has criticized the "verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985); *see also Jefferson v. Upton*, 560 U.S. 284, 294-95 (2010) ("Although we have stated that a court's verbatim adoption of findings of fact prepared by prevailing parties should be treated as findings of the court, we have also criticized that practice.") (quotation omitted). The Fifth Circuit, however, has rejected the argument that habeas findings adopted verbatim from those submitted by the State are not entitled to deference. *See Basso v. Stephens,* 555 F. App'x 335, 342, 343 (5th Cir. 2014); *Green v. Thaler*, 699 F.3d 404, 416 n. 8 (5th Cir. 2012).

- not calling an expert witness to explain the relevance of Batiste's social history.
- not investigating, preparing, and presenting testimony from lay witnesses.
- not calling additional witnesses to strengthen his mitigating evidence.
- not presenting additional evidence that Batiste would not be a future societal danger.
- inadequately preparing Batiste to testify.
- failing to challenge the State's use of letters Batiste wrote while awaiting trial.

2. The State violated Batiste's right to a fair trial by failing to disclose impeachment evidence.

3. Juror misconduct violated Batiste's rights to due process and a fair trial.

4. Trial counsel failed to preserve error regarding the State's presentation of allegedly inadmissible evidence.

5. The trial court erred by compensating trial counsel with a flat fee and trial counsel provided ineffective representation by accepting that arrangement.

6. Trial counsel provided ineffective representation by not making a sufficient objection to the introduction of evidence allegedly protected by the First Amendment.

7. Texas unconstitutionally administers the death penalty in an arbitrary manner.

8. The trial court violated the Constitution by not informing jurors that a single juror's vote could result in a life sentence.

9. Trial counsel failed to preserve the record for appeal.

10. The punishment phase instructions constricted the jury's consideration of mitigating evidence.

11. Batiste's appellate and habeas attorneys provided ineffective representation in their selection of grounds for relief.

12. The trial court violated Batiste's First Amendment rights by allowing testimony and evidence about religious practices.

13. The trial court violated Texas evidentiary law by allowing victim-impact testimony.

14. Courtroom disruptions violated Batiste's right to due process.

15. The trial court improperly prevented the defense from presenting execution-impact testimony.

16. The trial court violated Batiste's constitutional rights by granting the State's challenge for cause to one prospective juror.

17. The trial court should have suppressed Batiste's statements to police officers.

Stating that his petition was "fact based" without "discuss[ing] all of the applicable law," Batiste indicated that he would file a supplement to his federal petition. Dkt. 9 at 2. The Court entered a scheduling order giving Batiste an opportunity to supplement the arguments in his petition. Dkt. 18. Batiste did not file any supplemental pleading.

Respondent has moved for summary judgment. Dkt. 22.[8] Batiste has filed a reply. Dkt. 38. This action is ripe for adjudication.

II. STANDARD OF REVIEW

The writ of habeas corpus provides an important, but narrow, examination of an inmate's conviction and sentence. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). "Society's resources have been concentrated at [a criminal trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its

[8] Summary judgment is proper when the record shows "that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "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. 2000). A district court considering a motion for summary judgment usually construes disputed facts in a light most favorable to the nonmoving party, but must also view the evidence through "the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). The general summary judgment standards hold to the extent they do not conflict with AEDPA and other habeas law. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir.2002) (Rule 56 "applies only to the extent that it does not conflict with the habeas rules"), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004).

citizens." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977); *see also McFarland v. Scott*, 512 U.S. 849, 859 (1994) (stating that a "criminal trial is the 'main event' at which a defendant's rights are to be determined"). The States, therefore, "possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

If the inmate has presented his federal constitutional claims to the state courts in a procedurally proper manner, and the state courts have adjudicated their merits, AEDPA provides for a deferential federal review. "[T]ime and again," the Supreme Court "has instructed that AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, 'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.'" *White v. Wheeler*, ___ U.S. ___, 136 S. Ct. 456, 460 (2015) (quoting *Burt v. Titlow*, ___ U.S. ___, 134 S. Ct. 10, 16 (2013)). Under AEDPA's rigorous requirements, an inmate may only secure relief after showing that the state court's rejection of his claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1),(2).

Inmates arguing legal error in state court decisions must comply with § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). A petitioner does not merit relief by merely showing legal error in the state court's decision. *See White v. Woodall*, ___ U.S. ___, 134 S. Ct. 1697, 1702 (2014) (stating being "merely wrong" or in "clear error" will not suffice for federal relief under AEDPA). In contrast to "ordinary error correction through appeal," AEDPA review exist only to "guard against extreme malfunctions in the

state criminal justice systems . . . ." *Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1376 (2015) (quotation omitted). "[F]ocus[ing] on what a state court knew and did," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), AEDPA requires inmates to "'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woodall*, 134 S. Ct. at 1702 (quoting *Richter*, 562 U.S. at 103); *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010); *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

A petitioner challenging the factual basis for a state decision must show that it was an "unreasonable determination of the facts in light of the evidence . . . ." 28 U.S.C. § 2254(d)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). A federal habeas court must also presume the underlying factual determinations of the state court to be correct, unless the inmate "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). As the same judge presided over the trial proceedings and the state habeas action in this case, the presumption of correctness for state habeas factual findings is especially strong. *See Mays v. Stephens*, 757 F.3d 211, 214 (5th Cir. 2014); *Woods v. Thaler*, 399 F. App'x. 884, 891 (5th Cir. 2010); *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000).[9]

[9] Section 2254(e)(2) authorizes evidentiary hearings under narrow conditions. No evidentiary hearing is necessary to adjudicate Batiste's petition.

An inmate's compliance with 28 U.S.C. § 2254(d) does not guarantee habeas relief. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) (observing that no Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]"); *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). A habeas petitioner meeting his AEDPA burden must still comply with weighty jurisprudential tenets, such as the harmless-error doctrine and the non-retroactivity principle, that bridle federal habeas relief. *See Thacker v. Dretke*, 396 F.3d 607, 612 n.2 (5th Cir. 2005). Thus, any error cannot require habeas relief unless it "ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict,'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993)), or would not require the creation of new constitutional law, *see Banks*, 536 U.S. at 272 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).

III. ANALYSIS

A. Ineffective Assistance of Trial Counsel

Batiste raises several complaints about his trial representation. A court reviews an attorney's representation under the general conceptual framework established in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under *Strickland*, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's *performance* falls below an objective standard of reasonableness and thereby *prejudices* the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3 (2003) (emphasis added); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*,

466 U.S. at 687. A petitioner must also show actual prejudice, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694; *see also Wiggins*, 539 U.S. at 534.

"Surmounting *Strickland*'s high bar is never an easy task . . . ." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). When the state courts have already adjudicated the merits of a *Strickland* claim, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 562 U.S. at 101. Federal courts employ a "doubly deferential judicial review" of already adjudicated Strickland claims that gives wide latitude to state decisions. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see also Cullen v. Pinholster*, 563 U.S. 170, 201 (2011). "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 104; *see also Premo v. Moore*, 562 U.S. 115, 123 (2011). With those standards in mind, the Court turns to Batiste's individual allegations of error by defense counsel.

1. Investigation, Preparation, and Presentation of Evidence Relating to Brain Dysfunction

Batiste claims that he was denied effective trial representation because counsel did not retain a neuropsychologist, investigate sufficiently whether he suffered from frontal lobe damage, and advance a mitigation defense based on his general cognitive functioning. Mental-health issues did not play a prominent role in Batiste's trial. The State presented testimony in the penalty phase from Dr. Scott Krieger, a clinical psychologist who had examined Batiste at age sixteen. Dr. Krieger had performed several psychological tests, including the Minnesota Multiphasic Inventory Adolescent Form (MMPI-A). As a result of his interview and testing, Dr. Krieger diagnosed Batiste with "disruptive behavior disorder non-specified," a condition characterized by disruptive or oppositional

behaviors. Dr. Kieger also testified that Batiste's results on the MMPI-A were common to people with hyperactive, impulsive behavior patterns. The State adduced testimony from Dr. Kieger showing that Batiste felt no empathy for his victims. Dr. Kieger, however, did not attribute any psychological condition to brain dysfunction or disorder. The defense did not call any mental-health experts at trial.

On state habeas review, Batiste argued that his trial attorneys did not perform an adequate investigation because they did not secure a neurological examination. Specifically, Batiste faulted trial counsel for not retaining a neuropsychologist who could diagnose him with brain dysfunction.[10] Batiste identified "neuropathology and cognitive dysfunction risk factors present in [his] social history," such as his "history of meningitis as a neonate" and other "risk factors present in [his] juvenile history," that should have prompted counsel to seek a neuropsychological evaluation. S.H.R. at 39. Batiste substantiated his claim through the results of a neuropsychological examination conducted by Dr. James Underhill on January 5 and 6, 2012. Dr. Underhill administered various testing instruments, the results of which led him to opine, "with a reasonable degree of scientific certainty, that Teddrick Batiste suffers from damage to the frontal lobe of his brain. As a result, he is unable to calculate risk and appropriately weigh the consequences of his actions." S.H.R. at 275.[11] Dr. Underhill could not identify the etiology of Batiste's brain dysfunction, but speculated that it may have been either his mother's lack of pre-natal care while pregnant with him or "the meningitis Mr.

[10] In addition to training in clinical psychology, a neuropsychologist specializes in administrating psychological tests to evaluate human brain disorders or psychological impairment caused by, or related to, injury to brain tissue. *See United States v. Kasim*, No. 2:07 CR 56, 2008 WL 4822291, at *4 (N.D. Ind. Nov. 3, 2008) (describing a neuropsychologist as a "specialist of interdisciplinary branch of psychology and neuroscience that aims to understand how the structure and function of the brain relate to specific psychological processes and overt behaviors").

[11] Dr. Underhill also concluded that "Mr. Batiste suffers from mild impairment of memory. However, it is his inability to conceptualize risk that significantly affects his functioning." S.H.R. at 272.

Batiste was reported to have suffered from as a neonate." S.H.R. at 273. Dr. Underhill specified that Batiste's "damage to his frontal lobe" was specifically located in "the part of the prefrontal cortex that controls risk taking." S.H.R. at 270. Persons with similar frontal lobe damage exhibit "[I]mpulsivity and/or risk taking" behaviors, causing them to "make a decision quickly, without considering the consequence, ultimately leading to behavior that exhibits a lack of control." S.H.R. at 271.[12] Dr. Underhill opined that "Mr. Batiste's inability to perceive risk can be compared to that of an impulsive gambler" because "the chance of winning is extraordinarily slim, and the likelihood of him losing his money is great," but "once the process of gambling has begun, he experiences difficulties in stopping himself" and " increases the risk by continuing to gamble, despite the fact that he can acknowledge he will almost certainly lose." Dr. Underhill opined that medication and the structures of prison life would help control Batiste's risk-taking behaviors. S.H.R. at 274-75.

The record indicates that trial counsel made some effort to investigate issues relating to Batiste's mental health. The state habeas court found that the defense's "pre-trial investigation included an investigation of [Batiste's] mental health; that trial counsel sought funding for and retained three mental health experts." S.H.R. at 950. Specifically, trial counsel retained two clinical psychologists and a medical doctor as a substance-abuse expert. The record indicates that these experts conducted forensic interviews, reviewed records, and consulted with the defense team. The

[12] Dr. Underhill clarified:

> Impulsivity and/or risk taking are often seen in individuals following frontal lobe damage; While these two concepts may seem to have the same meaning, they are indeed different; impulsivity is simply a response disinhibition, while risk taking is related to the reward-based aspects of decision-making. An impulsive person will make a decision quickly, without considering the consequences, leading ultimately to behavior that exhibits a lack of self-control. Contrarily, a person with an inability to evaluate risk will look at the consequences but not weigh them. Instead, they will jump at the opportunity of a reward even if the likelihood of receiving that reward is slim.

S.H.R. at 271.

record does not contain any psychological report obtained from those three experts. Nothing in the record, however, suggests that the three experts uncovered any information that would have indicated the need for neuropsychological testing.

Trial counsel provided an affidavit on state habeas review explaining the defense investigation into possible mental-health issues. Trial counsel expressed concern about the double-edged nature of using mental-health evidence in general:

> One of the realities of death penalty litigation that all experienced defense attorneys will admit is this: if you use mental health evidence, short of proving actual insanity, you run the risk of making the defendant look even more dangerous to the jury, and frankly it is generally true, because they are more dangerous. Let me illustrate briefly. If you prove that the defendant needs medicine to overcome his mental health challenges, and even if you prove the medicine is available, the State will argue that even if this were true the jury will never be assured the defendant will take his medicine and if he doesn't society is in danger.
>
> Conversely, if you don't use mental health evidence you will be writing affidavits like this one and/or testifying at hearings as to why you didn't use it.

S.H.R. at 817. With that context, trial counsel provided specific reasons for which the defense did not investigate the possibility of brain dysfunction:

> We had no information from any source, be it a family member, friend, our experts or investigators, or any record that would indicate a frontal lobe disorder, or any mental disorder. He was sharp and I personally saw him make decisions. I am very careful not to call witnesses, especially experts, who on cross examination can destroy our case.
>
> If the Texas Court of Criminal Appeals rules, or if the Texas Legislature passes a law that requires in every capital murder prosecution a defendant must be given neuropsychological testing to see if they have brain damage, even if there is absolutely no indication, and the county or State must bare the cost, then I certainly will follow that requirement but that is not my understanding of the law in Texas.

S.H.R. at 817.

With that background, the state habeas court entered findings of fact and conclusions of law denying this claim. Despite the use of three mental-health experts, as well as the other investigations into Batiste's background, the state habeas court found that trial counsel "had no information from any expert, investigator, record, family member, or friend indicating that [Batiste] had any indicia of frontal lobe disorder." S.H.R. at 951. The state habeas court also questioned Dr. Underhill's diagnosis of frontal lobe damage. The state habeas court found "unpersuasive Dr. Underhill's conclusions regarding [Batiste's] alleged frontal lobe damage and impaired perception/control of risky behavior." S.H.R. at 950. The state habeas court found that Dr. Underhill's conclusion about the source of Batiste's risk taking was "vague" because he "does not disclose [Batiste's] specific score" or provide specific facts which could be corroborated. S.H.R. at 951. Additionally, the state habeas court found "Dr. Underhill's conclusions unpersuasive" about his impulsivity because state jail records "reflect[ed] that [Batiste] had no disciplinaries while incarcerated at the Lynchner Unit [before trial] which indicated that [Batiste] could control his behavior, including risk taking behavior, when he so chose without medication." S.H.R. at 952. Also, Dr. Underhill's "conclusion regarding [Batiste's] alleged inability to calculate risk and weigh the consequences of his actions is cumulative of Scott Krieger's punishment testimony concerning the results of [his] MMPI-A score which indicated that [Batiste] was impulsive and preferred action over thought and reaction." S.H.R. at 952. In sum, the state habeas court found no deficient performance by counsel or actual prejudice.

a. Deficient Performance

Batiste has not shown that trial counsel's performance was deficient. Batiste is correct that trial counsel "did not retain an expert to perform a neuropsychological evaluation and/or conduct any testing of Batiste." Dkt. 9 at19. Applying applicable Supreme Court precedent, the Fifth Circuit has

explained that, "[I]n investigating potential mitigating evidence, counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary." *Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). Trial counsel "must not ignore pertinent avenues of investigation, or even a single, particularly promising investigation lead." *Id*. at 390 (internal citations and quotation marks omitted); *see also Higgins v. Cain*, 720 F.3d 255, 265 (5th Cir. 2013) (explaining that counsel must "research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful"). Batiste's claim depends on identifying some set of circumstances that would have led a reasonable attorney to engage in an investigation that included specific neuropsychological testing.

Trial counsel inquired into Batiste's background and retained the services of three mental-health experts. Batiste's attorneys explored facets of his mental health and background with the assistance of various psychologists.[13] Trial counsel did not receive "information from any source, be it a family member, friend, our experts or investigators, or any record that would indicate a frontal lobe disorder, or any mental disorder." S.H.R. at 817. Batiste has not pointed to any place in the record containing any indication that he experienced a head injury or other physical event causing brain damage.[14] Under the *Strickland* standard, counsel are required to conduct reasonable

[13] In a state habeas hearing, the State summarized the concern with Batiste's argument: "Your Honor approved expert funding for two psychologists and an addiction specialist. Two psychologists met with Mr. Batiste. They interviewed family members. And what they told you was – is that was no indicia of any brain damage. And what habeas counsel and [Batiste] wants you to do is in essence create a new prevailing professional norm that in every case its not just enough that you have to see a psychologist you have to see a neuropsychologist. There's no case law to support that." Transcript of December 21, 2014 Writ Hearing, p.10.

[14] Here, Dr. Underhill pointed to "several possible etiologies of the brain dysfunction." S.H.R. at 373. Dr. Underhill only specifically mentioned, however, that "[t]he impairment can result from head trauma or illness." S.H.R. at 373. Batiste argues that his "medical history of infantile meningitis" should have alerted trial counsel to engage in a neuropsychological investigation. Dkt. 38, p. 57. Dr. Underhill, however, opined that "the meningitis Mr. Batiste was reported to have suffered from as a neonate could have contributed to or been the direct cause of Mr. Batiste's

(continued...)

investigation under prevailing professional norms. *Strickland*, 466 U.S. at 688. Counsel are not expected to be experts in all fields, but can reasonably rely on experts in deciding the scope of pre-trial investigation. *See, e.g.*, *McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) (finding no error in trial counsel's investigation notwithstanding a later, more favorable expert opinion). Recognizing that "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 698, Batiste's trial attorneys could reasonably forgo investigating neuropsychiatric problems when the defense's three mental health experts did not indicate that such investigation was necessary.

Yet even if trial counsel had uncovered evidence suggesting that Batiste possibly suffered from brain dysfunction, and secured results similar to those reached by Dr. Underhill, Batiste has not necessarily shown that a reasonable attorney would have presented that information to the jury. Trial counsel was apprehensive about presenting similar testimony because it would allow the State to characterize Batiste's mental state as unpredictably dangerous and intractable. Testimony about a brain injury may be a "'double-edged' sword," *Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir. 2005), because jurors could fear that the defendant would never be able to control his violent behavior. *See Nelson v. Quarterman*, 472 F.3d 287, 307-08 (5th Cir. 2006). "Presenting evidence of 'organic (i.e., permanent) brain damage,' which is associated with poor impulse control and a violent propensity, would have substantiated the state's evidence and increased the likelihood of a future dangerousness finding." *Martinez*, 404 F.3d at 890. And, as the Seventh Circuit has noted, sentencers "may not be impressed with the idea that to know the cause of viciousness is to excuse

[14] (...continued)
impairment." S.H.R. at 273. Dr. Underhill posited that Batiste had developed brain dysfunction as a "neonate" based on his mother's claim that he had been born with meningitis. The record, however, does not indicate that Batiste suffered from any neonatal disease. Instead, Batiste experienced meningitis at nine months of age. S.H.R. at 385. Dr. Underhill's affidavit does not describe whether the same risk of frontal lobe damage occurs when the disease strikes one who is not a newborn.

it; they may conclude instead that when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate." *Foster v. Schomig*, 223 F.3d 626, 637 (7th Cir. 2000) (quotation omitted).

Dr. Underhill recognized the double-edged potential of brain trauma evidence but predicated the mitigating thrust of his conclusions on (1) the ability of medication to reduce Batiste's tendency toward risk taking and (2) the structures of prison preventing dangerous actions. Trial counsel, however, feared that those two factors would not withstand cross-examination. Trial counsel anticipated that the State would argue that Batiste would only be capable of improvement if he chose to take his medication. More important, the State had already presented evidence of Batiste's threats and violence while in jail awaiting trial. Testimony that incarceration would squelch Batiste's free-world violent impulsivity would ring hollow against his inability to control himself in a structured environment. Weighing the benefit of Dr. Underhill's testimony against the potential that the State would undercut it, and possibly turn it against the defense, a reasonable trial attorney could choose not to present such evidence.

b. Actual Prejudice

Batiste has also not shown that the state habeas court was unreasonable in deciding that he did not meet *Strickland*'s prejudice prong. The state habeas court concluded that (1) the jury already had before it evidence that Batiste "was 'impulsive' and 'preferred action over thought and reflection'" and (2) evidence of his "two capital murders, an aggravated robbery, and multiple bad acts" which was "particularly strong" would eclipse any brain-injury evidence. S.H.R. at 978. Without the veneer of neuropsychological testimony, the jury already heard a psychologist's opinion

that Batiste acted on impulse. Insofar as that information has only mitigating value, the jury could already consider the effects of evidence similar to that identified on state habeas review.

Importantly, strong evidence supported the jury's answers to the special issue questions. The question of *Strickland* prejudice does not exist in a vacuum; "[I]n making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. On habeas review "the reviewing court must consider all the evidence – the good and the bad – when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). The Fifth Circuit has indicated that a court looks to see if the petitioner's new evidence will "lessen the impact of the other evidence against him[,]" *Conner v. Quarterman*, 477 F.3d 287, 294 (5th Cir. 2007), because "overwhelming aggravating factors" can outweigh unpresented mitigating evidence. *Sonnier v. Quarterman*, 476 F.3d 349, 360 (5th Cir. 2007). For instance, the "horrific facts of the crime," *Martinez*, 481 F.3d at 259, the "brutal and senseless nature of the crime," *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006), or the "cruel manner in which he killed," *Miniel v. Quarterman*, 339 F.3d 331, 347 (5th Cir. 2003), may weigh heavily against a finding of *Strickland* prejudice. *See also Strickland*, 466 U.S. at 700; *Knight v. Quarterman*, 186 F. App'x 518, 535 (5th Cir. 2006); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002); *Andrews v. Collins*, 21 F.3d 612, 624 n.23 (5th Cir. 1994); *Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989). Additionally, if the "evidence of . . . future dangerousness was overwhelming . . . it is virtually impossible to establish prejudice." *Ladd*, 311 F.3d at 360 (citing *Strickland*, 466 U.S. at 698).

Batiste committed murders for personal gain. The killing in the instant case was particularly brutal and senseless. Batiste repeatedly shot into the victim's car on the freeway to steal the rims from his car. Once they both stopped, Batiste could have stolen the victim's car and left the injured

man lying on his stomach bleeding and pleading for his life. Instead, Batiste repeatedly shot him. Batiste's police statement indicates that he did not act on impulse. Batiste paused, mustering "all [his] empathy towards" the victim, but after "weighing" out what to do, decided that he had "to get these wheels." In addition, Batiste participated in, and led, aggravated robberies. He stole cars. He used drugs. He sold stolen property for others. Batiste did not reform his character after previous periods of incarceration and, in fact, he became more violent. Even knowing that the State would use his actions against him in an impending capital murder trial, pre-trial incarceration did not squelch Batiste's violence. Batiste engaged in fights, threatened inmates, disrespected jail personnel, and possessed weapons. Batiste exhibited little remorse in jailhouse correspondence, but continued glorifying the gang lifestyle and praising violence. Against that background, the state habeas court was not unreasonable in finding no reasonable probability of a different result from trial counsel's failure to present neuropsychological evidence.

2. *Efforts to Rebut Testimony Concerning Batiste's Gang Involvement*

Batiste argues that trial counsel failed to provide the jury with an accurate picture of his gang membership. While Batiste's gang membership was mentioned only briefly in the guilt/innocence phase,[15] it was a major and predominant theme throughout the punishment hearing.[16] References to Batiste's gang affiliation permeated both lay and expert testimony. The State called three expert witnesses who, in great detail, elaborated on the extent to which Batiste identified as a gang member:

[15] Batiste's gang membership was only mentioned incidentally in the guilt/innocence phase. Tr. Vol. 14 at 127; Vol. 16 at 148.

[16] The state habeas court reviewed the State's evidence of "extensive involvement with the Crips gang" which included "(a) his gang tattoos; (b) [his] acknowledgment that he was a member of the Crips gang and organized fellow Crips gang members to participate in the Phat Kats aggravated robbery; (c) [his] letter regarding 'O[riginal] G[angster]' Rome; (d) [his] advice to his brother regarding the type of gang tattoo he should obtain; and (e) the testimony of Harris County Jail inmate Robert Dean." S.H.R. at 959.

- Prison classification expert David Davis testified for the prosecution about Batiste's tattoos related to his Crips membership.[17] In particular, Davis explained that the Five Deuce Hoover Crips were involved in various crime-related activities, including drug dealing.

- Clint Ponder, a Houston Police Department officer assigned to a gang unit, testified that Batiste was found in the gang membership database as a documented member of the Five Deuce Hoover Crips. Tr. Vol. 18 at 165-67. Ponder testified that Batiste had "quite a few tattoos that were gang-related." Tr. Vol. 18 at 171-72. Ponder testified extensively about Batiste's numerous gang-related tattoos. Those tattoos included the letters HCG under his left eye, which stand for "Hoover CRIP Gangster." Tr. Vol. 18 at 179. Other tattoos included LOC, a "common acronym . . . for love of CRIP"; a Roman numeral V below his right earlobe signifying the Five Deuce Hoover Crips; numbers 8-3-7, signifying the letters of the alphabet corresponding to HGC; and the word CRIP on his left hand. Some tattoos were intended to show disrespect to other gangs, including one meaning "Piru killer" and "Bloods killer." Tr. Vol. 18 at 171-198.

- Irma Fernandez, a prison security threat expert with TDCJ, testified that membership in a gang such as the Crips is a security threat in prison. Fernandez testified that Crips members tended to continue violent and unlawful activity when incarcerated. Tr. Vol. 19 at 36, 39-40, 64.

Lay testimony provided mixed information about Batiste's ties to the Crips. Robert Dean, a fellow jail inmate, testified that Batiste was the leader of a group of Crips inmates that would pick fights. Dean said that Batiste acknowledged his gang membership and bragged about being incarcerated for capital murder. Tr. Vol. 19 at 125-26. Some family members and friends did not know that Batiste belonged to the Crips. Tr. Vol. 24 at 25, 71. Batiste himself, however, took the stand and acknowledged being a member of the Crips. Batiste told the jury that he recruited fellow Crips gang members to participate in the Phat Kats aggravated robbery. Tr. Vol. 24 at 192-93.

[17] During a previous incarceration, TDCJ classified Batiste as a member of the Crips because he self-identified as such and had gang related tattoos, including with the gang's name itself. S.H.R. at 857.

Batiste, however, explained that he wanted to distance himself from the gang upon incarceration and "do what I have to do to renounce them." Tr. Vol. 24 at 138.

The State argued in closing that Batiste "wanted to portray himself as . . . a tatted-up street thug who deserves street cred." Tr. Vol. 25 at 63. The State told jurors: "He told you yesterday he wanted out of the gang, but you know as recent as May 15th, after all of you had been selected for this jury, he's still writing his gang symbols in his mail. . . . He wants to stay in. He's telling you that because he thinks you will feel sorry for him and say: Oh, he's going to change." Tr. Vol. 25 at 74.

Batiste claims that "he was not a hard-core gang member, and only ever marginally affiliated at best." Dkt. 9 at 5. Instead of being a leader in the Five Deuce Hoover Crips, Batiste was "a young man struggling with the 'gangster' label that had been thrust upon him." Dkt. 9 at 6. Batiste argues that trial counsel should have called an expert to place his gang affiliation into the proper context.

On state habeas review, Batiste presented an affidavit from Charles Rotramel, the executive director of an organization that works with at-risk and gang-influenced youth. Rotramel conducted a three-hour interview with Batiste while on death row in 2013. Rotramel also reviewed trial testimony, read affidavits from Batiste's family members, and examined various records. Rotramel opined that Batiste was "never a 'hard-core' gang member" because he was never "formally inducted into gang membership." S.H.R. at 238. According to Rotramel, Batiste "never broadcast his gang membership to the world around him" and, in fact, "never actively defined himself according to his gang affiliation." S.H.R. at 238-39. Rotramel explained that Batiste "did not have any actual involvement or membership" in the Crips before being in Texas Youth Commission custody. S.H.R. at 240. While in TYC, Batiste joined the Crips, but only "as a matter of his own protection and

survival in an unfamiliar and dangerous institution far removed from everything and everyone he knew." S.H.R. at 238. When released, Batiste "profess[ed] a Five Deuce Hoover Crip affiliation outwardly" but "actually never had a strong gang-affiliation because he lacked a set or a common group of gang members with whom he associated on a regular basis." S.H.R. at 231. Rotramel also said that Batiste's subsequent employment history and interaction with family members was not indicative of gang membership.

Rotramel reviewed Batiste's pre-trial letters and opined that they showed "an emotionally complex young man trying to come to terms with the consequences of his actions and preparing himself for a life of incarceration." S.H.R. at 235. "Using the common tropes and argot of hip hop music," Batiste "vacillat[ed] between typical empty rap braggadocio and genuine emotional expression" when creating rap lyrics that "commonly use hyperbolic and grandiose language" but do not truly "glorify[], much less encourage violence." S.H.R. at 935. Rotramel saw within Batiste's letters "emotional vulnerability behind the thin veneer of typical rap braggadocio and toughness." S.H.R. at 328. Also, Rotramel explained that "[r]emorse is a common theme in [Batiste's] letters." S.H.R. at 239. Rotramel contends that "[c]onspicuously absent from Teddrick's raps and letters are any explicit gang references, slang, or symbolism." S.H.R. at 330.

Trial counsel provided an affidavit responding to Rotramel's opinion that Batiste only had limited gang involvement:

> "Limited scope of [Batiste's] gang involvement?" Are you kidding? He was as ganged up as any person I have ever met and I have been doing this since way before there were gangs in Houston, Texas. A cursory reading of his writing will illustrate that his gang involvement included virtually every word he wrote. Every conceivable gang reference is contained in all of his writing, to the point of not using certain letters because they refer to a rival gang and using certain letters, or the formation of the letters, to emphasize his gang. He had on his body every conceivable tattoo and reference to his gang. Every decision he made was about the gang. He was the living

> embodiment of his gang. We were not going to come out on top with testimony form any expert on gangs. The less said about gangs the more I liked our chances to save his life.

S.H.R. at 818.[18] Trial counsel, in fact, said that Batiste refused to consider a plea bargain because it would have required him to turn on another gang member. Trial counsel opined that Batiste was "so involved in his 'gang mentality' that he wouldn't even consider it. He wanted the life sentence but the gang code of honor was more important to him than his own life." S.H.R. at 959.

With that background, the state habeas court found that trial counsel "made a reasonable strategic decision to not present a gang expert at punishment because counsel believed that such tactic would harm the defense." S.H.R. at 954. The state habeas court expressed deep skepticism regarding Rotramel's opinion about Batiste's "limited involvement with the Crips," particularly in light of the trial record. S.H.R. at 878. With the extensive, detailed trial testimony about Batiste's gang membership, the state habeas court found that Rotramel's testimony was "unpersuasive." S.H.R. at 954. The state habeas court reasonably found that "the State's trial evidence and [Batiste's] testimony directly contradict [his] habeas characterization of his gang membership as 'limited.'" S.H.R. at 953.

Batiste has not shown that the state court was unreasonable in finding no deficiency because trial counsel did not present evidence similar to Rotramel's habeas affidavit. Trial counsel could reasonably decide that Batiste did not have only limited interaction with the Crips. Rotramel apparently drew a distinction between a "hard-core gang" member and someone only "affiliated" with a gang. S.H.R. at 317. Even accepting Rotramel's opinion that Batiste was not a hard-core gang member, a reasonable trial attorney could shy away from presenting that expert testimony when

[18] The state habeas court issued an explicit finding that trial court's affidavit was credible. S.H.R. at 935.

the violent conventions of gang life permeated Batiste's words, actions, and lifestyle. Batiste had not just adopted common customs of gang membership, he bore evidence of gang affiliation over his entire body. Jurors would have difficulty believing Rotramel's opinion that Batiste "never broadcast his gang membership to the world around him" when he had a gang tattoo on his face. The tattoos covering Batiste's body testified of his devotion to the Crips. More to the point, his actions bore indicia of gang membership as he recruited and directed other Crips in the commission of violent crimes. Batiste told police officers that, "because he was . . . [a member of the] CRIPS," he did not want to show fear as he shot into the victim's moving car. His self-identification as a gang member continued into the prison setting, where bad acts directly related to gang affiliation continued despite expert predictions that the rigors of prison would cause him to act otherwise. The state habeas court was not unreasonable in finding "unpersuasive" any attempt to minimize Batiste's gang membership.

A reasonable attorney could instead decide to avoid unnecessary reference to gang affiliation or identification. With the extensive evidence of Batiste's involvement in not only the Crips gang, but in the lawlessness associated with gang membership, the state habeas court was not unreasonable in finding no *Strickland* deficient performance or resultant prejudice. Batiste has not met his AEDPA burden with regard to his claim that counsel should have minimized his gang membership.

3. Mitigating Evidence

Batiste's federal petition raises three specific challenges to trial counsel's efforts to investigate, prepare, and present mitigating evidence. With Batiste's extremely violent past, and aggressive behavior that extended into the prison setting, trial counsel knew that "[m]itigation was [the] best, and really only, opportunity to save his life at trial." S.H.R. at 916. The defense team

included an investigator, a specific mitigation investigator, three mental-health experts, and an expert on the criminal justice system. Trial counsel met with family members before trial. From the defense investigation, trial counsel called various witnesses to provide mitigating evidence. The state habeas court provided a comprehensive review of the defense's trial evidence, as recited below:

> CLASSIFICATION AND FUTURE RISK
>
> 37. Mary Elizabeth Pelz, Ph.D., Dean of the College of Public Service at the University of Houston-Downtown, testified as an expert regarding TDCJ-CID classification, stating that she had interviewed [Batiste] and reviewed his TYC, TDCJ-CID, and employment records; that studies indicated that prisoners sentenced to life without parole were "very manageable" and did not manifest an increase in acts of violence while incarcerated;-that inmates sentenced to life without parole were more likely to obey prison rules because they needed to keep as many privileges as possible in order to survive; that an inmate's previous behavior in prison was more important than the actual crime committed to determine future behavior; that Dr. Pelz was not aware of [Batiste] having any disciplinary issues while incarcerated in a state jail facility; that [Batiste's] physical altercations in the Harris County Jail while awaiting trial would not be "seriously considered" for his inmate classification; and, that [Batiste's] future behavior in prison would become "tempered" as he aged and became institutionalized (XXIII RR at 27-30, 43, 50-52, 59, 97-8, 110).
> 38. Sgt. David Davis, Harris County Sheriff's Office Classification Unit, testified that [Batiste's] Harris County jail disciplinary records contained no record of [Batiste] having physical contact with the jail staff (XVIII RR at 6).
>
> [BATISTE'S] SCHOOL AND WORK HISTORY
>
> 39. Gary Thiebaud, head football coach at Cypress Ridge High School, testified that [Batiste] was a gifted athlete; that [Batiste] did well in athletics, presented no disciplinary problems, and benefitted from the program's highly structured nature; that Thiebaud considered [Batiste] to be a "follower" who was influenced by those around him; and, that Thiebaud "lost" [Batiste] after spring football when [Batiste] left the structure of the sports program and became involved in car thefts (XXIII R. R. at 115-6, 118-22).
> 40. Kristopher McSherry, the plant manager for Forge USA, testified regarding [Batiste's] work history, stating that [Batiste] was a helper on a forging crew where the work was physically demanding and often required working more than eight hours per day; that McSherry never had issues with [Batiste's] job performance; that [Batiste] indicated that he was "desperate to find a job to feed his family"; and, that McSherry was shocked when [Batiste] was charged with capital murder (XXIII R.R. at 130-36, 145-7).

[BATISTE'S] SOCIAL/FAMILY HISTORY

41. Stephanie Soliz, [Batiste's] girlfriend, testified that [Batiste] was the "best" father to their biological son Alex and her son Kash from a different relationship; that [Batiste] took care of her, Alex, and Kash financially; that [Batiste] regularly bathed and clothed the boys; and, that [Batiste] was trying to be a positive influence on the children while in the Harris County Jail (XXIII R.R. at 155-8).

42. Terry Soliz, Stephanie Soliz's mother, testified that [Batiste] was a loving influence on Kash; that [Batiste] cared for Kash more than anyone else after Kash was born; that [Batiste] was always "very respectful" to her and took care of her when she was sick; and, that she was shocked by the primary offense (XXIII R.R. at 6-7, 11-2).

43. Kevin Noel Jr., [Batiste's] brother, testified that [Batiste] was a loving brother and a good father who took care of his family; that Noel did not know that [Batiste] was a member of the Crips; and, that tattoos were common in their neighborhood (XXIV R.R. at 26, 30).

44. Micala Lara, [Batiste's] friend, testified that [Batiste] and Stephanie Soliz lived with Lara and her husband, Ricardo, in Denton, Texas, in 2007; that Ricardo helped [Batiste] obtain a job in the Denton area; that [Batiste] got along with everyone and treated his own children well; and, that [Batiste] was respectful to Stephanie Soliz and loved her (XXIV R.R. at 56-60, 62, 65).

45. Beverly West, [Batiste's] cousin, testified that [Batiste's] mother was fifteen years old when she gave birth to [Batiste]; that [Batiste] always treated her with respect; and, that she never saw [Batiste] act disrespectful to any family members (XXIV R.R. at 74-80).

46. Darlene Beard, [Batiste's] grandmother, testified that [Batiste] was born in her home because no one knew that [Batiste's] mother was pregnant; that [Batiste] was respectful to other family members and attended church as a child; and, that [Batiste] never had a father figure (XXIV R.R. at 86-90).

47. Rowena Scott, [Batiste's] mother, testified that she and [Batiste] frequently moved when he was young, and her relationship with [Batiste's] stepfather had a "bad effect" on [Batiste]; that [Batiste] could follow rules, and it was possible for [Batiste] to be a positive influence on his children while imprisoned; and, that, while [Batiste] had meningitis as a child, he was otherwise healthy with no mental problems or learning disabilities (XXIV R.R. at 97-8, 107-11).

[BATISTE'S] TESTIMONY AT PUNISHMENT

48. [Batiste] testified on direct examination at punishment, providing a comprehensive account of his life and circumstances, including his transient upbringing, his relationship with Stephanie Soliz and their children, his gang membership, his criminal acts, and his remorse:

- Regarding his childhood and schooling, [Batiste] testified that his grandfather was a positive influence on him, but he died while [Batiste] was in state jail; that his mother kept moving which caused [Batiste] to attend a series of schools in Houston; that [Batiste] sold Ritalin in middle school to make money; that [Batiste] listened to his coach Gary Thiebaud, but the "goal" of school disappeared after [Batiste] left TYC; and, that it was [Batiste's] fault for not listening to Thiebaud (XXIV R.R. at 113-4, 118-20);
- Regarding his family, [Batiste] testified that his relationship with Stephanie Soliz developed while [Batiste] was in TYC, and [Batiste] decided to play a paternal role to Kash because he knew that Kash's biological father had no interest in raising the child.
- Regarding work, [Batiste] testified that he paid the rent and other bills with the money he earned from Forge Industries; that [Batiste's] work hours were cut as the economy soured; and, that [Batiste] started selling stolen goods to make up the difference in his earnings (XXIV R. R. at 133-5);
- Regarding his gang membership, [Batiste] acknowledged that he was a Crips member but testified that he planned to "distance" himself from the gang in prison, "do[ing] what I have to do to renounce them" (XXIV R.R. at 138);
- Regarding his criminal activities, [Batiste] admitted that he killed the complainant and Robbins and that he participated in the Phat Kats aggravated robbery (XXIV R.R. at 136);
- Regarding his feelings concerning the primary offense, [Batiste] testified that he had let his family down and understood that he needed to teach Kash and Alex right from wrong, and [Batiste] expressed remorse for his actions, stating: "I know ain't no right to take nobody's life . . . . I let material things, you know, get ahold of me. Can't blame nobody but myself. And just I was wrong for what I did" (XXIV R.R. at 126-70, 226-7); and
- Regarding future danger, [Batiste] testified that he intended to follow the rules in prison (XXIV R.R. at 142).

49. On the prosecution's cross-examination, [Batiste] testified about his leadership role in the capital murders and aggravated robbery, as well as certain rap lyrics he composed while awaiting trial in the Harris County Jail, testifying to the following:

- Regarding the primary offense, [Batiste] testified that, even though he knew that the complainant was shot and heard the

complainant crying for help, [Batiste] felt that the complainant could still protect himself at the gas station; that [Batiste] put on a ski mask and threw his firearm out of the car in order to facilitate the crime; and, that [Batiste] denied tinting the windows on his Buick to facilitate his crimes, insisting that the purpose of the tint was to protect his children from the sun (XXIV R.R. at 160-1, 218-23);

- Regarding the capital murder of Steve Robbins, [Batiste] testified that he led and planned the capital murder; that [Batiste] shot Robbins first as Robbins was coming towards him to protect his customers; and, that [Batiste] shot at Norsworthy as he ran away to the back of the shop (XXIV R.R. at 192-3);
- Regarding the Phat Kats aggravated robbery, [Batiste] testified that he was in charge, and he recruited fellow Crips gang members to participate in the offense (XXIV R.R. at 192-3);
- Regarding the rap lyrics in letters that [Batiste] composed while awaiting trial in the Harris County Jail, [Batiste] testified that the lyrics described [Batiste's] feelings regarding Stephanie Soliz's new love interest, [Batiste's] murder of the complainant, and [Batiste's] participation in the Phat Kats aggravated robbery; that the lyrics did not necessarily reflect [Batiste's] actual feelings; and, that eighty-five percent of [Batiste's] lyrics were "hype music" (XXIV R.R. at 182-9, 192-3, 227-8).

EXHIBITS

50. Prior to resting on punishment, the defense introduced twenty-one documents into evidence, including: (a) [Batiste's] juvenile and TYC files; (b) [Batiste's] juvenile psychological evaluations; (c) [Batiste's] letters composed while in the Harris County Jail; and (d) [Batiste's] employment and educational records (XXIV R.R. at 6-14); Defendant's Trial Exhibits 1-20, 31. The State and defense attached tabs on certain pages within the documents to highlight specific information (XXIV R.R. at 7).

S.H.R. at 943-48.

Despite the evidence presented at trial, Batiste contends that trial counsel: (1) should have called a social historian to put his mitigating evidence into a coherent narrative; (2) inadequately interviewed and prepared the lay witnesses who testified at trial; and (3) should have called

additional witnesses to provide mitigating evidence. On state habeas review, Batiste adduced numerous affidavits to support these arguments. The affidavits fall into three categories, each relating to Batiste's individual allegations of trial counsel errors.

First, Batiste presented affidavits from several witnesses from trial, to wit: Darlene Beard, Micaela Lara, Kristopher McSherry, Kevin Noel, Rowena Scott, Stephanie Scott, and Beverly West. Batiste relied on those affidavits to argue that trial counsel did not make sufficient efforts to prepare witnesses, leaving them vulnerable to cross-examination and prone to provide detrimental testimony. Batiste contends that with additional preparation those witnesses would have given jurors a more-fulsome view into his life.

Second, Batiste relies on affidavits from ten family members and friends that trial counsel did not put before the jury, four of whom had been interviewed by trial counsel. Batiste argues that these witnesses would have provided deeper insight into Batiste's personal background, and also have given jurors a longitudinal view into the intergenerational problems experienced by Batiste's family members.

Finally, Batiste criticizes counsel for not retaining a social historian to weave the details provided by the various witnesses into a coherent narrative. Through an affidavit provided by Dr. Scott Bowman, Batiste contends that trial counsel should have used expert testimony to fill in the outlines drawn by witness testimony, and rearrange the evidentiary picture into a more-powerful story. In sum, Batiste argues that the defense should have presented evidence that he "was the product of three generations of poverty, teenage pregnancy, residential instability, and a lack of positive role models. He was also searching desperately for a way out of the path he was on, [he was also] a person who helped other people and provided for his family when he could." S.H.R. at 149.

The state court based its resolution of these three arguments on an overarching theme: trial court presented a "clear and detailed mitigation case" differed from the habeas allegations in detail but not in mitigating thrust. S.H.R. at 955. The habeas affidavits from trial witnesses and those not called to testify did not travel a different mitigating path from the themes considered by jurors in answering the special issue questions.[19] Batiste's habeas arguments presupposed the development of a mitigating case that covered much of the same ground as the evidence from trial.

In reviewing the choices underlying a trial defense, the Court "must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000) (internal quotation marks and citation omitted); *see also Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999). This is a case where the additional mitigation evidence presented by Batiste "was largely cumulative and differed from the evidence presented at trial only in detail, not in mitigation thrust." *Villegas v. Quarterman*, 274 F. App'x 378, 384 (5th Cir. 2008). The new affidavits provide background information that "is essentially cumulative of [Batiste's] social history evidence presented at trial." S.H.R. at 959. In sum, trial counsel presented "a clear and detailed mitigation case" and Batiste was "unpersuasive in demonstrating that [his] mitigation case would have been strengthened by [the new affiant's] respective testimonies." S.H.R. at 957, 959.[20]

[19] As summarized by the habeas court, the mitigating case at trial focused on showing that Batiste "was the child of a teenage mother who frequently moved her residence during his formative years, and [he] lacked a father-figure in his life, worked in a difficult and physically demanding job to support the family he loved, assumed a fatherly role to a non-biological child, and was a gifted athlete in an inner-city high school who ultimately did not overcome the challenges of his neighborhood." S.H.R. at 957.

[20] The Court observes that Batiste's habeas affidavits contain information that pales in comparison to those cases in which the Supreme Court has found constitutional deficiencies in the investigation and presentation of (continued...)

The only habeas evidence that arguably exceeded the contours of the trial evidence relates to the background of extended family members. The habeas affidavits discuss generations of poverty and difficult life circumstance which, in general, do not contain information substantially different from Batiste's own background. The new information only shows that other family members shared somewhat similar experiences. Batiste has not shown that the law requires reasonable attorneys to present that evidence or that it would have mattered had trial counsel presented it.[21]

Batiste's claim faults not only the content of counsel's chosen defense, but also how it was presented to jurors. Batiste's federal petition identifies ways in which an attorney may have brought mitigating evidence before jurors differently. Trial counsel relied on a mitigation specialist to develop evidence for the punishment phase. The mitigation specialist interviewed family members and obtained various medical, school, and criminal history records. Batiste wishes trial counsel had

[20] (...continued)
mitigating evidence. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), "the only evidence that Wiggins's trial attorney presented to the sentencing jury was Wiggins's lack of prior criminal history. Comparatively, post-conviction counsel uncovered evidence of sexual abuse, rape, physical abuse, homelessness, as well as an 'alcoholic, absentee mother,' and evidence that Wiggins had 'diminished mental capacities.'" *Escamilla v. Stephens*, 602 F. App'x 939, 944 (5th Cir. 2015) (quoting *Wiggins*, 539 U.S. at 535). In *Rompilla v. Beard*, 45 U.S. 374, 392 (2005), trial counsel missed multiple "red flags" that would have led to previously undiscovered evidence of Rompilla's "organic brain damage[ ] an[d] extreme mental disturbance significantly impairing several of his cognitive functions [,] [which] relate back to his childhood, and were likely caused by fetal alcohol syndrome." In addition, Rompilla's trial attorney failed to recognize leads that would have uncovered severe childhood abuse and unimaginable neglect. In *Williams v. Taylor*, 529 U.S. 362 (2000), the inmate presented evidence that he was borderline mentally retarded, that he had experienced severe and repeated child abuse, that his parents had been imprisoned for criminal neglect, and that he shuffled through abusive foster homes while his parents were incarcerated. The evidence Batiste has developed after his trial differs fundamentally from the severe abuse, harsh neglect, and other deeply disturbing circumstance in those cases in which the Supreme Court found constitutional error. Batiste has not brought out powerful evidence that counsel ignored.

[21] The Supreme Court's Eighth Amendment jurisprudence requires that the sentencing jury be able to consider, as a mitigating factor, the character and the record of the individual offender and his particular offense. Batiste has not pointed to any Supreme Court precedent requiring defense attorneys to build a mitigation case premised on life histories across several generations and following various branches of a defendant's family tree. *See, e.g, Wiggins*, 539 U.S. at 535 (addressing an attorney's obligation to investigate "powerful" evidence of abuse and neglect suffered specifically by the petitioner). Some of the evidence about the upbringing of Batiste's extended family members has only marginal relevance to Batiste or his own childhood, if it has any relevance at all. For instance, the fact that Batiste's grandmother was raised by a single mother would add little to the jury's consideration of the special issue questions. The focus of the mitigation special issue was on Batiste, as opposed to his ancestors or distant relatives. Any evidence of intergenerational mitigating evidence did not have strong relevance to the special issues.

not relied on other lay and expert witnesses to present the mitigating evidence, but instead had called a social historian[22] to tie together his mitigating evidence into a coherent life story.

Batiste's briefing suggests that not relying on a social historian is *per se* ineffective assistance. Dkt. 9 at 57-58. Constitutional law does not require that mitigating evidence come through one specific vehicle. Because "counsel has wide latitude in deciding how best to represent a client," an attorney may decide the best manner in which to put information before jurors. *Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir. 2015). The state habeas court found the affidavit proffered by a social historian to be "similar" to the trial evidence. S.H.R. at 956.[23] Without the gloss of expert testimony, the basic tone and tenor of the social historian's habeas affidavit mirrors the mitigation case that the jurors considered. Without being summarized by an expert, trial counsel "presented a comprehensive social history of [Batiste] through the testimony of [Batiste himself], his family, and friends . . . ." S.H.R. at 955. Batiste has not shown that the Constitution demands that trial counsel call an expert to summarize and extrapolate conclusions from the same basic information jurors have already heard. In the end, "this is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face . . . ." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009). The state habeas court was not unreasonable in finding

[22] "[A] testifying social historian" is "a species of mitigation expert whose function in this habeas proceeding is to interpret the detailed social history summary of the [inmate] by developing a coherent theme of the case within a psychological framework to assist the court in understanding the mitigation evidence." *Allison v. Ayers*, 2008 WL 5274580, at *2 (C.D. Cal. 2008). A trial attorney may hesitate in presenting evidence through a social historian or mitigation specialist because much of the putative testimony may "qualif[y] as hearsay, however, since many of the facts recounted by the mitigation specialist reflected only what she had been told by others." *Clark v. Thaler*, 673 F.3d 410, 419 (5th Cir. 2012); *see also Watts v. Quarterman*, 448 F.Supp.2d 786, 796 (W.D.Tex. 2006) (recognizing that "the state trial court repeatedly sustained the prosecution's hearsay objections whenever defense counsel attempted to elicit testimony from [a mitigation specialist] concerning the contents of petitioner's school, medical, or jail records and concerning the contents of her discussions with petitioner's family and friends).

[23] Even so, the state habeas court found the social historian's consolidation of evidence and conclusions derived therefrom to be "speculative, naive, and irrelevant." S.H.R. at 956.

that trial counsel did not perform deficiently in investigating, preparing, and presenting mitigating evidence.

Batiste has also not shown that the state habeas court unreasonably decided that he had not shown actual prejudice. Batiste has not adduced any mitigating evidence that would cause jurors to respond differently than they did at trial. "When compared to the strong aggravating evidence, any incremental increase in mitigation evidence would not create 'a reasonable probability that . . . the result of the proceeding would have been different.'" *Davila v. Davis*, 650 F. App'x 860, 870 (5th Cir. 2016) (quoting *Wiggins*, 539 U.S. at 534). The Court, therefore, finds that the state habeas court was not unreasonable in denying Batiste's claim that trial counsel should have better prepared mitigating witnesses, called more mitigating witnesses, or presented his cumulative evidence through a social historian.

4. Evidence of Future Dangerousness

Batiste complains that trial counsel "failed to present any evidence that Batiste was not likely to commit criminal acts of violence in the future." Dkt. 9 at 136. A brief review of the punishment phase contradicts Batiste's strident claim that trial counsel made no effort to secure a favorable answer to the future-dangerousness special issue. For instance, the defense called an officer from the Harris County Sheriff's Office Classification Unit, who explained that "there was no record of [Batiste] having physical contact with the jail staff in [his] Harris County jail disciplinary records." S.H.R. at 960. Also, the defense relied on records from Batiste's earlier incarcerations to argue that, once confined in the structured environment of prison, he would no longer pose a future danger. Setting his hyperbole aside, Batiste's federal habeas claim argues that trial counsel should have put on a better future-dangerousness defense, primarily through expert witness Dr. Mary Elizabeth Pelz.

Trial counsel called Dr. Pelz, Dean of the College of Public Service at the University of Houston-Downtown, as a punishment witness. The defense primarily posed general questions to Dr. Pelz about the strictures of prison life and the ability of life-sentenced inmates to conform their behavior to institutional norms. The defense only asked brief questions that elicited testimony that Batiste had not committed disciplinary infractions while in state jail or juvenile custody. Tr. Vol. 23 at 59.[24] Trial counsel carefully avoided asking Dr. Pelz to apply her general testimony about future dangerousness to Batiste's specific circumstances. In fact, trial counsel informed the trial court outside the jury's presence: "I want the record to reflect that I have not asked [Dr. Pelz] a question about her opinion as to future dangerousness of [Batiste] and I never intended to ask that. I haven't asked it and never intend to ask it. So, the record is clear on that." Tr. Vol. 23 at 73.[25]

The State's cross-examination challenged some of Dr. Pelz's general opinions about the threat posed by life-sentenced inmates housed in general population. Most problematic for the defense, however, the State challenged the insinuation that Batiste had not previously been violent

[24] As summarized by the state habeas court, Dr. Pelz

> testified for the defense at punishment on a range of topics related to future dangerousness in a comprehensive manner including: (a) prior incarceration behavior was more important than the actual crime committed to determine how someone will behave in prison in the future; (b) she was not aware of [Batiste] having any disciplinary issues while previously incarcerated in state jail; (c) [Batiste's] physical altercations with other inmates in the Harris County jail would not be "seriously considered" for his inmate classification; (d) studies of inmates sentenced to life without parole indicated that these prisoners were "very manageable" and "do not illustrate" increased acts of violence while incarcerated; (e) inmates sentenced to life without parole were more likely to obey prison rules because they need to keep as many privileges as possible in order to survive; and, (f) [Batiste's] future behavior in prison would become "tempered" as he got older and institutionalized.

S.H.R. at 960.

[25] During voir dire examination by the State, Dr. Pelz explained that she had worked as the Coordinator of the Unit Classification in a Texas prison unit and had studied inmate populations for over thirty years. Tr. Vol. 23 at 30. Dr. Pelz said that she would testify that there was no "extraordinary violence" in Batiste's "institutional behavior" and it was her opinion that he would not be a future danger to society. Tr. Vol. 23 at 30, 32.

when in custody. The State questioned Dr. Pelz about Batiste engaging in various fights, assaults, aggressive actions, and belligerent behaviors while previously incarcerated, including in the time awaiting trial. Tr. Vol. 23 at 94-97. When the State asked why there is any "reason to believe that [Batiste is] going to change his behavior" when he entered the prison system, Dr. Pelz expressed a hope that his behavior "will be tempered because it is the first time he will be in prison. I don't know how else to reply to that." Tr. Vol. 23 at 98. Trial counsel's redirect tried to refocus Dr. Pelz's testimony on the general behavior of inmates, but also tried to minimize the specific violent actions Batiste had previously committed in jail.

Batiste claims that trial counsel should have done a better job of using Dr. Pelz's testimony to show that he would not be violent in prison. Dr. Pelz provided a habeas affidavit saying that, had her testimony been utilized more effectively, the jury would have heard that Batiste was not likely to be a future danger because of his age, education, employment history, desire to maintain prison privileges, and prior behavior while incarcerated. Dr. Pelz opined that trial counsel failed to show that Batiste would adapt to a secure prison environment in a positive non-violent way. To summarize, Dr. Pelz faulted counsel for not emphasizing that his past behavior, when considered in conjunction with future factors, would show a decrease in projected violence.

Trial counsel's state habeas affidavit explained why the defense limited the focus of Dr. Pelz's testimony:

> I decided to use Dr. Elizabeth Pelz the way I decided to use her because I felt it was our best shot at obtaining a life sentence. I did not feel the expert testimony she was prepared to offer about future dangerousness was going to be as helpful to our case as my ability to argue it from our witnesses and the records. We had good witnesses and good records and a lot to argue and my feeling was that a paid expert's opinion was not going to win the day and in fact might give the State more to argue and ultimately be more harmful than helpful.

> Again this was my decision to emphasize this testimony and these records myself without a paid expert's opinion on future dangerousness. I believed we had so much to work with in this case that I felt a lay juror would understand it and I feared the repercussions of paid expert testimony. I felt we didn't need it and were better off without it. I could have offered it but chose not to.
>
> It is easy to say today that we should have had this expert testimony or that expert testimony but in my opinion then and now experts in this case and on those issues would have had no impact on our jury.

S.H.R. at 918.

In light of the state habeas affidavits and the record, the state habeas court found that "Dr. Pelz's habeas affidavit is unpersuasive to demonstrate that trial counsel failed to present 'any' evidence that [Batiste] was not a future danger and that Dr. Pelz 'was not utilized in an appropriate manner.'" Specifically, the state habeas court found that trial counsel made "a strategic decision not to ask Dr. Pelz her opinion as to [Batiste's] future dangerousness." S.H.R. at 961. The state habeas court also found that "[t]rial counsel exercised a reasonable trial strategy decision regarding the presentation of future danger evidence, and [Batiste] does not establish trial counsels' deficient performance, much less harm." S.H.R. at 961.

The state habeas court's rejection of this claim was not unreasonable. Trial counsel made a strategic decision to focus Dr. Pelz's testimony on general prison procedures and classification without extensively particularizing the discussion to Batiste's own potential future conduct. In making that decision, trial counsel knew that testimony about Batiste's actions while incarcerated could harm the defense. The jury already knew that Batiste had not been subject to any prison disciplinary action while incarcerated in state jail in 2007 and during his time in juvenile facilities. But focusing on Batiste's threat of future violence while incarcerated would ultimately draw the jury's attention to his more recent violent actions while incarcerated before trial.

Specifically, a reasonable attorney could avoid presenting testimony similar to Dr. Pelz's opinion that "the disciplinary infractions [Batiste] received while at county jail during the pendency of his trial are of limited significance to the overall determination of the probability of future violence." S.H.R. at 481. During his pre-trial custody in Harris County, Batiste had led a group of inmates who assaulted, threatened, and stole from other inmates. Tr. Vol. 19 at 110-32. Batiste committed disciplinary infractions such as fighting, threatening inmates, possessing or manufacturing a weapon, and refusing to obey orders. Tr. Vol. 18 at 130-49. Batiste's actions caused the atmosphere of the jail to turn from "somewhat relaxed" to "unpredictable." Tr. Vol. 19 at 129. Batiste bragged in letters that he had broken another inmate's jaw. Tr. Vol. 24 at 69, 145-46. In closing argument the State chronicled his behavior while "awaiting trial, a trial where it will be determined whether or not he gets the death penalty. And he knows, he knows that [the State] gets records of what he does." Tr. Vol. 25 at 72. Even when in that structured setting, and with fateful incentives, Batiste could not "control himself." He engaged in a list of bad behavior: "disrespect of staff," "[p]ossessing intoxicants in the jail," "[d]amaging county property," "[r]iot, group demonstration," "[l]ots of fights," "[t]errorizing the other inmates, extorting, robbing, threatening." Tr. Vol. 25 at 72-73. Even when facing a capital murder charge, Batiste "was the big man there. And he was running things and he was hurting people. And he didn't care." Tr. Vol. 25 at 73.

In light of his violence while awaiting trial, Dr. Pelz's opinion that Batiste's institutional history was "unremarkable" would be unpersuasive and could be damaging to the defense. Thus, trial counsel made a reasonable strategic decision to focus Dr. Pelz's testimony on policies and procedures, rather than Batiste's own behavior. Because Dr. Pelz's unpersuasive habeas affidavit could allow the State to highlight further Batiste's pre-trial violent conduct, Batiste has not shown

that trial counsel's strategic decision prejudiced the defense. The state habeas court, therefore, was not unreasonable in finding no deficient performance or prejudice in counsel's use of Dr. Pelz's testimony.

5. Preparing Batiste to Testify

Batiste claims that "[w]ith little preparation, trial counsel thrust Batiste into the witness box to testify, ill-prepared for what questions to expect from his own defense team much less what the prosecution might bring up on cross-examination." Dkt. 9 at 153. While the defense was able to provide a mitigating view into Batiste's background through his testimony, a blistering cross-examination by the State examined in fine detail the violence replete throughout his life. In particular, Batiste's testimony allowed the State to introduce into evidence letters he wrote while awaiting trial showing his dedication to gang life, his lack of remorse, and his continued violence. Batiste now argues that "[h]ad trial counsel properly prepared [him] to testify and adequately advised him of the potential dangers and pitfalls inherent in testifying, the jury would have never heard such damaging and prejudicial testimony . . ., either because Batiste would have been more equipped to respond to the inevitable challenges of cross-examination, or because he would have chosen not to testify at all." Dkt. 9 at 159.

Trial counsel averred that they "did prepare [Batiste] to testify." S.H.R. at 819. Trial counsel's affidavit reconfirmed Batiste's trial testimony that trial counsel discussed "at length" whether he should testify. Tr. Vol. 24 at 226. The state habeas court found that Batiste then "provided a detailed account of his life and circumstances on direct examination, as well as an explanation for certain rap lyrics he composed while in the Harris County Jail, and [Batiste's] answers to trial counsel's comprehensive direct examination questions indicated prior preparation

by counsel." S.H.R. at 962. The trial testimony contradicted Batiste's "vague and conclusory" claim that counsel should have prepared him better. S.H.R. at 962.

Batiste has not shown that the state habeas court's rejection of this claim was unreasonable. Batiste provides nothing but conclusory allegations about how better preparation would have aided the defense. He does not explain how additional coaching would have changed what he said or how he said it, such that the results of the proceedings would have been different. Batiste chose to testify, and once he made his decision, he risked cross-examination that would hurt the defense. Even with additional coaching by trial counsel, cross-examination could still have covered Batiste's jailhouse correspondence, his former violent acts, and the dissonance between his mitigating evidence and his lawlessness. The Court finds that the state habeas court was not unreasonable for not finding deficient performance or actual prejudice.

6. Batiste's Letters and Rap Lyrics

The State filed a pre-trial a notice of its intent to introduce Batiste's extraneous offenses and jail correspondence at the punishment phase. C.R. at 1426-30. The notice said that the letters "reflect[] a lack of respect for authority and a high regard for street crime, gun use, theft and gang membership. In addition, [Batiste] has little regard or respect for women." C.R. at R 1427. The defense did not object to the admission of that evidence.

Batiste's letters proved his dedication to the Crips. Batiste's letters first came before the jurors during cross-examination of his brother Kevin Noel, Jr. Batiste wrote to Noel about someone called "OG Rome," resulting in testimony that the letters "OG" stand for "original gangster." Tr. Vol. 24 at 40, 43. The State also adduced testimony that Batiste had advised his brother on what kind of tattoos to get, including ones signifying gang membership. Tr. Vol. 24 at 46-47. In other

letters, Batiste was disrespectful to women when asking his brother to send contraband nude photographs and when describing sexual interaction with a jail nurse. Tr. Vol. 24 at 47-49, 53-54.

Some letters confirmed Batiste's bad behavior during pretrial detention. The State's cross-examination of Micaela Lara discussed correspondence in which Batiste claimed to have "beat[en] up a white guy from the military" because "[h]e hung up [his] phone call . . . ." Tr. Vol. 24 at 69. Batiste also wrote about making alcohol in prison. Tr. Vol. 24 at 70. In that same letter, he used spelling characteristic of a Crips gang member. Tr. Vol. 70-71.

Batiste's own testimony allowed extensive discussion of his jailhouse letters. The State repeatedly cross-examined Batiste about his own words, and particularly rap lyrics portraying himself as a remorseless, heartless, violent, sexist gang member. The letters described Batiste's fights while incarcerated pending trial. Batiste described wanting to shoot someone. Tr. Vol. 24 at 184. Batiste admitted that he glorified violence in some lyrics. Tr. Vol. 24 at 185. The State's questioning emphasized that Batiste's writings showed no remorse. Tr. Vol. 24 at 187-89.

Batiste explained away his lyrics as "just hypermusic sometimes." Tr. Vol. 24 at 186. Batiste said that the rap lyrics were "just hype." Tr. Vol. 24 at 182.

At the close of testimony, the prosecution moved without objection to place letters into evidence. Tr. Vol. 23 at 174. Trial counsel later submitted 225 pages of letters into evidence. Tr. Vol. 25 at 10-11; Vol. 33 at 43-281. The defense's closing arguments told jurors that, while they would find "foul language and disgusting street stuff" in the letters, Batiste also talked "about what he did to himself." Trial counsel urged that the letters would help a person "motivated by love, compassion, and understanding." Tr. Vol. 25 at 20-21.

On state habeas review, Batiste argued that trial counsel should have had expert witness Rotramel deaden the impact of his violent and lawless language by explaining that he only engaged in hyperbole. Also, Batiste argued that trial counsel should have prepared witnesses to discuss the letters better. Trial counsel's affidavit explained the defense's approach to the letters:

> Even though I told my client as I tell every one of my clients in person and in writing not to ever discuss the case with any person by phone or mail or in any manner unless I approve it he did not follow my advice. He was not even close to following my advice. He had it from me in writing and in person every single time I met with him but he did not follow it. But having said all of that he did as good a job of explaining the lyrics to the jury as any expert could have or any one else for that matter.
>
> Unfortunately there existed no explanation that would overcome the effect of those lyrics. No argument. No expert witness testimony. Nothing. As a matter of trial strategy in my opinion the best treatment of that part of the case was to leave it alone.

S.H.R. at 819.

The state habeas court found that "trial counsel made a strategic decision to enter over 200 pages of [Batiste's] letters into evidence at the close of punishment; that the letters contained 'flags' placed by the State and defense to highlight certain portions, including passages positive" to Batiste. S.H.R. at 964. The state habeas court found that the rap lyrics "constituted a small portion of the trial proceedings." S.H.R. at 965. Also, Rotramel's affidavit was "unpersuasive to demonstrate that an expert was necessary to assist the trier of fact to understand [Batiste's] rap lyrics when [Batiste] explained that the lyrics were largely 'hype.' Further, the fact that music lyrics are often expressive, grandiose, and a vehicle to express emotions is not a concept alien to the typical lay person on a jury." S.H.R. at 965. In sum, "counsel made reasonable trial strategy decisions in countering the State's presentation of [Batiste's] letters and rap lyrics, and [Batiste] does not establish trial counsels' deficient performance, much less harm, on the basis urged in the instant ground for relief." S.H.R. at 965.

Batiste has not shown that the state habeas court's decision was unreasonable. Batiste has not indicated how the defense could prevent his jailhouse correspondence from being admitted into evidence. Batiste did not heed counsel's directive not to discuss his case, and he created writings the prosecution would later use against him. Trial counsel chose to let Batiste explain his own words. The Court has already found that trial counsel did not otherwise provide ineffective representation in not calling Rotramel as a witness. Batiste has also not shown that trial counsel needed expert testimony to show effectively why Batiste wrote what he did. With the prejudicial language Batiste put to paper, trial counsel had to decide the least prejudicial manner in which it could come before jurors. Batiste has not shown that the concept that Batiste's writings exhibited hyperbole was beyond the jury's lay understanding.

Batiste has not shown that additional preparation of the recipients of his letters would have dampened the effect of his words. Perhaps other attorneys may have used a different approach to the letters, but Batiste has not overcome the state habeas court's finding that trial counsel made a reasonable strategic decision in how best to do so in this case. Further, Batiste has not shown that, had the defense acted as he argues on state habeas review, that there would have been a reasonable probability of a different result, particularly in light of the other aggravating evidence at trial. Batiste has not shown that the state habeas decision was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

7. Cumulative Prejudice

Batiste argues that the Court should consider the cumulative effect of all trial counsel's alleged deficiencies. Batiste asserts that the jury would have responded to the special issues differently had trial counsel presented evidence of organic brain damage, refuted testimony about

his gang membership, amplified the mitigating evidence and cast it into a different form, asked his future-dangerousness expert different questions, prepared Batiste for what would assuredly be a blistering cross-examination, and otherwise performed differently. For the reasons discussed with regard to each allegation of *Strickland* error, it is not reasonably probable that the cumulative effect of different representation would have brought about a different result. Many of the differences between the case put on by counsel and that developed on habeas are differences in detail, not mitigating thrust. Some information may have refined and possibly broadened the mitigation evidence, but it would not have changed how jurors approached the special issues. Some habeas evidence, such as greater emphasis on gang affiliation and his pre-trial incarceration, was double edged and could have made jurors more disposed toward a death sentence. Even considering the full effect of Batiste's *Strickland* claim, the evidence of guilt was overwhelming. The State presented a solid case for a death sentence. Batiste lived a violent, lawless life. Despite his recent claims to minor gang affiliation, Batiste demonstrated his gang devotion though numerous Crips tattoos, including on his face. Even while holding down jobs, Batiste lived in a lawless world of stealing cars and selling stolen property. He used drugs. He committed aggravated robberies. Incarceration did not reform Batiste's character; he left each period of custody more violent than before. Batiste committed the instant murder in a brutal manner, possibly endangering the lives of many as he fired into the victim's car on the freeway, all for his own profit. Batiste did not need to shoot the victim as he pleaded for his life on the ground, but after weighing out his options, Batiste decided to kill anyway. The victim's body bore fifteen gunshot wounds. Crucially, the State presented the "the most powerful imaginable aggravating evidence": Batiste "had committed another murder." *Wong v. Belmontes*, 558 U.S. 15, 28 (2009). Whether considering each *Strickland* argument individually

or collectively, Batiste has not shown a reasonable probability that the jury would have responded to the special issues differently had counsel performed differently. The Court will deny Batiste's effective-assistance-of-counsel claims.

B. Disclosure of Impeachment Evidence

In his second ground for relief, Batiste claims that the State failed to turn over important impeachment evidence relating to trial witness Anthony Moore. Moore was asleep inside the Black Widow tattoo parlor when Batiste and his friends entered to rob the shop. The State called Moore in the penalty phase to describe the subsequent crime, particularly emphasizing Batiste's role in directing the robbery and in shooting the shop owner. Batiste claims that the State violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) by failing to disclose that Moore had previous felony convictions and had absconded from a probated sentence in Michigan.

"There are three components to a *Brady* violation. First, the evidence must be favorable to the accused, a standard that includes impeachment evidence. Second, the State must have suppressed the evidence. Third, the defendant must have been prejudiced." *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). Cases often add a fourth requirement: "nondiscovery of the allegedly favorable evidence was not the result of a lack of due diligence." *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003); *see also Graves v. Cockrell*, 351 F.3d 143, 153–54 (5th Cir. 2003). "When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility for failing to conduct a diligent investigation." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002).

Batiste has not shown that the State possessed undisclosed information that was unavailable to his attorneys. In rejecting this claim, the state habeas court found that the prosecutor did not know

about Moore's criminal history at the time of trial. The prosecutor provided an affidavit on state habeas review stating that "Moore's Michigan criminal history was not reflected on NCIC/TCIC when she generated his criminal history report on June 1, 2011. Had [the prosecutor] known of Moore's criminal history, she would have disclosed this information to trial counsel." S.H.R. at 966. According to an affidavit provided by an investigator for the State, the "the discrepancy in Moore's NCIC/TCIC criminal history report was the result of Moore's FBI number not being electronically linked to his State of Texas Identification number in the NCIC/TCIC system." S.H.R. at 966. On that basis, the state habeas court found that "the State did not possess knowledge of Moore's out-of-state criminal history at the time of [Batiste's] capital murder trial; therefore, knowledge of Moore's Michigan criminal history cannot be imputed to the prosecutors who tried [his] case." S.H.R. at 966.

Batiste has not refuted the state habeas findings that the State did not know about Moore's criminal history. Batiste has not shown that the government has a constitutional obligation to divulge information it does not possess. *See United States v. Cutno*, 431 F. App'x 275, 278-79 (5th Cir. 2011) (finding no *Brady* violation when a witness' criminal history did not appear in a NCIC report). Additionally, Batiste has not shown that a *Brady* violation occurs when allegedly suppressed evidence is equally available to the defense. Batiste concedes that "[m]odern technology has made access to information easy and inexpensive. Moore's criminal record was public and discoverable through a simple computer search." Dkt. 9 at 89 n. 56. "When information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim." *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980); *see also Woodford v. Cain*, 609 F.3d 774, 803 (5th Cir.

2010) ("[T]his court has previously recognized that there can be no viable *Brady* claim when allegedly suppressed evidence was available to the defendant through his own efforts.").[26]

Even if the State had withheld otherwise-unavailable evidence, Batiste has not shown that he has met *Brady*'s materiality prong. "The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." *Edmond v. Collins*, 8 F.3d 290 (5th Cir. 1993). The state habeas court observed that "[I]n addition to Anthony Moore, two other witnesses, Christie Moore and Joshua Norsworthy, positively identified the [Batiste] as the shooter in the capital murder of Steve Robbins and provided in-court identifications of [him]." S.H.R. at 866. In fact, "[a]t punishment, [Batiste] acknowledged that he led and planned the Black Widow capital murder and admitted that he shot [the victim]." S.H.R. at 866. With that context, the state habeas court found that Batiste "does not establish materiality – by a reasonable probability that the result of the punishment proceeding would have been different had [he] been able to impeach Moore with his Michigan criminal history." S.H.R. at 867.

"[W]hen the testimony of a witness who might have been impeached by undisclosed evidence is strongly corroborated by additional evidence, the undisclosed evidence generally is not found to be material." *Wilson v. Whitley*, 28 F.3d 433, 439 (5th Cir. 1994). With the other evidence showing Batiste's leadership role in the Black Widow tattoo parlor robbery and murder, including

[26] Batiste summarily argues in a footnote that "[t]o the extent that trial counsel failed to conduct a comprehensive background and criminal history check of all witnesses testifying for the State, Batiste was denied the effective assistance of counsel." Dkt. 9 at 189 n.56. Respondent persuasively argues that any intended *Strickland* claim on that basis is "conclusory and subject to dismissal as such." Dkt. 22 at 152 n.37. Additionally, Batiste has not shown *Strickland* prejudice in light of the *Brady* materiality discussion that follows above. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (adopting the "prejudice" prong of the *Strickland* as the appropriate standard for determining "materiality" under *Brady*).

Batiste's own confession to the crime, the state habeas court reasonably found that Batiste did not meet *Brady*'s materiality prong.

Batiste has not shown that the State withheld evidence of Moore's criminal history or that any *Brady* violation was material. Accordingly, the state habeas court's adjudication of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

C. Juror Misconduct

Batiste claims that external factors influenced jurors' deliberations. Batiste's juror-misconduct claim arises out of one juror's concern after an incident occurred in the courthouse contemporaneous to trial. During the second day of the penalty phase, jurors Cathy Upshaw and Robert Coleman both rode in an elevator on their way to the courtroom. As the crowded elevator emptied, a man remained uncomfortably close to juror Upshaw. Juror Upshaw described him as having "two big, fat braids," "a gun tattoo like behind both ears and some initials." The man turned around, "looked at [her] juror badge and said: You okay?" Tr. Vol. 19 at 3. When the jurors exited the elevator, juror Coleman asked juror Upshaw if she was alright, to which she responded: "Yeah. Now I can breathe. I couldn't breathe." Tr. Vol. 19 at 4. The two jurors told the others about the incident. The jurors discussed possible ways to maintain their safety, such as using a separate elevator and moving about in groups. Tr. Vol. 19 at 5. The jury foreman told the bailiff what had happened.

Even though the trial court "discovered that those people [on the elevator] are not a part of this case at all," Tr. Vol. 19 at 5, the trial court questioned jurors Upshaw and Coleman about the elevator episode. Juror Upshaw described how she "went into shock," but that she "was just being paranoid." Tr. Vol. 19 at 4. Even though she found the incident "a little bit intimidating," juror

Upshaw affirmed that the experience would not prejudice her against Batiste. Tr. Vol. 19 at 4. Juror Upshaw also avowed that she could decide the case based on the evidence alone. Tr. Vol. 19 at 4-5.

Juror Coleman explained that juror Upshaw "seemed uncomfortable" in the elevator. Tr. Vol. 19 at 7. Juror Coleman also said that "[t]here's some concern in the jury room over – especially among the women, but I think everyone felt pretty – I think the – I think the people are trying to calm each other down, not that they're overly excited or anything like that." Tr. Vol. 19 at 7. Juror Coleman stated that it would not change how he would rule in this case. Tr. Vol. 19 at 7.

The parties and the trial court discussed how to handle the situation. Trial counsel did not request a mistrial, but only requested that the trial court ask each juror if the incident would affect their verdict. Tr. Vol. 19 at 9-10. Rather than "leave it up to the writ lawyer" to find out if the incident made a difference, trial counsel asked the trial court to interview jurors one by one. Tr. Vol. 19 at 11, 13. Each juror affirmed that they could be impartial and that they would decide the case based on the evidence alone. Tr. Vol. 19 at 14-27

Batiste argues that "[j]urors in [his] trial committed misconduct when they impermissibly discussed issues fundamental to the case prior to the full presentation of evidence and the court's instructions." Dkt. 9 at 198. The defense's concern in the trial court, however, was not that jurors discussed the case, but that the incident "would affect their verdict." Tr. Vol. 19 at 10. Batiste contends that "juror Upshaw violated the court's orders" not to discuss the case with anyone "when she told the rest of the jury about the confrontation in the elevator." Dkt. 9 at 193.[27]

[27] Batiste also argues that appellate counsel provided ineffective representation for not advancing this issue on direct appeal. The state habeas court found that "appellate counsel was not ineffective for not raising on direct appeal the meritless claim of juror misconduct." S.H.R. at 969. The state habeas court's decision was not unreasonable for the same reasons described above. *See Jones v. Barnes*, 463 U.S. 745, 103 (1983) (finding that appellate counsel not ineffective for choosing not to advance meritless appellate claim).

The state habeas court found that "Upshaw's elevator incident and subsequent discussion with fellow jurors does not establish the existence of an outside influence under Texas caselaw." S.H.R. at 968. The state habeas court's resolution of his issue was not unreasonable. The Sixth Amendment guarantees a "trial by an impartial jury." Exposure to outside influences during jury deliberations may violate a defendant's rights. *See Parker v. Gladden*, 385 U.S. 363, 364-65 (1966); *Oliver v. Quaterman*, 541 F.3d 329, 334-36 (5th Cir. 2008). A reviewing court, however, will only grant relief if the outside influence affected the jury's verdict. *See United States v. Olano*, 507 U.S. 725, 739 (1993). Here, the record does not suggest that the incident caused jurors to "impermissibl[y] discuss[] issues fundamental case prior to the full presentation of evidence . . . ." Dkt. 9 at 198. Respondent persuasively argues that "Batiste presents no evidence that the jury discussed his case at all prior to deliberations, much less that the jury discussed the incident involving the juror as it might have related to Batiste's case." Dkt. 22, p. 169.

The trial court reassured jurors that the elevator incident was unrelated to the trial. Jurors said that they discussed the incident but did not say that they specifically related it to the evidence in Batiste's case. Even if the incident made some jurors wary, subjective fears or concerns, rather than actual external influences, are not a basis for impeaching a jury's verdict. *See United States v. Ahee*, 5 F. App'x 342 (6th Cir. 2001), *Peterson v. Chrans*, 921 F.3d 278 (7th Cir. 1990); *United States v. Krall*, 835 F.2d 711, 715-16 (8th Cir. 1987).

Alternatively, the state habeas court found that "juror misconduct, if any, was resolved through the trial court's curative instructions." S.H.R. at 969. The trial court took steps to remedy any concerns raised by the incident. The state habeas court found that, "[u]pon learning of juror Upshaw's elevator incident, the trial court questioned each juror individually about what had

transpired, and each juror assured the Court that the situation would not affect their decision making in [Batiste's] trial. S.H.R. at 967; *see also Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); *United States v. Martinez-Moncivais*, 14 F3d 1030, 1036 (5th Cir. 1994) ("[A] trial court must hold an evidentiary hearing when a defendant shows that external influence."). Each juror affirmed that they would impartially consider the evidence. After that, "the trial court regularly admonished the jurors that they were not to discuss the case among themselves." S.H.R. at 968. The trial court repeatedly instructed jurors only to consider only the evidence, which presumably cures any error. *See Zafiro v. United States*, 506 U.S. 534, 540 (1993).

Batiste has not shown that the state habeas court was unreasonable in finding that one juror's subjective concern, based on what likely was an innocuous incident, amounts to an outside influence on jury deliberations. Further, Batiste has not shown that the state court unreasonably found that the trial court's efforts and instructions were insufficient to cure any error. The Court, therefore, will deny Batiste's jury misconduct claim.

D. Objecting During the Cross-Examination of Defense Witnesses

Batiste faults trial counsel for not making numerous objections during the State's cross-examination of defense witnesses. Batiste argues: "During the cross-examination of the defense's eleven penalty phase witnesses, the State asked numerous impermissible questions that called for hearsay, improperly impeached witnesses, or related to irrelevant events. Despite this, trial counsel objected only twice, ignoring at least fifty other plausible objections." Dkt. 9 at 199 (footnotes omitted). As he did in his state habeas application, footnotes in Batiste's federal petition cite pages in the record which he argues trial counsel should have made "twenty-three different hearsay

objections," "twenty-two different character or impeachment objections," and ten different relevance based objections." Dkt. 9 at 199; S.H.R. at 192. Batiste, however, only provides significant discussion regarding a few of the unobjected-to questions.

The state habeas court found that Batiste had not adequately briefed most of his allegations of error. Batiste's habeas briefing cited record pages without identifying the particular statements to which trial counsel should have objected. The state habeas court found that, because Batiste did not identify "when an objection should have been made," much of this claim was "vague and inadequately briefed." S.H.R. at 969. Accordingly, the state habeas court found that Batiste had procedurally defaulted consideration of any inadequately briefed objections. The same default results in a procedural bar of federal review. *See Roberts v. Thaler*, 681 F.3d 597, 607-08 (5th Cir. 2012).[28] The Court, therefore, will only consider the eight objections which the state habeas court adjudicated. S.H.R. at 970.

The state habeas court considered only whether trial counsel should have objected during the State's cross-examination of witnesses Kevin Noel Jr. and Stephanie Soliz. Batiste complains that trial counsel should have objected when the State asked questions about those witnesses' bad acts, including Noel's gang membership, Soliz's participation in stealing cars with Batiste, and both of their drug use with Batiste. Tr. Vol. 23 at 168-69, 171; Tr. Vol. 24 at 3, 16, 23, 38, 44-45, 159. Batiste argued that his trial attorney's failure to object "tarnished the credibility of [the defense's] own witnesses, diminished the strength of the mitigating evidence these witnesses attempted to

[28] Batiste's failure to provide any greater specificity regarding those allegations leaves the related portions of his federal claim subject to denial as conclusory and inadequately briefed. *See Dowthitt v. Johnson*, 230 F.3d 733, 752 (5th Cir. 2000) ("[Petitioner] does not provide further detail (beyond his assertion) as to why the failure to object rose to the level of a Sixth Amendment violation. Because this issue is inadequately briefed, we do not consider it on appeal."). Batiste's cursory federal briefing on these arguments also precludes finding that any of his prior attorneys provided deficient performance relating to these claims.

share, and crippled trial counsel's effort to make a compelling case for Batiste's life." S.H.R. at 215.[29]

Batiste based his state habeas claim on Rule 608 of the Texas Rules of Evidence which provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime . . ., may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence." Under this rule, the parties may not attack a witness' character for truthfulness by offering extrinsic evidence concerning specific prior instances of untruthfulness. *See Hammer v. State*, 296 S.W.3d 555, 563 (Tex. Crim. App. 2009). Respondent argues that the State did not ask the indicated cross-examination questions in an effort to impeach the witness' credibility. Respondent argues that the witness' answers were relevant, offered in rebuttal to testimony on direct, or otherwise permissible under Texas law. For example, the state habeas court found that Noel's gang membership was relevant because it related to gang references in Batiste's correspondence with him. S.H.R. at 970. Also, Batiste's drug use with the two witnesses was relevant because Batiste had already "acknowledged on cross-examination that he would regularly spend $150 per week on marihuana for his home." S.H.R. at 970.

Even if trial counsel should have objected in those instances, however, the state habeas court found that "questions regarding Noel's and Soliz's bad acts in these eight specific areas of the record did not 'undermine' or 'cripple' [Batiste's] mitigation case" when "both witnesses provided evidence favorable to [Batiste] regarding his love for his children and the positive role he played in his

[29] Trial counsel's state habeas affidavit responded to this claim: "I made the trial objections I felt were necessary and helpful to [Batiste]. If I failed to object to some piece of evidence or testimony it was because I either felt it was actually admissible or would come in another way, or I felt it was helpful to the defense." S.H.R. at 819.

children's lives." S.H.R. at 970. The state habeas court found that trial counsel's failure to object did not harm the defense.

Batiste has not shown that the state habeas decision was unreasonable, particularly because much of the unobjected-to testimony came before jurors in a different form or had negligible effect on the trial. Even if trial counsel did not ask Noel about his gang membership, Batiste's correspondence alluded to that fact. Batiste himself described marijuana use in his home, and the testimony of the indicated witnesses was not so harmful either to eviscerate the force of their testimony or influence the punishment phase as a whole. Batiste has not shown that the jury's verdict would have been different if trial counsel made the indicated objections. Batiste has not met his burden of showing that the state court judgment was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

E. Compensation of Trial Counsel

Batiste complains that the trial court violated federal and state law by compensating his trial attorneys through a flat fee arrangement. The trial court "grant[ed] a $70,000 flat fee to each trial counsel for their representation of [Batiste]." S.H.R. at 970. The state court observed that Texas law does not define what compensation for capital representation is "reasonable," nor does it expressly preclude compensation through a flat fee. S.H.R. at 971. In fact, at the time of trial "a flat fee for counsel appointed to represent a defendant in a Harris County death capital represented a prevailing professional norm." S.H.R. at 971. The state habeas court found that Batiste did not provide any "legal authority to support his claim that the [trial court] committed fundamental and structural error by granting trial counsel a flat fee for their representation in [his] capital murder trial." S.H.R. at 972.

Despite providing political and policy reasons for which a flat fee may not be the best way to ensure effective legal representation, Batiste has not identified any clearly established federal law requiring the States to adopt one method of compensating capital counsel. Accordingly, Batiste has not shown constitutional error in his conviction and sentence due to counsel's compensation, and finding otherwise would require the creation of new federal law in violation of the non-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989). The Court summarily denies Batiste's compensation-of-counsel claim.

F. Texas' Administration of the Death Penalty

Batiste complains that his death sentence is unconstitutional because he received it in Harris County, rather than in another location. According to Batiste, "geographic and racial disparities in Texas have created a system of capital punishment . . . that punishes, not based on the heinousness of a defendant's crime, but on the irrelevant factors of where he lives and what races were involved in the crime." Dkt. 9 at 220. Batiste argues that Texas arbitrarily and capriciously imposes death sentences because: (1) most capital convictions arise from only a few counties and (2) racial considerations taint capital prosecution and sentencing.

Batiste has not shown that a constitutional violation occurred because of where he received his death sentence. Constitutional law, particularly in the jurisprudence flowing from *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Furman v. Georgia*, 408 U.S. 238 (1972), emphasizes "eliminating total arbitrariness and capriciousness in" imposing the death penalty. *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). The Constitution, however, does not require complete uniformity throughout the entire death penalty process. Discretion permeates capital punishment at various stages: "the prosecutor's decision whether to charge a capital offense in the first place, his

decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the Executive's decision whether to commute a death sentence." *Id.* at 254. The existence of discretion alone does not "render[] the capital sentences imposed arbitrary and capricious." *McCleskey v. Kemp*, 481 U.S. 279, 307 (1987) (quoting *Gregg*, 428 U.S. at 199); *see also Spinkellink v. Wainwright*, 578 F.2d 582, 608 (5th Cir. 1978); *Proffitt*, 428 U.S. at 254. The Constitution only limits prosecutorial discretion in charging capital crimes when "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification[.]" *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quotations omitted); *see also United States v. Armstrong*, 517 U.S. 456, 465 (1996).

Batiste's briefing says that differences in death sentence throughout Texas occur because larger counties, such as Harris County, can allocate greater resources to capital prosecutions. The Supreme Court has not required uniformity in prosecutorial considerations made by state entities with different resources. Other courts have traditionally recognized "the amount of resources required to convict a defendant" and "the extent of prosecutorial resources" as "legitimate prosecutorial factors that would justify" the use of prosecutorial discretion. *United States v. Lightly*, 616 F.3d 321, 370 (4th Cir. 2010); *see also Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004) (noting "the optimal deployment of prosecutorial resources" among the permissible "host of variables" in deciding to prosecute). Constitutionally prohibited arbitrariness does not occur merely because "[t]he capability of the responsible law enforcement agency can vary widely." *McCleskey*, 481 U.S. at 307 n.28. The Fifth Circuit has similarly observed in another context that the Constitution does not prohibit

> simply failing to prosecute all known lawbreakers, whether because of ineptitude or (more commonly) because of lack of adequate resources. The resulting pattern of

> nonenforcement may be random, or an effort may be made to get the most bang for the prosecutorial buck by concentrating on the most newsworthy lawbreakers, but in either case the result is that people who are equally guilty of crimes or other violations receive unequal treatment, with some being punished and others getting off scot-free. That form of selective prosecution, although it involves dramatically unequal legal treatment, has no standing in equal protection law.

Parude v. City of Natchez, 72 F. App'x 102, 105 (5th Cir. 2003) (quotation omitted). Batiste has not pointed to any case finding that different prosecutorial decisions in different counties violates the Equal Protection Clause.

In particular, Batiste has not shown that any unlawful considerations drive the State's choice to prosecute his as a capital crime. S*ee Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (requiring "a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully."). Batiste's crime facially fit the statutory requirements for capital murder. Nothing suggests that the prosecutor in this case considered anything other than the severity of Batiste's crime in asking for a severe punishment. Batiste can only speculate that Harris County's resources made his a capital prosecution when another county would have sought a lesser penalty. In short, federal habeas relief is not available because "no Supreme Court case has held that the Constitution prohibits geographically disparate application of the death penalty due to varying resources across jurisdictions." *Allen v. Stephens*, 805 F.3d 617, 629 (5th Cir. 2015).

Batiste has also not shown that racial discrimination played any part in his conviction or sentence. Batiste relies on studies which concluded that certain racial groups are more likely than others to be sentenced to death. "[T]o prevail under the Equal Protection Clause, [Batiste] must prove that the decisionmakers *in his case* acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987) (emphasis added). Batiste "offers no evidence specific to his own case

that would support an inference that racial considerations played a part in his sentence." *McCleskey*, 481 U.S. at 292-93. Batiste has not shown that racism, rather than a permissible exercise of prosecutorial discretion, was the motivating factor in the State's decision to seek a sentence of death. The state court's rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

G. Effect of a Single Juror's Vote

Consistent with article 37.071, § 2, of the Texas Code of Criminal Procedure, the trial court told jurors that their votes for a death sentence must be unanimous, but that ten or more jurors could return an answer resulting in a life sentence. C.R. at 1708. Courts generally label this instruction the "12-10 Rule." Batiste contends that, by not informing the jury of the effect of a single dissenting vote or of a single hold-out juror, the instructions predisposed the jurors to impose a death sentence, thus violating the Sixth, Eighth, and Fourteenth Amendments. Batiste specifically argues that the trial court's punishment-phase instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), by failing to adequately inform the jury on the effect of hold-out jurors.

In *Mills*, the Supreme Court "held invalid capital sentencing schemes that require juries to disregard mitigating factors not found unanimously." *Beard v. Banks*, 542 U.S. 406, 408 (2004) (emphasis added); *see also Smith v. Spisak*, 558 U.S. 139, 148 (2010); *McKoy v. North Carolina*, 494 U.S. 433, 439-40 (1990). Because the Constitution mandates that jurors be able to consider mitigating evidence, *see Lockett v. Ohio*, 438 U.S. 586, 604 (1978), *Mills* prohibits sentencing instructions that preclude jurors "from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 486 U.S. at 384 (emphasis added). Batiste argues that the 12-10 Rule instruction gave jurors the mistaken impression that they did not

have an individual ability to prevent a death sentence, thus precluding them from considering mitigating evidence.

The Fifth Circuit has held that Texas's 12-10 Rule instruction "is wholly dissimilar to that involved in *Mills*," *Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996), because "all jurors can take into account any mitigating circumstance." *Jacobs*, 31 F.3d at 1329. Unlike in *Mills*, "the instructions did not say that the jury must determine the existence of each individual mitigating factor unanimously." *Spisak*, 558 U.S. at 148. On that basis, the Fifth Circuit has repeatedly denied 12-10 Rule claims. *See Allen v. Stephens*, 805 F.3d 617, 632 (5th Cir. 2015); *Holiday v. Stephens*, 587 F. App'x 767, 789 (5th Cir. 2014); *Reed v. Stephens,* 739 F.3d 753, 779 (5th Cir. 2014); *Parr v. Thaler,* 481 F. App'x 872, 878 (5th Cir. 2012); *Druery v. Thaler,* 647 F.3d 535, 542–43 (5th Cir. 2011); *Greer v. Thaler,* 380 F. App'x 373, 389 (5th Cir. 2010). The Fifth Circuit also has held that any extension of *Mills* to Texas's penalty-phase instructions would violate *Teague v. Lane*'s prohibition on habeas courts from creating new constitutional law. *See Druery*, 647 F.3d at 542–43 (5th Cir. 2011). This Court concludes that Batiste has not shown entitlement to habeas relief based on the trial court's 12-10 Rule instruction to the jury.[30]

H. Preserving the Record

The trial court held twenty-seven off-the-record discussions throughout trial. Batiste complains that trial counsel should have asked for the court reporter to record all discussions.

On state habeas review, trial counsel averred that "[a]nything said by any one that could possibly adversely effect [Batiste's] right to a fair trial and due process was on the record." S.H.R. at 820. The state habeas court, presided over by the same judge who presided over trial, found

[30] Batiste's challenge to the 12-10 Rule also fails in light of the AEDPA standards of review.

"[b]ased on the record and personal recollection," that the hearings involved "administrative matters" and other unimportant issues such as "whether the jury should be given a break." S.H.R. at 875. The state habeas court simply found that Batiste did not "demonstrate any alleged deficiency regarding the court reporter's record," S.H.R. at 876, because: "(1) the trial record is voluminous; (2) there are no missing sections of an entire phase of the trial; (3) counsel's efforts to build and protect the record allowed appellate counsel to raise twenty-two (22) points of error on direct appeal; and (4) the context of several of the conferences indicate that the topics being discussed were administrative." S.H.R. at 992.

Trial counsel averred that the off-the-record discussions did not involve Batiste's substantive rights. The state habeas court did not remember any issue missing from the record. Batiste has not countered those recollections with any verifiable showing that the court reporter omitted crucial matters from the trial record. *See Green v. Johnson*, 160 F.3d 1029, 1043-44 (5th Cir. 1998) (rejecting a similar claim when the petitioner offered "only the conclusory allegation that 'significant proceedings affecting substantial rights of the accused have been lost forever"). Batiste, therefore, has not shown that the state habeas court's judgment was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

I. Jury Instruction on Mitigating Evidence

Batiste's tenth claim complains that the trial court denied his Eighth Amendment rights by providing the jurors a definition of mitigating evidence that restricted their consideration of his punishment-phase evidence. The trial court gave the commonly used Texas instruction: "[Y]ou shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness, including evidence of the defendant's background, character, record,

emotional instability, intelligence, or the circumstances of the offense that mitigates against the imposition of the death penalty." C.R. at 1709; *see also* TEX. CODE CRIM. PRO. art. 37.071 § 2(g) (describing mitigating evidence as "evidence that a juror might regard as reducing the defendant's moral blameworthiness."). Even though the instruction given by the trial court informs jurors to consider broad factors such as a defendant's background and character, Batiste argues that the instructions confined the jury to considering only matters relating to his "personal culpability" because of the term "moral blameworthiness." C.R. at 435.

Batiste raised this claim on state habeas review. The state habeas court found that the Court of Criminal Appeals had "previously rejected the argument that TEX. CRIM. PRO. CODE art. 37.071 unconstitutionally narrows a jury's discretion to consider as mitigating only those factors concerning moral blameworthiness." S.H.R. at 977 (citing *Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App. 1996)). The state habeas court found that "the punishment instructions . . . allowed the jury to consider all submitted evidence in answering the special issues" and "did not restrict the jury to consider as mitigating only evidence that reduced [Batiste's] moral blameworthiness." S.H.R. at 977.

The law is clear that Texas' mitigation special issue provides a constitutionally acceptable vehicle to consider mitigating evidence. In fact, the Fifth Circuit has "rejected similar arguments multiple times." *Rockwell v. Davis*, 853 F.3d 758, 763 (5th Cir. 2017); *see also Blue v. Thaler*, 665 F.3d 647, 665-66 (5th Cir. 2011); *Robles v. Thaler*, 344 F. App'x 60, 63-64 (5th Cir. 2009); *Cantu v. Quarterman*, 341 F. App'x 55, 60-61 (5th Cir. 2009); *Roach v. Quarterman*, 220 F. App'x 270, 277 (5th Cir. 2007); *Jackson v. Dretke*, 181 F. App'x 400, 413-14 (5th Cir. 2006); *O'Brien v. Dretke*, 156 F. App'x 724, 735-36 (5th Cir. 2005); *Beazley*, 242 F.3d at 260. Accordingly, Batiste has not

shown that the state court's decision regarding his challenge to the trial court's mitigation instruction was contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1).[31]

J. Selection of Grounds for Relief

Batiste claims for the first time on federal review that his appellate and habeas attorneys should have challenged Texas' capital punishment scheme under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. Batiste's failure to exhaust this claim makes it subject to dismissal, but it also lacks merit. Inmates have repeatedly challenged *Apprendi*'s application to Texas. Here, Batiste argues that his former attorneys should have argued that *Apprendi* requires that the indictment include findings on the future-dangerous special issue. The Court of Criminal Appeals, however, has rejected any application of *Apprendi* to a grand jury indictment. *See Velez v. State*, 2012 WL 2130890, at *34 (Tex. Crim. App. 2012); *Thompson v. State*, 2007 WL 3208755 (Tex. Crim. App. 2007); *Roberts v. State*, 220 S.W.3d 521, 535 (Tex. Crim. App. 2007); *Renteria v. State*, 206 S.W.3d 689, 709 (Tex. Crim. App. 2006); *Russeau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005); *see also Bigby v. Stephens*, 595 F. App'x 350, 354 (5th Cir. 2014).[32] An appellate or habeas attorney cannot provide ineffective assistance by, and no prejudice can result from, not raising a legal claim repeatedly rejected by the federal and state courts. This claim is without merit.

[31] Batiste also claims that trial counsel provided ineffective assistance by not requesting a jury instruction that clarified with the term "mitigating evidence." The state habeas court found that "the punishment charge submitted to the jury comported with TEX. CODE CRIM. PROC. art. 37.071 therefore trial counsel was not ineffective for failing to object to the charge on the basis urged in the instant ground for relief." S.H.R. at 977. In light of the discussion above, Batiste has not shown that the state habeas court's decision was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

[32] The Supreme Court has never held that the indictment provisions of the Fifth Amendment apply to the States through the Fourteenth Amendment. *See, e.g., Branzburg v. Haynes*, 408 U.S. 665, 686-88 n.25 (1972) (noting that "indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment"); *see also Apprendi*, 530 U.S. at 477 n.3 (declining to discuss the implications of that decision on the sufficiency of an indictment).

K. First Amendment

Batiste was wearing a blue necklace when the police arrested him for murdering Horace Holiday.[33] Clint Ponder, a Houston Police Department gang officer, provided the only testimony about the necklace. When the State introduced the blue necklace into evidence, the parties approached the bench and trial counsel objected on relevance grounds. Tr. Vol. 18 at 173. The trial court identified the necklace as "a scapular," to which the prosecutor responded: "it's very similar to a scapular, but it's actually – instead of a Catholic saint, that it's what would be known in English as Saint Death. . . . They're commonly worn, especially in Hispanic gangs more often in the drug cartels. Before they go and commit crimes, they wear them as a form of protection from the police." Tr. Vol. 18 at 174.[34] Trial counsel unsuccessfully renewed his objection to the necklace, and testimony about it, on grounds of "relevance, [and] lack of foundation on the part of the witness. Not that they didn't try to get it in. And a [Rule] 403 objection." Tr. Vol. 18 at 174.

Officer Ponder then provided the jury a brief description of the necklace as being blue, a color worn by Crips gang members, with a "grim reaper" figure attached. Tr. Vol. 18 at 175, 177. Officer Ponder identified the necklace as a "Santa Muerte necklace" and explained its significance:

> Santa Muerte is a saint that a lot of guys will worship to ward off the police or . . . different people worship it for different things, but in a criminal world, you see a lot of guys wearing these, drug traffickers wear necklaces or detailed [on] the back of their car or shrines in their apartment. And they pray to the saint for various reasons, but in the criminal world, it's to keep the cops away. If you're making a big drug run

[33] A police officer remarked earlier at trial that Batiste wore a "blue necklace that was around his neck" when arrested. Tr. vol. 14 at 184. The Court of Criminal Appeals observed that "[n]either the necklace, nor a photograph of it, is in the appellate record." Opinion on Direct Appeal at 8.

[34] The prosecution explained that Batiste wore the necklace because "he's married to a Hispanic person." Tr. Vol. 18 at 174.

> across the state, a big package of marijuana from one state to the next, you wear this in hopes that you get to your destination without the cops stopping you, but it's – in the criminal world, it's worn for that, to keep the police away and hope your criminal endeavor goes okay.

Tr. Vol. 18 at 175. Officer Ponder affirmed that "non-gang members, non-criminals, also have items that might have Santa Muerte on them" and "[n]ot everybody wearing a Santa Muerte is a criminal." Tr. Vol. 18 at 176. Officer Ponder also agreed that "somebody who was going to commit a crime might wear" a Santa Muerte necklace. Tr. Vol. 18 at 176.[35]

Officer Ponder then gave extensive testimony about Batiste's various gang-related tattoos. Tr. Vol. 18 at 177-195. The prosecution also set the stage for later discussion of Batiste's prison letters by discussing with Officer Ponder idiosyncratic features in writing and clothing by Crips members. Tr. Vol. 195-200. Trial counsel did not ask Officer Ponder any questions.

Batiste raised several complaints about the necklace and related testimony on direct appeal, including that it "(1) violated his right to the free exercise of religion under the federal and Texas constitutions, (2) was irrelevant under Article 37.071, (3) should have been excluded under Rule 403, and (4) was not properly authenticated." On federal review, Batiste argues that the trial court violated his First Amendment rights by commenting on his religious background and practices.[36] Batiste also claims that trial counsel should have raised a First Amendment objection.

[35] Cases have linked the image of Santa Muerte to drug trafficking or criminal activity. *See United States v. Guerrero*, 768 F.3d 351, 356 (5th Cir. 2014); *United States v. Beltran-Aguilar*, 412 F. App'x 171 (10th Cir. 2011); *United States v. Pena Ponce*, 588 F.3d 579 (8th Cir. 2009).

[36] The First Amendment protects an individual's right to associate with others who hold similar beliefs. *Dawson v. Delaware*, 503 U.S. 159, 164 (1992). However, the Constitution does not prohibit the admission of evidence concerning an individual's beliefs and associations at sentencing "simply because those beliefs and associations are protected by the First Amendment." *Id*. at 165; *see also Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997) ("The fact that Fuller was within his rights in joining the gang does not bar the use of relevant evidence at trial."). Evidence concerning Batiste's gang membership was admissible because testimony showed he was a member of a gang that committed unlawful and violent acts.

Batiste, however, does not present his First Amendment arguments in a procedural actionable manner. Trial counsel did not object based on the First Amendment. Relying on TEX. R. APP. P. 33.1(a)(1)(A), the Court of Criminal Appeals held that Batiste "failed to preserve . . . any First Amendment or religious issue." Opinion on Direct Appeal at 9. In other words, the appellate court relied on Texas' contemporaneous-objection rule to preclude consideration of any First Amendment issue. *See Evans v. Cockrell*, 285 F.3d 370, 373 (5th Cir. 2002) (linking TEX. R. APP. P. 33.1 and Texas' judicial contemporaneous-objection rule). "The 'Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims.'" *Styron v. Johnson*, 262 F.3d 436, 453 (5th Cir. 2001) (quoting *Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir. 1999). The First Amendment portions of this claim are procedurally barred.

The Court of Criminal Appeals discussed the Santa Muerte necklace's religious implications in a footnote. The Court of Criminal Appeals observed that "[a]t no time did the prosecutor or the gang expert suggest that Batiste's necklace had any significance to the exercise of a bona fide religion." Opinion on Direct Appeal at 9, n.6. After reviewing state and federal cases addressing the relationship between Santa Muerte worship and drug trafficking, the Court of Criminal Appeals observed that "Officer Ponder never referred to [Batiste's] religious beliefs or affiliations; he simply stated that the Crips gang uses the color blue as was used in the necklace and that the 'grim reaper' pendant is used by criminal gangs. The logical connection to be made is between 'Santa Muerte' necklace and gang membership and criminal activities, not between wearing a 'Santa Muerte' necklace and being religious or being Catholic." Opinion on Direct Appeal at 9, n.6.

The state habeas court's reasoning traveled a similar path in finding that trial counsel did not provide ineffective representation by not lodging an objection on First Amendment grounds. The state habeas court held that such an objection would have been meritless because "the State did not introduce into evidence that the scapular had any significance to the exercise of religion." S.H.R. at 990. Also, no prejudice resulted because "the evidence of [Batiste's] two capital murders, an aggravated robbery, and multiple bad acts was particularly strong." S.H.R. at 990. Appellate counsel also did not provide ineffective assistance by not raising trial counsel's effectiveness in that regard because Batiste did "not demonstrate that he would have prevailed on appeal" and because "appellate counsel chose to raise other claims on direct appeal regarding the Santa Muerte scapular." S.H.R. at 990.

The state court's rejection of any First Amendment claims was not unreasonable. This is not a case where, as Batiste alleges, "the State repeatedly injected the issue of religion." Dkt. 9 at 279. The State focused its references to the medallion on the gang and criminal, not religious, implications of wearing it. Interestingly, Batiste has never presented any evidence, through affidavit or otherwise, to establish what the Santa Muerte necklace meant to him. Batiste's briefing presumes that, because the medallion can have a religious meaning, it did to him. The record, however, does not provide any indication of whether Batiste wore the medallion for religious worship, as protection in the drug trade as suggested by the prosecution, or for some unrelated reason.[37] Batiste's claim presumes that he intended the medallion to be a manifestation of sincerely held religious conviction, though the record is entirely silent on that point.

[37] The defense, in fact, seemed to question whether Batiste even knew that the necklace represented Santa Muerte. Tr. Vol. 18 at 173.

Even so, Batiste has not identified any case law precluding a trial discussion of a Santa Muerte symbol on First Amendment grounds. Federal courts often cite testimony about the use of Santa Muerte by drug traffickers or other criminals without expressing any constitutional concern. *See United States v. Garcia-Coronado*, 657 F. App'x 648, 649 (9th Cir. 2016); *United State v. Zaragoza-Moreira*, 780 F.3d 971, 976 (9th Cir. 2015); *United States v. Guerrero*, 768 F.3d 351, 356 (5th Cir. 2014); *but see United States v. Medina-Copete*, 757 F.3d 1092, 1095 (10th Cir. 2014) (avoiding any constitutional question because trial discussion of Santa Muerte came through the testimony of a witnesses improperly qualified as an expert). Nevertheless, Officer Ponder's testimony did not necessarily link the Santa Muerte necklace to religious beliefs or practices, but instead observed its common use among some criminals. Officer Ponder also explained the distinctiveness of the necklace in this instance where it, contrary to other practices, contained colors associated with the Crips gang. Batiste has not shown any violation of his First Amendment rights at trial.

Batiste has not shown that the presentation and discussion of the Santa Muerte necklace prejudiced the defense. Whether Batiste casts his claim in a First Amendment, *Strickland*, or other framework, federal relief only becomes available after some showing of harm. Batiste has not shown that the necklace had any measurable effect on the jury's consideration of the special issue questions. The discussion of the necklace was brief. Officer Ponder explained why some people may wear such a necklace, but did not provide the jury with any definitive description of why Batiste chose to do so. Even then, the necklace's "probative value concerning [Batiste's] character and gang membership was not particularly compelling—not nearly as compelling as the myriad gang tattoos on his body . . . ." Opinion on Direct Appeal at 13. The discussion of the necklace was the prelude

to a lengthy and detailed discussion, comprising numerous pages of transcript, of how Batiste adorned himself with other signs of violence and lawlessness. The abundant and detailed testimony about Batiste's numerous gang-related tattoos would eclipse any short mention of the Santa Muerte necklace, particularly given the fact that the State did not return to discuss the necklace in closing arguments but amply addressed his gang tattoos. Nothing else in the record suggested that, as Batiste committed the repeated and extremely violent acts upon which the State premised its punishment case, he relied on divine or talismanic protection. When properly placed in the detailed landscape of the punishment phase, the necklace was of only incidental importance. Whether assessing the trial under a reasonable-probability, harmlessness, or other standard, Batiste has not shown that the admission of, and testimony about, the necklace prejudiced the defense. *See United States v. Esquivel-Rios*, 725 F.3d 1231, 1241 (10th Cir. 2013) (finding any error harmless when a government agent identified a Santa Muerte tattoo).

For the same reasons as discussed above, and in light of the fact that the state habeas court found that the "trial court would not have abused his discretion in overruling a First Amendment objection," Batiste has not shown that trial counsel should have objected to the necklace on First Amendment grounds. S.H.R. at 990. The Court denies Batiste's claims relating to his Santa Muerte necklace.

L. Spectator Outbursts and Victim-Impact Testimony

Batiste argues that the trial court violated Texas evidentiary law by allowing victim-impact testimony (claim eighteen) and that courtroom disruptions violated his due process rights (claim nineteen). Batiste's claims arise from three concerns: the trial court (1) did not prevent emotional outbursts by people observing the trial; (2) allowed family members to testify constructively through

emotional outbursts and (3) permitted one victim's mother to relate hearsay statements. Federal procedural and substantive law preclude habeas relief on these claims.

Batiste first argues that outbursts during trial violated his right to confront witnesses and to due process. The record indicates that some family members present in the courtroom reacted emotionally to trial testimony. The State requested that the trial court allow Horace Holiday's mother, grandmother, and uncle to be present in the courtroom during trial. Tr. Vol. 13 at 3. The trial court overruled the defense's objection that family members should be excluded from the courtroom for fear that they would become emotional.

As an assistant medical examiner testified about Mr. Holiday's death, the trial court requested a bench conference because Mr. Holiday's family was "all crying over there." Tr. Vol. 16 at 20-21. The prosecutor opined that she had heard some "sniffling," but had not heard any crying. Tr. Vol. 16 at 22. Trial counsel did not want to draw attention to the crying by asking for a jury instruction, but instead unsuccessfully requested a mistrial. Tr. Vol. 16 at 23.

In another incident, an unidentified spectator loudly said "Amen" when the prosecutor questioned Batiste "[i]f you were scared [during the Black Widow robbery] why did you do this robbery in the first place?" Tr. Vol. 24 at 208. Batiste attributes the outburst to the victim's uncle. Trial counsel did not object to the outburst. The trial court later made the following statement to courtroom spectators outside the jury's presence:

> I wanted to tell the rest of you, we had a little bit of an outburst out there. I'm asking you again if you feel like you can't be quiet while you're sitting there as a spectator in this trial, don't come in because it is – we still have a lot of testimony to go on and we don't want anything to jeopardize the jury. And I would remind you that I would have to use whatever contempt powers I have.
>
> So, please do not say anything while you're sitting out there.

Tr. Vol. 24 at 230. Batiste complains that these audible outbursts deprived him of a fair trial.

On direct appeal, the Court of Criminal Appeals observed that emotional outbursts by grieving family members is "one potential hazard in a society that cherishes the right to a public trial." Opinion on Direct Appeal at 21. The Court of Criminal Appeals continued: "The defendant in a criminal trial has the constitutional right to a trial that is open to the public; and the public – including both the defendant's and victim's family members – also has a right to attend criminal trials." Opinion on Direct Appeal at 21 (footnotes omitted). The Court of Criminal Appeals' review of the record led it to conclude:

> The mere fact that, at a couple of points during gruesome testimony, one or more of Mr. Holiday's family members were crying or sniffling does not show that the trial judge abused his discretion or that [Batiste] was denied a fair trial. Even a disruptive outburst by a witness or other bystander "which interferes with the normal proceedings of a trial will not result in reversible error unless the defendant shows a reasonable probability that the conduct interfered with the jury's verdict."

Opinion on Direct Appeal at 23-24 (quoting *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009)). The Court of Criminal Appeals did not find any error because "[n]othing in this record suggests that the jury could not (1) ignore those occasions when Mr. Holiday's family members showed some emotion or (2) fairly examine the evidence in arriving at a verdict." Opinion on Direct Appeal at 24. Batiste's briefing does not show that the state court's assessment of those outbursts was unreasonable.

Batiste also complains that outbursts by Mr. Holiday's uncle (who was never called to the stand) was the equivalent of actual testimony, subject to confrontation and cross-examination under *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). The Court of Criminal Appeals, however, correctly observed that *Crawford* "applies only to those who offer testimony or testimonial statements." Opinion on Direct Appeal at 20, n.36. The Court of Criminal Appeals explained that

"Mr. Holiday's uncle cannot be said to have 'testified' against the defendant by sitting in the courtroom during public proceedings, even when he may have exhibited some emotion." Opinion on Direct Appeal at 20, n. 36.[38] Batiste has not shown any federal law extending *Crawford* to an outburst by someone who is not testifying. *See Turner v. Johnson*, 2017 WL 2819039 (C.D. Cal. Mar. 29, 2017) ("Petitioner's right of confrontation was not implicated here because the spectator was not a witness against Petitioner and his comments were not offered as testimony at trial."). Without clearly established federal law extending *Crawford* in the same manner as in Batiste's claim, and with *Teague*'s limitation on the creation of new law, habeas relief is not available on this argument.

Finally, Batiste complains because the trial court allowed Holiday's mother to relate hearsay statements. During her trial testimony, Mr. Holiday's mother mentioned that he had saved his money to buy the wheel rims for his Cadillac. Batiste complains that the contrast between the victim's hard work and his own robbery to obtain the rims was "a contrast that rises to the level of an impermissible use of victim impact evidence to compare the value of the complainant to other members of society." Dkt. 9 at 287. The Court of Criminal Appeals refused to consider this argument under TEX. R. APP. P. 33.1 because trial counsel did not make a hearsay objection, a holding that likewise bars federal habeas review. The Court of Criminal Appeals also found that state law did not forbid that "type of comparison" and that any error was harmless. Opinion on

[38] Because Batiste "cite[d] no legal authority for his suggestion that 'the presence and actions' of Mr. Holiday's uncle in the courtroom 'were effectively testimonial'" and the Court of Criminal Appeals was "also unable to find any," this "aspect of [Batiste's] claim" was procedurally defaulted as "[in]adequately briefed and present[ing] nothing for review." Opinion on Direct Appeal at 20, n.36 (citing TEX. R. APP. P. 38.1(I)). Texas' briefing requirements "constitute[] an independent and adequate state ground for denial of relief that procedurally bars federal habeas review." *Roberts v. Thaler*, 681 F.3d 597, 608 (5th Cir. 2012). As Batiste has not shown cause or prejudice to overcome the procedural bar, this Court cannot grant relief on his aspect of his federal claim.

Direct Appeal at 21, n.36. Because no clearly established federal law prohibits the testimony about Mr. Holiday's efforts to obtain the rims, and the testimony played only a minor role at trial, the state habeas court was not unreasonable in denying this aspect of Batiste's claim.

M. Execution-Impact Testimony

Batiste claims that the trial court should have allowed testimony on how his execution would impact his family members.[39] Batiste draws comparison to the Supreme Court's holding in *Payne v. Tennessee*, 501 U.S. 808 (1991), which held that the constitution permits the prosecution to present victim-impact evidence. The Supreme Court, however, has not included execution-impact testimony within the category of mitigating evidence that must be allowed to come before jurors. *See United States v. Snarr*, 704 F.3d 368, 401-02 (5th Cir. 2013); *United States v. Jackson*, 549 F.3d 963, 969 n.3 (5th Cir. 2008); *Jackson v. Dretke*, 450 F.3d 614, 618 (5th Cir. 2006). The Fifth Circuit has observed that execution-impact claims

> ignore the reasoning behind the Court's holding in *Payne*. Because victim impact evidence relates to the harm caused by the defendant, *Payne* held that it is relevant to the jury's assessment of 'the defendant's moral culpability and blameworthiness.' In this respect, victim-impact evidence fundamentally differs from execution impact evidence, which in no way reflects on the defendant's culpability.

Snarr, 704 F.3d at 401-02 (quoting *Payne*, 501 U.S. at 825); *see also Jackson*, 450 F.3d at 618. For those reasons, the Court of Criminal Appeals rejection of this claim was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

[39] Trial counsel filed a pre-trial Motion to Introduce the Testimony of Defendant's Family and Friends Regarding their Feelings on the Prospect of a Death Sentence. C.R. at 1742. The trial court summarily denied that motion. Batiste argues that the trial court should have allowed the testimony from his family members.

N. Dismissal for Cause

Batiste claims that the trial court violated his constitutional rights by granting the State's motion to dismiss prospective juror Alexandria Dunwood for cause. As will be discussed below, the trial court excused Ms. Dunwood because she repeatedly said that she could not return a death sentence in this case. Exclusion of prospective jurors "hesitant in their ability to sentence a defendant to death" without any limitations violates the Fourth and Fourteenth amendments. *Morgan v. Illinois*, 504 U.S. 719, 732 (1992); *see also Adams v. Texas*, 448 U.S. 38, 45 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968). The State must demonstrate through questioning that the potential juror it seeks to exclude lacks impartiality, and the judge must then determine whether the state's challenge is proper. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985). Thus, the key issue is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams*, 448 U.S. at 45).

The exclusion of potential jurors is a question of fact. *See McCoy v. Lynaugh*, 874 F.2d 954, 960 (5th Cir. 1989); *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). The factual determinations of the Texas Court of Criminal Appeals are presumed to be correct, and the petitioner has the burden of rebutting these determinations by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). This Court can grant federal habeas relief only if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Fuller v. Johnson*, 114 F.3d 491, 500-01 (5th Cir. 1997) (holding that a trial court's finding of juror bias is entitled to a presumption of correctness)

The prosecution questioned Alexandria Dunwood first. After a few preliminary inquires regarding her responses on the jury questionnaire about capital punishment, the prosecutor observed that Ms. Dunwood had not answered the question of whether she had any moral, religious, or personal beliefs that would prevent her from rendering a verdict that would result in execution. Tr. Vol. 8 at 103. Ms. Dunwood said that she did not answer the question because she "really [didn't] know what [her] answer would be to that question." Tr. Vol. 8 at 103. Throughout the remainder of the State's questioning, Ms. Dunwood consistently expressed that she could not return a verdict resulting in a death sentence. Tr. Vol. 8 at 104-05. After repeated questions resulting in similar answers, the State said that it "has a motion." Tr. Vol. 8 at 105. While the State did not elaborate that it intended to challenge Ms. Dunwood for cause, the defense's subsequent questioning shows that the parties understood that was the State's intention and that the for-cause challenge related to her inability to return a death sentence.

The defense asked several questions, and Ms. Dunwood repeatedly answered that she could not render a death sentence. Ms Dunwood affirmed that she could not do so "no matter what" and without regard to "how bad the case was." Tr. Vol. 8 at 107. Ms. Dunwood's answer to the final question put to her, however, gives rise to the instant claim:

> Q: Let me see if I hear what you're saying. Are you saying that you might could find someone guilty of capital murder, but you would never be able to give him the death sentence?
> A: Yes.
> Q: No matter what the answers to the questions ought to be, you wouldn't be able to answer them because you could not ever participate in giving someone the death penalty?
> A: True.
> Q: No matter what they did?
> A: Uh-huh.
> Q: No matter how bad it was?

A: *It depends on what actually happened during the case to me.*

Tr. Vol. 8 at 107 (emphasis added). The State then objected to "any further questioning" because "She's already made herself clear. And further battering by the defense counsel I don't think we should get her – make her change her answer to that question." Tr. Vol. 8 at 107. The trial court sustained that objection and granted the State's challenge for cause. Trial counsel, however, had Ms. Dunwood clarify that the defense was not battering her. Tr. Vol. at 8 at 108.

After the trial court excused Ms. Dunwood, the defense objected that her last answer indicated an ability to serve "depend[ing] on what the evidence was." Tr. Vol. 8 at 108. The State responded by asking the trial court to "make a finding on the record as to what her demeanor was and the way she answered the questions . . . ." Tr. Vol. 8 at 109. The trial court stated that "[s]he obviously, obviously said that she could not do it. And I believe that any further questioning would be fruitless." Tr. Vol. 8 at 109.

Batiste challenged the dismissal of Ms. Dunwood on direct appeal. Under Texas law, appellate courts review the State's for-cause challenge with "considerable deference" because the trial court is in the best position to evaluate a prospective juror's demeanor and responses. *Hernandez v. State*, 390 S.W.3d 310, 317 (Tex. Crim. App. 2012). Texas appellate courts pay particular deference when a prospective juror's answers are vacillating, unclear, or contradictory. *Id*. A federal habeas court's respect for such a finding "certainly should be no less." *Ortiz v. Quarterman*, 504 F.3d 492, 502 (5th Cir. 2007).

Here, the Court of Criminal Appeals found no error in the dismissal of Ms. Dunwood for cause:

> Ms. Dunwood's final statement was the only response indicating that she might be open to considering a death sentence. Viewed in context, that one statement does not

> convince us that she was an impartial juror. More importantly, it did not convince the trial judge, to whom we owe great deference. First, Ms. Dunwood had not answered any capital-punishment questions on the questionnaire. When asked why, she explained that initially she was unsure, but, after thinking about it, voting to impose a death sentence was "probably not something [she] could do." Second, Ms. Dunwood agreed that (1) she "could not sit on a jury where the [State] is seeking the death penalty," (2) "it would do violence to [her] conscience to have to answer questions in a way that could cause the defendant to be executed," and (3) she had "conscientious scruples in regard to the infliction of the punishment of death[.]" This is not the mind set of an impartial juror willing to consider both a life and a death sentence.
>
> During defense questioning, Ms. Dunwood continued to answer in the same vein, noting that she "could find someone guilty of capital murder, but [she] would never be able to give him the death sentence." She agreed that "no matter what the answers to the questions ought to be, [she] wouldn't be able to answer them because [she] could not ever participate in giving somebody the death penalty." It was only after all of this questioning, that Ms. Dunwood said that her decision to impose capital punishment "depends on what actually happened during the case."
>
> At best, Ms. Dunwood was a "vacillating juror," but even that is dubious. Only after unequivocally saying that she could not be impartial eight different times, did Ms. Dunwood say that her decision would "depend on the facts of the case." This single response does not establish her ability to follow the law; her answer may have been a concession to stop a seemingly endless barrage of questions. The significance of her answer, taking into account her accompanying tone and demeanor, was a factual determination for the trial judge.

Opinion on Direct Appeal at 34-35.

In all of the repeated questioning, Ms. Dunwood only possibly wavered in one instance. Notwithstanding that answer, the trial court did not hesitate to find that Ms. Dunwood's personal opinions would prevent her from following the law. The "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from the appellate record." *Id.* at 429. Indeed,

> [d]espite this lack of clarity [regarding a prospective juror's bias] in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [T]his is why deference must be paid the trial judge who sees and hears the juror.

Witt, 469 U.S. at 425-26. Despite her single statement during the defense examination, the trial court could reasonably conclude that Ms. Dunwod would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following [her] oath[]." *Witt*, 469 U.S. at 423. As the trial court clearly could have been "left with the definite impression that [Ms. Dunwood] would be unable to faithfully and impartially apply the law," *Witt*, 469 U.S. at 426, the trial court had a reasonable basis for granting the State's challenge for cause. Batiste, therefore, has not met his AEDPA burden of overcoming the state court's factual determination regarding her answers and demeanor.

O. Statements to Police Officers

Batiste made several incriminating statements to police officers after the murder. Immediately after being pulled over, Batiste responded to questions about whether he had been shot. Batiste also confessed to the murder for which he was convicted, and other crimes, during a subsequent police interrogation. After hearing testimony in a suppression hearing, the trial court allowed Batiste's statements to come before the jury.[40] The trial court issued findings and conclusions determining that Batiste's statements were voluntary. C.R. at 1801-05. In claims twenty-five and twenty-six, Batiste complains that the trial court should have suppressed his first statement as it resulted from a custodial interrogation without the safeguards of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In claims twenty-seven through twenty-nine, Batiste contends that the trial court should have suppressed his statements during a later police interrogation because he had already made an inadmissible statement. Batiste must show that the state courts were unreasonable in finding that his statements were admissible.

[40] The record contains Batiste's statement to Officer Miller at Tr. Vol. 35, Exhibit DX-1.

1. Initial Comments

Batiste repeatedly shot the victim as he drove down the freeway. Blood covered the inside of the victim's car when Batiste drove it away from the scene of the murder. Police officers knew that Batiste had fired shots when the Cadillac had stopped at the gas station; they did not know the whole series of events that led to Batiste stealing the car. Tr. Vol. 13 at 91. Batiste eluded police officers for some time until spike strips blew out the Cadillac's tires. Police officers, including Harris County Sheriff Officer Christopher Gore, took Batiste into custody. Officers handcuffed Batiste and put him in the back of a police car.

At that point, Officer Gore went to "clear[] the vehicle and ma[ke] sure it was safe." Tr. Vol. 13 at 79. Officer Gore then noticed "blood spatter throughout the interior of the vehicle and another small caliber handgun in the front seat." Tr. Vol. 13 at 80. "With the amount of blood that [he] saw," Officer Gore told another officer: "I wonder if this guy's been shot, there's blood everywhere." Tr. Vol. 13 at 81. The other officer said: "Go check on him, make sure he's not injured. That way if he is we can get him medical attention." Tr. Vol. 13 at 82.

Officer Gore then approached Batiste who was still sitting in a patrol car, under arrest. Officer Gore saw blood on Batiste. Officer Gore asked "if he had been shot." Tr. Vol. 13 at 82. The conversation that gives rise to the instant claim then took place:

Batiste: No, I'm fine.
Officer Gore: Well, you've got blood all over you.
Batiste: That's not mine. That's the driver's.
Officer Gore: Well, you were driving.
Batiste: No. It belongs to the guy I took the car from.

Tr. Vol. 13 at 82-83. Batiste argues that Officer Gore subjected him to a custodial interrogation and, because he did not receive his *Miranda* warnings, the trial court should not have allowed Officer Gore to tell jurors how Batiste had responded to his questions.

In *Miranda*, the Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. Custodial interrogation consists of questioning by law enforcement agents "after a person has been taken into custody." *Id*. The "term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980). An incriminating response is "any statement – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial." *Id*. at 301 n. 5.

The State conceded that Batiste was in custody when Officer Gore asked if he had been shot, but argued that Officer Gore did not interrogate him. Tr. Vol. 13 at 87-88. The Court of Criminal Appeals found that "[i]t is undisputed that [Batiste] was in custody," leaving only "the legal question [of] whether Sgt. Gore 'interrogated' [him] for the purposes of *Miranda*." Opinion on Direct Appeal at 37. Interrogation includes "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301. Certain questions "normally attendant to arrest and custody" such as those concerning a suspect's "name, address, height, weight, eye color, date of birth, and current age" are not an interrogation. *See Pennsylvania v. Muniz*, 496

U.S. 582 (1990). The State argued that Officer Gore's questions were not the functional equivalent of an interrogation because he "had a responsibility to make certain [Batiste] was not injured." Tr. Vol. 13 at 88.

Here, Officer Gore's question about whether Batiste was injured was not "reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301. On direct appeal, the Court of Criminal Appeals could not "say that Sgt. Gore was acting under the guise of inquiring about [Batiste's] medical condition, but actually hoping to elicit an incriminating response." Opinion on Direct Appeal at 39.[41] Officer Gore "repeatedly explained that his sole purpose in questioning was to 'check on his medical condition.'" Opinion on Direct Appeal at 39. The Court of Criminal Appeals observed that "police officers are under a general duty to ensure that, if a suspect is injured, he is provided proper medical attention. The question Sgt. Gore asked [Batiste] was in furtherance of this duty. Once Sgt. Gore was assured that [Batiste] did not need immediate medical attention, he ceased questioning." Opinion on Direct Appeal at 40. Even looking at the question "from a suspect's point of view," the question posed "was not one likely to elicit an incriminating response," because it only required a yes or no answer, neither of which "would have been incriminating." Opinion on Direct Appeal at 40. Officer Gore made "an inquiry that was appropriate under the circumstances and one that did not raise any concern of coerciveness or compulsion." Opinion on Direct Appeal at 41.

[41] The Court of Criminal Appeals "review[s] a trial judge's denial of a *Miranda*-violation claim under a bifurcated standard." When the trial judge has made factual findings, the Court of Criminal Appeals "afford[s] almost total deference . . . to fact rulings that turn on credibility and demeanor." Opinion on Direct Appeal at 39. "When there is no factual dispute as to whether *Miranda* warnings were given, what questions the officer asked, or what answers the defendant gave, the question of whether the defendant was subjected to 'interrogation' is a mixed question of fact and law reviewed *de novo* because there are no disputed issues of fact that depend upon credibility or demeanor." Opinion on Direct Appeal at 39.

Batiste has not shown that general on-the-scene questioning which enables an officer to determine if a suspect as been injured is an interrogation under *Miranda*.

Batiste provided a confusing answer to Officer Gore's initial question. He told Officer Gore that the driver had been shot, but without more-detailed information about the circumstances leading up to the chase, Officer Gore would not know that Batiste meant the victim. As the Court of Criminal Appeals observed, Batiste "responded with an answer to that question [which] was confusing and required some follow-up to ensure that (1) [he] was not actually suffering from a serious wound or trauma but was too confused or delusional to relay the correct information to the officer, or (2) there was not another person—perhaps the driver—who had been in the car with him, who may have left the scene, and was either a security threat or in need of immediate medical attention." Opinion on Direct Appeal at 41. "In sum, Sgt. Gore's questions neither presented [Batiste] with the 'psychological intimidation' associated with a police interrogation nor was it an underhanded way of bypassing *Miranda* and eliciting an incriminating response." Opinion on Direct Appeal at 41. Batiste's answer that the blood belonged to "the driver" confused the officers who had just seen him drive the car. Tr. Vol. 13 at 82-85, 92-93. Because Officer Gore's follow-up question was not reasonably likely to evoke an incriminating response, but only clarified who had been the driver that had left so much blood in the car, it does not constitute interrogation. *See Innis*, 446 U.S. 291 at 301. The state habeas court's rejection of Batiste's challenge to his initial statements was not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

2. Police Statements

Batiste made several incriminating statements after the police transported him to the police station. Batiste first gave a recorded statement in which he confessed to the murder for which he was

eventually convicted. Tr. Vol. 14 at 138-48. About twelve hours later, a police officer interrogated Batiste about the murder he committed at the Black Widow tattoo parlor. The police officer taking that statement said that he delivered the *Miranda* warnings before speaking to Batiste. Tr. Vol. 11 at 59. Batiste gave an initial unrecorded confession to the crime, followed by a recorded statement reconfirming his guilt. A different officer later took a recorded statement in which Batiste confessed to robbing the Phat Kats tattoo parlor.

The trial court found that the police properly warned Batiste prior to each interview and statement. C.R. at 1800-04. Batiste presents no evidence to rebut the state court's findings. Batiste nonetheless claims that the trial court should have suppressed all these statements because they violated the rule set forth in *Missouri v. Seibert*, 542 U.S. 600 (2004).

In *Seibert*, the police diluted the effect of *Miranda* warnings through a two-step strategy: a detective exhaustively questioned the suspect until securing a confession and then, after a brief break, delivered the *Miranda* warnings and had the suspect repeat the earlier confession. *Seibert* addressed a specific concern: "the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession." 542 U.S. at 609; *see also United States v. Montalvo-Rangel*, 437 F. App'x 316, 319 (5th Cir. 2011) (stating that *Seibert* condemned a "question first" police tactic, "a strategy by which officials interrogate an individual without administering a *Miranda* warning, obtain an admission, administer a *Miranda* warning, and then obtain the same admission again"). Batiste claims that Officer Gore intentionally interrogated Batiste and, once he inculpated himself, only then warned him of his constitutional rights in the subsequent questioning.

On direct appeal, the Court of Criminal Appeals found that Batiste had procedurally defaulted consideration of this claim by not making an argument for their suppression under *Seibert*. Opinion

on Direct Appeal at 44. Because Batiste has not shown cause or prejudice to overcome that state-law ruling, a procedural bar precludes federal consideration of this claim.

In the alternative, the Court of Criminal Appeals found that Batiste's *Seibert* claim lacked merit:

> Even if [Batiste] had preserved this issue for appeal, his claim is without merit. As we have previously concluded, [Batiste's] roadside statement to Sgt. Gore was not the product of custodial interrogation, and therefore Sgt. Gore was not required to give [him] any *Miranda* warnings before [his] responses were admissible at trial. Because [Batiste's] first statement was not the product of custodial interrogation, *Seibert* is inapplicable as the "question first, warn later" situation arises only when both the unwarned and warned statements are the product of custodial interrogation. Furthermore, there is no suggestion that the three officers who obtained station house confessions ever mentioned any statement that [Batiste] had already made to Sgt. Gore, or that Sgt. Gore's inquiry had been part of a deliberate two-step interrogation.

Opinion on Direct Appeal at 44-45. Batiste's federal *Seibert* claim is also wholly dependant on the presence of constitutional error in his statement to Officer Gore. Because Batiste has not shown that Officer Gore violated his constitutional rights through the same "question first, warn later" procedure condemned in *Seibert*, he has also not demonstrated any constitutional violation. Batiste has not shown that the state court adjudication was unreasonable, and accordingly has not shown that he merits habeas relief.

IV. CERTIFICATE OF APPEALABILITY

Under AEDPA, a prisoner cannot seek appellate review from a lower court's judgment without receiving a Certificate of Appealability ("COA"). *See* 28 U.S.C. § 2253(c). Batiste has not yet requested that this Court grant him a COA, though this Court can consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). A court may only issue a COA when "the

applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

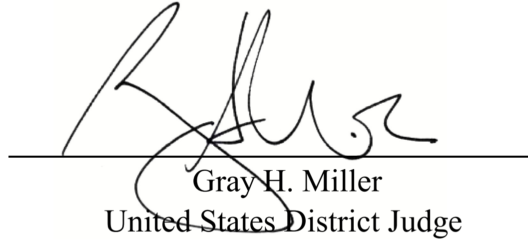
The Fifth Circuit holds that the severity of an inmate's punishment, even a sentence of death, "does not, in and of itself, require the issuance of a COA." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). The Fifth Circuit, however, anticipates that a court will resolve any questions about a COA in the death-row inmate's favor. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has explained the standard for evaluating the propriety of granting a COA on claims rejected on their merits as follows: "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*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. On the other hand, a district court that has denied habeas relief on procedural grounds should issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336-38. Unless the prisoner meets the COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Batiste's petition raises issues worthy of judicial review. Nevertheless, having considered the merits of Batiste's petition, and in light of AEDPA's standards and controlling precedent, this Court determines that a COA should not issue on any claim.

V. CONCLUSION

For the reasons described above, the Court GRANTS Respondent's motion for summary judgment, DENIES Batiste's petition, and DISMISSES this case WITH PREJUDICE. All other requests for relief are DENIED. The Court will not certify any issue for appellate review.

Signed at Houston, Texas on September 19, 2017.



Gray H. Miller
United States District Judge

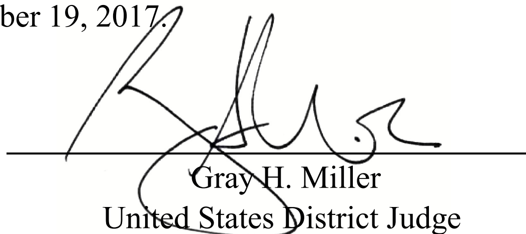
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TEDDRICK BATISTE,	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION H-15-1258
	§	
LORIE DAVIS,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

The Court **DENIES** Teddrick Batiste's petition for a writ of habeas corpus and **DISMISSES** this case **WITH PREJUDICE**. No certificate of appealability will issue.

Signed at Houston, Texas on September 19, 2017.



Gray H. Miller
United States District Judge

Tab 4

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-81,570-01

EX PARTE TEDDRICK R. BATISTE

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. 1212366 IN THE 174TH DISTRICT COURT HARRIS COUNTY

Per curiam. HERVEY, J., not participating.

O R D E R

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

Applicant was convicted in June 2011 of capital murder committed in April 2009. TEX. PENAL CODE ANN. § 19.03(a). Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure, Article 37.071, sections 2(b) and 2(e), the

trial court sentenced him to death. Art. 37.071, § 2(g).[1] This Court affirmed applicant's conviction and sentence on direct appeal. *Batiste v. State,* No. AP-76,600 (Tex. Crim. App. June 5, 2013) (not designated for publication), *cert. denied*.

Applicant presented seventeen allegations in his application in which he challenges the validity of his conviction and sentence. The trial court did not hold a live evidentiary hearing. As to all of these allegations, the trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 29TH DAY OF APRIL, 2015.

Do Not Publish

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[1] Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

Tab 5

Original

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FILED
Chris Daniel
District Clerk
DEC 15 2014
Time: Harris County, Texas
By Deputy

No. 1212366-A

EX PARTE	§	IN THE 174th DISTRICT COURT
	§	OF
TEDDRICK R. BATISTE, Applicant	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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The Court, having presided over trial and considered the applicant's initial state application for writ of habeas corpus, the State's original answer, the arguments of counsel, and official court documents and records in cause no. 1212366 and 1212366-A, makes the following Findings of Fact and Conclusions of Law.

I.
FINDINGS OF FACT

CONVICTION/DIRECT APPEAL

1. On June 10, 2011, a jury found the applicant, Teddrick R. Batiste, guilty for the April 19, 2009 capital murder of Horace Lee Holiday, cause no. 1212366, in the 174th District Court of Harris County, Texas.

2. On June 23, 2011, pursuant to the jury's answers to the special issues, the trial judge sentenced the applicant to death (XXV R.R. 81-4).

3. Ruben Guerrero, judge of the 174th District Court of Harris County, Texas, presided over the applicant's capital murder trial and the instant habeas proceedings.

4. Harris County Assistant District Attorneys Traci Bennett and Julian Ramirez represented the State in the applicant's capital murder trial.

5. R.P. "Skip" Cornelius and Gerald E. Bourque represented the applicant at trial. The Court finds credible their affidavits filed in response to the applicant's ineffective claims. *Findings of Fact and Conclusion of Law Exhibit A, Affidavit of R.P. "Skip"*

RECORDER'S MEMORANDUM
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Cornelius ("Cornelius Affidavit"); Findings of Fact and Conclusion of Law Exhibit B, Affidavit of Gerald E. Bourque ("Bourque Affidavit").

6. The applicant was represented on direct appeal by Patrick F. McCann who filed a brief urging twenty-two points of error in the primary case. *Batiste*, No. AP-76600, 2013 WL 2424134.

7. On June 5, 2013, the Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion. *Batiste v. State*, No. AP-76,600, 2013 WL 2424134 (Tex. Crim. App. 2013)(not designated for publication).

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STATE'S EVIDENCE AT GUILT/INNOCENCE

CAPITAL MURDER OF HORACE LEE HOLIDAY

8. Early in the morning of April 19, 2009, Jose Guevera stopped at an Exxon station located at U.S. 59 and Aldine Mail Route in Houston, Texas, to purchase cigarettes; as Guevera drove into the station, he saw a man on the ground by a white Cadillac parked by the gas pumps; Guevera heard the man say "please help," and, as he started to approach the man, Guevara heard gunshots and saw a man wearing a hood shooting; and, the shooter got into a white Cadillac and fled the scene (XIII R.R. at 113-23).

9. On April 19, 2009, at approximately 3:00 a.m., Harris County Sheriff's Office Deputies Bryce Curtis and Mark Gustafson, who had been talking in the parking lot of a nearby police substation, heard gunshots ring out near an Exxon station located at U.S. 59 and Aldine Mail Route, and the officers jumped into their respective vehicles and drove in direction of the gunfire to investigate (XIII R.R. at 24-6)(XV R.R. at 6-8).

10. Deputy Curtis approached the Exxon station just as a white Cadillac quickly drove from the parking lot and headed back to the highway; Deputy Curtis then radioed a description of the white Cadillac and its flight path to Gustafson; and, Deputy Curtis remained at the Exxon to call EMS and secure the crime scene (XIII R.R. at 26)(XV R.R. at 9-16).

11. Deputy Gustafson pursued the white Cadillac onto the highway, accelerating as fast as he could in an effort to catch up with the vehicle; as Deputy Gustafson followed the Cadillac, he observed a handgun and a ski mask being thrown out of the driver's window of the Cadillac; and, other officers joined in the pursuit, forcing the Cadillac to stop with a spike strip that destroyed both passenger-side tires (XIII R.R. at 26-34, 59-64, 72-7).

12. The applicant was driving the white Cadillac, and he was the sole occupant during the high speed chase; there was blood spatter on the vehicle's dashboard, steering wheel and driver's seat; there were multiple bullet holes on the driver's side of the Cadillac; and, blood was visible on the applicant's clothing and hands (XIII R.R. at 63-91, 186).

13. Upon being stopped and detained, the applicant acknowledged that the blood belonged to the victim and admitted "I took his car" (XIII R.R. at 63-91, 186).

14. Police found the applicant's discarded 9mm Glock handgun and ski mask on the freeway and 9mm shell casings at the Exxon station (XIII R.R. at 109, 173).

15. The applicant's wife, Stephanie Soliz, stopped by the scene where the ski mask was discarded, driving a Buick which was registered to the applicant and contained bandanas, duct tape, and a knife (XIII R.R. at 112, 178-82, 210-2).

16. The applicant was taken into custody, and Sergeant Sidney Miller with the Homicide Division of the Harris County Sheriff's Office transported the applicant to a police station where the applicant gave a voluntary, recorded, *Mirandized* confession detailing his motive and actions in the capital murder of complainant Horace Lee Holiday (XIV R.R. at 128-39, 150-1, 159-60). *State's Trial Exhibit 133*; *Record Exhibit R-1*.

17. In his confession, the applicant stated that he was a member of the Crips street gang; that he was at home getting a tattoo when he "just decided to go into the streets"; that the applicant and a fellow Crip member "Loc" got into the applicant's Buick to find a

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car with "rims" (i.e., expensive hubcaps) to steal and then sell; that the applicant needed money because his hours had been cut at work; that the applicant got his gun and put it under the brake pedal; that the applicant spotted a white Cadillac with expensive rims worth approximately $3,000; that the applicant followed the white Cadillac for miles and then made a decision to shoot; that the applicant pulled up to the left of the white Cadillac, rolled down the passenger front window and shot four or five times into the Cadillac's driver's side; that the Cadillac drifted into a gas station and hit the pump; that the applicant circled the Cadillac in his Buick, heard the complainant say "help, help, help," stopped his car, and got out to face the complainant; that the applicant told "Loc" to take the Buick to his wife; that the applicant got his gun (that was stolen), put on a ski mask, walked over to the complainant who was out of the Cadillac and face down on the ground and shot the complainant multiple times; and, that the applicant got into the Cadillac which was full of blood and glass and quickly sped away from the Exxon station. *State's Trial Exhibit 133*; *Record Exhibit R-1*.

18. The complainant's body had fifteen gunshot wounds, including fatal gunshot wounds to the brain, liver, gall bladder, and stomach (XVI R.R. at 11-37).

19. The bullets recovered from the complainant's neck and back were consistent with being fired from the applicant's Glock recovered on the freeway (XVI R.R. at 141-50).

DEFENSE'S EVIDENCE AT GUILT/INNOCENCE

20. The defense presented no evidence at guilt-innocence (XVI R.R. at 84).

STATE'S EVIDENCE AT PUNISHMENT

PHAT KATS TATTOO PARLOR AGGRAVATED ROBBERY

21. On the evening of March 23, 2009, Walter Jones (Walter), his wife Kari Jones (Kari), the Joneses' five-year-old son, and one of Walter's employees, David McInnis, were at the Phat Kat tattoo shop which Walter owned and operated with Kari; that shortly before 11:00 p.m., the applicant parked his Buick in the Phat Kat parking lot; as Walter

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was talking on the telephone inside the tattoo parlor, he looked through the glass of his storefront and saw three men walking up to his shop, pulling blue bandanas over their faces; the applicant entered the shop, cocked the pistol he was carrying, and screamed, "This is a fucking robbery"; the applicant then walked up to Walter and pointed his gun at Walter's face while a second robber held Kari at gunpoint, and the third robber covered McInnis; the three robbers yelled and cursed at Walter, Kari, and McInnis, took away their cell phones, and demanded money; Kari was afraid that her young child would emerge from an adjacent room in the shop, and pleaded with the robbers not to panic and shoot the boy; Walter directed the robbers' attention to the computers and other valuable items in the shop; and, the gunmen took two laptop computers, a Nikon digital camera, three tattoo machines, wallets, cell phones, and cash before fleeing in the Buick (XIX R.R. at 165-70, 173-90, 200-2)(XX R.R. at 3-16)(XXIV R.R. at 192-202).

22. Walter was able to get a good look at the applicant's face and the face of the robber who held Kari at gunpoint because their bandanas kept sliding down; Walter provided the police with a description of the applicant and the gunman that guarded Kari; Walter also subsequently positively identified both men in a photo array; however, the police were unable to develop leads for any of the three robbers at that time (XX R.R. at 25, 44-6)(XIX R.R. at 190-210).

23. Upon being taken into custody for the primary offense, the applicant confessed to the Phat Kats aggravated robbery, admitting that he organized the aggravated robbery and involved fellow Crips gang members (XX R.R. at 32-42); *State's Trial Exhibit no. 277*.

CAPITAL MURDER OF STEVE ROBBINS

24. On the evening of April 7, 2009, Anthony (Anthony) and Christie (Christie) Moore accompanied Anthony's best friend, Joshua Norsworthy, to the Black Widow Tattoo parlor so that Norsworthy could get some tattoo work, and, while Steve Robbins, the

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owner and operator of Black Widow Tattoo, started tattooing Norsworthy's arm, Anthony and Christie settled on a small couch at the front of the shop, intending to nap during the four or five hours that it would take Robbins to complete Norsworthy's tattoo (XXI R.R. at 85-8, 123-5)(XXII R.R. at 15-8).

25. At approximately 12:45 a.m., on April 8, 2009, the applicant drove his Buick in a circle through the Black Widow Tattoo parking lot, casing the shop; the applicant pulled over behind a nearby restaurant, covered his license plates with duct tape, drove his Buick back to the strip center, and backed the vehicle into a parking space in front of the tattoo shop; and, the applicant and two other men exited the Buick and walked into Black Widow Tattoo (XXI R.R. at 32-44).

26. Anthony was asleep on the couch when he "felt like a whiff of wind," and woke to find a gun in his face, held by a man who told Anthony, "Don't fucking move"; while Anthony nudged Christie awake and tried to pull her behind him on the couch, Anthony noticed that two other men had entered the shop, also holding handguns; two of the gunmen held-up Anthony and Christie near the shop entrance while the third gunman moved further into the parlor where Robbins was tattooing Norsworthy; Norsworthy turned his head, saw "a semiautomatic pistol in [his] face", and complied with the gunman's order to move to the middle of the shop and lay on the floor; the applicant, who was holding Christie at gunpoint, was in charge of the other gunmen and appeared to be "[e]xtremely assertive, empowered[,]" and confident as he issued orders to the other assailants; the robbers grabbed Norsworthy's wallet and Christie's purse and seemed to be leaving when Robbins stood up, slowly approached the robbers with his hands up and empty, and calmly told the applicant, "[T]his doesn't have to happen" and that there were surveillance cameras in the shop; and, the applicant turned back to Robbins, said, "What, mother-fucker?", and began shooting (XXI R.R. at 90-102, 114-6, 126-8, 133-4)(XXII R.R. at 19-20, 23-4)(XXIV R.R. at 192-3, 201-2).

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27. The applicant shot Robbins several times, fatally wounding him; the applicant and one of the other gunmen then began firing at Norsworthy as he sprinted towards the back of the shop; Anthony pushed Christie onto the floor and covered her with his body while the applicant and another robber fired approximately sixteen shots in the shop before they left; and, Robbins died on the floor while the applicant and the other two assailants fled in the applicant's Buick (XXI R.R. at 39-43, 103-10, 134-8)(XXII R.R. XXII at 24-7).

28. After his arrest in the primary offense, the applicant confessed to participating in the capital murder of Steve Robbins (XIV R.R. at 128-39, 161-6)(XX R.R.at 32-42)(XXI R.R. at 54-66). *State's Trial Exhibit no. 307.*

29. Anthony, Christie and Norsworthy positively identified the applicant in live or videotaped lineups (XXI R.R. at 67-9, 113-4, 144-6)(XXII R.R. at 29-31).

CRIPS GANG MEMBERSHIP AND PRISON CLASSIFICATION

30. Officer Clint Ponder, Houston Police Department Divisional Gang Unit, testified regarding the significance of multiple Crips gang tattoos on the applicant's body and stated that the applicant was a member of the Five Deuce Hoover Crips street gang which was involved in a myriad of crime related activities, particularly drug dealing (XVIII R.R. at 157-200). *State's Trial Exhibits no. 242-72.*

31. Irma Fernandez, Texas Department of Criminal Justice – Correctional Institutions Division (TDCJ-CID), testified to the following regarding the prison classification system: that the Crips gang was considered a security threat group, and Crips members tended to continue their gang related activities while incarcerated, including extortion and assault; that gang recruitment continued in prison; that a member of a security threat group serving a sentence of life without parole tended to have "more influence" over other inmates and to be more assaultive; that the applicant was a self-admitted member of the Crips; and, that members of a security threat group like the Crips were not

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necessarily incarcerated in an extra security area or unit (XIX R.R. at 36-40, 46, 52, 57, 64, 67)[1].

BAD ACTS IN THE HARRIS COUNTY JAIL

32. While awaiting trial for the primary case at the Harris County Jail, the applicant was investigated and/or disciplined for multiple infractions, including assault on another inmate, unauthorized contact with staff, failure to obey orders, possession or manufacture of an intoxicant, and possession/manufacture of a weapon (XVIII R.R. at 129-48). *State's Trial Exhibits no. 229-41.*

33. Robert Dean testified regarding the applicant's activities and behavior while he and the applicant were incarcerated in the same area of the Harris County Jail, stating that the atmosphere in the pod went from "peaceable to unpredictable" after the applicant arrived; that the applicant and two friends tried to assault Dean; that Dean's prior incarceration in TDCJ-CID was "more peaceful" than his stay at the Harris County Jail with the applicant and his Crip friends; that the applicant was the leader of a group of inmates that picked fights with other inmates, particularly older inmates, and they stole other inmates' property, trading the stolen goods for contraband cigarettes; and, that the applicant acknowledged being a member of the Crips, "bragged" about being incarcerated for a capital murder, and indicated that he had "nothing to live for" (XIX R.R. at 112-7, 121-9, 133-5).

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[1] On cross-examination, Fernandez testified that she had seen Crips and their rival gang the Bloods get along in prison; that "many" prisoners sentenced to life without parole in the general prison population conducted themselves in an appropriate manner; and, that all prison units had administrative segregation available for "obstinate" inmates (XIX R.R. at 95, 98).

TYC PSYCHOLOGICAL INTAKE ASSESSMENT

34. Scott Kreiger, a licensed psychological associate and counselor, testified regarding his March 29, 2004 psychological intake assessment of the applicant, conducted when the applicant was incarcerated at TYC for unauthorized use of a motor vehicle. According to Kreiger, the applicant was not mentally retarded and had an MMPI score of 89, one point short of normal; that the applicant functioned at a higher level than his scores indicated; that the only scale that was elevated on the applicant's MMPI was the scale that measured the applicant's energy level; and, that individuals who scored higher on this scale were "impulsive," "prefer[ring] action over thought and reflection" (XVIII R.R. at 46-7, 59, 62).

35. Kreiger further testified that the applicant was diagnosed with disruptive behavior disorder unspecified and cannabis dependence; that the applicant provided no indication that he was sexually abused or had a family history of emotional disorder; that the applicant indicated that he was associated with a gang; and, that the applicant said that it made him irritable to think about his crime victims (XVIII R.R. at 48, 51-2, 58)[2].

VICTIM IMPACT TESTIMONY

36. Complainant Horace Holiday's mother, Lisa Harmon, and grandmother, Mayola Holiday, testified about the impact of his death on their respective lives with Harmon testifying that the complainant had two children, the complainant graduated from high

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[2] On cross-examination, Kreiger testified that the applicant indicated that he never met his biological father and that the applicant had relatives involved in crime and drugs, possible "risk factors" for the applicant's poor conduct and judgment; that the applicant's elevated personality traits of "impulsivity" and a preference for "action over thought and reflection" could become a "risk factor" of future conduct if raised "in a community of violence"; and, that the applicant's Global Assessment Functioning score rose in TYC, indicating that the applicant benefitted from TYC's structure (XVIII R.R. at 71-2, 75-81).

school, the complainant saved money to buy the Cadillac and "rims", and the complainant's death broke a piece of Harmon's heart (XXII R.R. at 52-4, 64).

DEFENSE'S EVIDENCE AT PUNISHMENT

CLASSIFICATION AND FUTURE RISK

37. Mary Elizabeth Pelz, Ph.D., Dean of the College of Public Service at the University of Houston-Downtown, testified as an expert regarding TDCJ-CID classification, stating that she had interviewed the applicant and reviewed his TYC, TDCJ-CID, and employment records; that studies indicated that prisoners sentenced to life without parole were "very manageable" and did not manifest an increase in acts of violence while incarcerated; that inmates sentenced to life without parole were more likely to obey prison rules because they needed to keep as many privileges as possible in order to survive; that an inmate's previous behavior in prison was more important than the actual crime committed to determine future behavior; that Dr. Pelz was not aware of the applicant having any disciplinary issues while incarcerated in a state jail facility; that the applicant's physical altercations in the Harris County Jail while awaiting trial would not be "seriously considered" for his inmate classification; and, that the applicant's future behavior in prison would become "tempered" as he aged and became institutionalized (XXIII R.R. at 27-30, 43, 50-52, 59, 97-8, 110).

38. Sgt. David Davis, Harris County Sheriff's Office Classification Unit, testified that the applicant's Harris County jail disciplinary records contained no record of the applicant having physical contact with the jail staff (XVIII R.R. at 6).

APPLICANT'S SCHOOL AND WORK HISTORY

39. Gary Thiebaud, head football coach at Cypress Ridge High School, testified that the applicant was a gifted athlete; that the applicant did well in athletics, presented no disciplinary problems, and benefitted from the program's highly structured nature; that Thiebaud considered the applicant to be a "follower" who was influenced by those

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around him; and, that Thiebaud "lost" the applicant after spring football when the applicant left the structure of the sports program and became involved in car thefts (XXIII R.R. at 115-6, 118-22).

40. Kristopher McSherry, the plant manager for Forge USA, testified regarding the applicant's work history, stating that the applicant was a helper on a forging crew where the work was physically demanding and often required working more than eight hours per day; that McSherry never had issues with the applicant's job performance; that the applicant indicated that he was "desperate to find a job to feed his family"; and, that McSherry was shocked when the applicant was charged with capital murder (XXIII R.R. at 130-36, 145-7).

APPLICANT'S SOCIAL/FAMILY HISTORY

41. Stephanie Soliz, the applicant's girlfriend, testified that the applicant was the "best" father to their biological son Alex and her son Kash from a different relationship; that the applicant took care of her, Alex, and Kash financially; that the applicant regularly bathed and clothed the boys; and, that the applicant was trying to be a positive influence on the children while in the Harris County Jail (XXIII R.R. at 155-8).

42. Terry Soliz, Stephanie Soliz's mother, testified that the applicant was a loving influence on Kash; that the applicant cared for Kash more than anyone else after Kash was born; that the applicant was always "very respectful" to her and took care of her when she was sick; and, that she was shocked by the primary offense (XXIII R.R. at 6-7, 11-2).

43. Kevin Noel Jr., the applicant's brother, testified that the applicant was a loving brother and a good father who took care of his family; that Noel did not know that the applicant was a member of the Crips; and, that tattoos were common in their neighborhood (XXIV R.R. at 26, 30).

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44. Micala Lara, the applicant's friend, testified that the applicant and Stephanie Soliz lived with Lara and her husband, Ricardo, in Denton, Texas, in 2007; that Ricardo helped the applicant obtain a job in the Denton area; that the applicant got along with everyone and treated his own children well; and, that the applicant was respectful to Stephanie Soliz and loved her (XXIV R.R. at 56-60, 62, 65).

45. Beverly West, the applicant's cousin, testified that the applicant's mother was fifteen years old when she gave birth to the applicant; that the applicant always treated her with respect; and, that she never saw the applicant act disrespectful to any family members (XXIV R.R. at 74-80).

46. Darlene Beard, the applicant's grandmother, testified that the applicant was born in her home because no one knew that the applicant's mother was pregnant; that the applicant was respectful to other family members and attended church as a child; and, that the applicant never had a father figure (XXIV R.R. at 86-90).

47. Rowena Scott, the applicant's mother, testified that she and the applicant frequently moved when he was young, and her relationship with the applicant's step-father had a "bad effect" on the applicant; that the applicant could follow rules, and it was possible for the applicant to be a positive influence on his children while imprisoned; and, that, while the applicant had meningitis as a child, he was otherwise healthy with no mental problems or learning disabilities (XXIV R.R. at 97-8, 107-11).

APPLICANT'S TESTIMONY AT PUNISHMENT

48. The applicant testified on direct examination at punishment, providing a comprehensive account of his life and circumstances, including his transient upbringing, his relationship with Stephanie Soliz and their children, his gang membership, his criminal acts, and his remorse:

- Regarding his childhood and schooling, the applicant testified that his grandfather was a positive influence on him, but he died while the applicant was in state jail; that his mother kept moving which

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caused the applicant to attend a series of schools in Houston; that the applicant sold Ritalin in middle school to make money; that the applicant listened to his coach Gary Thiebaud, but the "goal" of school disappeared after the applicant left TYC; and, that it was the applicant's fault for not listening to Thiebaud (XXIV R.R. at 113-4, 118-20);

- Regarding his family, the applicant testified that his relationship with Stephanie Soliz developed while the applicant was in TYC, and the applicant decided to play a paternal role to Kash because he knew that Kash's biological father had no interest in raising the child (XXIV R.R. at 123-5);

- Regarding work, the applicant testified that he paid the rent and other bills with the money he earned from Forge Industries; that the applicant's work hours were cut as the economy soured; and, that the applicant started selling stolen goods to make up the difference in his earnings (XXIV R.R. at 133-5);

- Regarding his gang membership, the applicant acknowledged that he was a Crips member but testified that he planned to "distance" himself from the gang in prison, "do[ing] what I have to do to renounce them" (XXIV R.R. at 138);

- Regarding his criminal activities, the applicant admitted that he killed the complainant and Robbins and that he participated in the Phat Kats aggravated robbery (XXIV R.R. at 136);

- Regarding his feelings concerning the primary offense, the applicant testified that he had let his family down and understood that he needed to teach Kash and Alex right from wrong, and the applicant expressed remorse for his actions, stating: "I know ain't no right to take nobody's life. . . . I let material things, you know, get ahold of me. Can't blame nobody but myself. And just I was wrong for what I did" (XXIV R.R. at 126-70, 226-7); and

- Regarding future danger, the applicant testified that he intended to follow the rules in prison (XXIV R.R. at 142).

49. On the prosecution's cross-examination, the applicant testified about his leadership role in the capital murders and aggravated robbery, as well as certain rap lyrics he composed while awaiting trial in the Harris County Jail, testifying to the following:

- Regarding the primary offense, the applicant testified that, even though he knew that the complainant was shot and heard the complainant crying for help, the applicant felt that the complainant

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could still protect himself at the gas station; that the applicant put on a ski mask and threw his firearm out of the car in order to facilitate the crime; and, that the applicant denied tinting the windows on his Buick to facilitate his crimes, insisting that the purpose of the tint was to protect his children from the sun (XXIV R.R. at 160-1, 218-23);

- Regarding the capital murder of Steve Robbins, the applicant testified that he led and planned the capital murder; that the applicant shot Robbins first as Robbins was coming towards him to protect his customers; and, that the applicant shot at Norsworthy as he ran away toward the back of the shop (XXIV R.R. at 201-8);
- Regarding the Phat Kats aggravated robbery, the applicant testified that he was in charge, and he recruited fellow Crips gang members to participate in the offense (XXIV R.R. at 192-3);
- Regarding the rap lyrics in letters that the applicant composed while awaiting trial in the Harris County Jail, the applicant testified that the lyrics described the applicant's feelings regarding Stephanie Soliz's new love interest, the applicant's murder of the complainant, and the applicant's participation in the Phat Kats aggravated robbery; that the lyrics did not necessarily reflect the applicant's actual feelings; and, that eighty-five percent of the applicant's lyrics were "hype music" (XXIV R.R. at 182-9, 192-3, 227-8).

EXHIBITS

50. Prior to resting on punishment, the defense introduced twenty-one documents into evidence, including: (a) the applicant's juvenile and TYC files; (b) the applicant's juvenile psychological evaluations; (c) the applicant's letters composed while in the Harris County Jail; and (d) the applicant's employment and educational records (XXIV R.R. at 6-14); *Defendant's Trial Exhibits* 1-20, 31. The State and defense attached tabs on certain pages within the documents to highlight specific information (XXIV R.R. at 7).

REPRESENTATION AT TRIAL

51. The Court finds, based on the record, personal recollection, and the habeas affidavits of trial counsel Cornelius and Bourque that both counsel are Board Certified in Criminal Law and have extensive experience representing criminal defendants, including those charged with capital murder. *Cornelius Affidavit at 1; Bourque Affidavit at 1.*

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52. The Court finds that trial counsels' representation in the primary case included, but was not limited to the following: trial counsel filed forty-four (44) motions or legal memoranda with the trial court during the primary case (I C.R. 5-28, 30, 63-65, 69-113, 132-171)(III C.R. at 860-75)(V C.R. at 1431-99)(VI C.R. at 1500-1680, 1722-30, 1734-52); trial counsel conducted a pre-trial motion to suppress hearing regarding the applicant's statement about the Holiday capital murder (XI R.R. at 8-75); trial counsel conducted a comprehensive voir dire from April 26, 2011 until May 5, 2011; trial counsel retained and consulted experts on psychology, addiction, mitigation, investigation, and criminal justice (I C.R. at 69-109, 132-62)(III C.R. at 860-75); and, trial counsel presented twelve witnesses during the punishment phase of trial, and effectively cross-examined twenty-four of the State's witnesses during trial (XIII R.R. at 63-8, 128-33, 154-9)(XIV R.R. at 3-23, 93-100, 149-67, 187-9)(XV R.R. at 46-53, 90-7, 157-60)(XVI R.R. at 73-7, 80-83)(XVIII R.R. at 33-5, 63-91, 97)(XIX R.R. at 73-99, 136-58, 160-5)(XX R.R. at 21, 46-56, 57, 123-44, 169-78)(XXI R.R. at 18-27, 74-80, 116-21, 152-61, 163)(XXII R.R. at 3-11, 31-44, 46-49).

53. Based on the trial and habeas records, trial counsels' habeas affidavits, and the Court's personal recollection of the instant trial proceedings, the Court finds that trial counsel made relevant objections, preserved error when appropriate, exhibited comprehensive knowledge of the offense and applicable laws, made persuasive jury arguments, and objected to the court's charge and requested specific instructions. *See, e.g.,* (XVI R.R. at 86-97)(requesting jury instructions and submitting proposed instructions for appellate review); (XXV R.R. 3-18)(same).

54. The Court finds, based on the trial and habeas records, including the affidavits of trial counsel and the Court's personal recollection of the primary trial, that counsel employed a reasonable trial strategy in the defense of the applicant at both phases of trial. *See Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. 1981)(fact that

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other counsel might have pursued a different strategy will not support a finding of ineffectiveness of counsel).

55. Based on the trial and habeas records, the affidavits of trial counsel, and the Court's personal recollection of the instant trial proceedings, the Court further finds that the totality of the representation afforded the applicant at trial was competent under prevailing professional norms; that the applicant fails to demonstrate that trial counsel was deficient in the representation of the applicant at either phase of trial; and, that the applicant fails to establish that the applicant was harmed on the basis of any alleged deficiency in trial counsels' representation. *See Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 792 (2011)(holding that likelihood of different result due to trial counsel's alleged deficient performance "must be substantial, not just conceivable"); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)(for ineffective assistance of counsel claims, a defendant must meet the standard established in *Strickland* by showing that "counsel's performance was deficient and that the deficiency prejudiced the defense").

CLAIM ONE: REPRESENTATION AT TRIAL – APPLICANT'S ALLEGED BRAIN DAMAGE

56. In his first ground for habeas relief, the applicant contends that he was denied the effective assistance of counsel at trial because counsel failed to retain a neuropsychologist, discover evidence of the applicant's alleged frontal lobe damage, and advance a mitigation defense involving the applicant's general cognitive functioning. *Applicant's Writ* at 15-30.

57. On cross-examination of State's punishment witness Scott Kreiger, trial counsel elicited testimony that the applicant's MMPI-A score in TYC reflected that the applicant was "impulsive" and preferred action over thought and reaction (XVIII R.R. at 59-60)

58. The Court finds, based on the record, that counsels' pre-trial investigation included an investigation of the applicant's mental health; that trial counsel sought funding for and retained three mental health experts: (a) Dr. Jolie Brams, psychologist,

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(b) Dr. Matthew Mendel, psychologist, and (c) Dr. Terry Rustin, M.D., an expert in substance abuse; that Dr. Brams conducted a four hour forensic interview of the applicant; and, that Dr. Rustin interviewed the applicant for three hours (I C.R. at 69-95, 132-44, 145-58). *See State's Writ Exhibit A, Invoice of Dr. Jolie Brams; State's Writ Exhibit B, Invoice of Dr. Terry Rustin.*

59. According to trial counsel Cornelius' habeas affidavit, counsel had no information from any expert, investigator, record, family member, or friend indicating that the applicant had any indicia of frontal lobe disorder. *Cornelius Affidavit* at 3.

60. In support of the instant habeas application, the applicant relies on the affidavit of neuropsychologist James Underhill, Psy.D., stating that the applicant suffers from frontal lobe disorder that has affected the applicant's ability to "calculate risk and appropriately weigh the consequences of his actions." Dr. Underhill reaches his opinion that the applicant's risk taking is impaired because "a majority of a representative sample of the United States population scored better than Mr. Batiste on the portions of the Iowa Gambling Test". *Applicant's Writ Exhibit No. 1, Affidavit of Dr. James G. Underhill, Psy.D.*

61. The Court finds unpersuasive Dr. Underhill's conclusions regarding the applicant's alleged frontal lobe damage and impaired perception/control of risky behavior. Dr. Underhill's conclusion that the applicant's risk taking is impaired because "a majority of a representative sample of the United States population scored better than Mr. Batiste on the portions of the Iowa Gambling Test" is vague given that Dr. Underhill does not disclose the applicant's specific score or define "a majority," such that Dr. Underhill's conclusion could mean that the applicant's Iowa Gambling Test score is simply in the forty-ninth (49) percentile. *Applicant's Writ Exhibit No. 1, Affidavit of James G. Underhill, Psy.D.* *See Ex parte Reed*, 271 S.W.3d 698, 747 (Tex. Crim. App.

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2008)(affidavit filed in support of writ of habeas corpus not credible when it lacked specific facts which could be corroborated).

62. Further, the Court finds Dr. Underhill's conclusions unpersuasive, given the applicant's state jail records reflecting that the applicant had no disciplinaries while incarcerated at the Lynchner Unit which indicated that the applicant could control his behavior, including risk taking behavior, when he so chose without medication. *Applicant's Writ Exhibit 25, state jail disciplinary records.*

63. The Court finds, based on the record and the instant habeas proceedings, that Dr. Underhill's habeas conclusion regarding the applicant's alleged inability to calculate risk and weigh the consequences of his actions is cumulative of Scott Kreiger's punishment testimony concerning the results of the applicant's MMPI-A score which indicated that the applicant was impulsive and preferred action over thought and reaction (XVIII R.R. at 59-60); *See Finding of Fact 10-34, supra. See Ex parte Weinstein*, 421 S.W.3d 656, 667 (Tex. Crim. App. 2014)(undisclosed impeachment evidence not material when it was cumulative of other impeachment evidence presented at trial).

64. The Court finds, based on the record and the instant habeas proceedings, that the applicant does not establish trial counsels' deficient performance, much less harm, on the basis urged in the instant ground for relief. *See Motley v. Collins*, 18 F.3d 1223, 1228 (5th Cir. 1994)(refusing to find deficient performance where proposed mitigating evidence is cumulative of other testimony presented at trial).

CLAIM TWO: REPRESENTATION AT TRIAL – GANG EXPERT

65. In his second ground for habeas relief, the applicant claims that trial counsel was ineffective for failing to present an expert to assist the jury in understanding the nature of his gang involvement, contending that the applicant's habeas expert, youth counselor Charles Rotramel, would have helped the jury understand that the applicant's involvement with the Crips was "limited" and that the applicant was not a "hard core"

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gang member. *Applicant's Writ Exhibit 2, Affidavit of Charles Rotramel*; *Applicant's Writ* at 30-53.

66. At the punishment phase of trial, the State presented evidence of the applicant's extensive involvement with the Crips gang including: (a) his gang tattoos; (b) the applicant's acknowledgement that he was a member of the Crips gang and organized fellow Crips gang members to participate in the Phat Kats aggravated robbery; (c) the applicant's letter regarding "O[riginal] G[angster]" Rome; (d) the applicant's advice to his brother regarding the type of gang tattoo he should obtain; and (e) the testimony of Harris County Jail inmate Robert Dean. *Findings of Fact no. 30-3, 48, supra.; 107-8, infra.*

67. Regarding his gang involvement, the applicant testified at punishment that he would "distance" himself from the Crips in prison, and "do what I have to do to renounce them" (XXIV R.R. at 138).

68. The Court finds, based on the record, that the State's trial evidence and the applicant's testimony directly contradict the applicant's habeas characterization of his gang membership as "limited."

69. According to the record and the habeas affidavits of trial counsel, trial counsel concluded that the applicant's gang involvement was extensive based upon their pretrial investigation and interaction with the applicant. Specifically, trial counsel Cornelius states in his habeas affidavit that the applicant "was as ganged up as any person [counsel has] ever met"; trial counsel was unable to negotiate a plea agreement for a life sentence for the applicant, but the applicant would not give up a third defendant because of the gang code of honor; the applicant's writings reflected that "his gang involvement included virtually every word he wrote"; the applicant's writings included all conceivable gang references; the applicant "had on his body every conceivable tattoo and reference

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to his gang; and, the applicant was the "living embodiment of his gang." *Cornelius Affidavit at 2-4*; *Bourque Affidavit*.

70. The Court finds, based on the trial and habeas records and the affidavits of trial counsel, that counsel made a reasonable strategic decision to not present a gang expert at punishment because counsel believed that such tactic would harm the defense. *Cornelius Affidavit at 4; Bourque Affidavit*.

71. The Court finds, based on the record and the affidavits of trial counsel, that the affidavit of Charles Rotramel is unpersuasive because Rotramel's opinion that the applicant is not a "hard core" gang member is unsupported by the trial evidence, including the punishment phase testimony of the applicant. *Applicant's Writ Exhibit 2, Affidavit of Charles Rotramel*; *see Findings of Fact no. 30-3, 48, supra.; 107-8, infra.*

72. The Court finds, based on the extensive evidence of the applicant's gang involvement, that the applicant does not establish trial counsels' deficient performance, much less harm, on the basis urged in the instant ground for relief.

CLAIM THREE: REPRESENTATION AT TRIAL – SOCIAL HISTORIAN

73. In his third ground for habeas relief, the applicant contends that trial counsel should have retained and presented a social historian to "create a social history" of his life for the jury's consideration; that the social historian would have been able to weave the various aspects of the applicant's life into a single narrative; that this narrative would include his birth to a teenage mother, the lack of a father-figure in his life, the instability of his years living with his grandmother and his mother's frequent changes in residence, the impact of the juvenile justice system and TYC on his development, how he tried to provide for his family, and the role of gangs in his community. *Applicant's Writ* at 53-94.

74. The Court finds, based on the record, that trial counsel retained a mitigation expert to conduct investigative interviews concerning the applicant's family and social history (I C.R. at 96-106).

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75. The Court finds, based on the record, that trial counsel presented a comprehensive social history of the applicant's life through the testimony of the applicant, his family, and friends; that this testimony included evidence of: (a) the applicant's birth to a teenage mother, (b) the applicant's lack of a father figure, (c) the applicant's frequent change of residences as a youth, (d) the applicant's life with his grandmother, (e) the applicant's efforts and struggles to financially support his family, (f) the impact of TYC and the juvenile justice system on the applicant's development, and (g) the role of gangs in his community. *Findings of Fact no. 39-47, supra.*; *see also Applicant's Writ Exhibit 3* at 6-33.

76. The Court finds that both trial counsel referenced evidence of the applicant's social history to argue before the jury that the socially disorganized nature of the applicant's community, in particular the absence of a father figure, shaped the applicant and contributed to his wasted talent and criminal actions (XXV R.R. at 25, 44).

77. In support of the instant habeas claim, the applicant relies on the habeas affidavit of Scott Bowman, Ph.D., stating that the applicant's life evidences "an unending search for emotional, structural and financial stability in a critically unstable environment"; that a number of "social, psychological, and emotional factors" beyond the applicant's control "led him down the wrong paths"; that these uncontrollable factors included "multi-generational patterns of poverty and ineffectual parenting; a complete lack of prenatal care; unsupervised home birth; meningitis as a neonate; psychological and emotional trauma associated with the lack of, and abandonment by, any appropriate father figures; frequent relocations and subsequent new schools; lack of parental supervision . . .; early and influential interaction with the juvenile justice system; gang affiliation; use of illegal drugs, including marihuana; and, finally, his overwhelming desire, but ultimately unattainable goal – to be the sole provider for his own family." *Applicant's Writ Exhibit no. 3* at 3-4.

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78. The Court finds that portions of social historian Bowman's habeas affidavit are speculative, naïve, and irrelevant; accordingly, Bowman's affidavit is unpersuasive and does not establish trial counsels' ineffectiveness on the basis urged.

79. The Court finds that the affidavit of Dr. Bowman is unpersuasive to demonstrate that the applicant's case necessitated the presentation of a social historian because the social history evidence that counsel developed and presented at the trial level is similar to that now urged on habeas through Dr. Bowman. *See Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007)(Fifth Circuit has refused to find *Strickland* prejudice when trial counsel presented similar mitigating evidence, even if only in outline form, at trial).

80. The Court further finds that the applicant does not establish trial counsels' deficient performance, much less harm, on the basis that counsel elected to present extensive punishment evidence through the applicant, his family, and friends, rather than a social historian.

CLAIM FOUR: REPRESENTATION AT TRIAL – PREPARATION OF LAY WITNESSES

81. In his fourth ground for relief, the applicant contends that trial counsel did not properly prepare multiple lay witnesses to testify; that the social history testimony of Rowena Scott, Darlene Beard, and Beverly West was not fully developed; that Stephanie Soliz, Kevin Noel, and Micaela Lara were vulnerable to cross-examination; and, that Gary Thiebaud and Kristopher McSherry ultimately provided harmful testimony. *Applicant's Writ* at 97-116.

82. The Court finds, based on the record and the applicant's habeas affidavits, that Rowena Scott, Darlene Beard, Beverly West, Stephanie Soliz, Kevin Noel, Micaela Lara, Kristopher McSherry, and Gary Thiebaud talked to a member of the defense team before testifying in the applicant's capital murder trial (XXIII R.R. 122); *Applicant's Exhibit 6* at 1, *Affidavit of Darlene Beard*; *Applicant's Exhibit 11* at 1, *Affidavit of Micaela Lara*; *Applicant's Exhibit 13* at 2, *Affidavit of Kristopher McSherry*; *Applicant's Exhibit 15*

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at 1, *Affidavit of Kevin Noel*; *Applicant's Exhibit 17* at 1, *Affidavit of Rowena Scott*; *Applicant's Exhibit 20* at 1, *Affidavit of Stephanie Soliz*; *Applicant's Exhibit 21* at 1, *Affidavit of Beverly West*.

83. According to the habeas affidavits of trial counsel, counsel properly prepared the lay witnesses that testified for the defense at trial and those witnesses, particularly Gary Thiebaud were good witnesses for the applicant. *Cornelius Affidavit at 4*; *Bourque Affidavit at 2-3*.

84. The Court finds, based on the record, the Court's personal recollection of the trial proceedings, and the habeas affidavits of trial counsel, that trial counsel properly prepared Rowena Scott, Darlene Beard, Beverly West, Stephanie Soliz, Kevin Noel, Micaela Lara, Kristopher McSherry, and Gary Thiebaud to testify, and trial counsels' direct examination of these witnesses set forth a clear and detailed mitigation case which included evidence of the following: that the applicant was the child of a teenage mother who frequently moved her residence during his formative years, and the applicant lacked a father-figure in his life, worked in a difficult and physically demanding job to support the family he loved, assumed a fatherly role to a non-biological child, and was a gifted athlete in an inner-city high school who ultimately did not overcome the challenges of his neighborhood. *Findings of Fact no. 38-47, supra*.

85. In light of the totality of the evidence presented at trial, the Court finds that the applicant does not establish trial counsels' deficient performance, much less harm, based on counsels' alleged failure to more fully prepare the applicant's punishment phase lay witnesses. *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792 (2011)(with regard to the prejudice inquiry, "*Strickland* demands that likelihood of a different result 'must be substantial, not just conceivable'").

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CLAIM FIVE: REPRESENTATION AT TRIAL – ADDITIONAL LAY WITNESSES

86. In his fifth ground for relief, the applicant alleges that trial counsel was ineffective for failure to present the testimony of ten additional family members and friends, claiming that these witnesses would have testified that the applicant "was the product of three generations of poverty, teenage pregnancy, residential instability, and a lack of positive male role models. He was also searching desperately for a way out of the path he was on, a person who helped other people and provided for his family when he could." *Applicant's Writ* at 117-31.

87. The Court finds, based on the record, that trial counsel presented a comprehensive mitigation case at punishment through the testimony of twelve witnesses, including a prison classification expert, a high school coach, an employer, the applicant, family, and friends; the applicant's juvenile and TYC records; mental health evaluations; letters; employment; and educational records. *Findings of Fact no. 39-47, supra.*

88. In support of the instant ground for relief, the applicant relies on the habeas affidavits of Monica Davis, Truman Jackson, Malcolm Mitchell, Ricardo Lara, Kevin Noel Sr., Necole Baldwin, Danyell Soliz, Raul Soliz, Melissa Beard-Carter, and Dyntaniel Rod Carter. *See Applicant's Writ Exhibit 5, Affidavit of Necole Baldwin*; *Applicant's Writ Exhibit 7, Affidavit of Melissa Beard-Carter*; *Applicant's Writ Exhibit 8, Affidavit of Dyantinel Rod Carter*; *Applicant's Writ Exhibit 9, Affidavit of Monica Davis*; *Applicant's Writ Exhibit 10, Affidavit of Truman Jackson*; *Applicant's Writ Exhibit 12, Affidavit of Ricardo Lara*; *Applicant's Writ Exhibit 14, Affidavit of Malcolm Mitchell*; *Applicant's Writ Exhibit 18, Affidavit of Danyell Soliz*; *Applicant's Writ Exhibit 19, Affidavit of Raul Soliz*; *see also Applicant's Writ Exhibit 16, Affidavit of Brian Fayhee* (hearsay affidavit of Kevin Noel Sr.).

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89. The Court finds that the applicant acknowledges in the instant habeas petition that his defense team interviewed four of these potential witnesses -- Monica Davis, Truman Jackson, Malcolm Mitchell, and Ricardo Lara. *Applicant's Writ* at 118.

90. According to trial counsels' habeas affidavits, trial counsel interviewed multiple family members and friends of the applicant and made a strategic decision to present those that they felt, "would do the best job in convincing the jury that he was not a threat and/or there existed sufficient mitigation to turn away from the death penalty." *Cornelius Affidavit* at 2.

91. The Court finds, based on the record, that trial counsel was not ineffective for failing to present the proposed testimony of Monica Davis, Truman Jackson, Malcolm Mitchell, Ricardo Lara, Kevin Noel Sr., Necole Baldwin, Danyell Soliz, Raul Soliz, Melissa Beard-Carter, and Dyntaniel Rod Carter because their proffered evidence is essentially cumulative of the applicant's social history evidence presented at trial. Further, the habeas affidavits of the applicant's proposed mitigation witnesses are unpersuasive in demonstrating that the applicant's mitigation case would have been strengthened by their respective testimonies. *Findings of Fact no. 39-47, supra.*; *see Motley*, 18 F.3d at 1228 (refusing to find deficient performance where proposed mitigating evidence is cumulative of other testimony presented at trial).

92. The Court finds, based on personal recollection, the trial record, and the affidavits of trial counsel, that trial counsels' presentation of punishment evidence was objectively reasonable and consistent with a coherent trial strategy; further, the applicant does not establish trial counsels' deficient performance, much less harm, on the basis urged in the instant ground for relief.

CLAIM SIX: REPRESENTATION AT TRIAL – FUTURE DANGER EVIDENCE

93. In his sixth ground for relief, the applicant contends that trial counsel was ineffective for failing to present "any" evidence that the applicant "was not likely to

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commit criminal acts of violence in the future"; that Dr. Pelz, the applicant's classification expert, "was not utilized . . . in an appropriate manner" because she was not asked her expert opinion regarding the applicant's future dangerousness; and, that, if Dr. Pelz had been utilized in an appropriate manner the jury would have heard that the applicant was not likely to be a future danger because his age, education, employment history, desire to maintain privileges, and prior state jail incarceration all indicated that he would adapt to a secure prison environment in a positive, non-violent way. *Applicant's Writ* at 132, 136, 148; *see Applicant's Writ Exhibit 4, Affidavit of Dr. Mary Elizabeth Pelz.*

94. Mary Elizabeth Pelz, Ph.D., Dean of the College of Public Service at the University of Houston-Downtown, testified for the defense at punishment on a range of topics related to future dangerousness in a comprehensive manner including: (a) prior incarceration behavior was more important than the actual crime committed to determine how someone will behave in prison in the future; (b) she was not aware of the applicant having any disciplinary issues while previously incarcerated in state jail; (c) the applicant's physical altercations with other inmates in the Harris County jail would not be "seriously considered" for his inmate classification; (d) studies of inmates sentenced to life without parole indicated that these prisoners were "very manageable" and "do not illustrate" increased acts of violence while incarcerated; (e) inmates sentenced to life without parole were more likely to obey prison rules because they need to keep as many privileges as possible in order to survive; and, (f) the applicant's future behavior in prison would become "tempered" as he got older and institutionalized (XXIII R.R. at 27-30, 43, 50-2, 59, 97-8, 110).

95. Additionally, the defense presented Sgt. David Davis, Harris County Sheriff's Office Classification Unit, who testified that there was no record of the applicant having physical contact with the jail staff in the applicant's Harris County jail disciplinary records (XVIII R.R. at 6).

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96. At trial, the defense cited evidence of the applicant's lack of disciplinary problems during his prior TYC and state jail incarcerations to argue that the applicant would not pose a future danger when confined in TDCJ's structured environment (XXVII R.R. at 24-6, 34-5).

97. According to trial counsel Cornelius' affidavit, counsel made a strategic decision not to ask Dr. Pelz her opinion as to the applicant's future dangerousness (XXIII R.R. at 73). Trial counsel believed, "We had good witnesses and good records and a lot to argue and my feeling was that a paid expert's opinion was not going to win the day and in fact might give the State more to argue and ultimately be more harmful than good. . . I believed we had so much to work with in this case I felt a lay juror would understand it and I feared the repercussions of paid expert testimony." *Cornelius Affidavit* at 4.

98. The Court, based on the trial and habeas records as well as the affidavits of trial counsel, finds that Dr. Pelz's habeas affidavit is unpersuasive to demonstrate that trial counsel failed to present "any" evidence that the applicant was not a future danger and that Dr. Pelz "was not utilized in an appropriate manner." Trial counsel exercised a reasonable trial strategy decision regarding the presentation of future danger evidence, and the applicant does not establish trial counsels' deficient performance, much less harm. *See Robertson v. State*, 187 S.W.3d 475, 481 (Tex. Crim. App. 2006)(observing that there are countless ways to provide effective assistance in any given case, and even the best criminal defense attorneys would not defend a particular client in the same way); *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004)(ineffective assistance claims are not built on retrospective speculation).

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CLAIM SEVEN: REPRESENTATION AT TRIAL – APPLICANT'S TESTIMONY

99. In his seventh ground for relief, the applicant alleges that trial counsel was ineffective for failing to adequately prepare him to testify at punishment, claiming that

"With little preparation, trial counsel thrust [the applicant] into the witness box to testify, ill prepared for what questions to expect." *Applicant's Writ* at 149-60.

100. When the applicant testified at punishment, he stated that he talked with trial counsel "at length" about his decision to testify (XXIV R.R. at 226).

101. According to the affidavit of trial counsel Cornelius, the defense prepared the applicant to testify, and in the opinion of counsel, the applicant was a good witness who presented himself as well as possible. However, the story that the applicant consistently related to trial counsel before he testified was not the story that the applicant told on the stand, and the applicant disputed some of the defense's theories with his testimony, possibly in an effort to protect another gang member who was never identified. *See also Cornelius Affidavit* at 5

102. The Court finds, based on the record and the habeas affidavits of trial counsel, that trial counsel were not ineffective in their preparation of the applicant to testify at punishment. The applicant provided a detailed account of his life and circumstances on direct examination, as well as an explanation for certain rap lyrics he composed while in the Harris County Jail, and the applicant's answers to trial counsel's comprehensive direct examination questions indicated prior preparation by counsel.

103. Additionally, the Court finds that the instant habeas claim is vague and conclusory – the applicant offers nothing to support his claim of counsels' ineffectiveness. *See Ex parte Medina*, 361 S.W.3d 633, 637-8 (Tex. Crim. App. 2011)(a writ "must allege specific facts so that anyone reading the writ application would understand precisely the factual basis for relief").

104. The Court finds, based on the record and the instant habeas proceedings, that the applicant does not establish trial counsels' deficient performance, much less harm, on the basis urged in the instant ground for relief.

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CLAIM EIGHT: REPRESENTATION AT TRIAL – APPLICANT'S LETTERS AND RAP LYRICS

105. In his eighth ground for relief, the applicant claims that trial counsel was ineffective in countering the State's presentation of the applicant's letters and rap lyrics at trial, alleging that trial counsel failed to adequately prepare the applicant, Kevin Noel Jr., and Micaela Lara to testify on cross-examination about the applicant's letters and that trial counsel should have called expert witness Charles Rotramel, a youth counselor familiar with "street slang and typical language used in rap music", to "discuss the meaning and significance" of rap lyrics the applicant composed in letters to friends and family while in the Harris County Jail. *Applicant's Writ* at 161-78.

106. Before the applicant's trial commenced, the State filed a "Supplemental Notice of the State's Intent to Use Extraneous Offenses and Prior Convictions for Impeachment and/or Punishment" which provided notice to the defense of the State's intent to introduce the contents of the applicant's jail letters into evidence (VI C.R. at 1426-30).

107. On cross-examination at punishment, defense witness Kevin Noel Jr. testified that the applicant wrote him a letter from the Harris County Jail in which he directed Noel to contact "OG Rome", a mutual friend, and tell "OG Rome" to visit the applicant in jail so that the applicant could tell him something; that "OG" stands for "original gangster"; and, that the applicant wrote Noel a letter from the Harris County Jail in which he gave Noel advice on the type of gang tattoo he should receive (XXIV R.R. 40-5, 51).

108. On cross-examination at punishment, defense witness Micala Lara acknowledged that the applicant wrote her and her husband a letter from the Harris County Jail containing gang imagery in which the applicant discussed assaulting another inmate and making contraband liquor (XXIV R.R. at 67-71).

109. At punishment, the applicant testified that his rap lyrics did not necessarily reflect his actual feelings, and eighty-five percent of his lyrics were "*hype* music" (XXIV R.R. at 184-6, 227-8)(emphasis added).

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110. The Court finds, based on the record, that some of the applicant's letters admitted into evidence contained rap lyrics describing Horace Holiday's murder and participation in the Phat Kats aggravated robbery (XXIV R.R. at 184-6, 192-3). In one of his letters the applicant's rap lyrics expressed introspection about his predicament, "[I] built my own bridge, but I sliped [sic] and now I free fall" (XXVII R.R. at 77).

111. According to the habeas affidavit of trial counsel Cornelius, trial counsel cautioned the applicant not to discuss his case with any person unless approved by counsel; however, the applicant did not heed counsel's advice. Counsel felt that, while the applicant did as good a job explaining the rap lyrics as any expert, there was no explanation that could overcome the effect of the applicant's rap lyrics, and counsel felt that the "best treatment of that part of the case was to leave it alone." *Cornelius Affidavit* at 5.

112. Based on the record, the Court finds that trial counsel made a strategic decision to enter over 200 pages of the applicant's letters into evidence at the close of punishment; that the letters contained "flags" placed by the State and defense to highlight certain portions, including passages positive to the applicant; and, that trial counsel explained this strategic decision in closing argument, stating:

> The things I want to talk about in the record, we got the flags. And I will tell you -- as the 12 of you sit here, I will tell you there are reasons that there are flags there. If you want to read some more about the foul language he uses and disgusting street stuff that he does with his hypemusic, you can read all about it. It's flagged. *If you want to read about him as he talks to his uncles and brothers and his family about what he's done to himself, those are flagged in there as well.* If you, as a human being, are motivated by anger, vengeance, and vitriol, then there's plenty of it flagged by the State in there for you to kill him. *If, on the other hand, you're motivated by love, compassion, and understanding, there's information in here that will help you.*

(XXXIII R.R. at 43-281)(XXV R.R. at 21)(emphasis added).

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113. Based on the record, the Court finds that the applicant's rap lyric, and letters to Noel Jr. and Lara, constituted a small portion of the trial proceedings (XXIV R.R. at 40-45, 51, 67-71, 144, 182-9, 192-3, 227-28)(XXV R.R. at 21, 58, 76).

114. According to the habeas affidavit of the applicant's expert Charles Rotramel, the applicant's rap lyrics reflected "typical empty rap *braggadocio* and genuine emotional expression." *Applicant's Writ Exhibit 2* at 23 (emphasis added).

115. The Court finds that Rotramel's affidavit is unpersuasive to demonstrate that an expert was necessary to assist the trier of fact to understand the applicant's rap lyrics when the applicant explained that the lyrics were largely "hype." Further, the fact that music lyrics are often expressive, grandiose, and a vehicle to express emotions is not a concept alien to the typical lay person on a jury. *See* TEX. R. EVID. 702; *cf. Fielder v. State*, 756 S.W.2d 309, 321 (Tex. Crim. App. 1988)(expert allowed to testify about why a woman who was physically and sexually abused would stay in a relationship with her abuser because the average lay juror "has no basis for understanding the conduct of a woman who endures an abusive relationship").

116. The Court finds, based on the trial and habeas records as well as the affidavits of trial counsel, that counsel made reasonable trial strategy decisions in countering the State's presentation of the applicant's letters and rap lyrics, and the applicant does not establish trial counsels' deficient performance, much less harm, on the basis urged in the instant ground for relief.

CLAIM NINE: DISCLOSURE OF IMPEACHMENT EVIDENCE

117. In his ninth ground for relief, the applicant contends that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny by failing to disclose that Anthony D. Moore, one of the three witnesses to Steve Robbins' capital murder at the Black Widow tattoo parlor, was convicted in Michigan of uttering and publishing and larceny and was

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an absconder from supervision at the time of the applicant's capital murder trial. *Applicant's Writ* at 179-83; *Applicant's Writ Exhibit 24* at 2.

118. In addition to Anthony Moore, two other witnesses, Christie Moore and Joshua Norsworthy, positively identified the applicant as the shooter in the capital murder of Steve Robbins and provided in-court identifications of the applicant (XXI R.R. at 67-9, 113-4, 144-6)(XXII R.R. at 29-31).

119. At punishment, the applicant acknowledged that he led and planned the Black Widow capital murder and admitted that he shot Robbins (XXIV R.R. at 201, 204-5, 207-8).

120. The Court finds, based on the habeas record, that the State generated Moore's NCIC/TCIC criminal history report on June 1, 2011, at 12:28 p.m., and the report does not reflect that Moore had any convictions from Michigan. *State's Writ Exhibit D*.

121. According to the credible affidavit of prosecutor Traci Bennett, Moore's Michigan criminal history was not reflected on NCIC/TCIC when she generated his criminal history report on June 1, 2011. Had Bennett known of Moore's criminal history, she would have disclosed this information to trial counsel. *State's Writ Exhibit D, Affidavit of Traci Moore Bennett*.

122. According to the credible affidavit of Harris County District Attorney's Office Investigator Donald Cohn, the discrepancy in Moore's NCIC/TCIC criminal history report was the result of Moore's FBI number not being electronically linked to his State of Texas Identification number in the NCIC/TCIC system. *State's Writ Exhibit E, Affidavit of Donald Cohn*.

123. The Court finds, based on the credible affidavits of prosecutor Bennett and investigator Cohn, that the State did not possess knowledge of Moore's out-of-state criminal history at the time of the applicant's capital murder trial; therefore, knowledge of Moore's Michigan criminal history cannot be imputed to the prosecutors who tried the

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applicant's case. *Kyles*, 514 U.S. at 427; *Harm*, 183 S.W.3d at 406-08 (impeachment evidence in the possession of Child Protective Services cannot be imputed to the prosecution when the records were in the possession of a state agency uninvolved in the prosecution of the defendant).

124. Based on the applicant's testimony admitting his role in the Black Widow capital murder, including shooting Robbins, and the applicant's identification by two other witnesses, the Court finds that the applicant does not establish materiality - by a reasonable probability that the result of the punishment proceeding would have been different had the applicant been able to impeach Moore with his Michigan criminal history. *Strickler*, 527 U.S. at 263; *Webb*, 232 S.W.3d at 114.

CLAIM TEN: ALLEGED JUROR MISCONDUCT

125. In his tenth ground for relief, the applicant alleges that he was denied due process as a result of juror misconduct, and appellate counsel was ineffective for failing to urge juror misconduct on direct appeal. *Applicant's Writ* at 181-91.

126. On June 14, 2011, during the second day of the punishment phase of trial, juror Upshaw became emotionally upset while riding in the elevator on her way up to court when a man wearing a turquoise color shirt and tattoos of guns and initials behind both ears talked, and stood close to her in an uncrowded elevator; juror Coleman was also in the elevator and discussed the incident with juror Upshaw; and, when Upshaw and Coleman reached the jury room they talked with the other jurors about what transpired, and there was discussion among the jurors about their safety (XIX R.R. at 3-8).

127. Upon learning of juror Upshaw's elevator incident, the trial court questioned each juror individually about what had transpired, and each juror assured the Court that the situation would not affect their decision making in the applicant's trial (XIX R.R. at 4-7, 15-27).

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128. For the remainder of the applicant's primary trial following juror Upshaw's elevator incident on June 14, 2011, the trial court regularly admonished the jurors that they were not to discuss the case among themselves (XIX R.R. at 73, 215)(XX R.R. at 181-2)(XXI R.R. at 82, 165)(XXII R.R. at 49, 76-7).

129. The Court finds, based on the record, that trial counsel did not request a mistrial based on juror Upshaw's elevator incident and subsequent discussion with fellow jurors (XIX R.R. at 4-7, 15-27).

130. Additionally, the Court finds that appellate counsel did not urge juror misconduct based on Upshaw's elevator incident and subsequent discussion with fellow jurors as a point of error on appeal.

131. The Court finds, based on the record, that Upshaw's elevator incident and subsequent discussion with fellow jurors does not establish the existence of an "outside influence" under Texas caselaw. *See White v. State*, 225 S.W.3d 571, 574 (Tex. Crim. App. 2007)("The plain language of ... Rule 606(b) indicates that an outside influence is something outside of both the jury room and the juror"); *Golden Eagle Archery Inc. v. Jackson,* 24 S.W.3d 362, 366-75 (Tex. 2000)(rules contemplate that an "outside influence" originates from sources other than the jurors themselves); *Brandt v. Surber*, 194 S.W.3d 108, 134 (Tex. App. - Corpus Christi 2006, pet. denied)(a jury's discussion of newspaper articles is not an "outside influence"); *Easly v. State*, 163 S.W.3d 839, 842 (Tex. App. - Dallas 2005, no pet.)(a chart brought into jury room with calculations of time appellant would serve in prison after application of the parole laws is not an "outside influence"); *Perry v. Safeco Ins. Co.*, 821 S.W.2d 279, 281 (Tex. App. - Houston [1st Dist.] 1991, writ denied)(juror using dictionary to share a definition with other jurors is not an "outside influence").

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132. Additionally, juror misconduct, if any, was resolved through the trial court's curative instructions. *See Ocon v. State*, 284 S.W.3d 880, 884-7 (Tex. Crim. App. 2009)(a trial court's repeated curative instructions to the jury were sufficient to cure juror misconduct after a juror was caught talking on the phone with a third-party about the trial).

133. The Court finds that appellate counsel was not ineffective for not raising on direct appeal the meritless claim of juror misconduct. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983)(appellate counsel not ineffective for choosing not to advance meritless appellate claim).

CLAIM ELEVEN: REPRESENTATION AT TRIAL – PRESERVATION OF ERROR

134. In his eleventh ground for relief, the applicant complains that trial counsel was ineffective for failure to make fifty-five various objections involving hearsay, improper impeachment, and/or relevance, and that this failure "undermined the defense mitigation case" and "crippled trial counsel's efforts to make a compelling case for Batiste's life." *Applicant's Writ* at 191-7.

135. Regarding eight of the objections that the applicant alleges should have been lodged pursuant to Tex. R. Evid. 608(b), the applicant contends that Kevin Noel Jr. was harmed by evidence of his membership in the Bloods gang, Stephanie Soliz was harmed by a suggestion that she stole cars with the applicant, and both witnesses were harmed by cross-examination testimony that they smoked marihuana with the applicant in his apartment (XXIII R.R. at 168-9, 171)(XXIV R.R. at 3, 16, 23, 38, 44-5, 159). *Applicant's Writ* at 193-6.

136. Based on a review of the instant habeas application, the Court finds that the applicant's claim regarding the remaining forty-seven possible objections is vague and inadequately briefed. The applicant cites to pages of the record without explanation of the specific portion of the record from those pages about which an objection should have

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been made. Accordingly, the applicant's claims need not be considered. *Applicant's Writ* at 192 n. 62-64. *See Ex parte Medina*, 361 S.W.3d at 637-8 (a writ "must allege specific facts so that anyone reading the writ application would understand precisely the factual basis for relief"); *Granger v. State*, 850 S.W.2d 513, 515, n.6 (Tex. Crim. App. 1993); *McFarland v. State*, 845 S.W.2d 824, 848-49 (Tex. Crim. App. 1992).

137. The Court finds, based on the record, that questions regarding Noel Jr.'s and Soliz's bad acts in these eight specific areas of the record did not "undermine" or "cripple" the applicant's mitigation case when: (a) both witnesses provided evidence favorable to the applicant regarding his love for his children and the positive role he played in his children's lives (XXIII R.R. at 155)(XXIV R.R. at 26); (b) pursuant to TEX. R. EVID. 402, Noel Jr.'s involvement with the Bloods gang was relevant in light of a letter the applicant wrote him in which he directed Noel Jr. to contact the gang member "OG Rome" and provided advice on the type of gang tattoo he should receive (XXIV R.R. 40-5, 51); and, (c) the applicant acknowledged on cross-examination that he would regularly spend $150 per week on marihuana for his home (XXIV R.R. at 159).

138. The Court finds, based on the record and the instant habeas proceedings, that the applicant does not establish trial counsels' deficient performance, much less harm, on the basis urged in the instant ground for relief.

CLAIM TWELVE: TRIAL COUNSELS' FEE

139. In his twelfth ground for relief, the applicant alleges that the trial court committed error by granting a $70,000 flat fee to each trial counsel for their representation of the applicant; that the flat fee arrangement caused fundamental and structural error; and, that trial counsel rendered ineffective assistance by accepting a flat fee. *Applicant's Writ* at 197-203.

140. The Court finds, based on the record, that the applicant did not urge the instant ground for relief on direct appeal; accordingly, the applicant has forfeited the instant

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claim. *Ex parte Hopkins*, 610 S.W.2d 479 (Tex. Crim. App. 1980)(habeas corpus will not lie as substitute for appeal).

141. Article 26.05, Texas Code of Criminal Procedure, addresses the payment of counsel appointed to represent an indigent defendant, stating that counsel appointed to represent a defendant in a criminal proceeding "shall be paid a reasonable attorney's fee"; that "All payments . . . shall be paid in accordance with a schedule of fees adopted by formal action of the judges of the . . . district courts trying criminal cases in each county"; and, that "Each fee schedule adopted shall state reasonable fixed rates . . . taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and shall provide a form for the appointed counsel to itemize the types of services performed." TEX. CRIM. PROC. CODE ANN. art. 26.05.

142. The Court finds that "reasonable" is not defined in Article 26.05, and the statute does not expressly disallow flat rate compensation for appointed counsel. TEX. CRIM. PROC. CODE ANN. art. 26.05.

143. The Court finds, based on the record, that, at the time of the applicant's capital murder trial and in accord with Article 26.05, the Harris County District Courts' fee schedule for a death capital murder allowed a $35,000 flat fee exclusive of investigation costs, expert witness fees, and witness travel costs. Further, a flat fee for counsel appointed to represent a defendant in a Harris County death capital represented a prevailing professional norm. *State's Writ Exhibit F, R.P. "Skip" Cornelius Expense Claim*; *State's Writ Exhibit G, Gerald Bourque Expense Claim*.

144. The Court finds, based on the record, that it approved the *Defendant's Ex Parte Motion for Compensation* and compensated both trial counsel at a flat rate of $70,000; that the Court explained its decision to compensate trial counsel at a rate higher than the fee schedule in a hand written note on trial counsel Cornelius' voucher: "This was a

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complicated capital murder w/ multiple victims, DNA, ballistics, multiple weapons, a second capital murder just as complicated as the first and then an aggravated robbery to add to all of the extraneous conduct stretching back to the age of 12 years."; and, that a similar notation by the trial court appears on the voucher for trial counsel Bourque. *State's Writ Exhibit F, R.P. "Skip" Cornelius Expense Claim; State's Writ Exhibit G, Gerald Bourque Expense Claim.*

145. Based on the instant habeas application, the Court finds that the applicant cites no legal authority to support his claim that the Court committed fundamental and structural error by granting trial counsel a flat fee for their representation in the applicant's capital murder trial. *Applicant's Writ* at 201.

146. The Court finds that the instant complained-of error did not affect the fact or length of the applicant's confinement in the primary case. *See Ex parte Rains*, 555 S.W.2d 478, 482 (Tex. Crim. App. 1976)(defendant must plead and prove facts which entitle him to habeas relief). *See also Stone v. Powell*, 428 U.S. 465, 477 n. 10 (1976)("the established rule with respect to nonconstitutional claims" is that they "can be raised on collateral review only if the alleged error constituted a 'fundamental defect which inherently results in a complete miscarriage of justice'"); *Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994)(habeas corpus is reserved for instances in which there exists a jurisdictional defect in the trial court which renders the judgment void or for denials of fundamental or constitutional rights); *Ex parte Watson*, 601 S.W.2d 350 (Tex. Crim. App. 1980)(post-conviction writ of habeas corpus is limited, and "lies only to review jurisdictional defects or denials of fundamental or constitutional rights").

CLAIM THIRTEEN: REPRESENTATION AT TRIAL – FAILURE TO OBJECT

147. In his thirteenth ground for relief, the applicant claims that trial counsel was ineffective for failing to lodge a First Amendment objection to the introduction of *State's Trial Exhibit 141*, a blue Santa Muerte scapular the applicant wore at the time of his

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arrest (XIV R.R. at 184)(XVIII R.R. at 172-74), and cross-examine Houston Police Department Officer Clint Ponder about non-criminal reasons why an individual might wear such a scapular. *Applicant's Writ* at 203-11.

148. At trial, the defense objected to *State's Trial Exhibit no. 141*, stating: "Our objection is going to be relevance, lack of foundation on the part of the witness. Not that they didn't try to get it in. And a 403 objection" (XVIII R.R. at 174).

149. The trial court overruled the defense's objection and admitted the Santa Muerte scapular into evidence (XVIII R.R. at 174).

150. After the Santa Muerte scapular was admitted into evidence, Officer Ponder testified that Crips normally associated themselves with the color blue and that "Santa Muerte is a saint that a lot of guys will worship to ward off the police". Officer Ponder acknowledged that non-gang members and non-criminals also wore the Santa Muerte scapular, and Ponder did not advance that the applicant wore the scapular in furtherance of his faith (XVIII R.R. at 175-6).

151. The applicant urged eight points of error on direct appeal relating to the admission of the applicant's Santa Muerte scapular, alleging that the admission of the necklace and expert testimony concerning the exhibit: (1) violated the applicant's right to free exercise of religion under the state and federal constitutions; (2) was irrelevant under TEX. CODE CRIM. PROC. ANN. art. 37.071; and, (3) was not properly authenticated. *Batiste*, 2013 WL 2424134, at *4.

152. While the Court of Criminal Appeals, on direct appeal, held that the applicant failed to preserve his first three claims for review because the defense did not object to the admission of the necklace on a First Amendment or religious basis, the Court determined that, even if trial counsel had lodged a First Amendment objection, the trial court would not have abused its discretion in overruling that objection. The Court of Criminal Appeals explained that, "at no time did the prosecutor or the gang expert

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suggest that the necklace had any significance to the exercise of a bone fide religion" and concluded that the applicant was not prejudiced by the introduction of the scapular when, "the time spent discussing the necklace was one-twentieth the time spent on appellant's tattoos, which were a much more graphic display of appellant's criminal-gang affiliation." *Batiste*, 2013 WL 2424134, at *5, n. 6.

153. Based on the Court of Criminal Appeals' determination that the trial court would not have abused its discretion in overruling a First Amendment objection to the admission of the applicant's scapular, the applicant does not establish trial counsels' deficient performance, much less that the applicant was prejudiced.

154. Moreover, appellate counsel was not ineffective for not urging a meritless claim of trial counsels' ineffectiveness on direct appeal. *Jones,* 463 U.S. at 754 (appellate counsel not ineffective for choosing not to advance meritless appellate claim).

<u>CLAIM FOURTEEN: CONSTITUTIONALITY OF TEXAS DEATH PENALTY SCHEME/DIFFERENT COUNTIES</u>

155. In his fourteenth ground for relief, the applicant contends that his sentence was unconstitutional, under U.S. CONST. amends. VI, VIII and XIV, based on Texas' alleged arbitrary system of administering death penalties in various counties. *Applicant's Writ* at 212-20.

156. The Court finds unsupported and speculative the applicant's claim that his sentence was unconstitutional based on it being administered in Harris County rather than any other Texas county.

157. Additionally, the Court finds unsupported and speculative the applicant's claim that his death sentence was unconstitutional based on an alleged arbitrary system of administering death penalties in various Texas counties.

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CLAIM FIFTEEN: 10-12 RULE

158. In his fifteenth ground for relief, the applicant alleges that his constitutional rights, under U.S. CONST. amends. VI, VIII, and XIV, were violated based on the trial court being prohibited from instructing the jury that one vote could result in a life sentence and argues that the 10-12 jury instruction violates the United States and Texas Constitutions, *Mills v. Maryland,* 486 U.S. 367 (1988), and *McKoy v North Carolina,* 494 U.S. 433 (1990). *Applicant's writ* at 221-8.

159. The Court finds that the Court of Criminal Appeals has repeatedly held that the 10-12 rule - not instructing the jury of the effect of a single "no" vote - does not violate the United States or the Texas Constitution. *See, e.g., Williams v. State*, 301 S.W.3d 675, 694 (Tex. Crim. App. 2009); *Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007); *Prystash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999).

CLAIM SIXTEEN: REPRESENTATION AT TRIAL – OFF-RECORD CONFERENCES

160. In his sixteenth ground for relief, the applicant claims that trial counsel was ineffective for consenting to twenty-seven off-the-record conferences, resulting in a "substantial and crucial portion" of the record to be missing, and denying "meaningful appellate review" as there is "few contextual clues" for these off-the-record conferences; and, that appellate counsel was ineffective for failing to allege trial counsel's ineffectiveness on this issue. *Applicant's Writ* at 228-33.

161. Based on the record and personal recollection, the Court finds that the applicant's habeas claim of a "few contextual clues for determining the subject matter" of the off-the-record conferences is not supported by the record; that at least two of the conferences pertain to administrative matters involving the scheduling of testimony (XX R.R. at 57)(XXI R.R. at 120); that one conference relates to whether the jury should be given a break (XVIII R.R. at 90); and, that another conference concerns identification of an individual whose cell phone continued to ring (XVIII R.R. at 25-6).

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162. The Court finds that the applicant's reliance on *United States v. Selva*, 559 F.2d 1303, 1304-6 (5th Cir. 1977), as authority for the proposition that he was prejudiced by the off-the record conferences is unpersuasive because *Selva* is inapplicable to the instant case; that *Selva* concerned what standard of prejudice should apply when an administrative error occurs during trial; and, that, in *Selva,* the reporter's record of the entire closing argument was missing because the court reporter became ill, his tape recorder malfunctioned, and it was impossible to reconstruct a verbatim account, resulting in a "substantial and significant portion of the record" to be lost.

163. The Court finds that the record of the applicant's capital murder trial is comprised of thirty-five volumes containing thousands of pages of voir dire, testimony, argument, and exhibits; and, that, unlike the situation discussed in *Selva*, there are no missing sections of an entire phase of the trial in the applicant's case.

164. The Court finds that trial counsels' efforts to build and protect the record allowed appellate counsel to raise twenty-two points of error on direct appeal.

165. The Court further finds, that counsel on direct appeal did not request a correction or supplementation of the reporter's record in the primary case. TEX. R. APP. P. 34.6.

166. The Court finds, based on the record, that the applicant fails to demonstrate any alleged deficiency regarding the court reporter's record in the instant cause.

167. The applicant failed to demonstrate trial counsels' ineffectiveness, much less that of appellate counsel for not advancing meritless claims. *Jones,* 463 U.S. at 754 (appellate counsel not ineffective for choosing not to advance meritless appellate claim).

CLAIM SEVENTEEN: MITIGATION SPECIAL ISSUE

168. In his seventeenth ground for relief, the applicant alleges that his sentence should be vacated because the special issues allegedly restricted the evidence that the jury could consider mitigating; that the instructions concerning "moral blameworthiness" and the lack of definitions unconstitutionally limit the categories of evidence the jury may

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find mitigating; and, at trial counsel was ineffective for failure to request a jury instruction that clarified the meaning and application of mitigating evidence. *Applicant's Writ* at 233-40.

169. The Court finds, based on the record, that trial counsel filed a pretrial motion regarding proposed jury instructions at punishment that was denied in its entirety; however, the defense's motion did not request any clarifying instruction regarding what a "mitigating circumstance" might include (VII C.R. at 1722-28).

170. The Court finds that the Court of Criminal Appeals has previously rejected the argument that TEX. CRIM. PROC. CODE ANN. art. 37.071 unconstitutionally narrows a jury's discretion to consider as mitigating only those factors concerning moral blameworthiness. *Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App. 1996).

171. The Court finds that the punishment instructions that allowed the jury to consider all submitted evidence in answering the special issues did not restrict the jury to consider as mitigating only evidence that reduced the applicant's moral blameworthiness.

172. The Court finds that the punishment charge submitted to the jury comported with TEX. CODE CRIM. PROC. art. 37.071; therefore, trial counsel was not ineffective for failing to object to the charge on the basis urged in the instant ground for relief.

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II.

CONCLUSIONS OF LAW

CLAIM ONE: REPRESENTATION AT TRIAL – APPLICANT'S ALLEGED BRAIN DAMAGE

1. The applicant fails to satisfy his burden of proof and demonstrate that trial counsel rendered ineffective assistance because the applicant cannot demonstrate by a preponderance of the evidence the factual premise to his claim for relief - that the applicant has frontal lobe damage - given the vagueness and unpersuasive nature of Dr. Underhill's affidavit. *See Ex parte Hogan*, 556 S.W.2d 352, 353 (Tex. Crim. App

1977)(habeas corpus relief dismissed when "nothing in the record" suggested the involuntariness of the applicant's plea).

2. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance such that their performance was not in accord with prevailing professional norms when their pre-trial investigation included retaining two psychologists and an expert in substance abuse and none of these experts detected any indicia of frontal lobe dysfunction. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte McFarland*, 163 S.W.3d 743, 754-60 (Tex. Crim. App. 2005)(ineffective assistance of counsel claim denied for failure to demonstrate deficient performance; trial counsel conducted an adequate pre-trial investigation when he read a leading treatise, reviewed the state's files, filed multiple pre-trial motions, hired an investigator, and consulted with other attorneys).

3. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance such that there is a reasonable probability that the outcome of the trial would have been different had a defense involving general cognitive functioning been advanced when: (a) the applicant's MMPI-A score already evidenced that he was "impulsive" and "preferred action over thought and reflection;" and (b) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate sufficient prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same).

CLAIM TWO: REPRESENTATION AT TRIAL – GANG EXPERT

4. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to retain a gang expert when counsel made a strategic decision to try to minimize discussion of the applicant's extensive Crips

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involvement. *See Strickland*, 466 U.S. at 689 (trial counsel is not ineffective simply because another attorney might have employed a different strategy); *Ex parte White*, 160 S.W.3d 46, 55 (Tex. Crim. App. 2004)("Just because another attorney would have pursued another strategy does not make this strategy [all-or-nothing] unreasonable").

5. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance such that there is a reasonable probability that the outcome of the trial would have been different had trial counsel engaged a gang expert to explain the applicant's "limited" involvement with the Crips when: (a) the applicant's documented gang involvement was extensive, not "limited"; (b) the applicant did not testify that his involvement was "limited"; and, (c) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate sufficient prejudice); *Ex parte Martinez*, 330 S.W.3d 891, 902-4 (trial counsel not ineffective for failure to object to gang related evidence when the remaining evidence against the defendant was "strong"); *see also Henderson v. Cockrell*, 333 F.3d 592, 601 (5th Cir. 2003)(trial counsel not ineffective for failure to object to evidence of the defendant's gang affiliation given the "brutal and senseless nature of the crime, the evidence of Henderson's utter lack of remorse, and the extremely strong evidence of guilt").

<u>**CLAIM THREE: REPRESENTATION AT TRIAL – SOCIAL HISTORIAN**</u>

6. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to retain and present a social historian such that their performance was not in accord with prevailing professional norms when: (a) trial counsel retained a mitigation expert to conduct investigative interviews of the applicant's family history; (b) trial counsel presented a comprehensive social history of the applicant's life through the testimony of the applicant, his family, and friends; and (c)

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both trial counsel both referenced evidence of the applicant's social history to argue before the jury that the socially disorganized nature of the applicant's community, in particular his lack of a father figure, shaped him and contributed to his criminal actions. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte Kunkle*, 852 S.W.2d 499, 506 (Tex. Crim. App. 1993)(holding that strategic choices made after thorough investigation of the law and facts virtually unchallengeable under Sixth Amendment); *Coble v. Quarterman*, 496 F.3d 430, 441 (5th Cir. 2007)(trial counsel effective for presenting a mitigation case including a "significant number of witnesses who testified regarding his background" including his time in a state home and "positive factors relating to his wife and children").

7. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to retain and present a social historian such that there is a reasonable probability that the outcome of the trial would have been different when: (a) trial counsel retained a mitigation expert to conduct investigative interviews of the applicant's family history; (b) trial counsel presented a comprehensive social history of the applicant's life through the testimony of the applicant, his family, and friends; (c) both trial counsel both referenced evidence of the applicant's social history to argue before the jury that the socially disorganized nature of the applicant's community, in particular his lack of a father figure, shaped him and contributed to his criminal actions; and, (d) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate prejudice); *cf. Wiggins v. Smith*, 539 U.S. 510 (2003)(holding that there was a reasonable probability that outcome would have been different when defense counsel did not investigate and present evidence of defendant's social history, an action

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that was prevailing norm in that jurisdiction, and did not pursue social service records showing the defendant was extensively abused).

CLAIM FOUR: REPRESENTATION AT TRIAL – PREPARATION OF LAY WITNESSES

8. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to properly prepare lay witnesses Rowena Scott, Darlene Beard, Beverly West, Stephanie Soliz, Kevin Noel Jr., and Beverly West to testify such that their performance was not in accord with prevailing professional norms when: (a) all of the witnesses were contacted by trial counsel prior to their respective testimonies; and, (b) direct examination of these witnesses set forth a clear and detailed picture of the applicant's upbringing that contributed to his mitigation case and evidenced careful preparation. *Strickland*, 466 U.S. at 700; *cf. Williams v. Taylor*, 529 U.S. 362 (2000)(trial counsel ineffective for failing to investigate mitigating evidence of the defendant's possible intellectual disability, and prison records indicating that the defendant performed well in the structured environment of prison).

9. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to properly prepare lay witnesses Rowena Scott, Darlene Beard, Beverly West, Stephanie Soliz, Kevin Noel Jr., and Beverly West to testify such that there is a reasonable probability that the outcome of the trial would have been different when: (a) direct examination of these witnesses set forth a clear and detailed picture of the applicant's upbringing that contributed to his mitigation case; and (b) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same); *see also Ruiz v. Stephens*, 728 F.3d 416, 424-27 (5th Cir. 2013)(defendant did not suffer prejudice by trial counsel's failure to develop evidence of his "bleak" childhood given the

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violent nature of capital murder coupled with his multiple attacks on guards and inmates while awaiting trial).

CLAIM FIVE: REPRESENTATION AT TRIAL – ADDITIONAL LAY WITNESSES

10. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to investigate and present ten additional lay witnesses (Monica Davis, Truman Jackson, Malcolm Mitchell, Ricardo Lara, Kevin Noel Sr., Necole Baldwin, Danyell Soliz, Raul Soliz, Melissa Beard-Carter, and Dyntaniel Rod Carter) such that counsels' performance was not in accord with prevailing professional norms when: (a) trial counsel made a strategic decision to present only those witnesses who they felt "would do the best job in convincing the jury that [the applicant] was not a threat"; and, (b) four of the lay witnesses (Monica Davis, Truman Jackson, Malcolm Mitchell, and Ricardo Lara) were interviewed by the defense team and were not selected to testify by trial counsel. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte Kunkle*, 852 S.W.2d at 506 (holding that strategic choices made after thorough investigation of the law and facts virtually unchallengeable under Sixth Amendment).

11. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that that trial counsel rendered ineffective assistance by failing to investigate and present ten additional lay witnesses such that there is a reasonable probability that the outcome of the trial would have been different when: (a) their respective social history testimonies would have been cumulative of the applicant's own testimony, and that of the applicant's family and friends; and (b) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same); *Ex parte*

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Weinstein, 421 S.W.3d at 667 (defendant not harmed by the State's failure to disclose impeachment evidence when it was cumulative of other impeachment evidence presented at trial).

CLAIM SIX: REPRESENTATION AT TRIAL – FUTURE DANGER EVIDENCE

12. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to present "any" evidence that the applicant would not be a future danger, and not utilizing expert Dr. Elizabeth Pelz "in an appropriate manner", such that their performance was not in accord with prevailing professional norms when: (a) trial counsel made a strategic decision to present evidence regarding future dangerousness with records and lay witnesses rather than through expert opinion; and, (b) trial counsel did present evidence relating to future dangerousness - the applicant's lack of disciplinary problems during his prior TYC and state jail incarcerations - to argue that the applicant would not pose a future danger when confined in TDCJ's structured environment. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte Kunkle*, 852 S.W.2d at 506 (holding that strategic choices made after thorough investigation of the law and facts virtually unchallengeable under Sixth Amendment); *see also Tucker v. Johnson*, 242 F.3d 617, 622-4 (5th Cir. 2001)(rejecting claim of ineffective assistance of counsel where defendant argued that counsel should have presented additional evidence of abuse; recognizing that defendant essentially arguing that counsel should have presented *stronger* mitigating case).

13. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to present "any" evidence that the applicant would not be a future danger, and not utilizing expert Dr. Elizabeth Pelz "in an appropriate manner", such that there is a reasonable probability that the result of trial would have been different when: (a) the applicant tried to assault

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fellow inmate Robert Dean in the structured environment of the Harris County Jail inmate while awaiting trial; (b) the applicant told Dean that, "he had nothing to live for"; (c) the applicant continued his gang related activities in the Harris County Jail as the leader of a group of inmates who would steal and pick fights with older inmates; and (d) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same).

CLAIM SEVEN: REPRESENTATION AT TRIAL – APPLICANT'S TESTIMONY

14. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to properly prepare the applicant to testify such that their performance was not in accord with prevailing professional norms when: (a) the applicant acknowledged on redirect examination that he talked with trial counsel "at length" about his decision to testify; (b) trial counsel indicates that they did prepare the applicant to testify; and (c) the applicant's answers to direct examination reflect prior preparation with trial counsel. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same).

15. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to properly prepare the applicant to testify such that there is a reasonable probability that the result of trial would have been different when the applicant, on direct and cross examination: (a) provided a detailed account of his life and circumstances; (b) acknowledged his leadership role in the two capital murders and aggravated robbery; (c) explained that his rap lyrics were largely "hype"; (d) indicated that he would distance himself from the Crips; and (e) expressed remorse for his crimes. *Strickland*, 466 U.S. at 700 (ineffective

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assistance of counsel claim denied for failure to demonstrate prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same).

CLAIM EIGHT: REPRESENTATION AT TRIAL – APPLICANT'S LETTERS AND RAP LYRICS

16. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to call expert witness Charles Rotramel to "discuss the meaning and significance" of the applicant's rap lyrics, and did not adequately prepare the applicant, Kevin Noel Jr., and Micaela Lara to testify on cross-examination about the applicant's letters, such that their performance was not in accord with prevailing professional norms when: (a) trial counsel made a strategic decision to introduce the applicant's letters with "flags" to highlight positive portions in which the applicant expresses remorse; and (b) the jury did not need an expert to explain that music lyrics are often expressive, grandiose, and a vehicle to express emotions. See *Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte Kunkle*, 852 S.W.2d at 506 (holding that strategic choices made after thorough investigation of the law and facts virtually unchallengeable under Sixth Amendment).

17. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to call expert witness Charles Rotramel to "discuss the meaning and significance" of the applicant's rap lyrics, and did not adequately prepare the applicant, Kevin Noel Jr., and Micaela Lara to testify on cross-examination about the applicant's letters, such that there is a reasonable probability that the result of trial would have been different when: (a) Rotramel's opinion that the applicant's rap lyrics reflect "typical empty rap braggadocio and genuine emotional expression" is cumulative of the applicant's testimony that eighty-five percent of his lyrics are "hype music"; (b) the applicant's rap lyrics, and letters to Noel Jr. and Lara, constituted only a small portion of the trial proceedings; and (c) the

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evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same); *see also Tucker v. Johnson*, 242 F.3d at 622-4 (rejecting claim of ineffective assistance of counsel where defendant argued that counsel should have presented additional evidence of abuse).

CLAIM NINE: REPRESENTATION AT TRIAL – DISCLOSURE OF IMPEACHMENT EVIDENCE

18. The State did not violate *Brady v. Maryland* by failing to disclose impeachment evidence pertaining to witness Anthony D. Moore when knowledge of Moore's out-of-state felony convictions and absconder status cannot be imputed to the State due to an administrative error that failed to electronically link Moore's FBI number to his Texas State Identification number in the TCIC/NCIC system. *See Kyles v. Whitley*, 514 U.S. 419, 427 (1995)(holding that a prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf *in the case*, including the police.")(emphasis added); *Harm v. State*, 183 S.W.3d 403, 406-8 (Tex. Crim. App. 2006)(impeachment evidence in the possession of Child Protective Services not imputed to the prosecution when the records were in the possession of a state agency uninvolved in the prosecution of the defendant).

19. The State did not violate *Brady v. Maryland* by failing to disclose impeachment evidence pertaining to witness Anthony D. Moore such that there is a reasonable probability that the result of the punishment proceeding would have been different had he been able to impeach Moore with his criminal history when the applicant testified that he led and planned the Black Widow capital murder and shot Steve Robbins first as Robbins was coming toward him to protect his customers. *See Strickler v. Greene*, 527 U.S. at 263, 282 (1999)(*Brady* claim denied for failure to satisfy materiality requirement); *Webb v. State*, 232 S.W.3d 109, 114 (Tex. Crim. App 2007)(same).

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CLAIM TEN: REPRESENTATION AT TRIAL – ALLEGED JUROR MISCONDUCT

20. The applicant was not denied due process due to alleged juror misconduct arising from juror Upshaw's elevator incident when: (a) the Court spoke to each juror individually and they each assured the Court that juror Upshaw's elevator incident would not affect their decision making; and, (b) the trial court routinely admonished the jurors after this incident that they should not discuss the case with anyone. *See Ocon*, 284 S.W.3d at 887 (a trial court's repeated curative instructions to the jury were sufficient to cure juror misconduct after a juror was caught talking on the phone with a third-party about the trial); *Robinson v. State*, 851 S.W.2d 216, 230 (Tex. Crim. App. 1991)(trial court did not abuse discretion in denying a mistrial when a juror learned from a newspaper article printed during the trial about uncharged bad acts of the defendant after the juror assured the trial court that the article's content would not affect her decision making).

21. Appellate counsel's decision not to raise alleged juror misconduct on direct appeal was objectively reasonable when the applicant does not demonstrate that he would have prevailed on appeal given that established jurisprudence recognizes repeated curative instructions and individual assurances of jurors as sufficient to cure alleged juror misconduct. *See Evitts v. Lucey*, 469 U.S. 387, 394 (1985)(an attorney "need not advance *every* argument, regardless of merit, urged by the appellant.")(emphasis in original); *Ex parte Davis*, 866 S.W.2d 234, 243 (Tex. Crim. App. 1993)(counsel not ineffective for failure to raise alleged point of error on appeal); *cf. Ex parte Miller*, 330 S.W.3d 610, 624-26 (Tex. Crim. App. 2009)(counsel ineffective for failure to raise a "lead pipe cinch" point of error on direct appeal).

CLAIM ELEVEN: REPRESENTATION AT TRIAL – PRESERVATION OF ERROR

22. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to make fifty-five various objections

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involving hearsay, improper impeachment, and/or relevance such that such that their performance was not in accord with prevailing professional norms when the applicant does not allege sufficient facts pertaining to forty-seven (47) of the purported areas of objection. *Ex parte Medina*, 361 S.W.3d at 637-8.

23. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to object to eight specific questions involving alleged improper impeachment of Stephanie Soliz and Kevin Noel Jr. such that there is a reasonable probability that the result of trial would have been different when: (a) Soliz and Noel Jr. both provided evidence favorable to the applicant regarding his love for his children that advanced his mitigation case; (b) questions regarding Noel Jr.'s involvement with the Bloods gang was a relevant area of inquiry in light of the applicant's letter to Noel Jr. regarding the type of gang tattoo he should receive; (c) questions of Soliz and Noel Jr. regarding their marihuana use in the applicant's home were cumulative of the applicant's testimony that he would regularly spend $150 per week on marihuana for his home; and, (d) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same).

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CLAIM TWELVE: TRIAL COUNSELS' FEE

24. The Court's decision to grant trial counsel a flat fee of $70,000 is not structural error, and is subject to a harmless error review. *See Hughes v. State*, 24 S.W.3d 833, 837 fn. 2 (Tex. Crim. App. 2000)("Failure to adhere to statutory procedures serving to protect a constitutional provision is a violation of the statute, not a violation of the constitutional provision itself.").

25. The applicant fails to demonstrate any harm from the flat fee compensation given the overwhelming evidence of his guilt and the comprehensive mitigation case developed by trial counsel. *See Hughes*, 24 S.W.3d at 837-8 (capital murder defendant not harmed by violation of art. 26.052 when the record reflects that he was "represented by fully qualified and capable counsel"); *Wright v. State*, 28 S.W.3d 526, 530 fn. 2 (Tex. Crim. App. 2000)(violation of art. 26.052 harmless when the record reflects that the defense attorney "filed numerous pre-trial motions, conducted voir dire, cross-examined the state's witnesses, made objections, and made arguments at both phases of trial").

26. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by accepting a flat fee when a flat fee is a prevailing professional norm in Harris County for compensating appointed counsel in a death capital. *Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

27. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by accepting a flat fee such that there is a reasonable probability that the result of trial would have been different when counsel conducted an extensive pre-trial investigation, filed numerous pre-trial motions, conducted voir dire and a motion to suppress; cross-examined the state's witnesses, lodged objections, made arguments at both phases of trial, and constructed a thorough and comprehensive mitigation case. *Wright*, 28 S.W.3d at 530 n. 2; *Conclusions of Law* no. 1-17, 22-3, 26, *supra*.; *Conclusions of Law* no. 34-5, *infra*.

<u>CLAIM THIRTEEN: REPRESENTATION AT TRIAL – FAILURE TO OBJECT</u>

28. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to make a First Amendment objection to the applicant's Santa Muerte scapular such that their performance was not in accord with prevailing professional norms when the Court of Criminal Appels has determined

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that the trial court would not have abused his discretion in overruling a First Amendment objection. *Batiste*, 2013 WL 2424134, *4 fn. 6 (collecting cases examining the relationship between criminal street gangs and Santa Muerte).

29. Additionally, the applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by failing to make a First Amendment objection such that there is a reasonable probability that the result of trial would have been different when: (a) the State did not introduce evidence that the scapular had any significance to the exercise of religion; and (b) the evidence of the applicant's two capital murders, an aggravated robbery, and multiple bad acts was particularly strong. *Batiste*, 2013 WL 2424134, at *4 fn. 6; *see Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate prejudice); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same).

30. Appellate counsel's decision not to raise ineffective assistance of trial counsel on direct appeal was objectively reasonable when the applicant does not demonstrate that he would have prevailed on appeal and appellate counsel chose to raise other claims on direct appeal regarding the Santa Muerte scapular. *Batiste*, 2013 WL 2424134, at *4; *see Evitts*, 469 U.S. at 394 (an attorney "need not advance every argument, regardless of merit, urged by the appellant.")(emphasis in original); *Ex parte Davis*, 866 S.W.2d at 243 (counsel not ineffective for failure to raise alleged point of error on appeal); *cf. Ex parte Miller*, 330 S.W.3d at 624-6 (counsel ineffective for failure to raise a "lead pipe cinch" point of error on direct appeal).

CLAIM FOURTEEN: CONSTITUTIONALITY OF TEXAS DEATH PENALTY SCHEME/DIFFERENT COUNTIES

31. The applicant fails to show that his death sentence was unconstitutional based on being administered in Harris County rather than any other Texas county. *See Cantu*

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v. State, 842 S.W.2d 667, 691-2 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 926 (1993)(holding prosecutorial discretion does not render death penalty unconstitutional).

32. The applicant fails to show that his sentence was unconstitutional, under U.S. CONST. amends. VI, VIII and XIV, based on an alleged arbitrary system of administering death penalties in various Texas counties. *See Allen v. State*, 108 S.W.3d 281, 286 (Tex. Crim. App. 2003)(*citing Bell v. State*, 938 S.W.2d 35, 55 (Tex. Crim. App. 1996); *King v. State*, 953 S.W.2d 266, 274 (Tex. Crim. App. 1997)(declining to reach merits of claim of disparate treatment based on cases being held in different counties; noting there was no empirical data, case law, or other factual basis to support claim); *see and cf. Morris v. State*, 940 S.W.2d 610, 613-4 (Tex. Crim. App. 1996)(noting possibility of two defendants, who have committed identical murder, receiving different sentences based on differing degrees of mitigating character and background evidence).

33. The applicant fails to show that the Texas death penalty scheme is unconstitutional, as applied to him. *Cockrell v. State*, 933 S.W.2d 73, 92-3 (Tex. Crim. App. 1996)(holding defendant has to show scheme unconstitutional as applied to him to gain relief from death sentence).

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CLAIM FIFTEEN: 10-12 RULE

34. The applicant fails to show that the 10-12 jury instruction violates the United States and Texas Constitutions and the "Supreme Court precedent" of *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v North Carolina*, 494 U.S. 433 (1990). *See Hughes v. State*, 897 S.W.2d 285, 300, 301 (Tex. Crim. App. 1994)(citing *Rousseau v. State*, 855 S.W.2d 666, 687 (Tex. Crim. App. 1993))(rejecting contention that 37.071 violates decisions in *McKoy* and *Mills*); *Leza v. State*, 351 S.W.3d 344, 361-2 (Tex. Crim. App. 2011)(holding "10-12 rule" in art. 37.071 does not violate Eighth Amendment); *Williams v. State*, 301 S.W.3d 675, 694 (Tex. Crim. App. 2009); *Druery v. State*, 225 S.W.3d 491,

509 (Tex. Crim. App. 2007); *Prystash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999).

CLAIM SIXTEEN: REPRESENTATION AT TRIAL – OFF-RECORD CONFERENCES

35. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by consenting to multiple, off-the-record conferences such that their performance was not in accord with prevailing professional norms when: (1) the trial record is voluminous; (2) there are no missing sections of an entire phase of the trial; (3) counsel's efforts to build and protect the record allowed appellate counsel to raise twenty-two (22) points of error on direct appeal; and (4) the context of several of the conferences indicate that the topics being discussed were administrative. *See Strickland*, 466 U.S. at 700 (ineffective assistance claim denied for failure to demonstrate deficient performance); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same); *but cf., Selva*, 559 F.2d at 1304-6 (defendant entitled to a new trial when a "substantial and significant portion of the record" was lost due to a technical error).

36. The applicant fails to demonstrate by a preponderance of the evidence that trial counsel rendered ineffective assistance by consenting to multiple, off-the-record conferences such that there is a reasonable probability that the result of trial would have been different when: (a) the trial record is voluminous; (b) there are no missing sections of an entire phase of the trial; (c) trial counsels' efforts to build and protect the record allowed appellate counsel to raise twenty-two points of error on direct appeal; and, (d) the context of several of the conferences indicate that the topics being discussed were administrative. *See Strickland*, 466 U.S. at 700 (ineffective assistance of counsel claim denied for failure to demonstrate deficient performance); *Ex parte McFarland*, 163 S.W.3d at 754-60 (same); *but cf., Selva*, 559 F.2d at 1304-6 (defendant entitled to a new trial when a "substantial and significant portion of the record" was lost due to a technical error with the court reporter's equipment).

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37. Appellate counsel's decision not to raise ineffective assistance of trial counsel on direct appeal was objectively reasonable when the applicant does not demonstrate that he would have prevailed on appeal. *See Evitts*, 469 U.S. at 394 (an attorney "need not advance every argument, regardless of merit, urged by the appellant.")(emphasis in original); *Ex parte Davis*, 866 S.W.2d at 243 (counsel not ineffective for failure to raise alleged point of error on appeal); *cf. Ex parte Miller*, 330 S.W.3d at 624-6 (counsel ineffective for failure to raise a "lead pipe cinch" point of error on direct appeal).

CLAIM SEVENTEEN: MITIGATION SPECIAL ISSUE

38. The trial court properly instructed the applicant's jury at punishment concerning the special issues; the applicant fails to show that TEX. CRIM. PROC. CODE art. 37.071 unconstitutionally narrows a jury's discretion to consider as mitigating only those factors concerning moral blameworthiness. *See Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App. 1996)(holding that because consideration of mitigation evidence is open-ended subjective determination by each individual juror, art. 37.071 does not unconstitutionally narrow jury's discretion to factors concerning only moral blameworthiness); *see also Williams v. State*, 301 S.W.3d 675, 694 (Tex. Crim. App. 2009)(rejecting claim that Texas death penalty scheme unconstitutional based on its definition of mitigating evidence allegedly limiting Eighth Amendment concept of "mitigation" to factors that render defendant less morally blameworthy for commission of capital murder).

39. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that habeas corpus relief be denied.

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Cause No. 1212366-A

EX PARTE	§	IN THE 174th DISTRICT COURT
	§	OF
TEDDRICK BATISTE , Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in cause no. 1212366-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 1212366-A, including his application for writ of habeas corpus;

2. all of the State's pleadings filed in cause number 1212366-A, including the State's Original Answer;

3. any affidavits filed in cause no. 1212366-A;

4. this court's findings of fact, conclusions of law and order denying relief in cause no. 1212366-A;

5. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or the State in cause no. 1212366-A; and,

6. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 1212366, unless they have been previously forwarded to the Court of Criminal Appeals.

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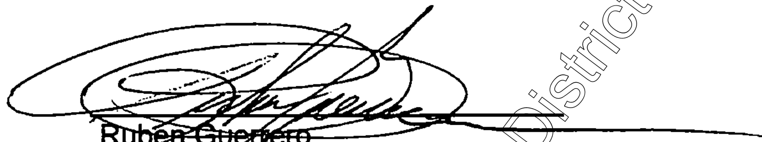
THE CLERK IS FURTHER ORDERED to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Ryan Kent, Office of Capital Writs; 1700 N. Congress Avenue; Suite 460; Austin, Texas 78711 and the

State: Joshua Reiss; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 1212366-A.

SIGNED this ______ day of JAN 21 2015, 20__.



Ruben Guerrero
Presiding Judge
174th District Court
Harris County, Texas

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EXHIBIT A

AFFIDAVIT OF R.P. "SKIP" CORNELIUS

Unofficial Copy Office of Chris Daniel District Clerk

NO. 1212366 A
174th

FILED
Chris Daniel
District Clerk
FEB 5 2014
Time:_______
Harris County, Texas
By_______
Deputy

P.8

STATE OF TEXAS :
: AFFIDAVIT
COUNTY OF HARRIS :

My name is R. P. CORNELIUS. I am an attorney licensed to practice law in the State of Texas since 1972. My bar card number is 04831500. My office address is 2028 Buffalo Terrace, Houston, Texas, 77019, and my telephone number is (713) 237-8547.

I am also admitted to the bar in good standing in the United States District Court For The Southern District Of Texas and the Fourth, Fifth, and Eleventh Circuit Courts Of Appeals, as well as, the United States Supreme Court. I am Board Certified in the field of criminal law by the Texas Board of Legal Specialization. I am a former Assistant District Attorney for Harris County, Texas, and a former Assistant United States Attorney for the Southern District of Texas. My Notice Of Appearance And Motion To Appear Pro Hac Vice has been approved in State or Federal court in the following states: California, Connecticut, Florida, Illinois, Louisiana, Michigan, New Hampshire, North Carolina, and Virginia. I have never been found ineffective, denied admission, or disciplined by any court.

I have been ordered by the Court to provide an affidavit answering several issues which have been presented to me as potential grounds for an allegation of ineffective assistance of counsel.

I did represent TEDDRICK R. BATISTE in the capital murder case for which a post conviction writ of habeas corpus has been filed and I will provide my answers to the questions I have been asked to respond to, but only because I am ordered to do so. It puts me at cross-purposes and requires me to say things that are not in the best interest of my client whom I gave a part of my life to defend and with whom I sat next to day after day in jury selection and in the trial and with whom I made decisions with and suffered with.

Let me say that I am very sorry Mr. Batiste received a death sentence in this case. He was very young and, as a child, had a world of potential. I believed in him and believed in our mitigation testimony and believed the jury would see sufficient mitigation but they did not.

The guilt/innocence phase of the trial was indefensible as both Mr. Batiste and I knew well. The crimes were about as cold as it gets, especially the white Cadillac case. His history and

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Certified Document Number: 59732047 - Page 1 of 8

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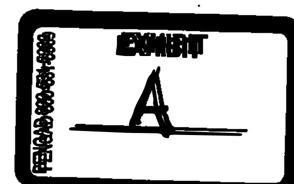

gang activity, which I will discuss in detail later made future dangerousness fairly hopeless to be honest. Mitigation was our best, and really only, opportunity to save his life at trial.

However, he was so honest and sincere with me and willing to plead for a sentence of life without parole, which was a reasonable and an intelligent assessment of the situation he was in, that I seriously went to work trying to convince the District Attorney's Office to allow him to plead to life without parole and, after months and months of subtle negotiation and several personal meetings with the First Assistant, I got the offer, with one condition: the Defendant had to tell the authorities the identity of the third defendant. He did not have to testify against him or provide any other evidence, just identify him. I was so relieved when this happened. It was like a huge weight had been taken off my chest. However, when I presented it to the Defendant he said no. I let it sit and let him think about it and later went back to attempt to save his life the best way I knew how but he would not agree to give up the third defendant. I will assure you that he was so involved in his "gang mentality" that he wouldn't even consider it. He wanted the life sentence but the gang code of honor was more important to him than his own life.

I am well aware that the procedure that must be followed in these cases requires the writ lawyers to essentially play devil's advocate and challenge every decision made by the trial lawyers whose responsibility and commitment to the client and the law is immense. I don't know the writ lawyers in this case, or what their actual experience is, and particularly if they have ever defended a single case like this one or not, but I do know their responsibility and I accept it as a part of the system.

Before I attempt to answer the specific questions my experience might be helpful. I have been trying death penalty cases since 1976 and have tried quite a few and have tried them from both sides of the table. There have been psychological issues, and gang issues, and witness decisions, and trial objections, and charge issues in every one of them and in virtually all of the non-death capital cases I have tried, as well as, these same issues in many of the other criminal cases I have tried since 1972 when I first began my practice. All of my practice has been in criminal law. Suffice it to say, even though I am only a lawyer and not a psychiatrist, or a psychologist, or even a social historian

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Certified Document Number: 59732047 - Page 2 of 8

I have a lot of experience in these fields.

One of the realities of death penalty litigation that all experienced defense attorneys will admit is this: if you use mental health evidence, short of proving actual insanity, you run the risk of making the defendant look even more dangerous to the jury, and frankly it is generally true, because they are more dangerous. Let me illustrate briefly. If you prove that the defendant needs medicine to overcome his mental health challenges, and even if you prove the medicine is available, the State will argue that even if this were true the jury will never be assured the defendant will take his medicine and if he doesn't society is in danger.

Conversely, if you don't use mental health evidence you will be writing affidavits like this one and/or testifying at hearings as to why you didn't use it.

I do hope this is of some assistance to the Court and to counsel.

Here are my answers to the specific questions:

1. Frontal lobe disorder

We had no information from any source, be it a family member, friend, our experts or investigators, or any record that would indicate a frontal lobe disorder, or any mental disorder. He was sharp and I personally saw him make decisions. I am very careful not to call witnesses, especially experts, who on cross examination can destroy our case.

If the Texas Court Of Criminal Appeals rules, or if the Texas Legislature passes a law that requires in every capital murder prosecution a defendant must be given neuropsychological testing to see if they have brain damage, even if there is absolutely no indication, and the county or State must bare the cost, then I certainly will follow that requirement but that is not my understanding of the law in Texas.

2. Limited scope of applicant's gang involvement

"Limited scope of applicant's gang involvement?" Are you kidding? He was as ganged up as any person I have ever met and I have been doing this since way before there were gangs in Houston, Texas. A cursory reading of his writing will illustrate that his gang involvement included virtually ever word he wrote. Every conceivable gang reference is contained in all of his writing.

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Certified Document Number: 59732047 - Page 3 of 8

To the point of not using certain letters because they refer to a rival gang and using certain letters, or the formation of the letters, to emphasize his gang. He had on his body every conceivable tattoo and reference to his gang. Every decision he made was about the gang. He was the living embodiment of his gang.

We were not going to come out on top with testimony form any expert on gangs. The less said about gangs the more I liked our chances to save his life.

3. **Social historian**

There is nothing deficient in our presentation of his social history, in my opinion.

4. **Properly prepare lay witnesses**

The lay witnesses were properly prepared and made good witnesses for our client. It was not their fault or our fault that the jury decided the special issues in favor of the death penalty.

5. **10 family members**

I believe we interviewed every family member and every friend and chose the ones we felt would do the best job in convincing the jury that he was not a threat and/or there existed sufficient mitigation to turn away from the death penalty.

6. **Properly utilize Dr. Mary Elizabeth Pelz**

I decided to use Dr. Elizabeth Pelz the way I decided to use her because I felt it was our best shot at obtaining a life sentence. I did not feel the expert testimony she was prepared to offer about future dangerousness was going to be as helpful to our case as my ability to argue it from our witnesses and the records. We had good witnesses and good records and a lot to argue and my feeling was that a paid expert's opinion was not going to win the day and in fact might give the State more to argue and ultimately be more harmful than helpful.

Again, this was my decision to emphasize this testimony and these records myself without a paid expert's opinion on future dangerousness. I believed we had so much to work with in this case that I felt a lay juror would understand it and I feared the repercussions of paid expert testimony. I felt we didn't need it and were better off without it. I could have offered it but chose not to.

It is easy to say today that we should have had this expert testimony or that expert testimony

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Certified Document Number: 59732047 - Page 4 of 8

but in my opinion, then and now, experts in this case and on those issues would have had no impact on our jury.

7. **Prepare applicant to testify**

We did prepare applicant to testify and we encouraged him to tell us the truth and believed he was telling us the truth. It turned out the story he consistently told us was not the story he decided to tell the jury. There is no amount of time in preparation of a witness that can make them tell the truth if they choose not to. Although the jury had no way to know that he did not tell us the same story he told on the witness stand he actually made a good witness for himself, in my opinion. He was able to explain the rap lyrics and his gang involvement and his life in general. He was actually well prepared and presented himself as well as he could have possibly presented himself. Unfortunately he changed what he told us before trial and disputed some of our defensive theories in an effort, I believe, to protect another gang member who has never been identified .

8. **Applicant's rap lyrics**

Even though I told my client, as I tell every one of my clients in person and in writing, not to ever discuss the case with any person, by phone or mail, or in any manner, unless I approve it, he did not follow my advice. He was not even close to following my advice. He had it from me in writing and in person every single time I met with him but he did not follow it. But, having said all of that, he did as good a job of explaining the lyrics to the jury as any expert could have, or any one else for that matter.

Unfortunately there existed no explanation that would overcome the effect of those lyrics. No argument. No expert witness testimony. Nothing. As a matter of trial strategy, in my opinion, the best treatment of that part of the case was to leave it alone.

9. **55 objections during trial**

I made the trial objections I felt were necessary and helpful to applicant. If I failed to object to some piece of evidence or testimony it was because I either felt it was actually admissible or would come in another way; or I felt it was helpful to the defense.

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Certified Document Number: 59732047 - Page 5 of 8

10. Santa Muerte scapular worn by applicant at the time of his arrest

I could not come up with any plausible objection to keep the Santa Muerte scapular out of evidence and still can't.

11. 27 off-the-record conferences

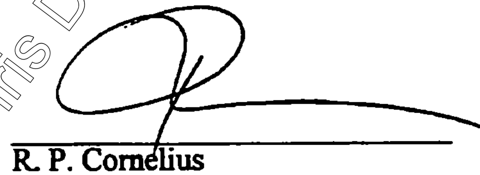
Anything said by any one that could possibly adversely effect applicant's right to a fair trial and due process was on the record.

12. Flat fee

I do not know how to respond to this statement. The Trial Court has the option of paying a flat fee or by the hour.

13. Charge on mitigation

I felt the punishment charge on mitigation followed the law.

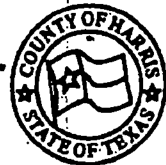


R. P. Cornelius

SWORN TO AND SUBSCRIBED BEFORE me on this the 9 day of January, 2014.

Unofficial Copy Office of Chris Daniel District Clerk

Certified Document Number: 59732047 - Page 6 of 8



CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

February 6, 2014

DEVON ANDERSON
DISTRICT ATTORNEY
HARRIS COUNTY TEXAS

To Whom It May Concern:

Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, please find enclosed copies of the documents indicated below concerning the Post Conviction Writ filed in cause number 1212366-A in the 174th District Court.

☐ **State's Original Answer Filed** ,

☒ **Affidavit FEBRUARY 5, 2014**

☐ **Court Order Dated** ,

☐ **Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.**

☐ **Respondent's Proposed Findings of Fact and Order** ,

☒ **Other**

Sincerely,

Roxana Garcia, Deputy
Criminal Post Trial

rg

Enclosure(s) – AFFIDAVIT FILE BY: R.P CORNELIUS

Unofficial Copy Office of Chris Daniel District Clerk

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

February 6, 2014

BRAD D. LEVENSON
ATTORNEY FOR APPLICANT
POST-CONVICTION WRITS
1700 N. CONGRESS AVE, SUITE 460
AUSTIN, TX 78711

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☐ Respondent's Proposed Findings of Fact and Order ,

☐ Other

Sincerely,

Roxana Garcia, Deputy
Criminal Post Trial

rg

Enclosure(s) – AFFIDAVIT FILE BY: R.P. CORNELIUS

Unofficial Copy Office of Chris Daniel District Clerk

Certified Document Number: 59732047 - Page 8 of 8

I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this December 15, 2014

Certified Document Number: 59732047 Total Pages: 8

Chris Daniel

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Unofficial Copy Office of Chris Daniel District Clerk

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

EXHIBIT B

AFFIDAVIT OF GERALD E. BOURQUE

Unofficial Copy Office of Chris Daniel District Clerk

FILED
Chris Daniel
District Clerk
FEB 5 2014
Time: Harris County, Texas
By: Deputy

Cause Number 1212366-A

EX PARTE In The District Court

174th Judicial District

TEDDRICK R. BATISTE,
Applicant **Harris County, Texas**

AFFIDAVIT OF GERALD E. BOURQUE

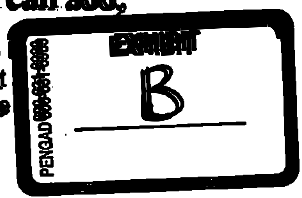
STATE OF TEXAS

MONTGOMERY COUNTY

Before me, the undersigned notary, on this day personally appeared GERALD E. BOURQUE, the affiant, a person whose identity is known to me. After being administered the oath, affiant deposed and said:

My name is Gerald E. Bourque. I am over twenty-one (21) years of age, of sound mine, and capable of making this affidavit. I have never been convicted of a felony. I was admitted to the State Bar of Texas in 1979, have been Board Certified in Criminal Law since 1989 and was certified for death penalty litigation by 1996. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I have reviewed the affidavit of lead counsel R.P. Cornelius. I agree with everything recited in Mr. Cornelius' affidavit. There is very little I can add,



Unofficial Copy Office of Chris Daniel District Clerk

modify or further explain, save two matters which I will discuss in the following paragraph. The guilt phase was indefensible. The best we could do was garner some mitigation facts that might help us in punishment. Mr. Cornelius went to extraordinary lengths trying to get the District Attorney's office to relent, but they would not. The fact that the defendant was willing to accept a life sentence was not enough for the prosecution. They wanted what he would not give them, as stated in Mr. Cornelius' affidavit.

I personally wish that every capital murder trial had a witness like Mr. Gary Thiebaud. His testimony was riveting as he talked about the young man he first saw running track in junior high school. You could see Coach Thiebaud wanted a better life for Teddrick. You could see he was trying to mentor him and show him a better way. The jury no doubt saw Coach as a man committed to helping young people and that he wanted so much to change the direction of Teddrick's life. As he testified the jury was given a glimpse into what might have been . Coach Gary Thiebaud was a witness that no other capital murder defendant had in my career spanning 35 years. Mr. Gary Thiebaud was an extraordinary witness. No other witness, lay or hired could have done for us what he did. Adding to the heartache of

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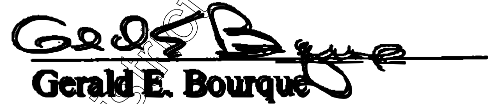
Certified Document Number: 59732046 - Page 2 of 5

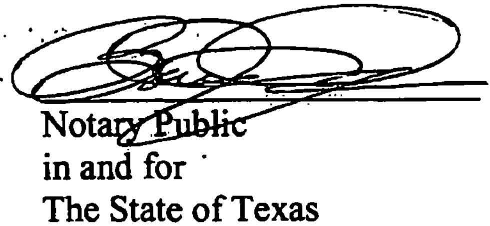
this case was the fact that the "story he consistently told us was not the story he decided to tell the jury." I also believe, as does Mr. Cornelius, that he changed the narrative to protect another gang member.



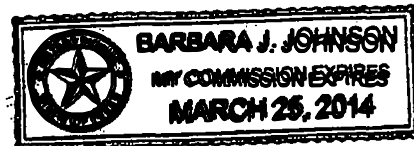
Gerald E. Bourque

SWORN TO AND SUBSCRIBED before me on this the 22nd day

of January, 2014.



Notary Public
in and for
The State of Texas



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Certified Document Number: 59732046 - Page 3 of 5

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

February 6, 2014

DEVON ANDERSON
DISTRICT ATTORNEY
HARRIS COUNTY TEXAS

To Whom It May Concern:

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☒ Affidavit FEBRUARY 5, 2014

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☐ Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.

☐ Respondent's Proposed Findings of Fact and Order ,

☒ Other

Sincerely,

Roxana Garcia, Deputy
Criminal Post Trial

rg

Enclosure(s) – AFFIDAVIT FILE BY: GERARLD E. BOURQUE

Unofficial Copy Office of Chris Daniel District Clerk

Certified Document Number: 59732046 - Page 4 of 5

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

February 6, 2014

BRAD D. LEVENSON
ATTORNEY FOR APPLICANT
POST-CONVICTION WRITS
1700 N. CONGRESS AVE, SUITE 460
AUSTIN, TX 78711

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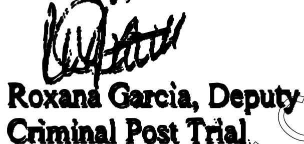
- [ ] Other

Sincerely,



Roxana Garcia, Deputy
Criminal Post Trial

rg

Enclosure(s) – AFFIDAVIT FILE BY: GERALD E. BOURQUE

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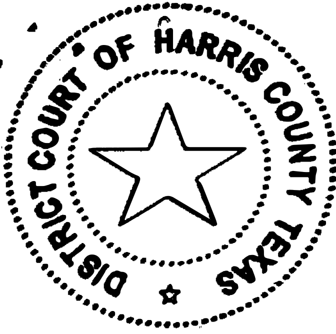

I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this December 15, 2014

Certified Document Number: 59732046 Total Pages: 5

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Unofficial Copy Office of Chris Daniel District Clerk

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

January 22, 2015

DEVON ANDERSON
DISTRICT ATTORNEY
HARRIS COUNTY, TX

To Whom It May Concern:

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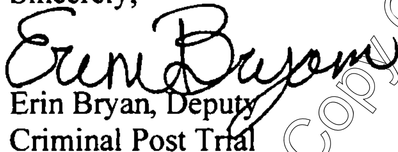
☒ Respondent's Proposed Findings of Fact and Order January 21, 2015

☐ Other

Sincerely,



Erin Bryan, Deputy
Criminal Post Trial

eb

Enclosure(s) –

Unofficial Copy Office of Chris Daniel District Clerk

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

January 22, 2015

RYAN CARLYLE KENT
POST-CONVICTION ATTORNEY
OFFICE OF CAPITAL WRITS
1700 N. CONGRESS AVENUE, SUITE 460
AUSTIN, TX 78701

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☐ Other

Sincerely,

Erin Bryan

Erin Bryan, Deputy
Criminal Post Trial

eb

Enclosure(s) –

Unofficial Copy Office of Chris Daniel District Clerk

Tab 6

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

October 15, 2018

Mr. Richard John Bourke
Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, LA 70113

Ms. Elizabeth Baker Murrill
Office of the Attorney General
for the State of Louisiana
1885 N. 3rd Street
Baton Rouge, LA 70802

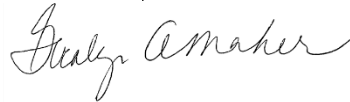
No. 16-30486 Ricky Langley v. Howard Prince, Warden
USDC No. 2:13-CV-2780

Dear Counsel

In addition to any other issues the parties deem appropriate to discuss, the court has requested that the en banc briefs (1) address the Tenth Circuit's decision in *Owens v. Trammell*, 792 F.3d 1234 (10th Cir. 2015), (2) identify any case finding issue preclusion under *Ashe v. Swenson*, 397 U.S. 436 (1970), after a conviction, and (3) address the Supreme Court's intervening opinion in *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)."

Sincerely,

LYLE W. CAYCE, Clerk



By: _________________________
Geralyn A. Maher
Calendar Clerk
504-310-7630

cc: Ms. Andrea Barient
Mr. Colin Andrew Clark
Ms. Karen C. McLellan
Ms. Carla Sue Sigler

Tab 7

2013

AFFIDAVIT OF JAMES G. UNDERHILL, Psy.D.

I, James G. Underhill, state and declare as follows:

A. Introduction

1. I am a psychologist licensed in the State of Texas.
2. I obtained my Bachelor of Arts degree in psychology from Southwestern University in Georgetown, Texas in 2002.
3. In 2005, I earned a Master of Arts degree in clinical psychology from the Chicago School of Professional Psychology in Chicago, Illinois. The Chicago School is accredited by the American Psychology Association.
4. In 2008, I earned a Psy.D. (doctorate in psychology) degree in Clinical Psychology from the Chicago School of Professional Psychology.
5. A Psy.D degree is intended to prepare graduates for careers as practicing psychologists. A Ph.D degree is more research focused and thus prepares the graduate to conduct research in the psychology arena, and to apply it to such.
6. From 2008 to 2010 I conducted my post doctorate fellowship in rehabilitation and neuropsychology at Austin Lakes Hospital in Austin, Texas. My clinical emphasis was on the evaluation and treatment of cognitive and behavioral disturbances associated with neurological disease, trauma, and developmental disorders.
7. Among other groups, I am a member of the International Neuropsychological Society, the American Psychological Association, the National Academy of Neuropsychology, and the Austin Neuropsychological Society.[1]

---

[1] The American Board of Clinical Neuropsychology has adopted the Houston Conference Criteria, which dictates a course of study with a two year full time

EXHIBIT

8. Since 2010 I have been in private practice. The focus of my practice is the independent evaluation of cognitive and behavioral disturbances associated with neurological diseases and trauma within a medicolegal context.
9. A complete copy of my curriculum vitae is attached hereto as Attachment A.
10. At the request of the Office of Capital Writs ("OCW"), current counsel for Teddrick Batiste, I conducted a comprehensive neuropsychological evaluation of Mr. Batiste at the Polunsky Unit in Livingston, Texas on January 5 and January 6, 2012. The purpose of the neuropsychological testing was to determine whether measureable neuropsychological dysfunction or deficits were present and, if so, the nature, extent, and effects of those impairments on Mr. Batiste's behavioral, psychological, and cognitive functioning.
11. My formal assessment included portions of the Halstead-Reitan neuropsychological battery, the Meyers Neuropsychological Battery, and other standardized neuropsychological measures designed to assess a patient's frontal, parietal, temporal, and occipital lobe functions. This battery of tests assesses a broad spectrum of cognitive and sensory-motor abilities dependent on the overall integrity of the brain. All neuropsychological tests administered in my evaluation of Mr. Batiste have appropriate and documented standardization, reliability, and validity. All tests administered are often used and are generally accepted in the neuropsychology community. These tests were widely available at the time

---

fellowship. This board also requires that the applicant pass a credential review, a written exam, two reviews of work samples, and an oral examination. At the time of this document, I have passed both the credential review and the written exam.

JCW

of the offense (2009), as well as at the time of his trial (2011). A full listing of the tests administered is attached hereto as Attachment B.

12. I also conducted a clinical interview of Mr. Batiste, speaking with him about his family background, personal history and experiences, and his current physical, medical and emotional state. The evaluation of Mr. Batiste, including the testing and clinical interview, took approximately sixteen hours over the course of two days.

13. Prior to my meeting with Mr. Batiste I reviewed his juvenile records from the juvenile probation department and the Texas Youth Commission; Mr. Batiste's medical records from the Harris County Sheriff's office; Mr. Batiste's disciplinary records from the Harris County jail; and Mr. Batiste's school records. In addition, I reviewed the testimony of family members and other mitigation witnesses from the punishment phase of Mr. Batiste's capital trial, as well as the testimony of Mr. Batiste himself and the State's expert witness, Scott Krieger. I also reviewed several online newspaper articles that referenced the crime and Mr. Batiste's capital trial.

14. Based upon my review of the historical data, and the neuropsychological testing and clinical interview I conducted, if called as a witness I would testify to the information set forth below:

B. Behavioral Observations and Clinical Neuropsychological Examination

15. Teddrick Batiste is a twenty-five year-old African-American male who is currently incarcerated at the Polunsky Unit in Livingston, Texas.

16. I saw Mr. Batiste for approximately sixteen hours of neuropsychological evaluation over the course of two days. The evaluation was conducted in a confidential contact evaluation room at the Polunsky Unit in Livingston, Texas. Mr. Batiste was not restrained during the evaluation and the evaluation was uninterrupted. The testing room was adequately lighted,

reasonably comfortable, and with an expected level of privacy for a prison. Mr. Batiste was not taking any medication at the time of testing. His visual, hearing, and tactile abilities were adequate and he was not experiencing any unusual pain. His sleep and eating prior to the testing was typical for him, as were his environmental and psychological stressors.

17. Mr. Batiste was cooperative throughout the course of the evaluation and attempted all tests that were requested of him. All indications are that Mr. Batiste expended sufficient effort to complete each test that was administered. Validity mechanisms imbedded in neuropsychological testing materials indicated that Mr. Batiste was putting forth appropriate effort on testing and revealed no evidence of malingering or exaggeration of neuropsychological dysfunction.

C. Opinions

Intellectual Function

18. Teddrick Batiste's general mental ability was evaluated using the Wechsler Adult Intelligence Scale (WAIS-IV). The WAIS-IV consists of ten core subtests and five supplemental subtests designed to evaluate an individual's general mental ability. Two broad scores are generated, the Full Scale IQ (FSIQ) and the General Ability Index (GAI).

19. The FSIQ is based on the total combined performance of the Verbal Comprehension Index (comprised of four tests), Perceptual Reasoning Index (comprised of five tests), Working Memory Index (obtained from three tests), and Processing Speed Index (comprised of three tests). The GAI is based only on the six subtests that the Verbal Comprehension Index and Perceptual Reasoning Index comprise.

20. Mr. Batiste's performance on the WAIS-IV test demonstrates overall intellectual functioning in the normal range, with a Full Scale IQ of 93. This

is consistent with previous intellectual functioning testing done of Mr. Batiste.

Neuropsychological testing

21. Teddrick Batiste's neuropsychological functioning was evaluated using a series of tests selected to evaluate his sensory, motor, attention, memory, language, visual-perceptual organization and executive functioning. Executive functioning is an umbrella term that describes an individual's ability to integrate and assess information in a manner necessary to think, reason, problem solve, anticipate consequences of actions, and if needed, change actions based on information received from the environment. Executive functioning affects all requirements of everyday functioning, decision making, impulse control, self-regulation, and goal-directed behavior, as well as insight and foresight.
22. Among other tests, I administered portions of the Meyers' Neuropsychological Battery (MNB), which is a comprehensive standardized neuropsychological testing battery. It has been used since the early 1990's to evaluate sensory, motor, attention, memory, language psycho-motor and executive functioning and provides a picture of the individual's overall brain functioning. The MNB has demonstrated accuracy in determining the presence or absence of brain damage, with a 96.1% accuracy rate of identifying brain damaged individuals.
23. Testing revealed that Mr. Batiste suffers from damage to his frontal lobe, specifically with regard to the part of the prefrontal cortex that controls risk taking.
24. The frontal lobe is the area of the brain located at the front of both cerebral hemispheres. It is positioned anterior to the parietal lobe and superior and anterior to the temporal lobes. The frontal lobe is involved in motor

function, problem solving, spontaneity, memory, language, initiation, judgment, impulse control, and social and sexual behavior. The left frontal lobe is responsible for language related movement, and the right frontal lobe controls non-verbal abilities.

25. However, for the majority of individuals, there is cross-over of function between the both sides of the frontal lobe. The frontal lobe also contains many of the dopamine-sensitive neurons in the cerebral cortex. The dopamine system is associated with reward, attention, short-term memory tasks, planning, and motivation. A common characteristic of frontal lobe damage is a difficulty in or an inability to interpret feedback from an external environment. Examples of this deficit may include, perseverating on a response, non-compliance with rules, impaired associated learning (which uses external cues to help guide behavior), and inappropriate or heightened risk taking.

26. Impulsivity and/or risk taking are often seen in individuals following frontal lobe damage. While these two concepts may seem to have the same meaning, they are indeed different; impulsivity is simply a response disinhibition, while risk taking is related to the reward-based aspects of decision-making. An impulsive person will make a decision quickly, without considering the consequences, leading ultimately to behavior that exhibits a lack of self-control. Contrarily, a person with an inability to evaluate risk will look at the consequences but not weigh them. Instead, they will jump at the opportunity of a reward even if the likelihood of receiving that reward is slim.

27. Mr. Batiste's frontal lobe functioning with regard to risk taking is impaired. In comparison, the majority of a representative sample of the United States population scored better than Mr. Batiste on the portions of the Iowa

Gambling Test designed to calculate an individual's ability to appropriately evaluate a situation involving risk.

Impact of Brain Impairment on Everyday Functioning

28. Individuals with damaged frontal lobes often suffer from minimal to substantial memory loss. Mr. Batiste suffers from mild impairment of memory. However, it is his inability to conceptualize risk that significantly affects his functioning. Once Mr. Batiste is engaged in risky behavior he will continue to engage in that behavior, despite having the knowledge and recognition that the behavior may ultimately have dire consequences. Mr. Batiste's brain impairment renders him unlikely to stop risky behavior once it has begun, and in fact, causes him to behave in a way that actually increases the risk associated with a given situation despite being aware of the costs.

29. Mr. Batiste's inability to perceive risk can be compared to that of an impulsive gambler. An individual affected in this manner can recognize that the chance of winning is extraordinarily slim, and the likelihood of him losing his money is great. However, once the process of gambling has begun, he experiences difficulties in stopping himself. Instead, he increases the risk by continuing to gamble, despite the fact that he can acknowledge he will almost certainly lose. This is true regardless of the extent of the risk-it does not matter if there is one dollar or 100,000 dollars on the line. His inability to stop escalating the risk is the same.

30. The impact of damage to Mr. Batiste's frontal lobe is demonstrated by his history of failure to appropriately weigh the consequence of his actions. For example, immediately prior to his arrest in this case, Mr. Batiste was employed at a steel forging company. There was a period of several weeks where he worked in excess of forty hours and earned a significant amount of

money in overtime. He immediately adjusted his spending habits to reflect that expectation of income, despite the fact that there was no guarantee that the overtime hours would continue. Intellectually, Mr. Batiste could understand that the consequence of this behavior was that he would not be able to meet his financial obligations. However, he continued to spend money and increased the material expectations of his family. In order to meet this expectation when the overtime income ceased he began to engage again in illegal activities.

31. Similarly, Mr. Batiste's admission of facts in the instant crime reflects his inability to calculate risk. Once he perceived a "reward" (i.e., the rims on the victim's tires), he was unable to adjust his behavior based on the risk involved to himself and others. He began to assume an inordinate amount of risk for a relatively small reward. His actions indicate that once he was in the situation he escalated the level of risk again and again until the incident ended with tragic results.

Etiology of Damage to the Frontal Lobe

32. There are several possible etiologies of the brain dysfunction that Teddrick Batiste demonstrates on neuropsychological testing. The impairment can result from head trauma or illness. Impairment of frontal lobe functioning is also found in a range of psychiatric conditions. Because of the confluence of interrelated factors it is not possible to distinguish the effects of any one etiology from the others.

33. However, contributing factors to Mr. Batiste's impairment could have been the result of a lack of pre-natal care his mother received during her pregnancy and/or her diet while pregnant. Furthermore, the meningitis Mr. Batiste was reported to have suffered from as a neonate could have contributed to or been the direct cause of Mr. Batiste's impairment.

Treatment for Damage to the Frontal Lobe

34. There are several ways that Mr. Batiste's frontal lobe damage can be treated and controlled within a prison environment. First, medication is available that normalizes the dopamine response within the brain. A dopamine reuptake inhibitor is a type of drug that acts as a reuptake inhibitor for the neurotransmitter dopamine. This in turn leads to increased extracellular concentrations of dopamine and therefore an increase in dopaminergic neurotransmission. In other words, the medication normalizes the amount of dopamine that is released in the brain, which in turn quells an individual's desire to engage in risk taking behaviors. In large scale studies, this class of medication has decreased criminality in adults, including those with violent criminal behavior. Methylphenidate, marketed under the brand name Ritalin, is a dopamine reuptake inhibitor that is widely available and extremely effective in normalizing behavior. As of April 1, 2013, this medication was available in the Texas Correctional Managed Care formulary.

35. Secondly, the prison environment itself is conducive to the management and control of Mr. Batiste's brain dysfunction. Life in a secure prison is by its very nature controlled. Without much opportunity for decision making, and with limited freedom of movement, Mr. Batiste would likely not be presented with the opportunity to engage in risk taking behavior. However, even if presented with such an opportunity, the structure of the prison provides for frequent intervention and interruption. The manifestation of Mr. Batiste's brain injury is not immediate. He must first be confronted with a situation. Once confronted with a situation, he fails to appropriately calculate and evaluate the amount of reward to be gained versus the risk to be undertaken. Then, he must execute his actions according to that

miscalculation. If his thought process is interrupted at any point, he is unlikely to follow through with the risk-taking behavior. The mechanics of the prison environment provide for constant interruption, and therefore disruption, of Mr. Batiste's ability to engage in and follow through with risk taking behavior.

Conclusions

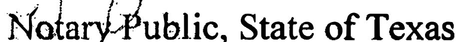
36. It is my opinion, which I hold to a reasonable degree of scientific certainty, that Teddrick Batiste suffers from damage to the frontal lobe of his brain. As a result, he is unable to calculate risk and appropriately weigh the consequences of his actions.

37. In my opinion, which I hold to a reasonable degree of medical certainty, the impairment revealed by this evaluation was present in 2009 at the time of the alleged offense for which Mr. Batiste is sentenced to death, and would have been found at the time of trial in 2011, had a complete battery of available neuropsychological testing been administered.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct to the best of my knowledge and that this affidavit was executed on the 2 day of April, 2013 in Austin, Texas.

DR. JAMES G. UNDERHILL

Subscribed and sworn to before me on April 2, 2013.



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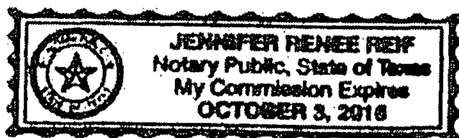

ATTACHMENT A

James G. Underhill, Psy.D. CURRICULUM VITAE

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underhill.james@gmail.com

Education:

2008-2010 Post-Doctoral Fellowship, Rehabilitation and Neuropsychology
St. David's Hospital, Austin, TX
William R. Stern, Ph.D., and Associates

2003-2008 Psy.D., Clinical Psychology (APA Accredited)
The Chicago School of Professional Psychology, Chicago, IL

1998-2001 B.A., Psychology
Southwestern University, Georgetown, TX

Hospital Affiliations:

Austin Lakes Hospital

Professional Memberships:

American Psychological Association,
- Division 22, Rehabilitation Psychology
- Division 40, Neuropsychology
- Division 41, Psychology and Law

Austin Cognitive Medicine Society
Austin Neuropsychological Society
National Register of Health Service Providers in Psychology
Texas Psychological Association
National Academy of Neuropsychology
International Neuropsychological Society

Experience:

RELEVANT CLINICAL EXPERIENCE

2010-present Forensic Neuropsychology Practice

Private practice, Clinical Neuropsychology/Rehabilitation Psychology. The focus of the practice is the independent evaluation of cognitive and behavioral disturbances associated with various neurological diseases and trauma within a medicolegal context.

2008-2010 Fellowship in Rehabilitation and Neuropsychology
Austin Lakes Hospital, Austin, TX

Clinical emphasis on the evaluation and treatment of cognitive and behavioral disturbances associated with neurological disease, trauma, and developmental disorders. Assessment approaches include: both embedded and derived Symptom Validity Testing (SVTs), Halstead Reitan neuropsychological battery (HRB), Meyers Neuropsychological Battery (MNB), and flexible neuropsychological assessment.

2007-2008 Central Texas Internship in Clinical and Forensic Psychology
Rockdale, TX

Assessed clients' legal capacity, psychosexual disorders (assessment of sex offenders), and risk of violence and/or sexual violence. Conducted psychotherapy in both individual and group modalities, for juveniles and adults. Settings included juvenile detention facilities, offices of expert witnesses, and attorneys' offices. Chief complaints included ADHD, anxiety, depression, aggressive behavior, adjustment issues, and PTSD. Position required on call hours.

2006-2007 Psychotherapy Extern
Hartgrove Hospital, Chicago, IL

Provided inpatient psychotherapy using both individual and group modalities, covering intake assessment, the creation of treatment protocols, and multidisciplinary treatment. Specialized duties included emergency room assessment, electroencephalography interpretation, crisis intervention, and outreach activities. Conducted both short-term and long-term therapy with patients from diverse ethnic, cultural, and academic backgrounds. Chief client complaints included anxiety, depression, aggressive behavior, adjustment issues, and PTSD.

2005-2006 Neuropsychology Diagnostic Extern
United Stand Family Counseling Center, Chicago, IL

This practicum required the administration and scoring of a wide variety of psychometric tools within the Chicago Catholic Schools. Two clinical psychologists, focused in pediatric neuropsychology, provided supervision. The Counseling Center delivers clinical services as well as in-school consultation. Duties included diagnosis, treatment design, and educational planning for children with a wide range of difficulties. Assessment incorporated both fixed and flexible batteries. Produced reports from battery data, focusing on the educational, psychological, and familial impacts of the findings.

RELEVANT RESEARCH EXPERIENCE

2005-2010 Neuroimaging Consultant (WOC)
Hines VA Hospital, Hines, IL

Developed a format for combining MRI, SPECT, and LORETA (EEG) images into a single image. A protocol was developed to force standard Talairach space (a brain atlas for neuroimaging) onto the images, in hopes of differentiating psychiatry patients from normal controls. Further investigation

explored the integration of neuropsychological batteries into the protocol. Achieved proficiency in MEDX and HERMES neuroimaging software, LORETA software, and hardware including EEG, MRI, and SPECT. This position required detailed communication with radiologists, neuropharmacologists, psychiatrists, and the head of the Clinical Neurosciences Division. Duties included intern training, data analysis, grant writing, article writing, and presentations to medical school.

TEACHING EXPERIENCE

2005-2008 Teaching Assistant
Chicago School of Professional Psychology, Chicago, IL

Served as a teaching assistant for two sections of The Biological Bases of Behavior, and two sections of Neuropsychology (for doctoral psychology students). Created test materials, graded papers, and lectured.

Selected Publications:

Friend, J. A., Underhill, J. G., & Konopka, L. M. (2007). Use of cognitive assessment to differentially diagnose between bipolar and ADHD in pediatric populations. *Journal of the International Neuropsychological Society, 13*(S1), 116.

Underhill, J. G. (2006). Spina bifida: Hard facts and figures for new parents. *Educational Packet for New Parents.* Chicago: Spina Bifida Association of Illinois.

Underhill, J. G., Crayton, J., & Konopka, L. M. (2006). qEEG's relationship to clinical interpretation of single photon emission tomography. *Clinical EEG and Neuroscience, 37*(3), 281.

Underhill, J. G., Friend, J. A., Chennamchetty, V., Crayton, J. W., O'Donnell, K. B., & Konopka, L. M. (2006). Decreased frontal coherence and increased temporal coherence in aggressive children and adolescents with mood and disruptive behavior disorders. *Clinical EEG and Neuroscience, 37*(3), 280.

Friend, J. A., Underhill, J. G., Konopka, L. M. (2006). Decreased neuropsychological memory functioning and beta amplitude asymmetry in a PTSD population. *Clinical EEG and Neuroscience, 37*(3), 269.

ATTACHMENT B

ATTACHMENT B

List of Tests Given to Teddrick Batiste

Forced Choice

Animal Naming

Controlled Oral Word Association (COWA)

Dichotic Listening

Sentence Repetition

Judgment of Line Orientation

Boston Naming

Trail Making A & B

Finger Tapping

Finger Localization

Strength of Grip

Token Test

Category Test

Auditory Verbal Learning Test (AVLT)

Rey Complex Figure Test (RCFT)

Wechsler Adult Intelligence Scale IV (WAIS IV)

North American Adult Reading Test (NAART)

Green's Word Memory Test

Personality Assessment Inventory

Iowa Gambling Task

Wide Range Achievement Test

Tab 8

2017

AFFIDAVIT OF JAMES G. UNDERHILL, Psy.D.

I, James G. Underhill, state and declare as follows:

A. Introduction

1. At the request of the Office of Capital Writs ("OCW"), previous counsel for Teddrick Batiste, I conducted a comprehensive neuropsychological evaluation of Mr. Batiste at the Polunsky Unit in Livingston, Texas on January 5 and January 6, 2012. The purpose of the neuropsychological testing was to determine whether measureable neuropsychological dysfunction or deficits were present and, if so, the nature, extent, and effects of those impairments on Mr. Batiste's behavioral, psychological, and cognitive functioning.
2. Based upon my review of the historical data, and the neuropsychological testing and clinical interview I conducted, I provided the courts with an affidavit indicating I was willing to testify regarding neuropsychological findings and the impact thereof if called.
3. It was my understanding at the time, that I would be called to testify at a later date.
4. I was contacted by Kenneth McGuire, counsel for Mr. Batiste. I was informed that the state appellate court had indicated that my affidavit was not persuasive. It is my understanding that the states findings of fact indicate that the basis of this determination was predicated upon the lack of stated scores in my affidavit, and jail records indicating controlled behavior in a correctional setting.
5. On August 4, 2017, Mr. McGuire provided the State's Proposed Finding of Fact, Conclusions of Law, and Order to me. Mr. McGuire requested I review the document, and submit my opinions about this document to the court.

B. Opinions

Circumstances of Affidavit Preparation

6. When the original affidavit was submitted to the court, it was my understanding that I would be called to testify at a later date.
7. I expected to be able to explain all of these scientific details during my testimony in open court.

Key Errors in the State's Proposed Finding of Fact, Conclusions of Law, and Order Regarding Statistics

8. The State's Proposed Finding of Fact, Conclusions of Law, and Order, seems to rely upon incorrect assumptions regarding psychological testing, neuropsychology terms of art, and statistics.
9. Because psychological testing scores, neuropsychology terms of art, and the underlying statistics required to interpret those scores are difficult to understand without the requisite education, such professional organizations as the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education have published guidelines indicating the minimal standards necessary to interpret psychological data.
10. Test publishers adhere to the same standards and will not sell these tests to unqualified people.
11. In neuropsychological testing, the word "impaired" is a term of art with specific connotations. The Heaton taxonomy of neuropsychological scores is arguably the most widely used manner of describing test scores in neuropsychology. I used this taxonomy in preparing my Affidavit submitted

to the state courts. In this taxonomy, the term impaired refers to any score under the 12th percentile. [1]

12. There is professional literature in neuropsychology which indicates that percentiles should not be used in forensic contexts because percentiles are easily misunderstood. [2] I prepared the document with the understanding that I would have the opportunity to explain the scores, and with the understanding that the courts did not have the necessary background to interpret psychological test scores. **I specifically did not report percentiles because they are known to be misleading in the forensic context, which is exactly the error made by the State court in their criticism of my findings.**

13. In the State's Proposed Finding of Fact, Conclusions of Law, and Order, the trier of fact attempts to interpret these finding without the assistance of someone trained in psychological testing and statistics.

14. The State's Proposed Finding of Fact, Conclusions of Law, and Order, relies upon what a term **could** mean, when it should have relied upon what the term in fact means and what my findings in fact were.

15. That Mr. Batiste scored within the impaired range means within the neuropsychology field that he did not score within the 49th percentile.

16. In actuality, Mr. Batiste's net score on the Iowa Gambling Test fell within the 7th percentile. Under the Heaton taxonomy, there are five degrees of impairment. This score would fall under the severely impaired range. Any standardized test has the potential for minor variation due to external factors if the test is repeated. Professionally, there are standardized methods for

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[1] R.K. Heaton, S.W. Miller, M.J. Taylor, I. Grant (2004). Revised comprehensive norms for an expanded Halstead-Reitan battery (norms, manual and computer program) Psychological Assessment Resources, Odessa, FL

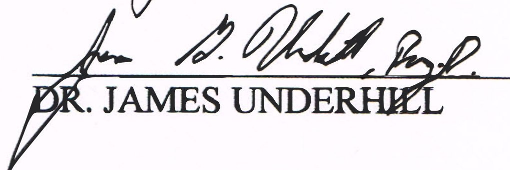
[2] Bowman, M. L. (2002). The perfidy of percentiles. Arch Clin Neuropsychol, 17(3), 295-303.

reporting these variations. Keeping this in mind, I chose to report the score in the most conservative term possible.

C. Conclusions

It is my opinion, that the court relied upon suppositions which were not consistent with the professional standards required to interpret neuropsychological data. These misconceptions could have easily been addressed in open court.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and that this affidavit was executed on the 19 day of August, 2017 in Austin, Texas.



DR. JAMES UNDERHILL