No. 18-8561

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERY LEE WOOD,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Jeffery Wood files this reply to Texas's Brief in Opposition. Texas argues that (1) the Court lacks jurisdiction to review the judgment below; (2) there is no compelling reason for further review; and (3) the claims at issue lack merit or are barred by nonretroactivity principles. Most of Texas's legal arguments are predicated on misrepresentations of fact and misunderstandings of law and therefore pose no obstacle to the Court's review of the state court's judgment.

I. THE COURT HAS JURISDICTION TO REVIEW THE JUDGMENT BELOW

Texas misunderstands the law concerning the Court's jurisdiction to review state court judgments. Texas argues that the claims for which Mr. Wood seeks review

were dismissed on an adequate and independent state law ground. Br. in Opp'n ("Opp'n") at 9–19. They were not. *See* Pet. for a Writ of Cert. ("Pet.") at 23–24, 31–32, 35–36 (explaining how Texas's statutory procedure incorporates federal legal questions and why the CCA necessarily rested its disposition on answers to those questions). This Court has jurisdiction to review any federal question passed on by a state court. In this case, the Court of Criminal Appeals of Texas (CCA) necessarily passed on the federal questions Mr. Wood has asked the Court to review.

A. The Texas Court Does Not Limit Its Review of the Federal Question Under § 5(a)(3) Only to Intellectual Disability Claims

Specifically, Texas argues with respect to the first two questions presented—questions that impact Mr. Wood's constitutional eligibility for execution under the Eighth and Fourteenth Amendments—that the CCA interprets and applies Section 5(a)(3) differently depending on the *specific type* of Eighth Amendment ineligibility claim that is raised. Texas argues the state court has carved out Eighth Amendment intellectual disability claims,[1] alone, as claims that it subjects to a threshold merits review to determine whether it will be authorized for plenary consideration. Texas's argument is incorrect; the CCA has explicitly recognized that Section 5(a)(3) applies to claims asserting a categorical exemption from the death penalty generally and did not limit its reasoning to only intellectual disability claims.

The case Mr. Wood principally relies upon, *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007), interpreted Texas's statutory rules governing the consideration of

[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002).

subsequent habeas applications and expressed a general rule about how they would apply to Eighth Amendment claims of categorical ineligibility—what it called claims of "constitutional ineligibility." To be sure, the case involved a specific context—an *Atkins* claim—but the *Blue* case did not announce a rule for *Atkins* claims alone, nor is it "nothing but an assumption," Opp'n at 14, that it announced a general rule (as courts presumably always do).

The *Blue* Court expressly said it was announcing a rule for how it would apply Texas Code of Criminal Procedure article 11.071, § 5(a)(3) to categorical ineligibility claims. The Court wrote: "Construing Section 5(a)(3) as we do today, to embrace constitutional as well as statutory ineligibility for the death penalty, is both consistent with the plain language of the statute, and at the same time accommodates the *Atkins* and *Roper* prohibitions." *Id.* at 161–62. Thus, it interpreted the statute to "embrace" and "accommodate" all "constitutional ineligibility" claims in capital cases, making the authorization decision for plenary consideration turn exclusively on whether the application's allegations state a viable claim for constitutional ineligibility under the Eighth Amendment. *See Garza v. State*, 435 S.W.3d 258, 267 (Tex. Crim. App. 2014) (Cochran, J., concurring) ("This significant risk [that a defendant faces a punishment that the law cannot impose upon him] explains why courts, including this one, *uniformly* review claims based on new substantive constitutional rules that have been "forfeited" or procedurally defaulted in some manner." (emphasis supplied) (citing *Blue*)). Accordingly, the Court plainly has jurisdiction to review the first two questions presented.

B. The Texas Court Necessarily Passed on the Due Process Claim as a Matter of Law When It Dismissed It

With respect to the third question presented—that changed circumstances have invalidated Texas's judgment that was predicated solely on a prediction of his future conduct—Texas appears to think that Mr. Wood's argument for jurisdiction rests on the mere "temporal nature" of the claim. Brief in Opposition at 16–17. Texas misapprehends the jurisdictional argument, and thus does not even address it.

Texas contends that Mr. Wood's argument is just a "quibble with state law" because Mr. Wood believes "the CCA should have found an exception to the abuse-of-the-writ bar." Opp'n at 17. The State is correct that Mr. Wood thinks the CCA should have authorized the due process claim, but not because of a quibble over state law. Instead, Mr. Wood takes issue with the state court's application of *federal* law that the CCA has incorporated into its § 5(a)(1) analysis: whether Mr. Wood's allegations state a federal constitutional violation that would entitle him to relief if his allegations are true. It is that federal question that the state court *necessarily* answered negatively and which he asks this Court to review and answer affirmatively. *See* Pet. at 35–36. Should it do so and remand the case back to the CCA, the CCA would have to authorize the application for plenary consideration as to whether Mr. Wood can prove he has been deprived of due process.

C. The Order Passed on the Federal Questions Presented Notwithstanding That the Order Purported to Dismiss the Claims "Without Reviewing the Merits"

Texas's Opposition reflects it does not understand how the Texas Court of Criminal Appeals reviews subsequent habeas applications. It argues that the

jurisdictional case is closed because the CCA order dismissing the claims underlying the questions presented in Mr. Wood's certiorari petition states they were dismissed "without reviewing the merits." Opp'n at 18–19. "The merits," here, does not do the work Texas thinks it does. The CCA does not use "the merits" to refer to consideration of federal constitutional law to dispose of a claim. Instead, it uses the term in this context only to refer to an adjudication of a habeas corpus claim after full plenary review of the law and the facts by the trial court. Where it makes a determination about a claim as a matter of law and as part of its gatekeeping function under Texas Code of Criminal Procedure article 11.071 § 5, it does not consider this review of "the merits," even when the ruling is substantive in nature. This is evident by the CCA's own cases applying § 5.

Texas's bar against subsequent habeas corpus applications in capital cases expressly prohibits a court from "consider[ing] the merits of or grant[ing] relief based on the subsequent application" unless the CCA has determined one of the statutory exceptions to be present. Yet, the CCA has interpreted all the exceptions to incorporate a *legal* assessment of the federal question, which it does not consider to be review of "the merits" within the meaning of the statute. Relevant to the § 5(a)(1) exception that Mr. Wood relied on for his due process claim, the CCA interpreted it in *Ex parte Campbell*, 226 S.W.3d 418 (Tex. Crim. App. 2007), to require two things: "1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if

established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Id.* at 421.

Even when the CCA explicitly dismisses a claim for the second reason, i.e., finds that the allegations do not state a federal claim, it does not consider itself to have reviewed "the merits" of the claim. *Campbell* itself is such a case. *Id.* at 422–25. *See also* Order at 2–3, *Ex parte Davila*, No. WR-75,356-03, 2018 WL 1738210 at *1 (Tex. Crim. App. Apr. 9, 2018) ("Applicant has failed to make a prima facie showing of a Brady violation, his ineffective assistance claim is procedurally barred because it should have been raised in his initial writ application, and he has failed to show that the law he claims renders the Texas scheme unconstitutional applies to the Texas scheme. Thus, applicant has failed to meet the requirements of Article 11.071 § 5. *Accordingly*, we dismiss this application as an abuse of the writ *without reviewing the merits* of the claims raised." (emphasis supplied)); Order at 6, *Ex parte Cruz-Garcia*, No. WR-85,051-03, 2017 WL 4947132 at *2 (Tex. Crim. App. Nov. 1, 2017) ("Applicant fails to make a prima facie showing that the new evidence [presented in due process claim] is material to the outcome of his case. *Accordingly*, we dismiss applicant's subsequent application as an abuse of the writ under Article 11.071 § 5(a)(1) *without reviewing the merits* of the claims raised." (emphasis supplied)); Order at 3, *Ex parte Shore*, No. WR–78,133–02, 2017 WL 4534734 at *1 (Tex. Crim. App. Oct. 10, 2017) ("After reviewing this application, we find that applicant has failed to make a prima facie showing that a person with brain damage, like an intellectually disabled person, should be categorically exempt from execution. . . . *Accordingly*, we dismiss this

application as an abuse of the writ *without reviewing the merits* of the claim raised." (emphasis supplied)); Order at 3, *Ex parte Reed*, No. WR-50,961-07, 2017 WL 2131826 at *1 (Tex. Crim. App. May 17, 2017) ("We find that applicant has failed to make a prima facie showing on any of his [federal] claims. . . . *Accordingly*, the application is dismissed as an abuse of the writ *without reviewing the merits of the claims*." (emphasis supplied)).

While the CCA's use of "the merits" may not comport with any traditional understanding of that term, its decisions make crystal clear that it does not consider its assessments of whether a federal constitutional claim has been alleged by an application to be review of "the merits."[2] Accordingly, the CCA's order stating that the claims underlying Mr. Wood's questions presented were dismissed "without reviewing the merits" does not control the question of this Court's jurisdiction. It does not mean the Court did not pass on the federal question as a matter of law. And as Mr. Wood argued in his petition, it necessarily *did* do so here.[3]

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[2] *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502–03 (2001) (discussing how "on the merits" has become such a confusing term that the Restatement of Judgments abandoned its use).

[3] Moreover, "merits" review by the state court is not necessary to establish jurisdiction. The state court only need pass on the federal question in a manner material to its adjudication. If the state court got the federal question wrong, and its incorrectness was relevant to the ultimate outcome—even if the outcome was procedural—the Court has jurisdiction to review that judgment, reverse it, and remand the case back for further proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (a procedural disposition on a state ground is not independent where the state disposes of it on a procedural ground that it has interpreted to "depend on an antecedent ruling on federal law").

II. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT MR. WOOD'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT IS DISPROPORTIONATE

Texas's confusion continues while trying to explain that the questions presented are not worthy of review. It insists again, and wrongly, that the federal questions were not passed on below. Opp'n at 20. As explained *supra*, the state court necessarily dismissed Mr. Wood's claims based on its views of the federal questions presented. That as a matter of state law it does not consider this form of review of "the merits" is wholly irrelevant.

Texas argues the decision below does not conflict with *Tison*[4] and *Enmund*[5] because evidence existed from which a jury could have concluded that there had been "major participation in the felony committed." Opp'n at 23. The evidence Texas relies on is that Mr. Wood "had discussed with [the store manager] plans to rob the convenience store maybe 'seven or eight' times in the days leading up to the robbery and murder;" that co-defendant Reneau "attended some of these sessions" but was in the background; and that Mr. Wood "called the coworker and asked him if 'wanted to go along and do it." Opp'n at 23.

First, Mr. Wood, Reneau, and store manager William Bunker actually discussed plans of *theft*—stealing the store's safe—not robbery. What was discussed was *staging* a robbery, not committing one. Second, none of this activity is part of the commission of the robbery and homicide that Daniel Reneau later chose to perpetrate,

[4] *Tison v. Arizona*, 481 U.S. 137 (1987).

[5] *Enmund v. Florida*, 458 U.S. 782 (1982).

alone, inside the store. Reneau chose to perpetrate the crime because, as Texas told his jury, "[Reneau] was frustrated, because this planning had been going on for at least a couple of weeks, maybe longer, and he was just tired of all this planning and all of these plans falling through, so he decided that one way or another, even if he had to kill someone, he was going to get that money."[6] Thus, while Mr. Wood may have been a larger player in formulating plans to commit a theft, those plans never came to fruition.

Texas's position that the evidence reflected Mr. Wood "was the impetus and planner of the entire thing" is therefore based on an entirely different potential criminal offense—theft—or a conspiracy to commit a theft. That the evidence Texas marshals to argue that Mr. Wood was a "major participant" relates to a separate offense is evidenced by the fact that store manager Bunker was never even charged with any criminal offense. It is passing strange for the State to argue that this activity constitutes "major participation" in a felony underlying a capital murder when one of the participants—a store manager having fiduciary duties to his employer—was never charged by the State with committing so much as a misdemeanor in connection with the death.

The rest of Texas's argument concerns post-offense activity, Opp'n at 23-24, none of which establishes that Mr. Wood was a major participant in Reneau's commission of capital murder. After Reneau shot Mr. Keeran in the course of robbing the store, the capital murder was complete. There is evidence that Mr. Wood did enter

[6] Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 20: 11–12.

the store after hearing the gunshot with a "confused" look of "real shock on his face" and that he assisted in removing the safe.[7] This is not major participation in a robbery or a homicide, both of which were completed before he ever entered the store.[8] None of the post-offense conduct described by the State involves Mr. Wood committing any criminal transgressions against other individuals or using violence.

When *Tison* distinguished a situation involving major participation and reckless indifference to human life from one that did not, it described *almost to a tee* this case as one that did not:

> Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnaping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight.

Tison, 481 U.S. at 158 (emphasis added). Mr. Wood was not actively involved in every element of the robbery and was not physically present during the entire sequence of criminal activity culminating in the murder of Mr. Keeran. Further, Mr. Wood's jury was never asked to answer the question of whether Mr. Wood was a major participant; a question necessary to determine whether he is eligible for the death

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[7] 24 RR 220.

[8] Texas relies on uncounseled custodial statements of Mr. Wood, Brief in Opposition at 24, but those statements are wholly unreliable because Mr. Wood is cognitively and emotionally impaired and his answers were mere acquiescence to leading questions in a highly coercive context. As well, Mr. Wood *denied* in those statements that he ever anticipated Reneau would shoot the clerk. 25 RR 34 ("I didn't think he was going to do anything."). Moreover, the portions of Wood's statement relied on by Texas conflict with custodial statements by Reneau, who told police that there was not any plan before he entered the store and chose to commit a homicide. Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 19: 236.

penalty under the Eighth Amendment. Yet the state court below necessarily held that the Eighth Amendment permitted Mr. Wood's death sentence. The Court should grant certiorari and reverse that judgment.

III. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER EVOLOVING STANDARDS OF DECENCY PROHIBIT THE EXECUTION OF A PERSON WHO NEITHER KILLED NOR INTENDED TO KILL

In its Opposition, Texas argues that certiorari should not be granted on Mr. Wood's second question presented because it is "inadequately briefed." Opp'n at 28. The case Texas relies on, *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016), merely declines to review a party's argument that was raised for the first time at the merits stage before this Court. *See id*. at 1653 ("The Commission's failure to articulate its preclusion theory before the eleventh hour has resulted in inadequate briefing on the issue."). Mr. Wood raised this claim in his habeas corpus application, decided below, and raised as a question presented the correctness of the CCA's (implicit) legal ruling that standards of decency could not have evolved to render persons who neither killed nor intended to kill categorically exempt from the death penalty under the Eighth and Fourteenth Amendments.

The state court disposed of this claim at the pleading stage and did not permit evidentiary development. Texas, and not Mr. Wood, is therefore to blame for the truncated state of the record below. The CCA held—as a matter of law—that evolving standards of decency have not evolved—and could not possibly have evolved no matter what facts are shown—to preclude execution of individuals who neither killed

nor intended to kill. Mr. Wood asks this Court to declare that they may have and that the state court should therefore afford the claim plenary consideration.

Texas also wholly misunderstands Mr. Wood's claim that evolving standards of decency now prohibit imposition of the death penalty for individuals who neither kill nor intend to kill. Texas asserts that Mr. Wood identified two "classes" of individuals, but there is only one class whom Mr. Wood alleges is categorically exempt from capital punishment: those who, like Mr. Wood, neither killed nor intended to kill.

Texas insists that Mr. Wood would not benefit from this new rule because "Wood intended to kill Keeran and was not a criminal participant simply caught unawares of the atrocity to be committed by his codefendant." But, Texas never secured a jury verdict establishing that Mr. Wood intended to kill anybody. Its reliance on Texas's broad law of parties to secure its capital murder conviction obviated that necessity. Nor is there reliable evidence from which a reasonable juror could infer he intended to kill anybody. Texas also calls Mr. Wood "the impetus behind the offense," which is the opposite of what it told Mr. Wood's codefendant's jury to secure his death sentence. In that case, it mocked the prospect that somebody like Mr. Wood could have been the impetus.[9] It was right to do so.

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[9] Texas told Reneau's jury:

> It's amazing to me that Jeff Wood []is being blamed for all this stuff, and yet you heard the witnesses. You have seen the time frame. . . . When did all this criminal conduct begin? It just happens to begin when Daniel Earl Reneau enters the picture. . . . They drag [Reneau] in and did it, but none of these crimes were happening. You heard Toledo say, "I don't remember anyone doing all this stuff until Reneau shows up," and then

IV. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT QUESTION OF WHETHER THE STATE MUST OBTAIN A NEW JUDGMENT BECAUSE ITS PRIOR JUDGMENT, BASED EXCLUSIVELY ON A PREDICTION OF FUTURE CRIMINAL BEHAVIOR, IS TOO STALE TO PERMIT EXECUTION

In his petition, Mr. Wood asks the Court to decide whether the due process clause requires a new judgment after the passage of time causes material changes in circumstances and evidence on which the original judgment was based. Specifically, Texas's judgment authorizes Mr. Wood's execution based on a prediction of how he would behave in the future, but it obtained that judgment over 20 years ago. The facts on which that judgment was based simply no longer exist to support it. Mr. Wood is not a 21-year-old man without a record in prison on which to judge his prison behavior. He is a 44-year-old man with a long record of successful incarceration without violence against either other prisoners or correctional officers.

Texas argues that non-retroactivity principles bar relief. Opp'n at 31–34. They do not. Mr. Wood's claim is based on facts that arise post-judgment, i.e., a change in facts on which his judgment was predicated. It is true that, typically, new constitutional rules do not apply to convictions that are final before the rule is announced. Opp'n at 31. But those are new rules about the manner by which trials are conducted. That is what makes the application of them retroactive: when the trial occurred, it was not the rule. Mr. Wood is not asking for *retroactive* application of any new rule. He is asking for *prospective* application of a new rule.

> the little crime wave begins. . . . Wood apparently was [not] doing that stuff until Reneau shows up . . . . What's the common equation?"

Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 22: 21–32.

For purposes of this claim, Mr. Wood does not ask the Court to declare anything retroactively unlawful about his trial or the manner by which the judgment was historically secured by announcement of a new rule. He does not, by virtue of this claim, contend there was anything invalid about the judgment when it was rendered. Instead, he asks the Court to declare that the judgment has *become* invalid due to changed circumstances *after* it was obtained (or at least to instruct the state court that due process requires such a reassessment and to proceed to plenary review of it).

While this type of claim is unusual, it is predicated on Texas's decision to rely exclusively on a prediction about future behavior to support its judgement authorizing it to execute Mr. Wood. That decision has constitutional implications. *See* Pet. at 37–38. Where a judgment imposing a sentence is based on a determination of historical facts, e.g., a defendant's prior criminal conduct or circumstances of the offense, those historical facts do not change over time. Such a judgment will remain valid even after the passage of time causes other circumstances to change, because the changed circumstances do not change the historical facts on which the judgment was based.

But Texas relied exclusively on a prediction to obtain its judgment: whether there is a probability that Mr. Wood would commit criminal acts of violence that would constitute a continuing threat to society. This is not a historical fact. Even if a jury "correctly" answered this question twenty years ago, the "correct" answer may not be the same today, because the facts have substantially changed. If the answer to this question is no longer the same, the judgment Texas has cannot justify executing

Mr. Wood today, notwithstanding the correctness of the answer that was given over twenty years ago. The state court below held—as a matter of law—that the due process clause does not impose any kind of reassessment criteria on a state seeking to act on a twenty-year-old prediction about an individual's future behavior. The Court should grant certiorari to decide whether the CCA was right.[10]

Texas argues that a determination of Mr. Wood's future dangerousness today would be futile "make work" because "[t]he State would still be able to present a punishment case significant enough to overcome" the pseudoscience it presented in the first trial and obtain another capital judgment. Opp'n at 37. This argument lacks credibility where the elected trial judge, district attorney, and sheriff of Kerr County each recently requested that the Texas Board of Pardons and Paroles commute Mr. Wood's death sentence to life, in part based on his lack of future dangerousness and Texas's reliance on a discredited psychologist—nationally known as "Dr. Death"—to testify otherwise at Mr. Wood's trial.[11] *See* App. 1. It is impossible to reconcile Texas's legal position in this case with the actions of local elected officials directly involved in it, one of whom was the lead prosecutor at trial. Such extreme discord and rank arbitrariness erode faith in the criminal justice system.

Respectfully Submitted,

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[10] On the merits, Texas argues that Mr. Wood is asking the Court to strike down Texas's use of future dangerousness as a basis for capital judgments. Opp'n at 35. Mr. Wood asks no such thing; he simply asks that the constitutional limits on deprivations of liberty and life based on such a prediction be enforced.

[11] The commutation request is part of the record below. The clemency board refused to consider the request.

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July 9, 2019

Appendix 1

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August 3, 2017

Texas Board of Pardons and Paroles
Clemency Unit
P. O. Box 13401
Austin, TX 78711

Re: Jeffery Lee Wood - Capital Murder
(Execution Date: Subsequent Writ of Habeas Corpus is pending before the Texas Court of Criminal Appeals after grant of stay of execution. No execution date is currently pending.)

Dear Chairman and Members of the Texas Board of Pardons and Paroles:

I am the original trial prosecutor in this case and am now the elected District Attorney. I have previously written two letters to this Honorable Board opposing clemency in this case. While I still stand by the facts set out in those letters, I now write respectfully requesting that you recommend Governor Greg Abbott grant clemency to this Offender and commute his Death sentence to a Capital Murder Life sentence.

During the early morning hours of January 2, 1996, Jeffery Lee Wood and Daniel Reneau committed the offense of Capital Murder in the City of Kerrville, Kerr County, Texas by killing Kris Keeran while in the course of committing or attempting to commit the offense of Robbery at a convenience store. Reneau shot the victim with a .22 caliber handgun. Wood was a party to the offense.

The guilt/innocence phase of the Offender's Capital Murder trial began on February 23, 1998. On February 25, 1998 the jury returned its verdict finding the Offender guilty of Capital Murder. At the punishment phase of the trial, the jury answered the special issues in a manner that required the court to impose a death sentence. The trial court imposed said sentence on March 2, 1998. (For further details on the

appellate and post conviction State and Federal writ history, please see Exhibit F, the State's Response to the Offender's Subsequent Writ of Habeas Corpus).

The Offender's second execution date was set for August 24, 2016. Execution Order, *State v. Wood*, No. A96-17 (216th Dist. Ct., Kerr County, Tex. May 20, 2016). About three weeks later, Offender filed a subsequent state habeas application. Writ Habeas Corpus, *Ex parte Wood*, No. A96-17-2 (216th Dist. Ct., Kerr County, Tex. Aug. 2, 2016). The CCA stayed the Offender's execution and remanded two of Applicant's claims so that they may proceed on the merits. Order, *Ex parte Wood*, No. WR-45,500-02 (Tex. Crim. App. Aug. 19, 2016) (Exhibit A). The state habeas trial court issued its order regarding said claims on March 1, 2017 finding that there existed no controverted, previously unresolved factual issues material to the legality of the Offender's confinement and ordered the parties to submit Proposed Findings of Fact and Conclusions of Law (Exhibit B). The parties timely submitted their proposed findings of fact and conclusions of law as ordered. However, on April 14, 2017, the Offender filed a "Motion to Stay and Place Case in Temporary Abeyance" (Exhibit C) requesting that the CCA place the writ in abeyance to give the parties an opportunity to attempt to resolve this pending subsequent writ of habeas corpus by agreement. The State having no objection to said motion, the state habeas trial court signed an "Order Requesting Placing Case in Abeyance" on April 13, 2017 (Exhibit D). Therefore, the state habeas trial court has not yet submitted its Findings of Fact and Conclusions of Law and the CCA has not yet issued a ruling on the Offender's subsequent writ of habeas corpus (however, the CCA has called the state habeas trial court inquiring on the issuance of the Findings of Fact and Conclusions of Law).

For your convenience, I have attached a copy of the Offender's subsequent writ of habeas corpus as well as the State's response (Exhibit E and F, respectively).

While I am aware that requests for clemency in Death Penalty Capital Murder cases are normally considered when there is an execution date pending, I respectfully ask that you consider this request for commutation of sentence and act on it now, in the absence of such an execution date, in the interest of justice and judicial economy for the following reasons.

At the time of the jury trial in this case, I was a newly licensed attorney with thirteen months of experience. I was not familiar with Dr. James P. Grigson. I did not make the decision to call him as a witness until after voir dire had begun in this case. I met with Dr. Grigson shortly before the trial on the merits began and it was at that time that I decided to use him as an expert witness. I was not aware that Dr. Grigson had been expelled from the American Psychiatric Association and Texas Society of Psychiatric Physicians until well after the jury trial of this case. Had I known about Dr. Grigson's issues with said organizations, I would not have

used him as the State's expert witness in this case on the issue of future dangerousness.

For that reason, combined with other factors unique to this Offender and to this case, I now respectfully request that his sentence be commuted to Capital Murder Life. The unique factors include (1) the Offender was not actually the person who shot the victim, (2) the Offender has a documented history of sub average IQ and was in Special Education classes in high school, (3) the victim's family did not desire the State seek the death penalty against this Offender, (4) the shooter in this case, co-defendant Daniel Reneau, has been executed, (5) since being sentenced to death in 1998, Offender has not committed any acts of violence, (6) Offender had no violent criminal history prior to associating with his co-defendant, Daniel Reneau, (7) based on today's standards combined with the issues involving Dr. Grigson set out above, the penalty now appears to be excessive, and (8) the jury was not aware of Dr. Grigson's issues with the APA and the TSPP at that time of the jury trial (three jurors have submitted affidavits indicating that had they been made aware of Dr. Grigson's issues with said organizations, they would not have found beyond a reasonable doubt that the Offender would probably commit future acts of violence that would constitute a continuing threat to society).

Undersigned, with the permission of the Offender's writ counsel, The Honorable Scott Sullivan, has conferred with David Knight, Chief of Police for the City of Kerrville, Kerr County, Texas, and with The Honorable N. Keith Williams, the Presiding Judge for the 216th Judicial District of Kerr County, Texas. Chief Knight is familiar with the facts of the case and was a police officer with the City of Kerrville at the time of this offense. Judge Williams has been the presiding judge of the 216th Judicial District Court of Kerr County, Texas for over eight years and is familiar with the facts of the case as well as the issues in the writ of habeas corpus though his involvement in the writ proceedings (The Honorable Stephen B. Ables presided over the trial of this case). Both Chief Knight and Judge Williams join in this request as indicated by their respective signatures below.

The Crime Victim's Assistance Coordinator for this office was unable to locate a member of the victim's family to obtain their opinion or recommendation on this request for commutation of sentence.

I would like to add that the elected District Attorney at the time, E. Bruce Curry, allowed me to make the decision on whether or not to seek the death penalty in this case; therefore, the decision to seek the death penalty was mine. Again, I now respectfully request that this Offender's Death sentence be commuted to a Capital Murder Life sentence.

If you have any questions, please do not hesitate to contact me. Chief Knight may

be reached at (830)257-8181. Judge Williams may be reached at (830)792-2290. Thank you for consideration in this matter.

Yours truly,

Lucy Wilke

Agreed:

David Knight
Chief of Police
City of Kerrville

N. Keith Williams
Presiding Judge
216th Judicial District Court
Kerr County, Texas

cc: Sian Schilhab, General Counsel, Texas Court of Criminal Appeals (without exhibits)

Edward Marshall, Chief, Criminal Appeals Division, Texas Attorney General's Office (without exhibits)

J. Scott Sullivan, Writ Counsel for Offender (without exhibits)