No. _____

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

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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Appendix 1

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-45,500-02

EX PARTE JEFFREY LEE WOOD, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. A96-17 IN THE 216TH JUDICIAL DISTRICT COURT
KERR COUNTY

Per curiam. NEWELL, J., filed a concurring opinion. ALCALA, J., filed a dissenting opinion with which WALKER, J., joined. YEARY, J., concurred.

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

Applicant was convicted in March 1998 of capital murder. The evidence showed that Applicant and Daniel Reneau robbed a gas station in Kerrville in 1996, and Reneau shot and killed employee Kriss Keeran during the robbery. During the punishment phase of his trial, the State called Dr. James Grigson to testify regarding Applicant's potential for future

dangerousness. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Wood v. State,* 18 S.W.3d 642 (Tex. Crim. App. 2000). This Court denied relief on Applicant's initial post-conviction application for writ of habeas corpus. *Ex parte Wood,* No. WR-45,500-01 (Tex. Crim. App. May 9, 2001)(not designated for publication).

The instant subsequent writ application, which Applicant filed in the trial court on August 2, 2016, presents eight claims challenging the validity of his conviction and resulting sentence. On August 3, 2016, Applicant filed in this Court a motion to stay his execution pending the consideration and disposition of this application. We stayed Applicant's execution and remanded this application to the trial court for consideration and resolution of Claims 3 and 4, in which Applicant complains of the presentation of "false and misleading testimony" and "false scientific evidence" from Dr. Grigson. *Ex parte Wood,* No. WR-45,500-02 (Tex. Crim. App. August 19, 2016)(not designated for publication). Specifically, Applicant complains that Grigson exaggerated his experience, "testified falsely about his ability to form a reliable psychiatric opinion based on a hypothetical question posed to him," and failed to inform the jury about his expulsion from the American Psychiatric Association ("APA") and the Texas Society of Psychiatric Physicians ("TSPP").

Following remand, the State filed a response that relief should be denied and the trial court signed an order stating that "there are no existing controverted, previously unresolved

factual issues material to the legality of Applicant's confinement." Applicant thereafter filed a motion requesting the trial court to "place the instant proceedings in abeyance pending discussions between the parties about possible settlement." On April 13, 2017, the trial court signed an order requesting that the case be placed in abeyance pending further discussion of the parties. The post-remand supplemental transcript was received in this Court on April 24, 2017.

On August 3, 2017, Kerr County District Attorney Lucy Wilke wrote a letter to the Parole Board stating in pertinent part that she "was not aware that Dr. Grigson had been expelled" from the APA and the TSPP "until well after the jury trial of the case." Wilke further stated that she would not have called Grigson as a witness if she had known about "Grigson's issues with said organizations." For this and other reasons, Wilke requested the Parole Board to recommend that the Governor grant clemency to Applicant and commute his sentence to life. On November 6, 2017, the Parole Board responded that it would not consider the clemency request "because there is currently no Execution Warrant."

On December 6, 2017, we again remanded this application for the trial court to make findings of fact and conclusions of law and a recommendation for the disposition of Claims 3 and 4. The trial court signed findings of fact and conclusions of law on January 19, 2018. The trial court concluded that "Claims 3 and 4 have merit," and recommended that relief be granted on these claims "as to punishment only."[1] We disagree.

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[1] The State objected to the trial court's findings and conclusions, explaining that "while the State may believe in a case for commutation, it does not believe that Applicant has met his burden

In order to be entitled to post-conviction habeas relief on the basis of false evidence, Applicant must show by a preponderance of the evidence that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict. *See Ex parte De La Cruz,* 466 S.W.3d 855, 866 (Tex. Crim. App. 2015), *citing Ex parte Weinstein,* 421 S.W.3d 656, 659, 665 (Tex. Crim. App. 2014). We review factual findings concerning whether a witness's testimony is false under a deferential standard, but we review *de novo* the ultimate legal conclusion of whether such testimony was "material." *See Weinstein,* 421 S.W.3d at 664.

Even if we assume that the complained-of testimony was false or misleading, it was not material. Grigson offered an opinion about the future dangerousness of an individual described in a hypothetical posed by the State. *See Barefoot v. Estelle,* 463 U.S. 880 (1983). The jury was aware that Grigson had not personally examined Applicant, and the State did not particularly focus on Grigson's testimony during closing argument. In addition to the facts of the offense and Grigson's testimony, the State presented other evidence at punishment to establish Applicant's future dangerousness. The jury heard that Applicant not only participated in a prior gas station robbery with Reneau, he also discussed the possibility of committing more crimes with Reneau while they were in jail awaiting trial for the instant offense. Witnesses testified that Applicant resisted jailers after committing a disciplinary infraction. Applicant cursed at the jailers, threatened to kill them and to file a complaint

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in demonstrating entitlement to habeas relief."

against them, and hit one of them in the stomach. The jury also saw a letter Applicant wrote to Reneau, in which he drew a picture of the grim reaper and bragged about filing a complaint against the jailers. In light of this evidence, Applicant has not shown a reasonable likelihood that Grigson's testimony affected the judgment of the jury at the punishment phase of the trial. *See Weinstein,* 421 S.W.3d at 665.

Under the circumstances presented in this case, Applicant is not entitled to relief on the remanded claims. Based upon our own review, we deny relief on Claims 3 and 4.

We have also reviewed Applicant's claims regarding his competency to stand trial (Claims 1 and 2) and his constitutional challenges to his death sentence and the Texas death penalty scheme (Claims 5, 6, 7, and 8). With regard to these claims, we find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss these claims as an abuse of the writ without reviewing the merits.

IT IS SO ORDERED THIS THE 21st DAY OF NOVEMBER, 2018.

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Appendix 2

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-45,500-02

EX PARTE JEFFERY LEE WOOD, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. A96-17 IN THE 216TH JUDICIAL DISTRICT COURT
KERR COUNTY

NEWELL, J., filed a concurring opinion.

Applicant and Daniel Reneau robbed a Texaco station in 1996, stealing a safe, surveillance VCR, and other items.[1] During the robbery, Reneau shot the victim, thirty-one-year-old Kris Keeran. Applicant, the getaway driver, later admitted that he knew Reneau was going to rob the store and that he and Reneau had returned home prior to the robbery so that Reneau could trade the gun he had for a quieter one. Applicant also

[1] *See Wood v. Dretke*, 386 F. Supp. 2d 820, 825–26 (W.D. Tex. 2005), *aff'd sub nom. Wood v. Quarterman*, 491 F.3d 196 (5th Cir. 2007).

admitted that he knew Reneau would shoot Keeran if Keeran refused to cooperate with the robbery. Reneau was executed in 2002.

Applicant is criminally liable for the capital murder of Kris Keeran under the law of parties even though he did not actually pull the trigger. The habeas court listed Applicant's party liability as a primary consideration for granting relief on Applicant's claim that the State's expert, Dr. James P. Grigson (now deceased), had offered false or misleading testimony when giving his opinion that Applicant would be a future danger. This is also a significant factor in the decision of the current District Attorney of Kerr County to agree not to seek another death sentence if habeas corpus relief is granted. And it is also a significant reason why the current District Attorney, who was the original prosecutor in the case, has petitioned the Board of Pardons and Paroles to have Applicant's death sentence commuted to life in prison.

But regarding the writ application itself, the State argues that habeas corpus relief is inappropriate. The State observes that Applicant himself prohibited his attorney from cross-examining Dr. Grigson. This left his testimony unchallenged and his expulsion from the American Psychiatric Society and the Texas Society of Psychiatric Physicians unexplored before the jury. More importantly, the State argues that

Applicant has not shown Dr. Grigson's testimony to be material in light of the other evidence introduced at trial. The State presented significant evidence on the future dangerousness issue independent of Dr. Grigson's testimony:

> Applicant had committed a previous armed robbery with Reneau a year before the crime in this case.
>
> Applicant had instigated the robbery at issue.
>
> Applicant had laughed when watching the surveillance videotape of the clerk being murdered.
>
> Applicant and Reneau had plotted even more crimes while the two were in jail awaiting trial on this capital murder.
>
> Applicant resisted jailers who attempted to place him in lock-down after a disciplinary offense, threatened to kill them, and hit one of the jailers in the stomach.

The State focused primarily upon this evidence when arguing that Applicant was a future danger rather than the hypothetical question posed to Dr. Grigson.[2]

I agree with the State that Dr. Grigson's testimony and history is troubling. But I also agree that it was not material to the jury's

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[2] Applicant also argues that Dr. Grigson's testimony was false because Applicant "has not committed any violent disciplinary infractions on death row." However, the State has provided prison disciplinary records in its response to Applicant's habeas application which show that Applicant threatened to inflict physical harm on prison guards on more than one occasion while on death row.

determination. And the appropriate avenue to address the concerns about Applicant being sentenced to death as a party is through the clemency process. The Board of Pardons and Paroles has previously rejected the State's request for commutation because it could not consider that request before an execution date is set. Now that this application is no longer pending, the conviction court can set an execution date, and the Board can properly consider a possible joint request for commutation.

With these thoughts, I concur.

Filed: November 21, 2018

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Appendix 3

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-45,500-02

EX PARTE JEFFERY LEE WOOD, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. A96-17 IN THE 216TH JUDICIAL DISTRICT COURT KERR COUNTY

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

DISSENTING OPINION

The habeas court has recommended that Jeffery Lee Wood, applicant, receive a new trial on punishment due to the introduction of false and misleading expert testimony during the punishment phase of his capital murder trial. Because I agree with the habeas court's determination that this evidence was introduced in violation of applicant's due process rights, I would follow the court's recommendation that applicant be granted relief in the form of a new punishment hearing. Accordingly, I respectfully dissent from this Court's judgment denying relief to applicant.

The State obtained a death sentence against applicant by relying heavily on testimony by discredited psychiatrist Dr. James P. Grigson. Without personally examining applicant,

Dr. Grigson provided testimony stating definitively that a person with applicant's characteristics would certainly commit future acts of violence. Dr. Grigson stated, "[T]he individual you described will most certainly commit future acts of violence and does represent a threat to society." Unbeknownst to the State at the time of trial, Dr. Grigson had been expelled from the American Psychiatric Association and Texas Society of Psychiatric Physicians for presenting this type of scientifically unreliable testimony in numerous cases. For this reason, the State's prosecutor, who presented this testimony to the jury that determined that applicant should be sentenced to death, has recently averred that, had she known of Dr. Grigson's unreliability, she would not have presented his testimony during the punishment phase of applicant's trial. Furthermore, the State has recently represented that, in the event that applicant is granted habeas relief from his death sentence, it will not seek the death penalty against applicant again in the future.

In its findings of fact and conclusions of law, the habeas court has determined that Dr. Grigson's scientifically invalid testimony violated applicant's due process rights by misleading the jury and affecting its decision on punishment. *See Ex parte Weinstein*, 421 S.W.3d 656, 665-66 (Tex. Crim. App. 2014) (due process violation results from State's use of testimony that is both false and material; evidence is false if it, taken as a whole, "'gives the jury a false impression'"; false evidence is material if there is a "reasonable likelihood that it affected the judgment of the jury") (quoting *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012)). Specifically, the habeas court has determined that Dr. Grigson

"gave untrue and unreliable testimony of a purportedly scientific nature relevant to the future dangerousness special issue," and "misled the jury into believing he could reliably predict with certainty whether a given individual would commit future acts of violence." The court concluded that the admission of Dr. Grigson's testimony "contributed to the jury's affirmative finding on the future dangerousness special issue," particularly in light of the fact that applicant was convicted as a party to this offense and the lack of other overwhelming evidence suggesting future dangerousness. The court concluded, "Absent the expert testimony by Dr. Grigson, the Court's confidence that the jury would have unanimously determined beyond a reasonable doubt that the future dangerousness special issue should be answered affirmatively in the State's favor is severely undermined." Given the habeas court's determination that scientifically unreliable evidence was introduced at applicant's trial in violation of his due process rights, that the trial prosecutor has indicated she would not have introduced this evidence had she been aware of its unreliability, and that the State has determined that the revelations about Dr. Grigson are so material that it would not seek the death penalty against applicant in the future if he were granted habeas relief, I would follow the habeas court's recommendation to grant applicant relief from his death sentence and award him a new trial on punishment.

In cases such as the instant one, in which the prosecutors today acknowledge that the death sentence assessed against applicant is inappropriate, this Court should hold that it would violate the Eighth Amendment to execute applicant. "Because the death penalty is

unique 'in both its severity and its finality,'" the Supreme Court has "recognized an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998) (internal citations omitted). The imposition of the death penalty against a defendant cannot be considered reliable when even the State considers its imposition to be unwarranted and unjust. Because this Court disregards the habeas court's recommendation and upholds applicant's death sentence, I respectfully dissent.

Filed: November 21, 2018
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Appendix 4

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-45,500-02

EX PARTE JEFFERY LEE WOOD, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. A96-17 IN THE 216TH DISTRICT COURT KERR COUNTY

Per curiam. **ALCALA, J., filed a concurring opinion. KELLER, P.J., and MEYERS, J., dissent.**

ORDER

This is a post-conviction application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.

In March 1998, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Wood v. State*, 18 S.W.3d

642 (Tex. Crim. App. 2000). On March 27, 2000, applicant filed in the convicting court his initial post-conviction application for a writ of habeas corpus. After reviewing the case, this Court denied applicant relief. *Ex parte Wood*, No. WR-45,500-01 (Tex. Crim. App. May 9, 2001)(not designated for publication). Applicant filed this, his first subsequent writ application, in the trial court on August 2, 2016.

In this subsequent application, applicant raises eight claims, including claims that his sentence was obtained in violation of due process because it was based on false testimony and false scientific evidence. After reviewing applicant's subsequent application, we find that his third and fourth allegations satisfy the requirements of Article 11.071 § 5. Accordingly, we remand those two claims to the trial court for resolution. Applicant's motion to stay his execution is granted pending resolution of this application.

IT IS SO ORDERED THIS THE 19th DAY OF AUGUST, 2016.

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Appendix 5

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-45,500-02

EX PARTE JEFFERY LEE WOOD, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. A96-17 IN THE 216TH DISTRICT COURT KERR COUNTY

ALCALA, J., filed a concurring opinion.

CONCURRING OPINION

I respectfully concur in this Court's judgment that grants the motion to stay the execution of Jeffery Lee Wood, applicant, and remands applicant's claims three and four, which allege that his capital sentence is based on false testimony and that his judgment violates due process because it was based on false scientific evidence. I write separately because I would also remand claims five, six, and seven, in which applicant alleges that his participation in the offense and his moral culpability are too minimal to warrant the death penalty, that evolving standards of decency now prohibit the execution of a person who was convicted as a party to a capital offense, and, more generally, that Texas's death-penalty

scheme should be declared unconstitutional because it is arbitrary and fails to target the worst of the worst offenders, in violation of the Eighth Amendment.

In 1982, in examining the constitutionality of the death penalty for individuals convicted and sentenced under a theory of party liability, the Supreme Court in *Enmund v. Florida* examined "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter." 458 U.S. 782, 788-89 (1982). Under its then-existing examination of jury decisions, the Supreme Court held that Enmund's death sentence "was impermissible under the Eighth Amendment" because he "did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [complainants]." *Id.* at 798.

Five years later, in considering a similar question in *Tison v. Arizona*, the Supreme Court also looked to society's then-prevailing views to determine whether the death penalty was constitutionally permissible for major participants in a violent felony who did not actually kill and lacked any specific intent to kill. 481 U.S. 137 (1987). In resolving this issue, the Court took note of the "apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an intent to kill." *Id.* at 154. Applying this principle to the facts in *Tison*, which showed that the defendants were actively involved in plotting and

executing the prison break of two convicted murderers, the Court said, "[W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158. The Court thus distinguished *Enmund* on the basis that Enmund's participation in the underlying felony was minor. *Id.* at 149 (explaining that, unlike the defendants in *Tison*, Enmund was a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state"). Although it concluded that a reckless disregard for human life combined with substantial participation in a violent felony could give rise to a death sentence, the Court declined to further "attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty." *Id.* at 158.

Almost thirty years have passed since the *Tison* decision and, as I have detailed in my recent opinion in *Ex parte Murphy*, societal views about the death penalty appear to have changed considerably during the past several decades. *See Ex parte Murphy*, ___S.W.3d___, No. WR-38,198-04, 2016 WL 3356280 (Tex. Crim. App. 2016) (Alcala, J., concurring and dissenting). Given that both *Enmund* and *Tison* looked to prevailing societal views in deciding whether the death penalty would be unconstitutional for people convicted and sentenced under a theory of party liability, as is the situation in the present case, I would also remand that question along with the other matters included in the remand order.

In addition to his claim that his death sentence is now unconstitutional in light of

shifting societal views, applicant further alleges that, even under the standard set forth by *Tison* in 1987, his execution is impermissible in light of his minimal participation in the offense and his minimal moral culpability. Applicant alleges that the jury never determined that he either killed a person or intended to kill a person, and an examination of the guilt-innocence jury instructions would support that contention. The guilt-innocence jury instructions permitted the jury to convict applicant of capital murder if he acted as a party by aiding or abetting another person to commit the offense, or, alternatively, if he acted with the intent to commit robbery and another person was killed as a result of that robbery under circumstances that showed that applicant should have anticipated that a death would result, even if he had no intent for a death to occur.[1] The jury, therefore, may well have convicted

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[1] Specifically, the guilt-innocence instructions authorized the jury to find applicant guilty under one of two theories, as follows:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 2nd day of January, 1996, in Kerr County, Texas, Daniel Reneau did intentionally cause the death of an individual, Kris Keeran, by shooting him with a firearm while in the course of committing the offense of robbery, and that the [defendant] then and there knew of the intent, if any, of said Daniel Reneau to shoot and kill the said Kriss Keeran and the defendant acted with intent to promote or assist the commission of the offense by Daniel Reneau by encouraging, directing, aiding or attempting to aid Daniel Reneau to commit the offense of causing the death of Kriss Keeran, you will find the defendant [ ] guilty of capital murder as charged in the indictment;
>
> or
>
> If you find from the evidence beyond a reasonable doubt that on or about the 2nd day of January, 1996, in Kerr County, Texas, [the defendant] and Daniel Reneau entered into an agreement to commit the offense of robbery, as above defined, of Kriss Keeran, and pursuant to that agreement, they did carry out their conspiracy and that while in the course of committing such robbery, Daniel Reneau did intentionally cause the death of an individual, Kriss Keeran, by shooting him with a gun with the

applicant of capital murder even if it believed that his sole intent was to rob the victim and that he should have anticipated, not that he actually did anticipate, the death of the victim by his co-defendant. Because the guilt-phase instructions permitted him to be found guilty of capital murder for a death that he may not have actually anticipated, applicant is correct that these instructions would have failed to comply with the requirement of *Tison* that the defendant exhibit at least reckless indifference to human life, coupled with major participation in a felony offense. *See Tison*, 481 U.S. at 152.

But, contrary to applicant's suggestion that the jury never determined that he either killed a person or intended to kill a person, the punishment-phase jury instruction did require the jury to find that he actually anticipated that a human life could be taken before the death penalty could be imposed. The punishment-phase instructions in this case permitted a death sentence for applicant's role as a party in this offense under alternative theories that "he intended to kill the deceased or another, or that he anticipated that a human life would be taken."

At first blush, the jury's finding in this case appears to have met the *Tison*

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specific intent to kill Kriss Keeran, and the defendant, [ ], pursuant to the conspiracy, if any, with intent to promote and assist Daniel Reneau in the commission of said robbery, then and there at the time of the shooting, was acting with and aiding, or attempting to aid, Daniel Reneau in the execution of the robbery of Kriss Keeran, if any, and that the shooting of Kriss Keeran was committed in furtherance of the conspiracy, if any, of [the defendant] and Daniel Reneau, to rob Kriss Keeran, and that the shooting of Kriss Keeran, if any, was an offense that should have been anticipated as a result of carrying out the conspiracy, then you will find the defendant [ ] guilty of the offense of capital murder as charged in the indictment.

requirements, but it likely did not. The jury instructions did comport with *Tison*'s requirement that a death sentence may be appropriate when the defendant exhibits a subjective reckless indifference to human life, but it failed to include the additional requirement that there be evidence of "major participation in the felony committed." *Id.* at 158. As described above, the guilt-innocence instructions permitted the jury to convict applicant as a party even if the evidence showed much less than "major participation" in the robbery. *See id.* More specifically, the jury instructions permitted the jury to convict applicant even for minimal participation in the robbery based on evidence that (1) he intended to promote and assist his co-defendant to commit robbery, and (2) he "was acting with and aiding, or attempting to aid" his co-defendant. Thus, it is arguable that the jury instructions in this case failed to comport with the *Tison* standard because they failed to require that applicant's participation in the offense be more than minor.

Perhaps one might suggest that I should not concern myself with the fact that applicant's death sentence appears to be unconstitutional under *Tison* because applicant should have raised this claim at some earlier stage of his post-conviction challenges and he is now procedurally barred from raising this challenge. I, however, would disagree with that suggestion. I would hold that *Tison* spells out the same type of categorical ban on the death penalty for certain individuals much in the same way as *Atkins* has for intellectually disabled offenders. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Applying the same reasoning that applies in the *Atkins* context, applicant may be actually innocent of the death penalty

because he may be categorically ineligible for that punishment under the particular facts of this case. I would consider treating *Tison* claims much like this Court has treated intellectual-disability claims that should have been raised in earlier proceedings by permitting relief on those claims when they are proven by clear and convincing evidence. *See Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (permitting consideration of otherwise procedurally barred *Atkins* claim if applicant could make "threshold showing" of evidence that would be "at least sufficient to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find mental retardation"). At a minimum, however, this Court should file and set the procedural question after remanding this matter to the habeas court so that the parties can develop the evidentiary basis for their claims. Furthermore, because society's views about the death penalty have significantly evolved since *Tison*, I would remand this matter for consideration in the habeas court.

In his seventh claim, applicant contends that this Court "should declare the Texas death penalty unconstitutional because of its arbitrariness and inability to ensure that only the worst of the worst receive death sentences." In keeping with the viewpoint I expressed in *Murphy*, I would also remand this claim to the habeas court for further development and consideration in light of shifting societal views about the death penalty. *See Murphy*, 2016 WL 3356280, at *4, 7 (Alcala, J., concurring and dissenting).

With these comments, I respectfully concur.

Filed: August 19, 2016

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