CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT SPARKS,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix

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Appendix	**Description**
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CERTIFICATE OF SERVICE

I hereby certify that, on the 3rd day of May 2019, a true and correct copy of this motion was mailed by first-class U.S. mail to:

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Tab A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-70013

United States Court of Appeals
Fifth Circuit
FILED
December 4, 2018
Lyle W. Cayce
Clerk

ROBERT SPARKS,

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 Northern District of Texas
USDC No. 3:12-CV-469

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Robert Sparks was convicted and sentenced to death for the 2007 murder of his wife and two step-sons. Sparks filed a federal habeas petition pursuant to 28 U.S.C. § 2254, asserting, *inter alia*, violations of his Eighth Amendment and Due Process rights, his right to an impartial jury, and cumulative error. After a thorough review, the district court denied the petition and did not certify any questions for appellate review. Sparks now seeks a certificate of

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

appealability (COA) from this court pursuant to 28 U.S.C. § 2253(c)(2). For the following reasons, Sparks's COA application is DENIED.

BACKGROUND

1. Factual

Robert Sparks was convicted of stabbing his wife and 9- and 10-year-old step-sons to death in September 2007. *Sparks v. Texas*, slip op. No. AP-76,099 (Tex. Crim. App. October 20, 2010). Following the murders, Sparks raped his 12- and 14-year-old step-daughters at gunpoint in the same room as two of the bodies. *Id.* Sparks fled to his ex-girlfriend's home immediately after committing his crimes, at which point he called the police and confessed. He then traveled from Dallas to Austin on a Greyhound bus, using a ticket purchased under an alias.

Sparks returned to Dallas a few days later and called the police again, this time to ask if they had recovered audiocassette tapes he left in his home. *Sparks*, slip op. No. AP-76,099, at 2-5. He told the police that the recordings proved that his wife and step-sons were conspiring to poison him. The police located the tapes, but they contained only gibberish. Sparks was arrested shortly thereafter.

2. Procedural

Sparks was charged and convicted of capital murder in state criminal court, and sentenced to death in state criminal court, and an automatic direct appeal to the Texas Court of Criminal Appeals followed. The Court of Criminal Appeals affirmed Sparks's conviction and sentence, *Sparks v. Texas*, slip op. No. AP-76,099 (Tex. Crim. App. October 20, 2010), and the Supreme Court denied certiorari, *Sparks v. Texas*, 131 S. Ct. 2152 (2011). While Sparks's direct appeal was pending, he filed his state habeas petition. *Ex Parte Sparks*, No. 76,786-01, 2011 WL 6293529 at *1 (Tex. Crim. App. Dec. 14, 2011). The state court entered Findings of Fact and Conclusions of Law, which the Texas

Court of Criminal Appeals adopted. *Id*. The Court of Criminal Appeals denied relief, *id*., and the Supreme Court denied certiorari. 133 S. Ct. 526 (2012).

Sparks then filed a federal habeas petition as well as a successive state court petition. The federal court stayed and abated Sparks's petition pending the resolution of his state court petition. The state court dismissed the application as an abuse of the writ, and Sparks returned to federal court and filed an amended petition seeking federal habeas relief. After reviewing Sparks's petition, the district court denied relief. Sparks now appeals the district court's ruling and seeks a COA from this court.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a state court prisoner must obtain a COA before appealing a federal district court's denial of habeas relief. 28 U.S.C. § 2253(c)(1)(A). A COA is warranted upon a "substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue only when the prisoner shows that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right . . . *and* whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000) (emphasis added). The "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003). The question for the appellate court is whether "reasonable jurists could debate whether (or, for that matter, agree that)" the district court should have handled the issues differently. *Miller-El,* 537 U.S. at 336, 123 S. Ct. at 1039. In cases involving the death penalty, "any doubts as to

whether a COA should issue must be resolved in [the petitioner's] favor." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000) (citation omitted).

AEDPA's standard for habeas petitions from state court judgments is highly deferential and demands that state court judgments "be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010). To prevail, the petitioner must prove that the adjudication by the state court "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" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Under AEDPA, it is not enough that a federal habeas court would reach a different conclusion than the state court. *Williams v. Taylor*, 529 U.S. 362, 411, 120 S. Ct. 1495, 1522 (2000).

This court reviews a district court's denial of evidentiary hearings or discovery for an abuse of discretion. *Clark v. Johnson*, 202 F.3d 760, 765 (5th Cir. 2000).

DISCUSSION

Sparks advances several theories in support of his petition for a COA. This court examines each in turn.

1. Eighth Amendment and Due Process Objections

Sparks's first objection is that his Eighth Amendment and Due Process rights were violated by materially inaccurate testimony of the state's expert witness during sentencing. Sparks argues that the state's expert witness, A.P. Merillat, "falsely told the jury that Sparks would initially be classified as a G-3 prisoner when arriving to prison, in spite of his past record or any other factors." This error in testimony, Sparks contends, led jurors to impose the death penalty based on unfounded fears that Sparks would be violent when incarcerated among the general prison population if he received life without

parole. The testimony in question was inaccurate as first stated, but, as the district court noted, the inaccuracy of Merillat's testimony was corrected by Merillat during cross-examination by Sparks's defense attorney. Sparks argues that the correction was insufficient and the jury was nevertheless left with a false impression due to Merillat's ambiguous further comment in cross-examination.

Because Sparks failed to raise this claim on direct appeal or in his initial state habeas proceedings, the federal court stayed its consideration of the claim while Sparks raised it in subsequent state habeas proceedings. The state court dismissed Sparks's subsequent application as an abuse of the writ without addressing the merits of his claim. The district court then held that Sparks's claim was procedurally barred from federal review and, alternatively, that it lacked merit because Sparks failed to prove that Merillat's testimony was materially false. The district court rejected Sparks's request for a cause and prejudice exception to his procedural default for substantially the same reasons that the claim itself was without merit.

Sparks argues here that his claim for a due process violation and suppression of evidence violative of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), satisfies the cause and prejudice standard to overcome the procedural bar. Because the merits analysis of Sparks's false testimony claim largely parallels the "cause" threshold he must clear, it is permissible to consolidate both issues into a single inquiry. *See Banks v. Dretke*, 540 U.S. 668, 686, 124 S. Ct. 1256, 1269 (2004).

"A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show cause to excuse his failure to comply with the state procedural rule and actual prejudice resulting from the alleged constitutional violation." *Davila v. Davis*, 137 S. Ct. 2058, 2064-65 (2017) (internal quotation marks and citation omitted). To establish "cause,"

the prisoner "must show that that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 2065 (internal quotation marks and citation omitted). A factor is only considered external to a prisoner's defense "if it cannot fairly be attributed to the prisoner." *Id.* (internal quotation marks and citation omitted).

Here, Sparks's claim centers around the allegedly-false testimony of the state's expert witness. Parsing the testimony for signs that the jury may have been confused or misinformed is unnecessary in this case, however, because it is undisputed that all parties were aware of Merillat's testimony—the alleged "cause" in this case—while it was happening. Indeed, Sparks's defense attorney focused on correcting Merillat's testimony during his cross examination. To the extent that the testimony may have been inaccurate, therefore, Sparks can hardly claim that he was unaware of its inaccuracy. Thus, because there is ample evidence that Sparks was aware of the allegedly-false testimony, Sparks cannot show that his failure to raise the issue at the state level was caused by some external factor that could not fairly be attributed to him. As such, reasonable jurists could not debate the district court's refusal to grant Sparks a cause-and-prejudice exception to surmount the procedural bar, and no COA is warranted on this issue.

2. Evidentiary Hearing and Discovery Objections

From the foregoing discussion, it follows that no COA should be granted on the district court's refusal to order discovery and an evidentiary hearing on the alleged falsity of Merillat's testimony. Of course, a district court has discretion to order an evidentiary hearing on a state habeas case only if it is not barred from doing so by 28 U.S.C. § 2254(e)(2). *Schiro v. Landrigan*, 550 U.S. 465, 468, 127 S. Ct. 1933, 1937 (2007). Although the claims asserted by Sparks in this connection might, if substantiated, satisfy a portion of that provision, Sparks did not attempt to prove "by clear and convincing evidence

that but for the constitutional error[s], no reasonable factfinder" would have sentenced him to death. Section 2254(e)(2)(B).

Sparks also requested leave to subpoena the files of the Dallas County District Attorney's office to gather information to support his Merillat claim. A habeas petitioner may obtain leave to conduct discovery when he provides the court with "specific allegations" and there is "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09, 117 S. Ct. 1793, 1799 (1997) (internal quotation marks and citation omitted). In other words, a petitioner seeking to conduct discovery must make a prima facie case that discovery is warranted. *See Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000)(citing Rule 6 of the Federal Rules governing Section 2254 cases).

Sparks's claim revolves entirely around the jury's possible misperception of Merillat's testimony during the punishment stage of his trial. As stated above, there is not ground for debating procedural default or the underlying claim that Merillat's testimony was false. Sparks does not explain how the files he requested might support his claim that Merillat's testimony—all of which is contained in the record—violated his constitutional rights. "Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review." *Strickler v. Greene*, 527 U.S. 263, 286, 119 S. Ct. 1936, 1950-51 (1999). Sparks's discovery request was based upon mere speculation.

Reasonable jurists could not debate that the district court did not abuse its discretion by denying the subpoena request or refusing an evidentiary hearing.

3. Right to an Impartial Jury

Sparks next asserts that his right to an impartial jury was violated. He presents several reasons for this assertion, laid out in two separate claims.

Sparks's first claim is that the necktie worn by the bailiff at his sentencing unfairly prejudiced the jury against him because it was emblazoned with a large, white syringe. The bailiff admitted that the purpose of the tie was to signal his support for the death penalty. Specifically, on request of defense counsel to the court, the bailiff took measures to partially conceal the tie from the view of jurors, and Sparks could not prove that a single juror saw the tie, much less was influenced by seeing it. The district court dismissed the claim, holding that the state court's determination of the facts, after a hearing at which several witnesses testified, was not unreasonable. 28 U.S.C. § 2254(d)(2).

The Supreme Court has held that a juror is exposed to an external influence when he receives information that has not been introduced into evidence. *Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 2746 (1987). When allegations of improper influence arise in the habeas context, as opposed to direct appeal, this court reviews them under the "substantial and injurious effect" standard set forth by the Supreme Court in *Brecht v. Adamson*. *See Oliver v. Quarterman,* 541 F.3d 329, 341 (5th Cir. 2008) (citing *Brecht v. Adamson*, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 1722 (1993)).

After an evidentiary hearing in Sparks's state habeas proceedings, the state court concluded that the tie was partially obstructed from view and that Sparks had not proven that any jurors saw the tie. The district court deferred to the state court's factual determinations—as prescribed by AEDPA—and rejected Sparks's claim. The district court's determinations under AEDPA and governing law are not reasonably debatable on this issue.

Sparks also alleges that he was denied his right to an impartial jury trial by audience disruptions. Sparks argues that "repeated instances of audience disruptions" improperly influenced the jury during the sentencing phase,

including one instance in which the father of one of Sparks's victims charged at Sparks while wearing a shirt displaying a photo of his deceased son.

The district court denied relief, ruling that the state court's decision to continue the sentencing phase after audience disruptions was not contrary to clearly-established law as defined by the Supreme Court. Sparks appeals that decision but cites no case in which the Supreme Court has held that disruptive conduct by spectators requires a mistrial or any other judicial act. In fact, as the district court noted, the Court explicitly stated that it has never addressed the issue. *Sparks v. Davis*, No. 3:12-CV-469-N, 2018 WL 1509205, at *9 (N.D. Tex. Mar. 27, 2018) (citing *Carey v. Musladin*, 549 U.S. 70, 76, 127 S. Ct. 649, 653 (2006) ("This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived the defendant of a fair trial.")). Therefore, the district court's determination that the state courts did not unreasonably apply the law under Section 2254(d)(1) is not itself reasonably debatable.

Nor is Sparks's claim to relief under Section 2254(d)(2) for spectator misconduct, which was rejected by the district court, reasonably debatable. Sparks's brief includes conclusory statements alleging that the state court's decision was "based on an unreasonable determination of the facts in light of the evidence," but it does not specify any meaningful facts or evidence that render the district court's determination unreasonable.

In sum, Sparks is not entitled to a COA for either claim.

4. Cumulative Error

Sparks also raises an objection predicated on the theory that the cumulative effect of the image on the bailiff's tie and the outbursts from the audience created a "mob domination" atmosphere that deprived him of his

right to an impartial jury. The district court held this claim to be both meritless and procedurally defaulted.

Sparks cites a pre-AEDPA case, *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (en banc), as support for his contention that the district court erred in its ruling. With regard to exhaustion of remedies, however, the post-AEDPA controlling precedent in this court is *Nickelson v. Stephens*, 803 F.3d 748 (5th Cir. 2015). *Nickelson* held that cumulative error claims not presented to the state courts are barred as unexhausted. 803 F.3d at 753. Because Sparks failed to raise this claim in state court proceedings, the district court held that the claim is procedurally barred.

The district court alternatively held that Sparks's cumulative error argument was meritless. Sparks does not even mention this holding on appeal. He has failed to show that the district court's decision on this issue was debatable.

5. Objection to Texas's Capital Sentencing Scheme

Finally, Sparks challenges the constitutional validity of Texas's capital sentencing scheme under *Apprendi*. Sparks argues that the state's sentencing scheme is unconstitutional because the jury was not required to conclude beyond a reasonable doubt that no mitigating factors existed to warrant a life sentence instead of death. This claim is both factually inaccurate in this instance and is also foreclosed by circuit precedent. The jury did indeed conclude beyond a reasonable doubt that no mitigating factors existed in Sparks's case. Furthermore, this court has already held that "[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof." *Rowell v. Dretke*, 398 F.3d 370, 375-77 (5th Cir. 2005).

Sparks argues that *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), now requires this court to apply *Apprendi* to Texas's capital sentencing law. This

court has consistently rejected that claim. *See*, *e.g.*, *Garcia v. Davis*, 704 F. App'x 316, 324 (5th Cir. 2017). Thus, because *Rowell* remains controlling precedent in this court, and *Rowell* upheld the validity of Texas's capital sentencing scheme, Sparks's challenge to Texas's capital sentencing scheme is foreclosed by circuit precedent. The district court's ruling is not reasonably debatable.

CONCLUSION

For the foregoing reasons, the Petitioner's COA request is **DENIED.**

Tab B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT SPARKS	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action No. 3:12-CV-469-N
	§	(Death Penalty Case)
LORIE DAVIS,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER DENYING RELIEF

Robert Sparks petitions the Court for a writ of habeas corpus, contending that his conviction and death sentence are unconstitutional due to trial errors, prosecutorial misconduct and ineffective assistance of counsel. Because Sparks has not shown that he is entitled to relief, the Court denies the requested relief.

I. Procedural Background

Sparks was convicted and sentenced to death for the capital murder of his wife and two stepsons in the same criminal transaction. *State v. Sparks,* No. F-0801020-J (Crim. Dist. Ct. No. 3, Dallas County, Tex. Dec. 11, 2008). The Texas Court of Criminal Appeals ("CCA") unanimously affirmed the conviction and death sentence. *Sparks v. State,* No. AP-76,099, 2010 WL 4132769, at *1 (Tex. Crim. App. Oct. 20, 2010), *cert. denied,* 563 U.S. 962 (2011). During the pendency of his direct appeal, Sparks filed his first postconviction application for a writ of habeas corpus in the state trial court in writ number W08-01020-J(A) on August 25, 2010. (State Habeas Clerk's Record, "SHCR," at 5-27). The CCA adopted

the trial court's findings of fact and conclusions of law to deny relief. *Ex parte Sparks,* No. WR-76,786-01 (Tex. Crim. App. Dec. 14, 2011).

Sparks filed his original petition for a writ of habeas corpus in this Court on June 10, 2013, which was accompanied by a motion to stay these proceedings to exhaust his claim concerning the allegedly false prisoner classification testimony of A.P. Merillat and a related claim of ineffective assistance of trial counsel. (Pet. doc. 19; Mot., doc. 18.) Respondent agreed to the motion to stay. (Resp., doc. 27.) The Court found that this agreement complied with *Rhines v. Weber,* 544 U.S. 269 (2005), and stayed these proceedings to allow Sparks to exhaust these claims. (Order, doc. 33.) Following abeyance, Sparks filed a subsequent state habeas application which was dismissed by the CCA as an abuse of the writ, and Sparks returned to this Court. *Ex parte Sparks,* No. WR-76,786-02, 2014 WL 2002211, at *1 (Tex. Crim. App. May 14, 2014) (per curiam).

Following exhaustion, these proceedings were reopened on June 19, 2014. (Order, doc. 37.) Sparks filed his amended petition on August 27, 2014 (Am. Pet., doc. 38), Respondent filed her answer on September 26 (Ans., doc. 44), and Sparks filed his reply on November 17 (Reply, doc. 52).

II. FACTUAL BACKGROUND

The state court described the facts of the offense as follows:

> Appellant was charged with intentionally and knowingly causing the deaths of Raekwon Agnew and Harold Sublet, Jr., by stabbing and cutting them with a knife, during the same criminal transaction. The record shows that on September 15, 2007, appellant murdered his wife, Chare Agnew, and his 9-

and 10-year-old stepsons, Harold and Raekwon, and he raped his 12- and 14-year-old stepdaughters, Garysha Brown and LaKenya Agnew. Some time after midnight, when everyone else in the house was asleep, appellant put his hand over Chare's mouth and stabbed her eighteen times as she lay in her bed. He then went into the boys' bedroom. As Raekwon lay sleeping, appellant woke Harold and took him to the kitchen, where he stabbed him at least 45 times. He then woke Raekwon, took him to the kitchen, and killed him in the same manner. Appellant dragged the boys' bodies to the living room and covered them with a comforter. He then went into the girls' bedroom and woke LaKenya. He pulled her out of bed at gunpoint, tied her up with bedsheets, and told her he had killed her mother and brothers. He showed her their bodies and told her it was her fault they were dead. Next, he woke Garysha and tied her up with electrical cords, and he tied a washcloth around her mouth. He then told LaKenya that in order to save her and her sister's life, one of the girls would have to have sex with him. LaKenya said that she would do it. Appellant took her to the living room and raped her on the living room couch.

When he had finished raping LaKenya, appellant took Garysha to the living room and raped her on the couch, next to her sister. Then, he made the girls stay in the bathroom with him while he took a shower. He apologized to the girls for the rapes and murders. He told them that their mother had been trying to poison him and that her death was their fault. Next, he forced both girls to go with him into the garage, where he tried, unsuccessfully, to change the license plate on his car. He took the girls back to the living room, where he lifted the comforter and showed the girls their brothers' bodies. He remarked that Raekwon was stronger than he had expected him to be. Appellant made the girls walk into their mother's bedroom and kiss her face, and then he put them into the bedroom closet. He started a CD player and told them that help would come when the music ended. He then locked the closet door and moved a dresser in front of it. Finally, appellant left the house.

Appellant drove to his mother's house to borrow her car. He then drove to the home of his former girlfriend, Shunta Alexander, and their teenaged daughter, Brianna. He told Shunta what he had done. He gave her some money for Brianna and remarked that if there was a reward for catching him, Brianna should have it. Shunta begged him to call the police. Appellant called the police on his cell phone and briefly reported that he had killed his wife and two boys and he had left two girls locked in a bedroom closet. He provided the address and stated that he knew the police would trace the call if he stayed

> on the phone too long. He then hung up, broke his cell phone, and left Shunta's home. Later that morning, appellant's cousin drove him to the Greyhound bus station, where he bought a bus ticket under an assumed name and traveled to Austin.
>
> Appellant returned to Dallas a few days later. He called a police detective and asked him if the police had found an audiocassette tape he had left in the house, which he believed contained a recording of Chare or one of the children admitting that they had been conspiring against him. He thought that this tape would help his case. After his arrest, appellant made a statement to police in which he requested testing for the presence of poison in his body, and he said that LaKenya and Garysha should be polygraphed about whether Chare had been poisoning him. He provided buccal, blood, hair, and fingernail samples to be tested for evidence of poisoning, but the lab that received the samples was not able to conduct the requested tests, and investigators were unable to locate a lab with that capability.

Sparks v. State, No. AP-76,099, 2010 WL 4132769, at *1-2 (Tex. Crim. App. Oct. 20, 2010).

These findings are entitled to deference. *See* 28 U.S.C. § 2254(e)(1).

III. CLAIMS

Sparks presents eight claims for relief in the following enumerated categories:

1. Sparks was denied his right to an impartial jury at the punishment phase of the trial when a bailiff wore a necktie bearing the image of a hypodermic syringe that showed his support for the death penalty. (Am. Pet. at 42);

2. (Abandoned.)[1] (Am. Pet. at 57.)

3. Sparks was denied his right to an impartial jury when the trial court refused to grant a mistrial in spite of repeated instances of misconduct by bystanders which took place within the view of the jury. (Am. Pet. at 57);

[1] This omitted claim is mentioned to preserve numbering.

4. Sparks was denied his right to an impartial jury based on the combined effects of the actions of the bailiff and the bystanders as well as the overall atmosphere surrounding his trial. (Am. Pet. at 61);

5. Sparks was denied his Eighth Amendment and Due Process rights when the State's expert witness, A.P. Merillat, testified to materially inaccurate evidence at the punishment stage of Sparks' trial. (Am. Pet. at 63);

6. Sparks was denied his right to an impartial jury and due process when the trial court denied his challenges for cause to numerous jurors specifically named in the direct state appeal. (Am. Pet. at 109);

7. The Texas death penalty scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by not requiring the state to prove aggravating factors relevant to the mitigation special issue beyond a reasonable doubt before the jury may sentence the defendant to death. (Am. Pet. at 137);

8. The Texas 12-10 Rule, and the law prohibiting jurors from being informed that their individual vote that life is the proper sentence will lead to a life sentence, violates the Eighth and Fourteenth Amendment as construed by *Mills v. Maryland*[2] and *McKoy v. North Carolina*.[3] (Am. Pet. at 150); and

9-11. Ineffective assistance of counsel addressed in the foregoing sections. (Am. Pet. at 157).

Sparks also requests an evidentiary hearing, specifically on his fifth claim (Am. Pet. at 107-09, 158). Respondent asserts that the fifth claim is defaulted and procedurally barred and in the alternative that it lacks merit. (Ans. at 26-46.) Respondent also asserts that the remaining claims lack merit and were properly denied by the state court.

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[2] 486 U.S. 367 (1988).

[3] 494 U.S. 433 (1990).

IV. Standard of Review

Federal habeas review of these claims is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This statute sets forth the preliminary requirements that must be satisfied before reaching the merits of a claim made in a federal habeas proceeding.

A. Exhaustion

Under this statute, a federal court may not grant habeas relief on any claim that the state prisoner has not first exhausted in the state courts. *See* 28 U.S.C. § 2254(b)(1)(A); *Harrington v. Richter*, 562 U.S. 86, 103 (2011). However, the federal court may deny relief on the merits notwithstanding any failure to exhaust. *See* 28 U.S.C. § 2254(b)(2); *Miller v. Dretke*, 431 F.3d 241, 245 (5th Cir. 2005).

B. State-Court Procedural Determinations

If the state court denies a claim on state procedural grounds, a federal court will not reach the merits of the claim if it determines that the state-law grounds are independent of the federal claim and adequate to bar federal review. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If the state procedural determination is based on state grounds that were inadequate to bar federal habeas review, or if the habeas petitioner shows that an exception to the bar applies, the federal court must normally resolve the claim without the deference that 28 U.S.C. § 2254(d) otherwise requires. *See Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir. 2000); *but see Busby v.*

Dretke, 359 F.3d 708, 721 n.14 (5th Cir. 2004) (affording deference to merits finding when state court "invoked a procedural bar as an alternative basis to deny relief"); *Rolan v. Coleman,* 680 F.3d 311, 319 (3rd Cir. 2012) (holding that "AEDPA deference [under section 2254(d)] applies when a state court decides a claim on procedural grounds and, alternatively, on the merits").

C. State-Court Merits Determinations

If the state court denies a claim on the merits, a federal court may not grant relief unless it first determines that the claim was unreasonably decided by the state court, as defined in section 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim——
>
> > (1) 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; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. In the context of section 2254(d) analysis, "adjudicated on the merits" is a term of art referring to a state court's disposition of a case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). This provision does not authorize habeas relief, but restricts this Court's power to grant relief to state prisoners by barring claims in federal court that were not first unreasonably denied by the state courts.

The AEDPA limits rather than expands the availability of habeas relief. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Richter*, 562 U.S. at 98. "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court rulings be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations omitted) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)).

Under the "contrary to" clause, a federal court is not prohibited from granting federal habeas relief if the state court either arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *See Williams*, 529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). Under the "unreasonable application" clause, a federal court may also reach the merits of a claim on federal habeas review if "if the state court identifies the correct governing legal rule ... but unreasonably applies it to the facts of the particular state prisoner's case." *White v. Woodall,* 134 S. Ct. 1697, 1705 (2014) (quoting *Williams*, 529 U.S. at 407-408). " '[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions.' " *Woodall,* 134 S. Ct. at 1702 (quoting *Howes v. Fields,* 132 S. Ct. 1181, 1187 (2012)). The standard for determining

whether a state court's application was unreasonable is an objective one and applies to federal habeas corpus petitions that, like the instant case, were filed after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court unless the record before that state court first satisfies section 2254(d). "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 563 U.S. at 185. The evidence required under section 2254(d)(2) must show that the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

V. ANALYSIS

A. External Influence - Necktie

In his first claim, Sparks contends that the jury was improperly influenced in the punishment phase of his trial by a necktie worn by one of the bailiffs that displayed a syringe. (Am. Pet. at 42-57; Reply at 1-9.) Respondent argues that this claim was reasonably denied by the state court. (Ans. at 11-15.)

1. Standard

A juror is exposed to an external influence when he receives information not admitted into evidence. *See Tanner v. United States,* 483 U.S. 107, 117 (1987). "Under clearly

established Supreme Court case law, an influence is not an internal one if it (1) is extraneous prejudicial information; i.e., information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, or (2) is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering . . . with a juror.'" *Robinson v. Polk,* 438 F.3d 350, 363 (4th Cir. 2006). Once the inmate proves that a "private communication, contact, or tampering" is received by a juror, the burden shifts to the government to prove that the contact with the juror was not harmful. *See Remmer v. United States,* 347 U.S. 227, 229 (1954); *but see Smith v. Phillips,* 455 U.S. 209, 215 (1982) (holding "that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias"). The ultimate question is whether the improper external intrusion affected the jury's deliberations and thereby its verdict. *See United States v. Olano,* 507 U.S. 725, 739 (1993).

2. State Court Action

No objection was presented on the record at trial or on direct appeal. During the postconviction habeas review, the state court conducted an evidentiary hearing on this claim. Based on the evidence presented, the state court determined that Sparks had not shown that any juror actually saw the image on the bailiff's tie. (State Habeas Clerk's Record, "SHCR," at 157-58.)

At the state evidentiary hearing, Sparks called the bailiff, Bobby Zoe Moorehead, who testified that he was not in charge of the jury at that time but was seated behind the defendant

and his attorneys, was wearing a lanyard in front of the tie that would have covered the image, which was also potentially obscured by the bailiff's coat and the stun-belt box he was holding. (SHRR at 12-40.) Moorehead also testified that he complied with an instruction relayed by defense counsel to tuck his tie into his shirt. (SHRR at 19.)

Sparks also called his investigator, Bobby Walton, who testified regarding measurements from the bailiff's chair to the jury and that he was able to see the tie and image on the tie at those distances. (SHRR at 40-46.) On cross examination, Walton testified that he did not view the tie on the black background of the bailiff's clothing, did not view it with a lanyard or stun belt box in front, and did not view it while attorneys were sitting at the desk or the defendant with security. (SHRR at 48-50.) He also testified that he did not know the position of the computer and monitor on the desk at the time of trial, but that it could also have affected the jury's view of the tie. (SHRR at 49.)

The State called Sparks' lead trial counsel Paul Johnson, who testified that when he saw the bailiff's tie with the syringe on it, he said something to the bailiff, asked to talk with the judge, obtained an instruction for the bailiff to conceal the image and told the bailiff, who complied. (SHRR at 55-56.) Johnson testified that he made his objection off the record, rather than on the record, because he didn't see a need for a record of it at that time. "I didn't have any reason to believe anybody else had seen it or noticed it or that it was having an impact or influence on the trial." (SHRR at 56-57.)

The State also called Lalon Peale, another one of Sparks' trial counsel, who said that

Mr. Johnson was the first to notice the tie and she did not know if anyone in the gallery or jury would have noticed. (SHRR at 71.) She said that there was a lot going on at the same time, but that Mr. Johnson brought it to the court's attention and the bailiff was told to conceal the tie. (SHRR at 71-72.) She thought that there was an objection on the record, but that the appellate counsel didn't find it. (SHRR at 71-72.) She said that the bailiff complied and concealed the tie. (SHRR at 73.)

The State also called Sparks' mother, Viola Sparks, who had provided an affidavit in support of petitioner's state habeas application. She testified that she saw the bailiff wearing the tie and could see the image of the needle before he tucked it in. (SHRR at 93.) She said the bailiff wearing the tie operated the box that controlled the stun gun and sat behind her son, the defendant. (SHRR at 93-94.) She said from the spot where she testified during the trial, she could see the bailiff wearing the tie if he was standing, but that during her testimony she was focused on the district attorney's questions and could not see the tie over her son and the attorneys. (SHRR at 94.) She also testified that her affidavit that the attorney wrote stated that you couldn't miss what the bailiff was wearing, but she does not know for sure whether the jury would have been able to see the image on the tie from where they were in the courtroom. (SHRR at 90, 95-96.) She also testified that she has problems with memory and gets confused. (SHRR at 96.)

The State also called Sparks' sister, Perstefanie Sparks, who had also provided an affidavit in support of petitioner's state habeas application. (SHRR at 98-100.) She testified

that she noticed the bailiff wearing the tie with the image of the needle on it when a victim's father approached the rail during jury argument, and the bailiffs made people in the audience where she was sitting leave the courtroom. (SHRR at 104-106.) She told Petitioner's trial counsel about it, but could not remember which day it was. (SHRR at 101.) She also remembered that the bailiff later tucked the tie into his shirt. (SHRR at 106-107.) She provided an affidavit that she did not feel it was possible that the jury did not see what the bailiff was wearing, but acknowledged that the jury would have seen the bailiff from a different vantage point than her during the trial. (SHRR at 101-102.) She did not remember whether there was a projector between the jury and the bailiff, and did not remember the bailiff holding a box. (SHRR at 102-103.) She also admitted prior offenses for forgery of a check and securing a document by deception. (SHRR at 103-104.)

The State also called Andy Beach, the lead trial prosecutor in the trial. (SHRR at 109.) Mr. Beach testified that he remembered seeing the bailiff wearing the tie with the image of a syringe on it during the last day of trial when the bailiff was handling the box that operated the stun belt. (SHRR at 109-10.) Mr. Beach testified that defense attorney Paul Johnson stood up, asked to approach the bench, and went sidebar with the judge to deal with the tie. (SHRR at 110.) The trial court judge took care of it and had the bailiff either tuck in the tie or button his coat to conceal the image of the syringe. (SHRR at 110.) Mr. Beach remembered that this took place early in the day and "well before argument." (SHRR at 110-11.) Mr. Beach also remembered the ruckus in the courtroom during his closing argument,

but did not remember what the bailiff was wearing during that part of his jury argument. (SHRR at 111.)

The State also produced an affidavit from the jury foreperson that she did not see the tie. (SHCR at 76-77.) "I personally never saw the tie. To my knowledge nothing about the tie or Bailiff Moorehead entered into the jury's deliberations." (SHCR at 77.) Based on this, other documents in the record, and the evidence at the hearing, the state court found that Sparks had not shown that any juror saw the tie, and concluded that no constitutional violation resulted from the bailiff's tie. (SHCR at 157-58.)

3. Analysis

To show the state court's determination to be an unreasonable determination of fact based on the evidence presented to the state court, Sparks argues that it was physically impossible for the jury to have not seen the image on the bailiff's tie and that other people saw it. (Am. Pet. at 48-50, 51-54.) However, none of the court officials–including the attorneys for either side–testified that they thought that the jury could see the image on the tie, the testimony indicated that there were obstacles between the jury and the tie that may have obstructed its view before the bailiff concealed it, and the only evidence from the jury was that it was not seen or considered by them. Even if this could rise to the level of the jury tampering in *Remmer,* 347 U.S. at 229, the first element of this claim–that the jury actually received the external influence by viewing the image on the tie–was not proven. Therefore, the burden of proof could not have shifted to the State to prove that the alleged viewing was

not harmful. The state court's determination has not been shown to be incorrect under section 2254(e)(1), much less unreasonable under section 2254(d).

Accordingly, Sparks' first claim for relief is DENIED for lack of merit.

B. External Influence - Spectators

In his third claim, Sparks contends that the jury was improperly influenced in the punishment phase of his trial by the "repeated instances of audience disruptions" at the trial.[4] (Am. Pet. at 57-61.) Respondent argues that the portion of this claim presented to the state court–which included only one incident of audience disruption–was reasonably denied, and that the portion not presented to the state court is unexhausted and procedurally barred. (Ans. at 15-24.)

1. <u>Exhaustion and Procedural Bar</u>

a. Law

Generally, a federal court cannot grant habeas relief on an unexhausted claim. *See* 28 U.S.C.A. § 2254(b). To properly exhaust a claim, a habeas petitioner must fairly present its factual and legal basis to the highest available state court for review in a procedurally correct manner that allows the state court to consider the merits of the claim. *See Carty v. Thaler,* 583 F.3d 244, 254 (5th Cir. 2009); *Deters v. Collins,* 985 F.2d 789, 795 (5th Cir. 1993); *Satterwhite v. Lynaugh,* 886 F.2d 90, 92-93 (5th Cir. 1989); *see also Nickleson v. Stephens,* 803 F.3d 748, 753 (5th Cir. 2015) ("The exhaustion doctrine demands more than allusions

[4] Sparks has abandoned his second claim. (Am. Pet. at 57.)

in state court to facts or legal issues that might be comprehended within a later federal habeas petition. The exhaustion doctrine is based on comity between state and federal courts, respect for the integrity of state court procedures, and 'a desire to protect the state courts' role in the enforcement of federal law.'") (quoting *Castille v. Peoples,* 489 U.S. 346, 349 (1989) (in turn quoting *Rose v. Lundy,* 455 U.S. 509, 518 (1982))). In Texas, a death-sentenced prisoner must present his claims to the CCA on direct appeal or in an application for state post-conviction relief. *See Bautista v. McCotter,* 793 F.2d 109, 110 (5th Cir. 1986) (noting procedure in noncapital cases); *Fuller v. State,* 253 S.W.3d 220, 224 (Tex. Crim. App. 2008) (noting that direct appeal to CCA is automatic under TEX. CODE CRIM. PROC. art. 37.071, § 2(h)); *Beazley v. Johnson,* 242 F.3d 248, 269 (5th Cir. 2001) (noting death-sentenced petitioner's failure to raise claim on direct appeal to CCA resulted in failure to exhaust claim).

b. State Court Action

In his twenty-second point of error on direct appeal, Sparks claimed that "[t]he trial court erred in denying Appellant's motion for a mistrial after a spectator caused a disturbance in the courtroom which had an improper influence on the jury." (App. Br. at 79.) In support of this claim, Sparks asserted his Sixth Amendment right to be tried by impartial jurors whose verdict is based solely on the evidence at trial and cited that portion of the record of the proceedings during the closing argument when the disturbance occurred and the motion

for mistrial made by Sparks' trial counsel. (App. Br. at 79-80 (citing 41 RR at 68).)[5] In this record, the defense counsel at trial asserted that this was the second time that this individual had caused a disruption and described a prior incident during the guilt phase of the trial. The prosecutor also expressed his view of the prior events and the defense moved for a mistrial. The trial court denied the motion and Sparks appealed.

The CCA denied this point of error, in part, because Sparks' counsel failed to preserve the error by first requesting the lesser remedy of an instruction to the jury to disregard the influence as required by Texas law. After discussing the incident, the prior incident, and comparing these facts to precedent, the CCA concluded:

> Although the harm, if any, could have been cured by an instruction to disregard, appellant did not request this "lesser remedy." Further, appellant has not carried his burden of showing a reasonable probability that the outburst interfered with the jury's verdict or posed a reasonable probability of injury to himself. Appellant offers only conclusory assertions that this disturbance violated his constitutional right to an impartial jury and was "designed" to deny him a fair trial. Point of error twenty-two is overruled.

Sparks v. State, No. AP-76,099, 2010 WL 4132769, at *20 (Tex. Crim. App. Oct. 20, 2010) (footnote omitted) (citing *Ocon v. State,* 284 S.W.3d 880, 885 (Tex. Crim. App. 2009)).

c. Analysis

In his third claim, Sparks complains that the same individual who charged the rail during the prosecutor's punishment argument had previously stood in the doorway during an outburst by "a hysterical woman." (Am. Pet. at 58.) Although the woman was not mentioned

[5] At the end of his allegation before the state court, Sparks' mistakenly cited volume 35 of the Reporter's Record at page 68, but that volume only has 31 pages.

in Sparks' complaint before the state court or in the CCA's discussion, the prior incident was raised and discussed in the context of the same motion for a mistrial. The CCA considered the nature of the disruption before the jury and the prior disruption, compared these facts with other precedents, and concluded that, even if Sparks had properly preserved this error in accordance with Texas law, Sparks had not shown a reasonable probability that the outburst interfered with the jury's verdict or posed a reasonable probability of injury to himself.

In support of his argument that this claim was exhausted, Sparks cites *Vela v. Estelle,* 708 F.2d 954, 960 (5th Cir. 1983), holding that an ineffective-assistance-of-counsel claim was exhausted because, although certain facts asserted before the federal court were not specifically raised in the state court pleading, the same legal theories were presented and the state court had an obligation under that pre-*Strickland* standard to review those additional facts in making its determination.

Outside of referencing "Sparks's claims regarding other instances of bystander misconduct," Respondent's argument does not identify any substantially different incidents raised in Spark's third claim that were not raised and considered in his claim before the state court. (Ans. at 16.) Therefore, while the *Vela* case is distinguishable, Sparks appears to have fairly presented the substance of his third claim to the state court.

The state court's conclusion that the error had not been properly preserved by first requesting a lesser remedy in accordance with state law has not been asserted as an

independent and adequate ground to bar federal habeas review, and this Court declines to raise that procedural bar *sua sponte*. Further, even if this claim were not exhausted, it is clear that this Court may deny the claim on its merits regardless of exhaustion. "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

2. Merits

a. Law

Sparks relies upon *Holbrook v. Flynn,* 475 U.S. 560 (1986), in which the Supreme Court held that a prisoner was not denied his constitutional right to a fair trial when, at his trial with five codefendants, customary courtroom security force was supplemented by four uniformed state troopers sitting in first row of spectator section. Sparks also relies upon *Carey v. Musladin,* 549 U.S. 70, 75-77 (2006), in which the Supreme Court reversed a grant of relief by the Ninth Circuit Court of Appeals and held that state appellate court determination that habeas petitioner was not inherently prejudiced when spectators wore buttons depicting murder victim was not contrary to or unreasonable application of clearly established law.

In *Musladin*, the Supreme Court distinguished between the "government-sponsored practices" governed by the standard set out in *Flynn* and in *Estelle v. Williams,* 425 U.S. 501 (1976), and"spectator conduct" that does not yet have an established governing standard.

> In contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence. This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial. And although the Court articulated the test for inherent prejudice that applies to state conduct in *Williams* and *Flynn*, we have never applied that test to spectators' conduct. Indeed, part of the legal test of *Williams* and *Flynn*–asking whether the practices furthered an essential state interest–suggests that those cases apply only to state-sponsored practices.

Musladin, 549 U.S. at 76 (footnote omitted). The Supreme Court then concluded that the state court could not have unreasonably applied clearly established federal law as determined by the Supreme Court because the Supreme Court had not established a standard for spectator's conduct. "No holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law." *Id.* at 77.

b. Analysis

Sparks relies upon *Musladin*, in which the Supreme Court held that it never applied the standard set forth in *Williams* and *Flynn* to the conduct of bystanders rather than government actors. The very case he relies upon reveals the lack of clearly established federal law to support relief under section 2254(d). Sparks has not shown that the state court decision was an unreasonable adjudication of his claim under section 2254(d). Therefore, the third claim is DENIED for lack of merit.

C. External Influence - Cumulative

In his fourth claim, Sparks complains that the cumulative effect of bystander outbursts and the image on the bailiff's necktie created an overall atmosphere of "mob domination" that deprived him of his rights to a fair trial by an impartial jury under the Sixth and Fourteenth Amendments. (Am. Pet. at 61-63.) Respondent again argues that this claim is unexhausted and procedurally barred, and in the alternative, lacks merit. (Ans. at 24-26.)

1. Exhaustion and Procedural Bar

a. Law

As set out above, a habeas petitioner must fairly present the factual and legal basis of his claims to the highest available state court to satisfy the exhaustion requirement. *See Carty,* 583 F.3d at 254; *Deters,* 985 F.2d at 795; *Satterwhite,* 886 F.2d at 92-93. This includes claims of cumulative error. It is not enough that the habeas petitioner "effectively raised in the state courts each of the underlying errors on which his claim of fundamental unfairness depends." *See Nickleson v. Stephens,* 803 F.3d 748, 753 (5th Cir. 2015). He must "fairly present to the state courts" that the cumulative effect of the errors denied him due process and a fundamentally fair trial.[6] *Id.* Further, "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find

[6] In *Nickleson,* the Court of Appeals noted that one court had misinterpreted its opinion in *Derden v. McNeel,* 978 F.2d 1453, 1454 (5th Cir. 1992), to imply that it dispensed with the exhaustion doctrine when considering a claim of cumulative error. *See* 803 F.3d at 753 n.5 (citing *Collins v. Sec'y of Pa. Dep't of Corrs.,* 742 F.3d 528, 541-42 (3d Cir 2014.)).

material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese,* 541 U.S. 27, 32 (2004).

"The purposes of the exhaustion requirement 'would be no less frustrated were we to allow federal review to a prisoner who had presented his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it.'" *Carty,* 583 F.3d at 254 (quoting *Edwards v. Carpenter,* 529 U.S. 446, 453 (2000)). This can also result in a procedural bar from federal review.

> "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." If the "independent and adequate state ground" doctrine were not applied, a federal district court or court of appeals would be able to review claims that [the Supreme] Court would have been unable to consider on direct review.

Lambrix v. Singletary, 520 U.S. 518, 523 (1997) (quoting *Coleman,* 501 U.S. at 730-731, 732; internal citations omitted).

A petition containing both exhausted and unexhausted claims must normally be dismissed or stayed so that the petitioner may return to state court to exhaust state remedies. *See Rhines v. Weber,* 544 U.S. 269, 277-78 (2005); *Rose v. Lundy,* 455 U.S. 509, 519-20 (1982). Such action would be futile, and the federal court should find claims to be procedurally barred, if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman,* 501 U.S. at 735 n.1; *see also Neville v. Dretke,* 423 F.3d 474, 480 (5th Cir. 2005) (holding unexhausted claims ineligible for stay when state court would find them

procedurally barred). But a habeas petitioner may avoid the imposition of this bar by demonstrating a recognized exception.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750.

The federal court should find claims to be procedurally barred, if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman,* 501 U.S. at 735 n.1; *see also, Neville,* 423 F.3d at 480. The United States Court of Appeals for the Fifth Circuit has repeatedly "held that 'the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.'" *Canales v. Stephens,* 765 F.3d 551, 566 (5th Cir. 2014) (quoting *Hughes v. Quarterman,* 530 F.3d 336, 342 (5th Cir. 2008)).

b. Analysis

Respondent argues that Sparks did not present the combined claim to the state court, but presented his complaint regarding the bailiff's tie in the state postconviction proceedings and his complaint about the bystander disruption in the state direct appeal. In neither of these proceedings did Sparks combine these claims to complain about an environment of "mob domination" in violation of his rights under the Sixth and Fourteenth Amendments.

Sparks responds that he properly exhausted each of his complaints regarding the necktie and regarding bystander disruption and that the remainder of his complaint was evident from the state court record. (Reply at 15-16.) Therefore, Sparks argues, his claims are exhausted and not procedurally barred.

Even if Sparks exhausted individual parts of his cumulative claim, he has not exhausted the cumulative claim itself. However, Sparks has not even exhausted each of his individual claims. He argues that portions of his claim were apparent from the record, but a claim is not "fairly presented" if the state court "must read beyond a petition or a brief ... in order to find material" that alerts it to the presence of a federal claim." *See Baldwin,* 541 U.S. at 32; *Wooten v. Kirkland,* 540 F.3d 1019, 1025 (9th Cir. 2008)). Therefore, the cumulative error claim presented to this court was not presented to the state court and it relies upon parts that were also not actually exhausted before the state court. Since his cumulative error claim would now be considered procedurally barred in state court under the state abuse-of-the-writ doctrine, it is procedurally barred in this Court as well. *See Coleman,* 501 U.S. at 735 n.1; *Neville,* 423 F.3d at 480; *Canales,* 765 F.3d at 566.

Spark's fourth claim is DISMISSED as procedurally barred.

2. <u>Alternative Merits Analysis</u>

The CCA denied Sparks' complaint regarding the Bailiff's necktie on the basis that Sparks had not shown it was seen by the jury. Before this Court, Sparks has not shown that finding to be incorrect or unreasonable. Therefore it could not have, either independently or

in combination with other factors, have created any adverse impact on the jury's consideration of his case.

This leaves the allegations of Spark's third claim now presented under the theory that the repeated conduct of a bystander created a "mob dominated" atmosphere that deprived him of his right to a fair trial under the Sixth Amendment. Petitioner also likens this case to *Sheppard v. Maxwell,* 384 U.S. 333 (1966), which only addressed prejudicially extreme media coverage, both before trial and during trial that created a carnival atmosphere.

> While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which (he) was entitled.' *Estes v. State of Texas, supra,* 381 U.S., at 536, 85 S.Ct., at 1629. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented.

Id., 384 U.S. at 354-55. Nothing like this is presented in this case.

For the same reasons this Court rejected the merits of Sparks' third claim, this claim also lacks merit. Therefore, if it were not dismissed as unexhausted and procedurally barred, it would be DENIED for lack of merit.

D. False Testimony - Merillat

In his fifth claim, Sparks complains that his Eighth Amendment and Due Process rights were violated when a state's expert was allowed to testify to materially inaccurate and

false information. (Am. Pet. at 63-109; Reply at 16-45.) Respondent asserts that this claim is procedurally barred by the state court's determination that it was barred in a successive habeas petition. (Ans. at 26-30.) In the alternative, Respondent asserts that the claim lacks merit. (Ans. at 26, 31-34.)

Sparks argues that the delay in filing this claim was due to prosecutorial misconduct. (Am. Pet. at 92-98; Reply at 16-17.) Sparks also asserts that he has established cause and prejudice to excuse the procedural default in that the prosecution team violated *Brady* in failing to disclose the false nature of the testimony.[7] (Am. Pet. at 92-98.) Further, Sparks argues that the state procedural ground are not independent of federal law. (Ans. at 103-106.) Respondent argues that Merillat's testimony was not false and he was not a member of the prosecution team. (Ans. at 31-38)

1. <u>Factual Background</u>

During the punishment stage, the prosecution called A.P. Merillat, a "criminal investigator with the special prosecution unit in Huntsville" to explain "the likelihood or opportunities to be violent inside the penitentiary." (Am. Pet. at 64 (citing 39 RR at 8-36, 68-95, at 8).) On direct examination, Merillat testified that Sparks would enter the state prison system, the Institutional Division of the Texas Department of Criminal Justice (TDCJ), at a G-3 classification level if he was sentenced to life in prison, and that no set of

[7] Sparks also argues that his alternate claim of ineffective assistance of trial counsel comes within the exception to procedural bar created in *Martinez v. Ryan,* 566 U.S. 1 (2012), and applied to Texas cases in *Trevino v. Thaler,* 569 U.S. 413 (2013). (Am. Pet. at 98-103.) This is addressed in the discussion of his "ninth" claim.

circumstances could change this. (Am. Pet. at 64-65 (citing 39 RR at 70-80).) Merillat also explained that persons entering at this level would be permitted to go to the mess hall with other inmates, go the library with other inmates, go to school and medical facilities, go to visitation, and that they could work outside the walls of the prison. (Am. Pet. at 65 (citing 38 RR at 76).) On cross examination by defense counsel, Merillat agreed that an offender receiving a life sentence for capital murder could be classified at the more restrictive G-4 or G-5 levels.

> Q. But as I just pointed out, sir, whether or not you're classified, the minimum classification for a person is G-3 and can go all the way up to an automatic classification of ad seg right off the bat, couldn't it? That's yes or no, sir. Right or wrong?
>
> A. You're wrong.
>
> Q. I'm wrong?
>
> A. Yes.
>
> Q. Couldn't be placed in ad seg?
>
> A. Very limited circumstances. But the broad way you say it is not correct.
>
> Q. He could be, couldn't he?
>
> A. He could be.
>
> Q. Could be G-4, couldn't he?
>
> A. He could be.
>
> Q. Could be G-5.
>
> A. Could be.

(39 RR at 86-87.)

In support of his claim, Sparks presents the testimony of his expert, Frank Aubuchon, that a person sentenced to life without parole will, at best, be classified to the G-3 level, or, to the more restrictive G-4 or G-5 levels, if required. (Am. Pet. at 66 (citing Pet. Ex. #1).)

2. State Court Action

This claim was not raised in the direct appeal or initial state habeas proceeding. Instead, this Court granted an agreed stay of these proceedings to allow this claim to be presented to the state court in a subsequent state habeas application. (Order, doc. 33.) During the abeyance, the state court denied the subsequent state application filed to present this claim "as an abuse of the writ without considering the merits of the claim." *Ex parte Sparks,* No. WR-76,786-02, 2014 WL 2002211, at *1 (Tex. Crim. App. May 14, 2014).

3. Procedural Bar

a. Law

This Court will not reach the merits of a claim that the state court denied on independent and adequate state procedural grounds, unless the habeas petitioner shows that an exception to the procedural bar applies. *See Sawyer*, 505 U.S. at 338; *Coleman*, 501 U.S. at 729. The United States Court of Appeals for the Fifth Circuit has repeatedly "held that 'the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.'" *Canales v. Stephens,* 765 F.3d 551, 566 (5th Cir. 2014) (quoting *Hughes v.*

Quarterman, 530 F.3d 336, 342 (5th Cir. 2008)).

b. Analysis

Because the state court denied the claim as procedurally barred by the Texas abuse-of-the-writ rule, Respondent argues that it is barred from review in this Court as well. (Ans. at 27-30.) Sparks responds that it comes within an exception to procedural bar.[8] (Am. Pet. at 92-103.) Specifically, Sparks asserts as cause and prejudice the prosecutorial misconduct of withholding exculpatory evidence under *Brady v. Maryland,* 373 U.S. 83 (1963), "by concealing the fact that Merillat, a state agent, was testifying falsely at Sparks (sic) punishment phase, and how sparks (sic) was prejudiced by Merillat's false testimony." (Am. Pet. at 92-93.) However, as set out in the alternate merits analysis below, Sparks has not shown that the testimony in question was materially false in light of Merillat's correcting testimony on cross-examination.

To the extent that Sparks asserts that the State withheld evidence because "Merillat had to have known he was testifying falsely," Sparks does not consider the correcting testimony provided on cross examination. Therefore, any prior misstatement of the TDCJ classification plan was not material under *Brady* in light of the correcting testimony.

To the extent Sparks complains of the suppression of TDCJ classification regulations, the withholding of administrative regulations is not generally considered a violation of *Brady* if the regulations were equally available to either side. *See e.g., United States v. Farkas, 867*

[8] Sparks also called upon the State to waive the procedural bar, but there is no indication that they have done so. (Am. Pet. at 90-91.) Instead, the procedural bar is clearly asserted in defense of this claim.

F.2d 609 (4th Cir. 1989) (holding that federal administrative regulations are not *Brady* material.). Sparks has not shown that the TDCJ Unit Classification Procedure was not equally available to both sides. Therefore, he has not shown any suppression, even if the testimony had been shown to be false and material.

To the extent that Sparks attempts to prove that the evidence was false based on the testimony of his own expert, this has generally not been considered sufficient to show a due process violation. A mere disagreement between experts is not normally sufficient to show that the opinion testimony of one of them is false or misleading. *See Boyle v. Johnson,* 93 F.3d 180, 186 (5th Cir. 1996) (holding that "the fact that other experts disagreed" was insufficient to show the state's expert testimony to be false or misleading); *Clark v. Johnson,* 202 F.3d 760, 767 (5th Cir. 2000) (holding disagreement between experts was insufficient to overcome state habeas court's factual determination that the prosecution expert's testimony was not false or misleading); *Harris v. Vasquez,* 949 F.2d 1497, 1524 (9th Cir. 1990) (holding that conflicting psychiatric opinions did not show that the state's expert testimony was false, noting that "psychiatrists disagree widely and frequently" (quoting *Ake v. Oklahoma,* 470 U.S. 68, 81 (1985)).); *Campbell v. Gregory,* 867 F.2d 1146, 1148 (8th Cir. 1989) (presenting differing testimony from new expert in motion for new trial did not establish falsity of prior expert's opinion offered at trial). But even if it could be sufficient, for the reasons set out in the alternate merits analysis, Sparks' expert testimony would not establish a due process violation.

Sparks' contention that the state court's disposition on procedural grounds is intertwined with federal law is effectively rebutted by the state court order which dismissed Sparks' subsequent application "as an abuse of the writ without considering the merits of the claim." *Ex parte Sparks,* 2014 WL 2002211, at *1. This language is sufficient to show the disposition on "adequate and independent state law" grounds. *Gutierrez v. Stephens,* 590 F. App'x 371, 384 (5th Cir. 2014); *see also Thompson v. Davis,* No. CV H-13-1900, 2017 WL 1092309, at *14 (S.D. Tex. Mar. 23, 2017) (holding such a dismissal adequate to bar federal review). Sparks argues that the state law is not independent, asserting that the "Art. 11.071 §(5) review necessarily includes a federal component." (Am. Pet. at 104.) He cited *Ruiz v. Quarterman,* 504 F.3d 523, 527 (5th Cir. 2007), in support of this position, but *Ruiz* is distinguishable.

In *Ruiz,* the state court order did not contain the express language that the claim was dismissed as an abuse of the writ without considering the merits of the claim. Instead, the "studied ambiguity" of the language gave rise to the uncertainty relied upon in *Ruiz.* 504 F.3d at 527. The Court of Appeals also considered the intricacies of the CCA's voting requirements and the language in both the concurring and dissenting opinions which "strongly suggest that the CCA debated and reached the federal merits question, not the independent state law ground." *Id.* at 528. This is clearly distinct from the express language of the order dismissing Sparks' subsequent state writ. Sparks has not shown this express finding to be incorrect.

The Court finds that Sparks has not shown cause and prejudice to excuse the procedural default on independent and adequate state grounds. Therefore, this claim is DISMISSED as procedurally barred.

4. <u>Alternate Merits Analysis</u>

a. Law

Sparks relies upon *Napue v. Illinois,* 360 U.S. 264, 269 (1959), in support of his argument that a conviction obtained through perjury, known to be such by representatives of the State, violates due process, even when the State, although not soliciting the perjury, allows it to go uncorrected when it appears. (Am. Pet. at 76-77; Reply at 16.) To prove a due process violation under *Napue*, a petitioner must establish that (1) the testimony was false, (2) the government knew the testimony was false, and (3) the testimony was material. *See Summers v. Dretke,* 431 F.3d 861, 872 (5th Cir. 2005); *United States v. Mason,* 293 F.3d 826, 828 (5th Cir. 2002). Sparks also relies upon *Johnson v. Mississippi,* 486 U.S. 578, 590 (1988), in support of his assertion that his death sentence was procured in violation of the Eighth Amendment because it was based on "materially inaccurate" evidence. (Am. Pet. at 74-75.) The United States Court of Appeals for the Fifth Circuit has held that, notwithstanding the difference between a claim of false testimony and the use of an invalid aggravator, to sustain a claim under *Johnson,* a habeas petitioner must establish that the testimony was "false and material." *See Hernandez v. Johnson,* 213 F.3d 243, 252 (5th Cir.

2000) (citing *Fuller v. Johnson,* 114 F.3d 491, 497 (5th Cir.1997)).[9] This would correspond with two of the three elements of a due process claim under *Napue*.

b. Analysis

Sparks argues that the principle set forth in *Johnson* was applied by the State court to reverse death sentences in *Estrada v. State,* 313 S.W.3d 274 (Tex. Crim. App. 2010) and *Velez v. State,* No. AP-76,051, 2012 WL 2130890, at *31 (Tex. Crim. App. June 13, 2012) because it found the death sentences to be based on similar inaccurate testimony by Merillat. In *Estrada,* the defendant presented expert testimony that the least restrictive classification he could receive if given a life sentence was G-3. In rebuttal, the state presented testimony from Merillat that, "after 10 years of G-3 status, a sentenced-to-life-without-parole capital murderer could achieve a lower (and less restrictive) G classification status than a G–3 status." 313 S.W.3d at 286. On appeal, the State confessed error, joining with Estrada in asking the CCA to take judicial notice of a TDCJ regulation which, both parties agree, unambiguously shows that, prior to Estrada's trial, "offenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G–3 throughout their incarceration' (it appears that before September 1, 2005, a sentenced-to-life-with-the-possibility-of-parole capital murderer could have obtained a lower and less restrictive G–3 status after ten years)." *Id.* at 287. The CCA accepted the

[9] Sparks also argues an opinion of the CCA in support of this claim. (Am. Pet. at 59 (citing *Estrada v. State,* 313 S.W.3d 274, 287 (Tex. Crim. App. 2010)); Reply at 8-9.) Under section 2254(d), however, only a state court decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" can make the required showing. This would not include state court decisions, but "only 'the holdings, as opposed to the dicta, of [United States Supreme Court] decisions.'" *Woodall,* 134 S. Ct. at 1702.

confession of error, vacated the sentence, and remanded for a new punishment hearing. *See id.* at 317.

In *Velez,* the State also called Merillat, who testified that a capital murderer sentenced to life without parole could achieve a lower, less restrictive G classification status than G-3 based on good behavior. 2012 WL 2130890, at *31. On direct appeal, the CCA found that this testimony contained the same error as in *Estrada,* that, if sentenced to life, the defendant could obtain a classification less restrictive than a G-3 status. The CCA sustained the point of error, vacated the death sentence, and remanded for a new punishment hearing. *See* 2012 WL 2130890, at *35.

Respondent argues that Sparks' case is distinguishable from *Estrada* and *Velez*, and that Merillat's testimony in Sparks' trial was not false. (Ans. at 31-34.) Respondent asserts that to obtain relief, Sparks must establish a due process violation resulting from the use of perjured testimony, and must show that the prosecution knowingly presented materially false evidence to the jury. (Ans. at 31-32 (citing *Koch v. Puckett,* 907 F.2d 524, 531 (5th Cir. 1990); *United States v. Martinez-Mercado,* 888 F.2d 1484, 1492 (5th Cir. 1989)).)

As noted above, Merillat's allegedly false testimony was corrected during defense counsel's cross examination. Any misstatement was not materially false for purposes of *Napue* or *Brady*. Accordingly, Sparks has not shown that the testimony was false or materially inaccurate. Therefore, if this claim were not dismissed as procedurally barred it would be DENIED for lack of merit.

E. Juror Challenges

In his sixth claim, Sparks complains that the state court improperly overruled his challenges for cause to numerous jurors named in his direct appeal. (Am. Pet. at 109-37.) Respondent argues that the state court adjudication was not contrary to or an unreasonable application of clearly established federal law. (Ans. at 46-58.) Respondent also asserts that Sparks has not demonstrated harm in that he was able to strike all but one of the jurors about which he complains and, moreover, that he was granted two additional strikes. Respondent argues that, at a minimum, Sparks must show that the juror who actually sat rendered his trial fundamentally unfair and that two additional jurors he peremptorily struck were equally egregious. (Ans. at 58.) Because Sparks fails to demonstrate a violation of clearly established constitutional law, Respondent argues that these claims for relief must be denied. (Ans. at 58.)

1. <u>State Court Action</u>

At trial, Sparks challenged seventeen jurors for cause that were made part of his appellate points of error to the CCA, including the eight jurors listed in his amended petition. When these challenges for cause were overruled, Sparks exercised a peremptory challenge to each of them except for the last one, Susan Cassel. By that time, Sparks had run out of his original and the two additional peremptory strikes that he had been granted. This prevented all but Cassel from serving on the jury. The CCA held that, because the trial court had granted 2 additional peremptory strikes, Sparks had to "show that the trial court committed

error in denying his challenges for cause to three potential jurors to demonstrate that he was harmed." *Sparks,* 2010 WL 4132769, at *2.

After thoroughly reviewing fifteen of the challenged jurors, and determining that each of the challenges lacked merit, the CCA declined to review the challenges to the last two, Kristine Marie Bell and Kimberlyn Moriarity, as moot due to the lack of three remaining challenges. *Sparks,* 2010 WL 4132769, at *17 n.32.

2. Law

"It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma,* 487 U.S. 81, 85 (1988). However, the forced use of a peremptory challenge does not rise to the level of a constitutional violation. *See id.* at 88. "Any claim that the jury was not impartial, therefore, must focus not on [the excused venireperson], but on the jurors who ultimately sat." *Id.* at 86.

The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment 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." *Wainwright v. Witt,* 469 U.S. 412, 424 (1985). Further, "[d]ue process implies a tribunal both impartial and mentally competent to afford a hearing." *Jordan v. Com. of Massachusetts,* 225 U.S. 167, 176 (1912). In federal prosecutions, "[t]o enforce this right, the jury's verdict must be set aside if the defendant presents 'clear

evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service." *United States v. Hall,* 989 F.2d 711, 714 (4th Cir. 1993) (quoting *United States v. Dioguardi,* 492 F.2d 70, 78 (2d Cir.1974), and *United States v. Vargas,* 606 F.2d 341 (1st Cir.1979)). "A federal court must assume the state court's determination of the facts is correct unless the petitioner 'rebut[s] the presumption of correctness by clear and convincing evidence.'" *Prystash v. Davis,* 854 F.3d 830, 835 (5th Cir. 2017), *cert. denied,* 138 S. Ct. 649 (2018) (quoting 28 U.S.C. § 2254(e)(1)).

3. <u>Analysis</u>

The only challenge that Sparks presents regarding a juror who actually sat on his jury complains of Susan Cassel. At trial, Sparks did not challenge this juror because of her views on capital punishment or any perceived bias. He only complained that she did not have the mental capacity to sit on this jury.

> After Cassel was interviewed by the both the state and the defense the defense objected that Cassel was "not the kind of juror that the law envision[ed] sitting on this type of case." 33 Ct. R. at 129-130. The defense was concerned that the Cassel did not understand the nature her role as a juror, and opined that there was no way, "under any stretch of the imagination we could accept [her] as the 12th juror on the panel." *Id.* at 129.

(Am. Pet. at 135.) The trial court disagreed and found the juror to be qualified.

> THE COURT: I'm not sure, Mr. Johnson, whether you and I just observed the same juror an hour and a half. Be that as it may, your motion that she be stricken for cause is denied.
>
> MR. JOHNSON: Judge, at this time, we have to ask the court to grant us an additional peremptory strike so we could excuse her from serving.

> THE COURT: Having given you two previous strikes, I deny your request for additional peremptory strikes.
>
> MR. JOHNSON: So the record's clear, the court's -- if we have to accept -- we can't accept her. If the court's gonna force this juror upon us without giving us an additional strike, that is the conclusion of the voir dire; is that correct?
>
> THE COURT: She will -- ya'll not having any strikes left, no additional being given, ***her clearly being qualified***, she will be our 12th juror and we will begin to pick the alternates.

(33 RR at 129-30) (emphasis added).

On appeal to the CCA, Sparks presented his seventeenth point of error which complained that Cassel was

> challengeable for cause under Article 35.16(a)(5), which provides that a challenge for cause may be made by either the state or the defense for the reason that
>
> > the juror has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case[.]
>
> A "mental defect" may be present when the prospective juror's responses show an inability to understand the jury's role in capital proceedings.

Sparks v. State, 2010 WL 4132769, at *15 (footnote omitted). The CCA explained

> During voir dire, Cassel said that she understood and would follow the law concerning the State's burden of proof at the guilt phase. She also stated that after finding a defendant guilty, she could presume that a life sentence was the proper punishment. She affirmed that she could presume that the defendant would not be a future danger, unless and until the State proved

> future dangerousness during the punishment phase. Cassel also said that she would be open to considering mitigating circumstances.
>
> Near the conclusion of voir dire, defense counsel asked Cassel if she had any questions for him. Cassel asked for clarification about the timing of the different parts of the trial. Counsel explained that the guilt phase would come first, and then, if the jury found the defendant guilty, the punishment phase would follow. During punishment, the jury would hear evidence concerning both future dangerousness and mitigation, all at the same time. The jury would then retire to deliberate on the future dangerousness question and then, if the jury found that the defendant was a future danger, the jury would deliberate on the mitigation question. Cassel thanked defense counsel for this information.

Id., 2010 WL 4132769, at *16. The CCA concluded,

> This record does not demonstrate that Cassel had any bodily or mental defect that rendered her unfit for jury service. The record shows only that, when defense counsel asked Cassel if she had any questions, she asked him for clarification about the timing of the different parts of the trial. Counsel answered her question, and she thanked him. The trial court did not abuse its discretion in denying appellant's challenge for cause. Point of error seventeen is overruled.

Id.

Sparks cites certain portions of Cassel's testimony as "nonsensical" and showing that she was "overwhelmed" and did not understand Texas death penalty law. (Am. Pet. at 135-37.) However, Sparks takes these passages out of context and does not accurately quote from the record. Sparks alleges that "when asked if society includes prison society she answered as follows . . . ." (Am. Pet. at 135.) But the record reflects that Cassel had already answered the question about society and heard the attorney's comments about how this part of future dangerousness may seem "counterintuitive." She was then asked, "You have any questions

about that? You're hesitating." (33 RR at 85.) Cassel's open-ended response makes far more sense in light of the open-ended question she was given.

Sparks also complains about Cassel's response to his question about the presumption of innocence in the first part of the trial and her response that in the second part she guessed she was supposed to presume guilt instead. (Am. Pet. at 136.) Sparks has not shown that her answer was unreasonable or any proof of mental incompetence. *See Stullivan v. State,* 47 Tex. Crim. 615, 619, 85 S.W. 810, 812 (1905) (holding that the presumption of innocence does not apply in the punishment stage after a determination of guilt); *United States v. Thaxton,* 483 F.2d 1071, 1072 (5th Cir. 1973) (presumption of innocense disappears with a verdict of guilty). And the attorney did not disagree with her answer. Further, Sparks neglected to mention that the attorney had just given her a scenario where the jury unanimously found the defendant guilty and emphasized that the best the defendant could get was life without the possibility of parole. (33 RR at 107.) He was looking for a presumption that the answer to Special Issue No. 1 was "no." (33 RR at 107-108.) In his questioning, the attorney's emphasis was that, at the punishment stage, Sparks was never going to get out of prison regardless of how the jury answered those special issues.

The state court has determined that Cassel was qualified and fit for jury service. Sparks has not shown that these findings were incorrect or any unreasonable adjudication of his claim. Since none of the other prospective jurors in issue served on this jury, there is no need to analyze whether Sparks' challenges for cause of those prospective jurors were

properly overruled before they were otherwise excused. *See Ross,* 487 U.S. at 86. Sparks' sixth claim is DENIED for lack of merit.

F. Jury Instructions

In his seventh claim, Sparks complains that the Texas death penalty procedures violate the Sixth, Eighth, and Fourteenth Amendments by not requiring the prosecution to disprove the mitigation special issue beyond a reasonable doubt. (Am. Pet. at 137-49.) Respondent argues that this claim is foreclosed by binding precedent in accordance with the state court adjudication. (Ans. at 58-63.) Respondent is correct.

In *Rowell v. Dretke,* 398 F.3d 370, 375-76 (5th Cir. 2005), the habeas petitioner complained that Texas law was unconstitutional for failing to assign a burden of proof to the mitigation special issue and not providing a standard for appellate review. The Court of Appeals held that this special issue procedure was constitutional and that to create such a new rule of constitutional law would be barred from federal habeas review under *Teague v. Lane,* 489 U.S. 288, 310 (1989). *Id.,* 398 F.3d at 376-77.

Sparks acknowledges this Circuit precedent, but argues that his argument is different, and it rests on a much firmer foundation. (Am. Pet. at 148-49.) He argues that his complaint is a more modest one in that it does not argue that the prosecution should have the burden of proof beyond a reasonable doubt, but that the law must merely assign a burden of proof to let everyone know "the rules of the mitigation game before play started." (Am. Pet. at 149.) Sparks both asserts different complaints in his own ground for relief and misapprehends

circuit precedent. His complaint bears no meaningful distinction from that in *Rowell,* even assuming the lesser standard.

This claim does not show an entitlement to relief, but is foreclosed by binding circuit precedent. Accordingly, Sparks seventh claim for relief is DENIED for lack of merit.

G. Informing Jurors of Effect of Failure to Reach Verdict

In his eighth claim, Sparks complains that the Texas death penalty procedures violate the Sixth, Eighth, and Fourteenth Amendments by not informing the jurors that the failure to come to a verdict will result in a life sentence. (Am. Pet. at 150-56.) Sparks argues that this affirmatively misleads jurors "about their individual ability to give effect to their personal belief regarding mitigation." (Am. Pet. at 150.) Sparks bases his argument on Supreme Court precedent "that the petitioner's sentence could not stand where it was possible that some 'jurors were prevented from considering factors which may call for a less severe penalty [than death.]'" (Am. Pet. at 150 (citing *Mills v. Maryland,* 486 U.S. 367, 376 (1988)). Respondent argues that this claim is foreclosed by binding precedent in accordance with the state court adjudication, and is barred by the the nonretroactivity principle of *Teague*. (Ans. at 63-67) (citing *Jones v. United States,* 527 U.S. 373, 381 (1999), *Blue v. Thaler,* 665 F.3d 647, 669-70 (5th Cir. Tex. 2011), *Alexander v. Johnson,* 211 F.3d 895, 897 (5th Cir. 2000), and *Webb v. Collins,* 2 F.3d 93, 95-96 (5th Cir. 1993)).

Citing *Mills v. Maryland,* 486 U.S. 367, 376 (1988), and *McKoy v. North Carolina,* 494 U.S. 433, 442-43 (1990), Sparks argues that the jury instructions were unconstitutional

in that they misled jurors about their individual ability to give effect to mitigating circumstances.

> Although Texas' sentencing statute gives individual jurors the power to prevent the death penalty if they believe mitigating circumstances call for a sentence of life, that same statute also misleads jurors into believing their individual belief is immaterial unless they are able to persuade nine of their fellow jurors that their view of the evidence is correct.

(Am. Pet. at 151.) This complaint has been repeatedly rejected in this Circuit.

In *Allen v. Stephens,* 805 F.3d 617, 631-32 (5th Cir. 2015), the petitioner argued that his "sentencing process was confusing and violated *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), because it gave the jurors the misimpression that they did not have an individual ability to prevent a death sentence based upon their personal view of the mitigating evidence." The Court of Appeals rejected that argument, holding that the Supreme Court has declined to give *Mills* such a "broad construction." *Id.* at 632 (citing *Smith v. Spisak,* 558 U.S. 139, 148-49 (2010)).

> *Mills* error occurs only where jurors are led to believe that they are "precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence ***of a particular such circumstance***." *Id.* (quoting *Mills,* 486 U.S. at 384, 108 S.Ct. 1860) (emphasis added).
>
> Allen points to no instruction in his case that would have led jurors to believe that they were required to agree on the existence of any particular mitigating circumstance. Indeed, the instructions in Allen's case specifically provided that jurors "need not agree on what particular evidence supports an affirmative finding on" the mitigation special issue.

Id.

> Similarly, Sparks has not identified any instruction that the jurors were required to

agree on any particular mitigating circumstance, and the instructions concerning the mitigation special issue at his trial provided that "[t]he jury however need not agree on what particular evidence supports a 'Yes' answer on this Special Issue." (Vol. 2, Clerk's Record, "CR", at 497.) This Circuit has repeatedly rejected arguments against the 12-10 rule like the one that Sparks raises here, holding that the 12-10 rule does not violate *Mills*. *See, e.g., Allen,* 805 F.3d at 632; *Reed v. Stephens,* 739 F.3d 753, 779 (5th Cir.2014); *Druery v. Thaler,* 647 F.3d 535, 542-43 (5th Cir.2011); *Miller v. Johnson,* 200 F.3d 274, 288-89 (5th Cir.2000); *Jacobs v. Scott,* 31 F.3d 1319, 1328–29 (5th Cir.1994).

Sparks attempts to avoid this long line of precedent by arguing that prior circuit precedent did not address the change in article 37.071 of the Texas Code of Criminal Procedure. (Am. Pet. at 151-56.) The United State Court of Appeals for the Fifth Circuit has expressly rejected this argument as well.

> Allen attempts to distinguish our prior cases on the ground that he was sentenced after Texas's 1991 revisions to the mitigation special issue. The district court rejected this argument because several of our cases in fact examined the post-1991 mitigation special issue. *Reed,* 739 F.3d at 761 (petitioner charged in 1997); *Parr v. Thaler,* 481 Fed. Appx. 872 (5th Cir. 2012) (petitioner convicted in 2004); *see also Druery v. State,* 225 S.W.3d 491, 495 (Tex. Crim. App. 2007) (petitioner convicted in 2003). Allen argues that these newer cases relied on precedent that analyzed the pre-1991 mitigation special issue. However, that the later cases relied on older precedent does not allow the panel to disregard their holdings and flout the circuit's rule of orderliness—"only an intervening change in the law . . . permits a subsequent panel to decline to follow a prior Fifth Circuit precedent." *United States v. Alcantar,* 733 F.3d 143, 145 (5th Cir.2013). Allen cites no such change in the law. Therefore, the district court correctly held that Allen's *Mills* argument is foreclosed by binding circuit precedent. *E.g., Druery,* 647 F.3d at 542-43.

Allen, 805 F.3d at 632-33. For these same reasons, Sparks' *Mills* argument is also foreclosed by binding circuit precedent.

Sparks' eighth claim is DENIED for lack of merit and as barred by *Teague*.

H. Effective Assistance of Counsel

In his final claim, labeled alternatively "Claims Eight to Eleven" and "Claims Nine, Ten, and Eleven," Sparks asserts in two sentences that he was deprived of the effective assistance of counsel as set out in earlier portions of the amended petition. (Am. Pet. at 157.) Respondent argues that these claims are inadequately briefed and lack merit. (Ans. at 67-70.)

1. Claim

Sparks references claims from his original skeletal petition which constituted a list of conclusions without supporting facts. (Pet., doc. 9, at 36-41.) Even so, Sparks confirms that "[t]he substance of these predecessor claims have all been raised in this amended petition." (Am. Pet. at 157.) This Court has only found one claim of ineffective assistance of counsel that was actually presented in the amended petition.

In addition to complaining in his fifth claim about prosecutorial misconduct, Sparks also complained in the alternative that his trial counsel failed to provide effective assistance of counsel by failing to correct the record by introducing evidence rebutting Merillat's testimony. (Am. Pet. at 86-89.) Specifically, Sparks argues that Defense counsel was ineffective for allowing Officer Merillat to mislead the jury with his demonstrably incorrect claim that inmates sentenced to life without parole will enter prison at the G3 classification

level regardless of the specific offender characteristics. (Am. Pet. at 87.) In connection with this, Sparks argues that defense inadequately investigated punishment-phase evidence by failing to request Merillat's personnel file, training history, and case files prior to trial. (Am. Pet. at 87.) Sparks also argues that defense counsel failed to secure an expert who could have set the record straight, and testify to the proper TDCJ rules regarding classification. (Am. Pet. at 88.)

Sparks asserts that he was prejudiced in that the jury was allowed to consider Merillat's false testimony which resulted in a death sentence rather than a life sentence. (Am. Pet. at 89.) This claim was not presented to the state court in the original state habeas proceeding, and was included in the alternative in his subsequent state habeas application that was dismissed as an abuse of the writ. (Subsequent State Appl at 25, 38-41, doc. 60 at 84, 97-100.) Sparks argues that this claim comes within the exception to procedural bar set out in *Trevino* and *Brady*. (Am. Pet. at 92-103.)

2. Analysis

a. Procedural Bar

As set out above, "the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar." *Canales,* 765 F.3d at 566. Therefore, this Court will not reach the merits of a claim that the state court denied on such procedural grounds, unless the habeas

petitioner shows that an exception to the procedural bar applies. *See Sawyer*, 505 U.S. at 338; *Coleman*, 501 U.S. at 729.

Sparks argues that good cause exists for this court to consider the merits of his prosecutorial misconduct claim because the prosecution "violated *Brady* by concealing the fact that Merillat, a state agent, was testifying falsely at Sparks punishment phase, and how sparks was prejudiced by Merillat's false testimony." (Am. Pet. at 92-93 (referencing allegations in Am. Pet. at 76-85).) Sparks argues that Merillat was a member of the prosecution team and "had to have known he was testifying falsely," thus giving rise to the State's duty to disclose. (Am. Pet. at 94.) However, as set out above, Sparks has not shown the testimony to be materially false in light of Merillat's correcting testimony on cross examination that an inmate could be placed in ad seg, G-4 or G-5 under certain circumstances. (39 RR at 86-87.) Therefore, this does not show cause and prejudice under *Brady*.

Sparks also asserts that this claim comes within the exception to procedural bar created in *Martinez v. Ryan,* 566 U.S. 1 (2012), and applied to Texas cases in *Trevino v. Thaler,* 569 U.S. 413 (2013). (Am. Pet. at 98-103.) To bring a claim within this exception, Sparks must show that a substantial claim of ineffective assistance of trial counsel was not presented to the state court because of the ineffective assistance of state habeas counsel. *See Martinez,* 566 U.S. at 14; *Trevino,* 569 U.S. at 429. However, as further discussed in the alternate merits analysis below, Sparks has not shown any merit to his claim that trial counsel

was ineffective for failing to correct a false statement in light of the record showing that it was trial counsel's own cross-examination that corrected the allegedly false statement. Further, state habeas counsel could not have been ineffective in failing to raise a meritless claim. *See Garza v. Stephens,* 738 F.3d 669, 676 (5th Cir. 2013) (agreeing with the district court that "habeas counsel was not ineffective in failing to raise [a] claim at the first state proceeding" because "there was no merit to [the petitioner's] claim"); *Beatty v. Stephens,* 759 F.3d 455, 466 (5th Cir. 2014).

Sparks has not established cause and prejudice to excuse the procedural default. Accordingly, this claim is DISMISSED along with the rest of Sparks' fifth claim as procedurally barred.

b. Alternate Merits Analysis

To determine whether a habeas petitioner has shown ineffective assistance of counsel, this Court applies the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong of *Strickland* requires the defendant to show that counsel's performance was deficient. *Id.* at 687. The second prong of this test requires the defendant to show prejudice resulting from counsel's deficient performance. *Id.* at 694. The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Id.* at 697.

In demonstrating that counsel's representation was deficient, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-

88; *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997). "It is well settled that effective assistance is not equivalent to errorless counsel or counsel judged ineffectively by hindsight." *Tijerina v. Estelle*, 692 F.2d 3, 7 (5th Cir. 1982). A court reviewing an ineffectiveness claim must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence or that, under the circumstances, the challenged action might be considered sound trial strategy. *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Richter,* 562 U.S. 106. In *Richter,* the Supreme Court noted the "wide latitude counsel must have in making tactical decisions" and the need to avoid judicial second-guessing. *Id.* (quoting *Strickland,* 466 U.S. at 689). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id.* at 110.

To satisfy the second prong of the *Strickland* test, the petitioner must show that counsel's errors were so egregious "as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The test to establish whether there was prejudice is whether "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

A reasonable probability under this test is "a probability sufficient to undermine confidence in the outcome." *Id.*

For the same reason that he has not shown cause and prejudice to excuse the procedural default, Sparks fails to show that his claim has any merit. Sparks has not shown Merillat's testimony to be materially false in light of his correcting testimony that dispelled the alleged falsity. Therefore, trial counsel could not have been ineffective in failing to correct a falsity that his own cross examination, in fact, corrected. *See, e.g. Beavers v. Lockhart,* 755 F.2d 657, 663 (8th Cir. 1985) (holding attorney not ineffective in deficiency that was corrected by the state eliminating prejudice); *Jones v. Attorney Gen. of California,* 280 F. App'x 646, 647 (9th Cir. 2008) ("Because Jones's second attorney corrected the misrepresentation, and it is clear from the record that the trial court was aware of the correct information, Jones cannot show prejudice and is not entitled to habeas relief."). Accordingly, if this claim were not dismissed as procedurally barred, it would be DENIED for lack of merit.

VI. Request for Evidentiary Hearing

Sparks requests an evidentiary hearing on his complaints regarding the false testimony of A. P. Merillat and related ineffective assistance of trial counsel, which are presented in his fifth and ninth through eleventh grounds for relief. (Am. Pet. at 63-109, 157; Reply at 16-45.) This Court has discretion to grant an evidentiary hearing if one is not barred under section 2254(e)(2). *See Schriro v. Landrigan,* 550 U.S. 465, 468 (2007). In exercising that

discretion, the Court considers whether a hearing could enable petitioner to prove the petition's factual allegations which, if true, would entitle him to relief. *Id.* at 474. The Court also must consider the deferential standards which limit the Court's ability to grant habeas relief. *Id.*

Sparks argues that a hearing is required because the state courts "have not fully and fairly addressed the factual issue" regarding Merillat's false testimony and this Court should now find cause and prejudice to excuse the procedural default. (Am. Pet. at 107-108.) Sparks argues that an evidentiary hearing is required whether or not the Court finds that the prosecution team knew whether the testimony was false.

> Simply put, if the cause for the default is Merillat's false testimony, then (unless the state concedes that it presented false testimony) a hearing will be necessary. On the other hand, if this Court concludes that nobody on the State's side should be charged with knowing whether Merrilat's testimony was false, then the question becomes whether the defense adequately investigated this issue pretrial and whether state habeas counsel adequately investigated in state hearings.

(Am. Pet. at 109.) In light of the record before this Court that Merillat corrected the alleged falsity on cross examination, Sparks has not shown any falsity upon which either claim may be granted. Therefore, in light of the record and this Court's own review of the merits of these claims, the request for an evidentiary hearing is denied.

VII. CONCLUSION

The Court denies Sparks's amended petition for a writ of habeas corpus.

In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court denies Sparks a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell,* 537 U.S. 322, 338 (2003); *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000); 28 U.S.C. § 2253(c)(2). If Sparks files a notice of appeal, he may proceed in forma pauperis on appeal.

SIGNED March 27, 2018.

David C. Godbey
United States District Judge

Tab C

WRIT NO. W08-01020-J(A)

EX PARTE	§	**IN THE CRIMINAL**
	§	**DISTRICT COURT NO. 3**
ROBERT SPARKS	§	**DALLAS COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the application for writ of habeas corpus, the State's general denial, official court documents and records, the testimonial and documentary evidence offered at the March 11, 2011 evidentiary hearing, the Court now enters the following findings of fact and conclusions of law:

HISTORY OF THE CASE

Applicant is confined pursuant to the judgment and sentence of Criminal District Court Number Three in Dallas County, Texas. Applicant was convicted of killing his 9- and 10-year-old stepsons. The jury answered the special issues in a manner requiring the imposition of the death penalty, and on December 11, 2008, the Court sentenced him to death. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b), (e)(1) (Vernon Supp. 2010). On October 20, 2010, the Court of Criminal Appeals affirmed applicant's conviction on direct appeal. *Sparks v. State*, No. AP-76,099, 2010 Tex. Crim. App. LEXIS 629 (Tex. Crim. App. Oct. 20, 2010) (not designated for publication). On August 25, 2010, applicant filed his initial application for writ of habeas corpus in the instant cause. On December 20, 2010, the State timely filed a general denial, and on March 11, 2011, the Court conducted an evidentiary hearing.

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GENERAL FINDINGS OF FACT

1. The Court takes judicial notice of the entire contents of the Court's file in Cause No. F08-01020.

2. The Court takes judicial notice of all forty-eight (48) volumes of the reporter's record of the trial in Cause Number F08-01020.

3. The Court takes judicial notice of the entire contents of the Court's file in Cause No. W08-01020-J(A).

4. The Court takes judicial notice of the reporter's record of the March 11, 2011 evidentiary hearing conducted on the instant writ.

GROUND ONE:

In his first ground for relief, applicant makes the assertion that his right to an impartial jury under the Sixth Amendment to the United States Constitution and Article I, § 10 of the Texas Constitution was violated when, during the punishment phase of trial and in the presence of the jury, bailiff Bobby Moorehead (hereinafter "Moorehead") wore a necktie "bearing the image of a hypodermic syringe." Applicant is claiming that the necktie constituted an improper external influence on the jury.

Claim Not Raised Previously

1. The Court finds that, at trial, applicant did not object to Moorehead's necktie on thee record.

2. The Court finds that applicant failed to raise the aforementioned claim on direct appeal.

No Evidence That Any Juror Saw Bailiff's Necktie

3. The Court conducted an evidentiary hearing on March 11, 2011. The testimony and documentary evidence offered during and after that hearing inform the resolution of both of applicant's claims.

4. The Court finds that Moorehead was one of several bailiffs assigned to Criminal District Court No. 3 during applicant's trial.

5. Bailiff Moorehead wore a black necktie bearing the image of a white syringe during the punishment phase of Spark's trial. He also wore a black shirt, a black suit, black shoes, and black sock with the necktie.

6. The necktie was custom-made by the bailiff's wife at his direction and was intended by the bailiff to show his support for the death penalty. Said necktie was introduced at the hearing and is presently in the custody of the court reporter.

7. Moorehead has worn the necktie during other Capital Murder cases in which he has served and has never been reprimanded by his supervisors..

8. The Court finds that Moorehead was not the bailiff in charge of the jury on the day he wore the said necktie, but was seated directly behind the Defendant operating the remotely activated custody control device.

9. The Court finds that, following an unrecorded sidebar with the trial court, defense counsel Paul Johnson advised Moorehead that the Court wanted Moorehead to tuck his necktie into his shirt. .

10 The Court finds that Moorehead tucked his necktie and the hypodermic syringe embroidered on the necktie was concealed from view.

11. The Court finds that the record is silent as to any objection made by any party regarding Moorehead's necktie.

12. The Court finds that applicant has failed to present any evidence from any juror regarding this issue.

13. The Court finds that the State has obtained and submitted an affidavit from the foreman of the jury, Ms. Heather Perttula Randall.

> In her affidavit, Randall states that she "personally never saw [Moorehead's] tie." . Randall states that "[t]o [her] knowledge, nothing about the tie or Bailiff Moorehead entered into the jury's deliberations. The jury followed the court's instructions in its deliberations and did not consider, discuss, or relate any matters not in evidence before it."

14. The Court finds that applicant has failed to present any evidence proving that any juror considered Moorehead's necktie during deliberations.

15. The Court finds that the applicant has failed to prove any constitutional violation.

16 The Court concludes that applicant's constitutional right to an impartial jury was not violated.

17. The Court recommends that applicant's first ground for relief be denied.

GROUND TWO:

In his second ground for relief, applicant contends that defense counsel rendered ineffective assistance at trial because he failed to object to the fact that the bailiff, in the

presence of the jury, wore as part of his uniform, a necktie bearing the image of a hypodermic syringe.

1. To succeed on a claim of ineffective assistance of counsel, an applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. He must overcome the presumption that, under the circumstances at trial, the challenged action could be considered sound trial strategy. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim..
2. The Court finds that applicant was represented at trial by Paul Johnson (hereinafter "Johnson") and Lalon Peale (hereinafter "Peale").
3. The Court finds that, pursuant to article 26.052 of the Texas Code of Criminal Procedure, both counsel were qualified before and during applicant's trial for appointment to death penalty cases in the First Administrative Judicial District. .
4. The Court finds that the defense mounted a compelling case in mitigation throughout trial with evidence of applicant's mental illness.
5. The Court finds that the Defense counsels did not object to Moorehead's necktie on the record.
6. The Court finds that Johnson made a strategic decision not to object to Moorehead's necktie on the record.

Johnson testified that he saw no need to object to the necktie on the record at that point in time. Johnson explained that he had "[no] reason to believe anybody else had seen [the tie] or noticed it or that it was having an impact or an influence on the trial."

7. The Court finds Johnson's testimony persuasive and his strategic choice reasonable under prevailing professional norms.

8. The Court finds that the Defense attorney's decision not to make an objection to Moorehead's necktie within the hearing of the jury was a matter of trial strategy.

9. The Court finds that no juror considered Moorehead's necktie during deliberations.

10. The Court finds that applicant has failed to prove his counsel rendered ineffective assistance.

11. The Court finds that defense counsel shed the best possible light on an overwhelmingly incriminating State's case..

The Court recommends that applicant's second ground for relief be denied.

CONCLUSION

1. The Court concludes that applicant has not been denied any rights guaranteed him by the United States Constitution and the Texas Constitution.

2. The Court concludes that applicant is lawfully restrained.

The Court concludes that applicant's Application for Writ of Habeas Corpus is totally without merit and should be denied.

ORDERS OF THE COURT

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in Cause Number F08-10120-J, and to 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. Applicant's Application for Writ of Habeas Corpus filed in Cause Number W08-01020-J(A), including any documentary exhibits filed both with the response and at the writ hearing;

2. The State's Original Answer filed in Cause Number W08-01020-J(A), including any documentary exhibits filed at the writ hearing and thereafter;

3. Any motions filed by the parties;

4. Applicant's proposed findings of fact and conclusions of law;

5. The State's proposed findings of fact and conclusions of law;

6. This Court's findings of fact and conclusions of law, and order;

7. The Order Designating Issues;

8. The reporter's transcript of the hearing conducted on March 11, 2011;

9. Any other matters used by the trial court in resolving issues of fact;

10. The indictment, judgment, sentence, docket sheet, and appellate record in Cause Number F08-01020-J, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER ORDERED to send a copy of this Court's findings of fact and conclusions of law, including its order, to applicant's counsel, David Richards, 204 West Central Avenue, Fort Worth, Texas, 76164, and to counsel for the State.

SIGNED AND ENTERED THIS 20TH day of May, 2011.

Gracie Lewis

Judge Gracie Lewis
Criminal District Court No. 3
Dallas County, Texas

Tab D

ROBERT SPARKS, Appellant v. THE STATE OF TEXAS

NO. AP-76,099

COURT OF CRIMINAL APPEALS OF TEXAS

2010 Tex. Crim. App. Unpub. LEXIS 629

October 20, 2010, Delivered

NOTICE: DO NOT PUBLISH.

PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Sparks v. Texas, 131 S. Ct. 2152, 179 L. Ed. 2d 938, 2011 U.S. LEXIS 3351 (U.S., 2011)*
Writ of habeas corpus denied *Ex parte Sparks, 2011 Tex. Crim. App. Unpub. LEXIS 919 (Tex. Crim. App., Dec. 14, 2011)*

PRIOR HISTORY: [*1]
ON DIRECT APPEAL FROM CAUSE NO. F08-01020-VJ IN CRIMINAL DISTRICT COURT THREE DALLAS COUNTY.

JUDGES: COCHRAN, J., delivered the opinion of the unanimous Court.

OPINION

Appellant was convicted in December 2008 of **capital** murder for the stabbing deaths of his two stepsons. [1] 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 judge sentenced appellant to death. [2] Direct appeal to this Court is automatic. *Art. 37.071, § 2(h)*. After reviewing appellant's forty-seven points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence of death.

1 *TEX. PENAL CODE § 19.03(a)(7)(A)*.
2 *TEX. CODE CRIM. PROC. art. 37.071, § 2(g)*.

STATEMENT OF FACTS

Appellant does not challenge the sufficiency of the evidence, but a brief statement of the facts is helpful for an understanding of his claims. Appellant was charged with intentionally and knowingly causing the deaths of Raekwon

Agnew [3] and Harold Sublet, Jr., by stabbing and cutting them with a knife, during the same criminal transaction. The record shows that on September 15, 2007, appellant murdered his wife, Chare Agnew, and **[*2]** his 9-and 10-year-old stepsons, Harold and Raekwon, and he raped his 12- and 14-year-old stepdaughters, Garysha Brown and LaKenya Agnew. [4] Some time after midnight, when everyone else in the house was asleep, appellant put his hand over Chare's mouth and stabbed her eighteen times as she lay in her bed. He then went into the boys' bedroom. As Raekwon lay sleeping, appellant woke Harold and took him to the kitchen, where he stabbed him at least 45 times. He then woke Raekwon, took him to the kitchen, and killed him in the same manner. Appellant dragged the boys' bodies to the living room and covered them with a comforter. He then went into the girls' bedroom and woke LaKenya. He pulled her out of bed at gunpoint, tied her up with bedsheets, and told her he had killed her mother and brothers. He showed her their bodies and told her it was her fault they were dead. Next, he woke Garysha and tied her up with electrical cords, and he tied a washcloth around her mouth. He then told LaKenya that in order to save her and her sister's life, one of the girls would have to have sex with him. LaKenya said that she would do it. Appellant took her to the living room and raped her on the living room **[*3]** couch.

> 3 The medical examiner testified that Raekwon's name appeared on his birth certificate as "Reakwon." However, he is identified throughout the reporter's record and both parties' briefs as "Raekwon," and the prosecutor stated at trial that Raekwon's family had indicated that this was the correct spelling of his name.
> 4 Subsequent references to the victims and their family members will be by first name because many of them share the same last name.

When he had finished raping LaKenya, appellant took Garysha to the living room and raped her on the couch, next to her sister. Then, he made the girls stay in the bathroom with him while he took a shower. He apologized to the girls for the rapes and murders. He told them that their mother had been trying to poison him and that her death was their fault. Next, he forced both girls to go with him into the garage, where he tried, unsuccessfully, to change the license plate on his car. He took the girls back to the living room, where he lifted the comforter and showed the girls their brothers' bodies. He remarked that Raekwon was stronger than he had expected him to be. Appellant made the girls walk into their mother's bedroom and kiss her face, **[*4]** and then he put them into the bedroom closet. He started a CD player and told them that help would come when the music ended. He then locked the closet door and moved a dresser in front of it. Finally, appellant left the house.

Appellant drove to his mother's house to borrow her car. He then drove to the home of his former girlfriend, Shunta Alexander, and their teenaged daughter, Brianna. He told Shunta what he had done. He gave her some money for Brianna and remarked that if there was a reward for catching him, Brianna should have it. Shunta begged him to call the police. Appellant called the police on his cell phone and briefly reported that he had killed his wife and two boys and he had left two girls locked in a bedroom closet. He provided the address and stated that he knew the police would trace the call if he stayed on the phone too long. He then hung up, broke his cell phone, and left Shunta's home. Later that morning, appellant's cousin drove him to the Greyhound bus station, where he bought a bus ticket under an assumed name and traveled to Austin.

Appellant returned to Dallas a few days later. He called a police detective and asked him if the police had found an audiocassette **[*5]** tape he had left in the house, which he believed contained a recording of Chare or one of the children admitting that they had been conspiring against him. He thought that this tape would help his case. [5] After his arrest, appellant made a statement to police in which he requested testing for the presence of poison in his body, and he said that LaKenya and Garysha should be polygraphed about whether Chare had been poisoning him. He provided buccal, blood, hair, and fingernail samples to be tested for evidence of poisoning, but the lab that received the samples was not able to conduct the requested tests, and investigators were unable to locate a lab with that capability. [6]

> 5 This tape consists of several segments in which the tape recorder was turned on and off. Some of the segments are appellant's conversations with Chare and/or one or more of the children, but none of them contains any admissions about anyone conspiring against appellant. In several segments, appellant expressed anger because he believed that the children were having sex with each other and that one of the girls was telling people

that appellant had put a camera in the bathroom. He complained that illegal activity **[*6]** was taking place in the house and that he would be breaking the law if he did not report it. He threatened to call the police and have the children removed from their mother. In one segment, appellant complained about his car being damaged, and he demanded that Chare pay for the repairs. In yet another segment, he complained to some of the children about needing money for food and utilities, and he talked about pawning something.

During the final two segments, appellant spoke directly into the tape recorder. He stated that the earlier segments would be evidence of what "y'all" (presumably, Chare and the children) had been doing. He said that by the time the police found the tape, he would have killed Chare's sister, Nicole, and her boyfriend. Appellant asserted that if he died, the police should analyze the contents of his stomach, which would prove that "they" had been "putting shit in [his] food."

6 A State's investigator testified that she watched the samples being collected and had them delivered to the Southwestern Institute of Forensic Sciences, but that lab was not able to test them for evidence of poisoning. Other labs around the country were contacted, but none of them was able **[*7]** to conduct the requested testing.

A. Jury Voir Dire

In points of error one through seventeen, appellant complains that the trial court erred by denying the defense's challenges for cause to seventeen potential jurors. The record shows that appellant used a peremptory strike to exclude each of the challenged potential jurors. He exhausted all of his peremptory strikes and was granted two additional peremptory strikes. After the trial court denied his request for a third additional peremptory strike, appellant identified an objectionable juror whom he was forced to accept. Therefore, appellant preserved error. [7] However, because the trial court granted him two additional peremptory strikes, appellant must show that the trial court committed error in denying his challenges for cause to three potential jurors to demonstrate that he was harmed. [8]

7 *See Green v. State, 934 S.W.2d 92, 105 (Tex. Crim. App. 1996).*
8 *See Busby v. State, 253 S.W.3d 661, 673 n.12 (Tex. Crim. App. 2008).*

We look at the entire record of voir dire to determine if there is sufficient evidence to support the court's ruling on a challenge for cause. [9] We give great deference to the trial judge's decision because he is present **[*8]** to observe the venireman's demeanor and to listen to his tone of voice. [10] Particular deference is due when the potential juror's answers are vacillating, unclear, or contradictory. [11] In addition, "[w]hen the record is confused, and without a clearly objectionable declaration by the venireman, . . . we must defer to the trial court's understanding of what actually occurred." [12]

9 *Feldman v. State, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).*
10 *Id.*
11 *Id.; see also Moore v. State, 999 S.W.2d 385, 400 (Tex. Crim. App. 1999).*
12 *Rachal v. State, 917 S.W.2d 799, 814 (Tex. Crim. App. 1996).*

A potential juror is challengeable for cause if he has a bias or prejudice against the defendant or against the law upon which either the State or the defense is entitled to rely. [13] The test is whether the prospective juror's bias or prejudice would substantially impair his ability to carry out his oath and instructions in accordance with the law. [14] Before a prospective juror may be excused for cause on this basis, the law must be explained to him, and he must be asked whether he can follow that law, regardless of his personal views. [15] To establish that the challenge for cause is proper, the proponent of **[*9]** the challenge must show that the prospective juror understood the requirements of the law and could not overcome his prejudice well enough to follow the law. [16]

13 EX. *CODE CRIM. PROC. art. 35.16(a)(9) & (c)(2)*; *see also Gardner v. State, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009).*
14 *Feldman, 71 S.W.3d at 744.*

15 *Id*.
16 *Id*.

Prospective jurors are not challengeable for their particular views about specific evidence. [17] The law does not require a juror to consider a specifically enumerated type of evidence as either mitigating or aggravating. [18] Therefore, a trial court does not abuse its discretion in overruling a defendant's challenge for cause based on a prospective juror's opinion that a particular type of evidence is not *per se* mitigating. [19] Indeed, a trial court does not abuse its discretion by disallowing questioning concerning a prospective juror's views about the mitigating value of particular evidence. [20] What is constitutionally required is that jurors must not be precluded or prohibited from considering any relevant evidence offered in mitigation of punishment. [21] This requirement is satisfied so long as a defendant is allowed to present relevant mitigating evidence and the jury **[*10]** is provided a vehicle to give mitigating effect to that evidence, if the jury finds it to be mitigating. [22]

17 *Morrow v. State, 910 S.W.2d 471, 472-73 (Tex. Crim. App. 1995)*.
18 *Gardner, 306 S.W.3d at 299-300*.
19 *Id*.
20 *See Joubert v. State, 235 S.W.3d 729, 734 n.23 (Tex. Crim. App. 2007)*.
21 *See Cordova v. State, 733 S.W.2d 175, 189 (Tex. Crim. App. 1987)* (citing *Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)*, and *Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*, and rejecting the argument that the Constitution mandates that jurors give weight to any particular fact that might be offered in mitigation); *see also Rachal, 917 S.W.2d at 813*.
22 *Raby v. State, 970 S.W.2d 1, 3-4 (Tex. Crim. App. 1998)*.

Appellant's first point of error concerns prospective juror Lawrence Allen. The record shows that, at the beginning of voir dire, Allen indicated that he generally favored the death penalty as an appropriate punishment for an intentional murder. However, when he was asked if, after finding a defendant guilty of **capital** murder, he could presume at the beginning of the punishment phase that the answer to the future dangerousness question should be negative, he replied that he would "have no problem with that." When Allen **[*11]** was asked if, after answering the future dangerousness question affirmatively, he could keep an open mind concerning the mitigation question, he again stated that he would "have no problems with that."

Defense counsel asked Allen if he thought that poverty would be a mitigating circumstance, and Allen replied, "Probably not." Counsel then asked Allen whether he would consider a mental defect to be mitigating. Allen answered, "I think I'd have to consider that. Any answer I give, it depends upon the circumstances taking place at the time of the trial, I think." At the conclusion of voir dire, defense counsel challenged Allen for cause on the ground that he was an "automatic death penalty juror," in that he would always answer the future dangerousness issue affirmatively and would not consider any mitigating factors, particularly poverty. The trial judge denied the challenge for cause.

On this record, we find no abuse of discretion. Regardless of his personal views, Allen affirmed that he could follow the law once it had been explained to him. Additionally, his statement that he did not think that poverty would be a mitigating circumstance did not make him challengeable for cause. Point **[*12]** of error one is overruled.

Appellant's second point of error concerns prospective juror Anthony Stephenson. The record reflects that the prosecutor explained to Stephenson that, if the defendant were found guilty and they moved to the punishment phase, the jurors would have to presume that the answer to the future dangerousness question would be no. Stephenson stated that he could make that presumption. He also stated that he could keep an open mind concerning mitigation. Later, defense counsel asked Stephenson whether, after he found a defendant guilty of a heinous **capital** murder, he would think that the defendant was a future danger. Stephenson responded, "Generally speaking, yes." Counsel then asked, "In that situation, when it comes to Special Issue Number 1 you're gonna always answer that in the way that would be yes, if you found someone guilty of **capital** murder, that they would be a future danger[]; is that right?" Stephenson responded, "I would say yes."

At the end of voir dire, counsel challenged Stephenson for cause on the ground that he would always answer Special Issue Number 1, the future dangerousness special issue, affirmatively. The State asked that Stephenson be brought **[*13]** back for clarification on that point. The trial court then brought Stephenson back and questioned him:

Court: When [the prosecutor] was asking you questions, you understand that after you found a defendant guilty of a **capital** offense, then you proceed into the punishment phase of the trial, or punishment part of the trial?

Stephenson: Okay.

Court: You find out more evidence, and in going into that you would have to assume that the correct verdict before you heard anything from the state would be that a life sentence would be the appropriate sentence in the case.

Stephenson: Right.

Court: And then the state has to overcome that presumption, like the presumption of innocence, by proving to you beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence in the future. Or be a continuing threat to society.

Stephenson: Right.

Court: Kind of predicting the future, so to speak.

Stephenson: Okay.

Court: And what is your opinion? . . . After having found-if you find him guilty, then can you presume the appropriate sentence is a life sentence until the state-and have the state prove to you beyond a reasonable doubt of the future-dangerousness issue **[*14]** . . . before you would invoke the death penalty?

Stephenson: Yes.

Court: Or would you always, having found a person guilty of a heinous crime such as a **capital**-murder case, that you would always find [S]pecial [I]ssue [1] yes, because if he killed two or more it was so heinous that you would always think that person would be a continuing threat to society?

Stephenson: No, I would not always think that.

Court: Okay. So you could make the state do their job, assume that a life sentence was an appropriate sentence, and then make the state prove to you, if they can, the future-dangerousness issue?

Stephenson: Yes.

Court: One other thing. Are you telling me you would or would not automatically find Special Issue Number 1, the answer to be yes? Yes is the one that invokes the death penalty.

(Pause in proceedings)

Court: Have I confused you?

Stephenson: I have to say I would not always find yes.

Court: In other words, you could follow the law and make them prove Special Issue Number 1 to you before you would make that finding of yes.

Stephenson: Yes.

* * *

Court: Challenge for cause is denied.

Defense: Your honor, I have two things on the record. I did forget about the mitigation. He specifically indicated **[*15]** he would not consider poverty or education as a mitigating factor. We submit for cause on those, also.

Court: Challenge for cause is denied.

This record shows that Stephenson arguably gave inconsistent answers concerning the future dangerousness question. We afford particular deference to the trial court's determination that Stephenson was not challengeable for cause on this basis. Further, Stephenson was not challengeable for cause based on his statements that he did not think that poverty and education were mitigating. Point of error two is overruled.

Appellant's fifth point of error concerns prospective juror William Triola. The record reflects that, when the prosecutor explained the penalty phase and asked Triola whether, after finding the defendant guilty, he could presume that the future dangerousness question should be answered negatively, Triola affirmed that he could do so. He stated that he would listen to all the evidence and keep an open mind before answering that question. Concerning mitigation, Triola stated that he would consider how the defendant lived his life, and what thoughts or reasons might have driven him to commit the offense.

Defense counsel examined Triola about **[*16]** his written questionnaire. In response to the question of whether some crimes, just because of their facts, called for the death penalty, Triola had written, "Premeditated murder or murder[] of an innocent person in the commission of a crime deserves the death penalty whether the [defendant] committed previous acts or not." When questioned about this response, Triola affirmed that that was how he felt, and he stated that he believed that someone who committed a premeditated murder "pretty much" deserved the death penalty. However, he also explained that those were his personal feelings, and he had not known about the applicable law and the penalty-phase questions until voir dire. He stated that, until the prosecutor explained the penalty phase to him, he had believed that the jurors' job was done once they found a defendant guilty of premeditated or "first degree" murder.

Defense counsel asked Triola what he would want to know when he answered the special issues. Triola said that he would want to know about the defendant's past to make a decision concerning future dangerousness. He stated that a defendant's history of violent behavior for most of his adult life would indicate a probability **[*17]** that the defendant would commit future acts of violence. He also stated that he agreed with the presumption that a life sentence would be appropriate until the State proved future dangerousness.

Defense counsel explained that neither party had a burden of proof on the mitigation question. He asked Triola what would be important to him in considering the mitigation special issue, and Triola answered that a sufficient mitigating circumstance could be "almost anything." He affirmed that he would keep an open mind and consider whatever evidence was presented. When counsel asked for examples, Triola answered, "What might have happened to the defendant in the past would be possibly mitigating circumstances." Counsel asked him whether poverty or substance abuse would be mitigating circumstances. Triola replied that he did not think that they would be. He believed that physical abuse and possibly mental-defect evidence could be mitigating, but he stated that he would have to hear the evidence before he could make a decision. He stated that he would be open to testimony from a psychiatrist or psychologist.

Defense counsel then challenged Triola for cause on the ground that he was an "automatic **[*18]** death penalty juror," who would always find future dangerousness and who stated that someone who committed premeditated murder would deserve the death penalty regardless of any special issues on that point. Counsel also challenged him as being "mitigation-impaired" because he did not consider poverty and substance abuse to be mitigating factors. The prosecutor responded that Triola had stated that he would make the punishment decision based on the evidence and argument presented in the penalty phase, not just the facts of the offense, and that he had indicated he would listen to the evidence

presented during each phase of the trial and give each step of the process due consideration. The trial court denied the challenge for cause.

On this record, we find no abuse of discretion. Triola indicated that he could set aside his personal feelings and follow the law concerning the special issues. Triola's statements that he did not think that poverty and substance abuse would be mitigating did not render him challengeable for cause. Point of error five is overruled.

Appellant's sixth point of error concerns prospective juror Myrna Conde. When questioned by the State, Conde consistently affirmed **[*19]** that, after finding a defendant guilty of **capital** murder, she would keep an open mind and follow the law with respect to the future dangerousness and mitigation issues. When questioned by defense counsel as to whether finding the defendant guilty would cause her to favor the death penalty, she initially responded, "If it was presented that the defendant did commit the crime[,] that the severity of it was horrendous, the circumstances were premeditation, I believe that the State of Texas does impose the death penalty, I would be in favor of that." She then indicated that she did not mean to say that in such a case the State "imposes" the death penalty, but rather the State of Texas "allows" the death penalty. Defense counsel asked Conde several times whether, after finding the defendant guilty, she would presume that the defendant would be a future danger, and each time Conde affirmed that she would answer the future dangerousness question affirmatively. When counsel asked Conde if there was anything that she thought would be mitigating or important to her, she stated that there was nothing.

Counsel then challenged Conde for cause on the grounds that after having found someone guilty, **[*20]** she would always presume the defendant to be a future danger and she would not consider anything to be mitigating. The State responded that the way counsel had asked the questions had led Conde to give those answers. The trial court then called Conde back for additional questioning. The court again explained the phases of the trial and the law applicable to the punishment phase. Conde indicated that, after finding the defendant guilty, she would not presume that the future dangerousness question should be answered affirmatively, and she would keep an open mind and consider any mitigating circumstances. The court then denied defense counsel's challenge for cause. Counsel objected to the court's rehabilitation of Conde and re-urged his challenge for cause, which was again denied.

The record shows that Conde vacillated depending on who was asking the questions. When the law was explained to her, she affirmed that she would follow the law. In this situation, we afford particular deference to the trial court's determination. [23] Point of error six is overruled.

23 *See King v. State, 29 S.W.3d 556, 568 (Tex. Crim. App. 2000).*

Appellant's seventh point of error concerns prospective juror Peter **[*21]** Cavazos. At the conclusion of voir dire, appellant challenged Cavazos on the ground that he would always answer the mitigation special issue in a way that the death penalty would result because he would not consider poverty or substance abuse to be mitigating factors. Cavazos's statements that particular types of evidence were not mitigating to him did not render him challengeable for cause. [24] Point of error seven is overruled.

24 *Joubert v. State, 235 S.W.3d 729, 734 (Tex. Crim. App. 2007).*

Appellant's eighth point of error concerns prospective juror Patrick Norton. Norton opined that, in general, the death penalty would be a just penalty for any murder. However, when questioned by the prosecutor, he affirmed that he would keep an open mind and follow the law concerning the future dangerousness and mitigation issues. When defense counsel questioned Norton about his written responses to the jury questionnaire, he stated that his own feelings were that if someone takes a life, his own life ought to be taken. However, Norton affirmed that, after the law had been explained to him, he would follow the law and not prejudge the case.

Norton also stated that he would consider mitigating circumstances. **[*22]** He acknowledged that he had written on his questionnaire that background was "not an excuse" in assessing punishment, but he affirmed that, after he was made aware of the context for that question, he could "probably" take into consideration anything that would "be leading up to

why [the defendant was] doing this crime." When counsel asked Norton whether he would consider poverty and education to be mitigating, Norton responded that they were not mitigating. Counsel also asked Norton whether he would consider a mental defect to be mitigating. Norton first stated that he was not sure, and then later he indicated that a mental defect would not be sufficiently mitigating. Defense counsel challenged Norton for cause on the grounds that he would always answer the future dangerousness question affirmatively after finding the defendant guilty, and he would not give any meaningful consideration to any mitigating factor.

Concerning future dangerousness, the record shows that Norton stated that he could set aside his personal views and follow the law. Concerning mitigation, Norton's statements that particular types of evidence were not mitigating to him did not render him challengeable for cause. **[*23]** [25] Point of error eight is overruled.

25 *Id.*

Appellant's ninth point of error concerns prospective juror Harold Wheeler. The record shows that, after the prosecutor explained the law concerning the special issues, Wheeler indicated that he would keep an open mind and follow the law. He said that he would presume a negative answer to the future dangerousness question until the State proved otherwise. The prosecutor pointed out that Wheeler had given a written response on the jury questionnaire, stating that mitigation is "never an issue" in a murder case. However, after the prosecutor explained the mitigation issue, Wheeler again confirmed that he would follow the law and keep an open mind.

During the defense's examination, Wheeler was somewhat less sure of his ability to set the defendant's guilt aside when considering the future dangerousness issue, but he continued to maintain that he would not always answer the future dangerousness question affirmatively, and that he would keep an open mind. Concerning the mitigation issue, Wheeler reiterated that he had not understood the law when he filled out the jury questionnaire, but he now understood the law and could consider mitigating evidence. **[*24]** When counsel questioned him about particular types of mitigating evidence, Wheeler stated that he was willing to consider mental illness as a mitigating factor.

At the conclusion of voir dire, counsel challenged Wheeler on the ground that he equivocated on the future dangerousness issue, was inclined to answer it affirmatively, and would not presume a negative answer, which effectively lessened the State's burden to prove future dangerousness. Counsel also challenged Wheeler on the ground that he would be unable to give fair consideration to mitigation, based on his written questionnaire answer that he did not think mitigation was appropriate in a murder case.

On this record, we find no abuse of discretion. After the law pertaining to the future dangerousness question had been explained to him, Wheeler indicated that he would set aside his personal feelings and follow the law. Although Wheeler wrote on his juror questionnaire that mitigation was "never an issue," after the law was explained to him, he affirmed that he would follow the law and consider mitigating evidence. Point of error nine is overruled.

Appellant's tenth point of error concerns prospective juror Stacy Chadwick. The **[*25]** record reflects that at the beginning of voir dire, Chadwick indicated that she generally favored the death penalty. She stated that she did not have any problem with assessing the death penalty because, in her view, someone who made the decision to take the lives of others "brought [the death sentence] upon himself." However, after the prosecutor explained the penalty phase and the special issues to her, Chadwick indicated that she could presume that the appropriate sentence would be life without parole until the State proved the defendant's future dangerousness to her. Concerning mitigation, she stated that she could keep an open mind. She indicated that drug use would not be "an excuse" for committing an offense. She acknowledged that after finding a defendant guilty and also answering the future dangerousness issue affirmatively, she would have to see "something massive" to cause her to find sufficient mitigation in order to change the death sentence to life. She agreed, however, to listen to the evidence and keep an open mind. Her answers during the defense's examination were consistent with these responses.

At the conclusion of voir dire, defense counsel challenged Chadwick on **[*26]** several grounds: she was

death-prone and would "equate finding of guilty with the result of death"; after an hour and a half of explaining, she still did not "seem to fully understand or appreciate the mitigation scheme put in place by the legislature"; and she would not properly consider the mitigation question.

The record does not support appellant's assertion that Chadwick would "equate" finding guilt with a death sentence. Chadwick initially said that someone who killed someone else had brought the death penalty upon himself, but after the law was explained to her, she affirmed that she would set aside her personal feelings and follow the law concerning future dangerousness. Nor does the record support appellant's assertions that Chadwick did not understand or appreciate the mitigation scheme and would not properly consider mitigation. Chadwick's statements that drug use was "not an excuse" and that she would have to see "something massive" in order to find sufficient mitigation did not render her challengeable for cause. [26] Point of error ten is overruled.

26 *See Gardner, 306 S.W.3d at 299-300*; *see also Saldano v. State, 232 S.W.3d 77, 92-99 (Tex. Crim. App. 2007)* (a potential juror **[*27]** who would place the mitigation burden on the defense is not challengeable for cause).

Appellant's eleventh point of error concerns prospective juror Phillip Magee. Magee expressed the view that he did not think that poverty "in and of itself" could be sufficiently mitigating. He also stated that he did not think that mental illness "by itself" would be mitigating. At the conclusion of voir dire, counsel challenged Magee, asserting that he was "mitigation impaired" because he could not consider defendant's specific mitigators, specifically poverty and mental illness. However, Magee's statements that he did not think particular types of evidence were mitigating "by themselves" did not render him challengeable for cause. [27] Point of error eleven is overruled.

27 *See Heiselbetz v. State, 906 S.W.2d 500, 509 (Tex. Crim. App. 1995).*

Appellant's twelfth point of error concerns prospective juror Catherine Roberts. The record shows that, at the beginning of voir dire, Roberts indicated that she generally favored the death penalty. When the prosecutor explained the punishment phase to her, she said that she would keep an open mind at punishment and make the State prove future dangerousness. She **[*28]** also affirmed that she could keep an open mind concerning mitigation.

Roberts's answers to defense counsel's questions were generally consistent with her answers to the prosecutor's questions. When defense counsel asked Roberts whether she thought that poverty or education would be sufficiently mitigating, she responded that they would not. When counsel asked her whether mental illness, child abuse, and spousal abuse would be sufficiently mitigating, Roberts answered that they could be, "depending on all the evidence." Defense counsel then challenged Roberts on the grounds that she would not be able to "presume a life sentence" and that she was mitigation-impaired because she would not consider poverty and education as mitigating factors.

The record does not support appellant's assertion that Roberts would be unable to presume that a life sentence would be appropriate after she found appellant guilty but before she heard the evidence at the penalty phase. When the law was explained to her, Roberts affirmed that she would make the State prove future dangerousness. Roberts's views as to whether particular types of evidence would be sufficiently mitigating did not render her challengeable **[*29]** for cause. Point of error twelve is overruled.

Appellant's thirteenth point of error concerns prospective juror Billy Esparza. At the beginning of voir dire, Esparza indicated that he generally favored the death penalty. When the prosecutor explained the punishment phase and the special issues to him, he indicated that he would presume that a sentence of life without parole would be appropriate until the State proved the defendant's future dangerousness. Initially, Esparza did not see a difference between the terms "possibility" and "probability," but he indicated that he understood the difference after the prosecutor explained it to him. Esparza affirmed that he would keep an open mind and listen to all the evidence before he decided the mitigation issue. He stated that he did not think that substance abuse, poverty, or education would be mitigating, but he said that he would keep an open mind and listen to all the evidence before making a decision.

When defense counsel asked Esparza about the distinction between probability and possibility, Esparza hesitated to give a direct answer. However, Esparza eventually affirmed that the term "probability" signified something more than "possibility":

Q. **[*30]** Let me talk about one other thing. . . . The prosecutor talked to you about the definition of "probability." Do you remember that?

A. Yes.

Q. What was your definition of "probability?"

A. I think I said 50/50.

Q. One of the things that concerned me, you said possibility and probability were the same thing. You remember that?

A. I don't think I said they were the same thing.

Q. Tell me, you see the difference between probability and possibility?

A. How could they be the same?

Q. No, the difference.

A. The difference? I don't know.

Q. You understand the law says that it's a probability?

A. Yeah.

Q. There are no definitions for these words. . . . I submit there's a definite distinction between probability and possibility[.]

A. Yes, okay.

Q. Do you see any distinction after the prosecutor went over it with you and talked about more than a mere possibility as far as definition of "probability"? Do you understand that?

A. Yes.

Q. Do you have any questions for me, Mr. Esparza?

A. No, sir.

At the conclusion of voir dire, defense counsel challenged Esparza on the grounds that he was mitigation-impaired in that he was unable to consider poverty or education as a mitigating factor. Counsel also challenged Esparza **[*31]** on the ground that he had "a problem [with] the definitions of 'possible' and 'probable.'"

Esparza's views that poverty and education were not mitigating did not render him challengeable for cause. Although he expressed some initial confusion concerning the distinction between "probability" and "possibility," he understood and accepted the distinction once it had been explained to him. Therefore, the trial court did not abuse its discretion in denying the challenge for cause. [28] Point of error thirteen is overruled.

28 *See Murphy v. State, 112 S.W.3d 592, 600 (Tex. Crim. App. 2003)* (juror who understood the distinction

between "probability" and "possibility" after it had been explained to him was not challengeable for cause).

Appellant's fourteenth point of error concerns prospective juror Michael Davis. During the State's examination, Davis said that he could keep an open mind and consider all the evidence in answering the future dangerousness and mitigation questions. During the defense's examination, counsel asked Davis what the result would be if he found the defendant guilty and answered the future dangerousness question affirmatively. Davis replied, "[P]robably the death penalty." **[*32]** Counsel asked Davis if his mind would be made up at that point, and he agreed that it would be. However, Davis then said that the death penalty should be invoked at that point "unless there's just mitigating circumstances to sway me the other way." Counsel asked Davis, if he found defendant guilty and a future danger, "[N]ow can you go forward and look at that [mitigating evidence] and unring the bell?" Davis answered, "Yes." But then, when counsel asked, "There isn't anything you would ever consider to be mitigating to unring that bell, so to speak?" Davis responded, "Uh, yeah."

The court questioned Davis in order to clarify his responses. During this questioning, Davis indicated that after he found a defendant guilty and answered the future dangerousness question affirmatively, the result would be a death sentence if he did not find sufficiently mitigating evidence, but a life sentence if he found sufficient mitigation. At the conclusion of voir dire, counsel challenged D avis on the grounds that he was "mitigation-impaired," and that once he found the defendant guilty and answered the future dangerousness question affirmatively, he would not consider mitigating factors. Counsel also **[*33]** asserted that after finding the defendant guilty, Davis would always find the defendant to be a future danger.

The record shows that Davis gave inconsistent answers with regard to whether he would consider mitigating evidence, but he affirmed on several occasions that he would follow the law and consider mitigating evidence. Appellant's assertion that Davis would always find the defendant to be a future danger is not supported by the record. We afford particular deference to the trial court's determination that Davis was not challengeable for cause. [29] Point of error fourteen is overruled.

29 *See King, 29 S.W.3d at 568.*

Appellant's fifteenth point of error concerns prospective juror John Reeves. In addition to setting out the grounds for defense counsel's challenge to Reeves, appellant "submits that the use of the phrase 'trips up juror[s]' by the State influenced this juror's answers in that it made him aware of how he needed to answer the question of future dangerousness to be qualified as a juror rather than expressing his true feelings concerning the death penalty." We understand appellant to mean that the prosecutor's use of this phrase impeded the defense's ability to develop a challenge **[*34]** for cause by discouraging Reeves from answering defense counsel's questions candidly.

During voir dire, the prosecutor discussed the law applicable to the guilt phase, and then explained that, if the jurors found the defendant guilty, they would be given two questions at the punishment phase. The prosecutor explained that, after finding the defendant guilty and before hearing any evidence at the punishment phase, the jury would have to presume that life in prison would be the appropriate punishment. Reeves stated that he would keep an open mind in answering the future dangerousness question and not automatically assume that the defendant would be a future danger. The prosecutor then continued:

Q. I'm gonna go back here. Never fails, once I have no further questions for you and [defense counsel] gets to ask you questions, he always trips up jurors on this.

At the point you have found someone guilty. Think where we are on this. The point you have actually found him guilty. And you found him guilty of a horrendous, horrible murder, multiple people, with no justification, not an accident, not self-defense; [he's] not defending a third person; he's not insane.

What are your thoughts on the **[*35]** death penalty at that point?

A. I certainly would be leaning in that direction.

Q. Okay. Now, I think that's normal. That's where he trips 'em up.

Defense: Your honor, I object to comments on counsel as far as --

Court: They just have different points of view when they ask you questions, Mr.--

A. Why should I get tripped up? Why should I be any different?

Q. Your opinions are fine.

At this point, as a juror, though, you haven't heard punishment evidence yet. So you, as a juror, cannot be leaning towards the death penalty. In fact, just the opposite; you have to be leaning towards life until the state proves to you it should be death.

You see what I mean?

A. Yes. I assume you're saying you almost--if you can, you're almost wiping the slate almost clean to proceed to the next basic trial part.

Q. Until you can hear everything. Then you can consider the fact that you found him guilty. You can't automatically lean towards death. The law wants you to listen to everything. May be something in his background.

A. I took your question to mean: If that's all there was at that point, what would your feelings be?

Q. I can tell you that if the state weren't seeking the death penalty and you found someone guilty **[*36]** of the same crime it's an automatic life sentence. Maybe it's easier to think in terms of that.

A. That's probably a better way.

Q. At the point you found him guilty, that's a life sentence, okay? That's a life sentence.

Now, if the state puts on evidence . . . that convinces you beyond a reasonable doubt that he's probably gonna continue being a danger, even in prison, at that point you get to change that to a death sentence.

Does that --

A. Makes more sense, yes.

Q. If I come back and ask you again: At the point you just found him guilty, as a juror, what are you thinking?

A. As a juror. Right now I'm at life sentence.

Q. So you--you know, it is a mental exercise. What it really comes down to, is it a mental exercise that you feel you can give more than lip service, that you could actually do as a juror? Or would you have feelings you really would be leaning towards a death sentence, honestly, and it may not be something you could actually give more than lip service to?

A. I think I could do the right way, as you explained. I think not knowing anything about the procedure before coming here, not knowing what the circumstances were with regards to the death penalty and that type thing--regardless **[*37]** what my answers were, I didn't know. And I said, just a layman, we would think a horrendous crime, you would lean. Now you explained there's two procedures and the proper way to do it. But just coming in here, I would [lean toward the death penalty].

Q. Obviously, it would be unfair to get into the facts at this point, try to commit you one way or the other. I can, however, assure you it's **capital** murder. It's gonna be a horrific crime, no matter which way you look at it, by the nature of the crime. . . . The law says you still go with that automatic assumption it's a life sentence unless you hear something in either phase of the trial that convinces you he's gonna be a continuing danger.

So you're telling me, "If the law requires that of me, I can d[o] it"?

A. Yes.

Q. Or, "I think I can do it"?

A. I can do it, yes.

The prosecutor then discussed the mitigation issue, and Reeves said that he would give it fair consideration if the jury reached that question after finding the defendant guilty and finding that the defendant would be a future danger.

Defense counsel remarked on the prosecutor's use of the words, "trips 'em up" during his examination of Reeves:

Q. You know, it's funny. [The prosecutor] **[*38]** used the words "tripped you up."

I want to use words they use: "follow the law," "be fair and impartial." Those are all words that I think sometimes, even the judge points out, it makes someone answer in a way they think they're supposed to answer.

If I came up and said, "Mr. Reeves, this is the law. You can follow the law, can't you," that implies that the answer is yes and it's harder to say no in that situation. That's what the judge was talking about when he talked to you. All we want is honest answers here. There are laws that people disagree with. And if that's the situation, we need to know.

Q. You understand that if you find someone guilty, you go forward to the punishment stage. The first special issue, the future issue--the future-dangerousness issue, if it's determined beyond a reasonable doubt the individual will probably be a continuing threat to society, then you answer yes. Then if that answer is yes, you proceed to Special Issue Number 2.

If the answer's no, you know what happens? He's not a future danger.

A. It's automatic life in prison.

Q. Exactly. I'm not trying to trip you up.

A. I always slow up on your answers. I have been warned.

Q. And we're gonna get back to the question **[*39]** that she said that I was trying to trip people up on here in a minute.

You look at the mitigating circumstance or circumstances that would warrant a life sentence without possibility of parole. If the answer's yes, there's mitigating circumstances, then what happens?

A. Life sentence.

Q. Right, exactly. I'm not trying to--

A. I'm processing your question.

Q. If the answer's no, there aren't any mitigating circumstances?

A. It's the death penalty.

Q. Sure. All right. So what I want to look at is put you in a hypothetical. You answered this originally one way with the prosecutor. She had used the words "tripped up." It's not. It's the natural tendency of people. If that's the way someone leans, one way or another, that's what we need to know.

A. Sure.

Q. The hypothetical gets to this.

If you're on a jury, hypothetically, you and 11 other individuals find someone guilty of **capital** murder. As the prosecutor explained to you, it's gonna be a heinous crime. It's a **capital** murder. You can imagine it's horrific. Person intended to commit the crime, meant to kill two people. Wasn't self-defense[;] wasn't defense of another person; individual wasn't insane.

As the prosecutor said, at that point what are **[*40]** your thoughts on the death penalty?

A. We have already decided?

Q. You have determined he's guilty of **capital** murder. See I used it four times, but it's tripped up--but people are--if you found someone guilty, people typically say, "You know what? The death penalty."

A. I think not knowing what I know now, you assume that's what you would think in a death-penalty case. Been explained a little differently to me. The real question is can I change my thinking, in the second phase. I feel I can. My answer is quite honest. Coming in here, that's my normal reaction. . . .

Q. That's what I want to get to. When the rubber hits the road, can you do it?

A lot of people said, "I might be able to." I give the example like getting on a plane flying to Austin and the pilot says, "I think I can get us there. I might be able to." You don't get a warm, fuzzy feeling at that point and might be heading for the exit door.

That's where it's difficult; can someone really do that? The prosecutor used the words of a "mental exercise." It's more than that. It's really looking introspectively at yourself: "Can I do this? Setting aside my initial reaction, which is leaning towards the death penalty or something, that **[*41]** you know what? I'm probably gonna get in there and will probably lean towards that side. I know the law tells me to do one thing. I'm supposed to presume life. I don't know if I can."

Push comes to shove, that's what I'm trying to find out. It extends to the next question. Tell me your thoughts.

A. I think I'm on board with the special issue question so I think that helps me in separating myself from the guilty to the punishment phase. The second board up there with the special issue, that helps me say yes, I'm able to do it.

Q. You used a couple [of] terms that perk my ears up: "I think I can," "I can probably."

A. Well, it's a tough one. This is all new to me of--I'm not there. You are.

Q. I understand. That's the dilemma people get in with the answers. Unfortunately, the law requires yes-or-no answers. I'm not saying--I told you the law. Someone's supposed to, but the question is, can you do that? If you can, that's fine. If you can't, I need to know i[t]. Unfortunately, can't accept "I think" or "probably."

A. I think I can. I know I can do it. I can do this.

Reeves continued to agree that he could follow the law concerning future dangerousness. He also stated that he would consider mitigating **[*42]** circumstances. When defense counsel questioned him about specific types of potentially mitigating evidence, Reeves indicated that he would consider poverty and education "to a small degree" as mitigating factors, and he would consider mental illness to a greater degree. Counsel then challenged Reeves for cause on the grounds that he would be leaning towards death and would always find future dangerousness after finding the defendant guilty.

The record reflects that, once the law was explained to him, Reeves agreed that he could set aside his personal feelings and follow the law, and he would not automatically lean toward the death penalty. In addition, the record does not support appellant's assertion that Reeves would always find future dangerousness after finding the defendant guilty. Point of error fifteen is overruled.

Appellant's sixteenth point of error concerns prospective juror Ronald Jarvis. Counsel challenged Jarvis on the ground that he was "mitigation impaired" and would not consider poverty as a mitigating factor. The record shows that Jarvis indicated that he would place the burden on the defense to show sufficiently mitigating evidence, and he did not consider poverty **[*43]** to be a mitigating factor. Neither of these facts rendered him challengeable for cause. [30] Point of error sixteen is overruled.

30 *See Gardner, 306 S.W.3d at 299-300*; *Saldano, 232 S.W.3d at 92, 96, 98*.

Appellant's seventeenth point of error concerns prospective juror Susan Cassel. He contends that Cassel was challengeable for cause under *Article 35.16(a)(5)*, which provides that a challenge for cause may be made by either the state or the defense for the reason that

> the juror has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case[.]

A "mental defect" may be present when the prospective juror's responses show an inability to understand the jury's role in **capital** proceedings. [31]

31 *Matamoros v. State, 901 S.W.2d 470, 476 (Tex. Crim. App. 1995)*.

During voir dire, Cassel said that she understood and would follow the law concerning the State's burden of proof at the guilt phase. She also stated that after finding a defendant guilty, she could presume that a life sentence **[*44]** was the proper punishment. She affirmed that she could presume that the defendant would not be a future danger, unless and until the State proved future dangerousness during the punishment phase. Cassel also said that she would be open to considering mitigating circumstances.

Near the conclusion of voir dire, defense counsel asked Cassel if she had any questions for him. Cassel asked for clarification about the timing of the different parts of the trial. Counsel explained that the guilt phase would come first, and then, if the jury found the defendant guilty, the punishment phase would follow. During punishment, the jury would hear evidence concerning both future dangerousness and mitigation, all at the same time. The jury would then retire to deliberate on the future dangerousness question and then, if the jury found that the defendant was a future danger, the jury would deliberate on the mitigation question. Cassel thanked defense counsel for this information.

Counsel then challenged Cassel for cause, asserting,

> Judge, at this time we spent over an hour and a half speaking to this juror. It's clear she does not have the mental capacity to fully understand the nature of the issues before **[*45]** her and we do not feel that--I mean, we have had to go back and cover these things in depth on every point that applies and she's

> been very--wavered back and forth as far as whether or not she has an understanding what's being asked as well as an appreciation of the issues involved. We feel that her inability to understand the issues, to understand--
>
> I'm talking to her about the special issues in punishment and she's going back asking how the trial works. That's not the kind of juror that the law envision[s] sitting on this type of case. . . .
>
> We would challenge the juror for cause for a lack of appreciation and understanding of the process and we would ask the court to excuse this juror for cause.

e trial court responded, "I'm not sure, Mr. Johnson, whether you and I just observed the same juror [for] an hour and a half. Be that as it may, your motion that she be stricken for cause is denied." Counsel then requested an additional peremptory strike, which was denied, and he identified Cassel as an objectionable juror. Cassel was seated as the twelfth juror.

This record does not demonstrate that Cassel had any bodily or mental defect that rendered her unfit for jury service. The record **[*46]** shows only that, when defense counsel asked Cassel if she had any questions, she asked him for clarification about the timing of the different parts of the trial. Counsel answered her question, and she thanked him. The trial court did not abuse its discretion in denying appellant's challenge for cause. Point of error seventeen is overruled.

Because appellant must show that the trial court erred by denying his challenges for cause to three prospective jurors, we need not consider his third and fourth points of error, [32] and they are overruled.

> 32 Those points of error deal with appellant's challenge for cause to prospective jurors Kristine Marie Bell and Kimberlyn Moriarity.

In points of error eighteen and nineteen, appellant asserts that, as a result of the errors alleged in points one through seventeen, the jury as constituted was biased or prejudiced, thus depriving appellant of a fair trial in violation of the United States Constitution and the Texas Constitution. [33]

> 33 Appellant does not make any separate argument in support of his claim of state constitutional error, and so we resolve this claim under the federal constitution only. *See Heitman v. State, 815 S.W.2d 681, 690 n.23 (Tex. Crim. App. 1991).*

We **[*47]** have found no error with respect to appellant's individual jury selection points of error, and so these points, complaining of cumulative error, are also without merit. Points of error eighteen and nineteen are overruled.

B. Motion for Separate Juries

In his twentieth point of error, appellant argues that the trial court erred by denying his pretrial motion to impanel separate juries for the guilt phase and the penalty phase. Appellant urges that the effect of the death-qualification process on appellant's jury violated his right to a fair trial "as embodied in the concepts of equal protection [and] due process under both the Texas and United States Constitution[s]." [34] He cites to social-science studies reporting that death-qualified jurors are more conviction-prone and more likely to believe that the law favors the death penalty as an appropriate punishment than jurors who have not gone through the death-qualification process.

> 34 *Id.*

The United States Supreme Court has rejected similar claims that relied, in part, on the same social studies cited by appellant. [35] After identifying "some of the more serious problems" with those studies, the Supreme Court held that, even if those studies **[*48]** established that the death-qualification process does in fact produce juries that are somewhat

more conviction-prone, "the Constitution does not prohibit the States from 'death qualifying' juries in **capital** cases." [36] This Court has also rejected the argument that the death-qualification process unconstitutionally influences jurors to favor the death penalty. [37] Furthermore, there is no constitutional impediment to a determination of sentence by the same jury that determined guilt. [38] Point of error twenty is overruled.

35 *See Lockhart v. McCree, 476 U.S. 162, 170, 106 S. Ct. 1758, 90 L. Ed. 2d 137* nn.4, 6 (1986).
36 *Id. at 173*.
37 *See Ramos v. State, 934 S.W.2d 358, 369 (Tex. Crim. App. 1996)*.
38 *See Hathorn v. State, 848 S.W.2d 101, 110 (Tex. Crim. App. 1992)*.

C. Special Issues Not Charged in Indictment

In his twenty-first point of error, appellant claims that the trial court erred by denying his pretrial motion to preclude the death penalty as a sentencing option because the indictment did not include notice of the penalty-phase special issues, and these issues are elements of the offense that must be pleaded in the indictment. He acknowledges that we have rejected similar claims. [39] We are not persuaded to reconsider our **[*49]** prior decisions. Point of error twenty-one is overruled.

39 *See, e.g., Joubert, 235 S.W.3d at 732*.

D. Spectator Outburst at the Punishment Phase

Appellant asserts in his twenty-second point of error that the trial court committed error by not declaring a mistrial after a spectator caused a disturbance in the presence of the jury. He argues that the disturbance was an external influence on the jurors, and that the trial court's refusal to grant a mistrial violated his constitutional right to be tried by impartial jurors whose verdict is based solely on the evidence at trial. He further asserts that the spectator's conduct was "designed to deny appellant a fair trial."

A trial court's denial of a request for a mistrial is reviewed under an abuse of discretion standard. [40] An appellate court views the evidence in the light most favorable to the trial court's ruling, considering only those arguments before the court at the time of the ruling. [41] The ruling must be upheld if it was within the zone of reasonable disagreement. [42] A mistrial is an extreme remedy that should be granted "only when residual prejudice remains" after less drastic alternatives have been explored. [43] When the party requesting **[*50]** a mistrial does not first request a lesser remedy, we will not reverse the court's judgment if the problem could have been cured by a less drastic alternative. [44]

40 *Ladd v. State, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)*.
41 *Ocon v. State, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009)*.
42 *Id*.
43 *Id. at 884-85*.
44 *Id. at 885*.

Spectator conduct that impedes normal trial proceedings will not result in reversible error unless the defendant shows a reasonable probability that the conduct interfered with the jury's verdict. [45] Injury to a defendant is measured on a case-by-case basis. [46]

45 *Howard v. State, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996)* (reh'g granted, reversed on other grounds).
46 *Landry v. State, 706 S.W.2d 105, 112 (Tex. Crim. App. 1985)*.

In this case, the record shows that, during the prosecutor's closing argument at the punishment phase, the proceedings were interrupted when a man rushed toward a break in the rail that separated the spectators from the "attorney-accessible-only area" of the courtroom. The prosecutor had been arguing that mercy was not appropriate in this case:

We know **Robert Sparks'** background, how he grew up.

* * *

You know, **Robert Sparks'** mom came and testified yesterday **[*51]** and she testified that Robert was two or three years old and would wake up in the middle of the night. She did what a parent's supposed to do. She . . . gave him water or gave him milk and gave him love, because that's what an adult's supposed to do with a young child when they're scared in the night or wake up in the night.

What did little Troy [47] get from this man when the tears start[ed] coming out of his eyes as Robert stuck that knife into him over and over again? You know what little Troy got? He didn't get milk, he didn't get water. He got another plunge of that blade.

47 Witnesses and counsel sometimes referred to Harold as "Troy" or "Junior Mac."

I don't care how paranoid you are --

At this point, the record shows an audience interruption.

Bailiff: Whoa up, brother. Stop there.

Bailiff: Get back.

Bailiff: Stay there. Get him.

Defense: Ask for a recess, your honor.

Court: We'll take a break for a minute. Neal, if you would get the jury a second.

After the jury had been removed, the trial court explained the interruption.

Court: Let the record reflect we're outside the presence of the jury.

So the record's clear, during [the prosecutor's] arguments somebody in the audience jumped up to move **[*52]** towards the break in the rail that brings you into the attorney-accessible-only area of the courtroom.

The bailiffs quickly and aptly took care of the situation. Took a short break.

* * *

Defense: Your Honor, at this time the defense is gonna move for a mistrial.

Like to at this time make a bystander's bill and would call a witness to testify in regards to the actions. This is the second time this individual has disrupted the court proceedings during portions of the descriptions of the evidence.

And if the court will allow, I'll make an offer of proof it's my understanding this is the same individual that during testimony in the guilt/ innocence phase of the trial, jumped up, started yelling and had to be escorted out of the courtroom by the prosecution.

We objected at that time. The court--

Prosecutor: This case?

Defense: Yes. In fact, the court told members of the jury [sic; audience] if there was any more outbursts in regards to testimony, they would be barred from the courtroom.

After an off-the-record discussion at the bench, appellant's counsel continued:

Defense: Judge, there's been discussion at sidebar in regards to the exact timing of when this--the exact events occurred. There was **[*53]** an outburst in the testimony of the guilt/innocence phase, and due to that outburst, my recollection, the court was going to excuse the jury to admonish the jury--or admonish the audience any further outbursts would result in any individuals being barred from further admittance into the courtroom, which time the jury was standing up at--the prosecutor Heath Harris was required to get up and take Harold Sublet, Sr., and escort him out of the courtroom because he again approached the rail.

It's my recollection, Judge, and I believe it to be accurate, and would call Heath Harris to testify.

Prosecutor: After arguments you can make your bill.

Court: What's your motion?

Defense: Just let the record to reflect that now, in the conclusion or portion of [the prosecutor's] argument in regards to the infliction of wounds on Harold Sublet, Sr.--Jr., this same individual's now rushed the jury rail in front of the jury.

> We believe this type of thing has prejudiced the defendant in the eyes of the jury. This individual again has been escorted out of the courtroom by the prosecutor Heath Harris, as well as several members of the bailiff[']s staff. We believe that. . . in the jury's eyes we have been prejudiced **[*54]** and ask the court to grant a mistrial at this time.

Court: All right. [A]ny response?

Prosecutor: Ask the court to deny the motion. The jury doesn't know who this fella is, who he's related to. They can draw their own conclusion and has got nothing to do with their deliberations.

Court: I'm gonna deny your motion for mistrial. So the record's clear, I'll give each side a chance to supplement the record later with their recollection of prior occurrences. [48] Mine's a little different than [defense counsel's].

The court admonished the members of the audience that any further outbursts would result in the person who caused the outburst being jailed and held in contempt. The jury was then escorted back into the courtroom, and the prosecutor continued his closing argument without further interruption.

> 48 The record does not reflect that either party supplemented the record with regard to any prior outbursts. Our independent review of the record reveals that during a portion of the prosecutor's opening argument that described Harold's murder, there was crying in the audience and a pause in the proceedings. The prosecutor stated, "I'm sorry. But [appellant] wasn't through yet," and went on to describe **[*55]** the murder of Raekwon. Later, during the State's examination of Chare's sister, Nicole, at the punishment phase, someone in the audience called out, "Bring it on." The examination then continued. We are unable to locate any objection or motion responsive to either of these prior outbursts. We decline to infer preservation or harm from this sparse record. *Cf. Howard, 941 S.W.2d at 117* (declining to assume that conduct

In the past, we have found that an emotional outburst from members of the victim's family was not harmful when the outburst was non-verbal and the jury was immediately removed from the courtroom. [49] In *Landry*, the decedent's family members testified during the trial with such emotion that the court recessed at several points in order to allow them to regain their composure before continuing. [50] Later, during the defendant's closing argument, the decedent's widow and brother caused a commotion in the audience, and the judge retired the jury. [51] Defense counsel moved for a mistrial, noting for the record that he had been interrupted by an emotional outburst from the decedent's widow, who "was in the process of fainting and leaving the courtroom," and also by an outcry from **[*56]** the decedent's brother that was loud enough to be heard near the jury rail. [52] Finding it significant that these outbursts did not involve any verbal outcries and that the jury was immediately removed from the occurred when the record did not reflect it).

49 *See Landry, 706 S.W.2d at 111-12*.
50 *Id*.
51 *Id*.
52 *Id. at 112*.

courtroom, we held that appellant had failed to demonstrate how these emotional responses reasonably could have interfered with the jury's verdict. [53]

53 *Id*.

More recently, we held that a spectator's verbal, emotional outburst did not require a mistrial. In *Gamboa*, during a State's witness's testimony, a family member of the murder victim shouted, "You did this for 200 dollars?" [54] We determined that the trial court's statement to the jury that the outburst was made by someone who was not a witness and not under oath, coupled with the court's instruction to disregard what was said, was sufficient to cure the impropriety. [55] We held that nothing in the record suggested that the outburst was of such a nature that the jury could not ignore it and fairly examine the evidence in arriving at a verdict. [56]

54 *Gamboa v. State, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009)*.
55 *Id*.
56 *Id*.

Here, **[*57]** Harold Sublet, Sr., never testified. As the prosecutor pointed out, the jurors did not know who he was, but could "draw their own conclusions." Further, the conduct at issue was Sublet's non-verbal, emotional response to the prosecutor's closing argument. Rushing toward the jury rail was, arguably, more disruptive than the conduct at issue in *Landry* and *Gamboa*, but Sublet was quickly escorted out of the courtroom, and the jury was immediately removed.

Although the harm, if any, could have been cured by an instruction to disregard, appellant did not request this "lesser remedy." [57] Further, appellant has not carried his burden of showing a reasonable probability that the outburst interfered with the jury's verdict or posed a reasonable probability of injury to himself. Appellant offers only conclusory assertions that this disturbance violated his constitutional right to an impartial jury and was "designed" to deny him a fair trial. Point of error twenty-two is overruled.

57 *See Ocon, 284 S.W.3d at 885*.

E. Jury Instructions at the Guilt Stage

In point of error twenty-three, appellant claims that the trial court erred in denying his requested jury instruction at the guilt phase on temporary **[*58]** insanity caused by involuntary intoxication. He argues that evidence of his belief that Chare had been giving him "yard treatment poison" was evidence of involuntary intoxication. He also points to Shunta's testimony that, when appellant showed up in front of her house shortly after the offense, he was behaving strangely and she thought he was on drugs.

Under *Section 8.01 of the Penal Code*, it is an affirmative defense to prosecution that, at the time of the conduct charged, the defendant, as a result of severe mental disease or defect, did not know that his conduct was wrong. [58] We have held that *Section 8.01(a)* implicitly encompasses the defense of temporary insanity due to involuntary intoxication. [59] Accordingly, in deciding whether the evidence raises the defense of involuntary intoxication, we examine whether (1) the defendant exercised no independent judgment or volition in taking the intoxicant; and (2) as a result of a "severe mental disease or defect" caused by the involuntary intoxication, the accused did not know that his conduct was wrong. [60]

58 *TEX. PENAL CODE § 8.01(a)*.
59 *Mendenhall v. State, 77 S.W.3d 815, 817-18 (Tex. Crim. App. 2002)*.
60 *Id*.

Here, the requested jury instruction **[*59]** did not correctly recite the applicable law. Instead, the requested instruction recited the law as it existed prior to legislative amendments in 1983:

> You are instructed that involuntary intoxication is a defense to prosecution for an offense when it is shown that the accused has exercised no independent judgment or volition in taking the intoxicant and that as a result of his intoxication the accused did not know that his conduct was wrong, or [was in]capable of conforming his conduct to the requirements of the law allegedly violated.

When appellant committed this offense, it was no longer an affirmative defense to prosecution that the defendant, as a result of involuntary intoxication, was incapable of conforming his conduct to the requirements of the law. [61] Therefore, appellant was not entitled to the specific instruction that he requested. [62]

61 *See Mendenhall, 77 S.W.3d at 817-18*.
62 In his brief, appellant relies upon *Torres v. State, 585 S.W.2d 746 (Tex. Crim. App. 1979)*, which was decided under the pre-1983 insanity law.

In addition, the record shows that, during the charge conference at the guilt phase, defense counsel explained that he was requesting the instruction on temporary **[*60]** insanity due to involuntary intoxication because appellant wanted it. Counsel did not distinctly specify the ground or basis for this requested instruction as required by *Article 36.14*. Further, we are unable to find any evidence in the record that would support a finding that appellant did not know that his conduct of stabbing his wife and two stepsons to death was "wrong." [63] In his brief on appeal, appellant points to evidence that he believed his family was poisoning him, but he fails to cite any record evidence that would support a rational jury finding that he did not know that his murderous conduct was "wrong." Nor did he cite any such evidence to the trial judge when he requested this jury instruction. Having failed to point out the factual basis for his requested instruction to the trial judge, appellant failed to preserve this issue for appeal. [64] Point of error twenty-three is overruled.

63 As the State points out, there is considerable evidence that appellant knew that his conduct was wrong: he repeatedly apologized to Lakenya and Garysha for killing their mother and brothers and for raping them; he called 911 from Shunta's house and confessed to the dispatch operator; he **[*61]** told Shunta that, if there was a reward for catching him, his daughter Brianna should get it; he tried to avoid capture by attempting to change the license plate on his car; when he did not succeed in changing the plate, he drove to his mother's house and borrowed her car; he fled to Austin, but then returned and called a detective to ask about the death penalty and turning himself in.
64 *See Mays v. State, AP-75,924, 318 S.W.3d 368, 2010 Tex. Crim. App. LEXIS 480, at *37-40* & n.53 (Tex. Crim. App. 2010) (holding that a defendant's failure to specify the facts or legal theory supporting the submission of a defense forfeits the error on appeal).

In point of error twenty-four, appellant claims that the trial court erred in denying his requested jury charge at the guilt phase on self-defense. He argues that his belief that he was being poisoned entitled him to this instruction, and that

denying the instruction denied him the right to present his defenses to the jury and therefore denied him his right to a fair trial.

A person is justified in using deadly force against another when and to the extent that he reasonably believes the force is immediately necessary to protect him self against **[*62]** another's use or attempted use of unlawful deadly force. [65] A defendant is justified in defending against danger as he reasonably apprehends it. [66] If the evidence, viewed in the light most favorable to the defendant, does not establish self-defense, the defendant is not entitled to an instruction. [67]

65 *TEX. PENAL CODE §§ 9.31(a), 9.32(a).*
66 *Hamel v. State, 916 S.W.2d 491, 494 (Tex. Crim. App. 1996).*
67 *Ferrel v. State, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001).*

Appellant was not entitled to a self-defense instruction under the facts of this case. Appellant was charged with the murders of Harold and Raekwon, but he does not assert that he reasonably believed that deadly force against his nine- and ten-year-old stepsons was immediately necessary to protect himself. At trial, there was no evidence that appellant reasonably apprehended any deadly force from his stepsons. Appellant confessed that the boys were asleep in their bedroom when he decided to kill them, and that he went into their room and woke them up, one by one, to kill them. Under these circumstances, the trial court did not err in refusing appellant's requested instructions.

In addition, the record shows that, during the charge **[*63]** conference at the guilt phase, defense counsel requested a jury instruction on self-defense. Counsel explained that he was requesting the instruction because appellant wanted it. Counsel did not specify the facts or legal theory that supported the submission of this defense. Therefore, the error was forfeited on appeal. [68] Point of error twenty-four is overruled.

68 *See Art. 36.14*; *Mays, 318 S.W.3d 368, 2010 Tex. Crim. App. LEXIS 480, at *37-40 &* n.53.

F. Expert Witness at the Punishment Phase

In his twenty-fifth point of error, appellant asserts, "The trial court erred in overruling appellant's objection to the proffered expert testimony of witness A.P. Merillat." Appellant argues that Merillat testified about subjects--the prison classification system and opportunities for violence in the penitentiary--that were beyond his expertise. [69]

69 Appellant also complains that Merillat's testimony was prejudicial and inflammatory and denied him a fair trial. However, defense counsel did not object to Merillat's testimony on this basis at trial. Therefore, he failed to preserve this issue for appeal. *Tex. R. App. P. 33.1(a).*

Texas Rule of Evidence 702 permits a witness qualified by knowledge, skill, experience, **[*64]** training, or education to testify on scientific, technical, or other specialized subjects if the testimony would assist the trier of fact in understanding or determining a fact issue. The party presenting the witness as an expert has the burden of proving that the expert is qualified. [70] A witness's qualification to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things. [71]

70 *Wyatt v. State, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000).*
71 *Id.*

When addressing fields of study that are based primarily upon experience and training as opposed to the scientific method, the appropriate questions are: (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. [72] The fact that the general subject matter is within the comprehension of the average jury does not require the exclusion of expert testimony. [73] The question of whether a witness offered as an expert possesses the required qualifications is **[*65]** a question resting largely in the trial court's

discretion. [74] Absent a clear abuse of discretion, the trial court's decision to admit or exclude testimony will not be disturbed. [75] The appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement. [76] Appellate courts may consider several criteria in assessing whether a trial court has clearly abused its discretion in ruling on an expert's qualifications, including the complexity of the field of expertise, the conclusiveness of the expert's opinion, and the centrality of the area of expertise to the case. [77]

72 *Nenno v. State, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998)*, *overruled on other grounds by State v. Terrazas, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999).*
73 *Rodgers v. State, 205 S.W.3d 525, 527 (Tex. Crim. App. 2006).*
74 *Nenno, 970 S.W.2d at 561.*
75 *Id.*
76 *Weatherred v. State, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).*
77 *Rodgers, 205 S.W.3d at 528.*

At the *Rule 705* hearing, A.P. Merillat testified that he was a criminal investigator for the Special Prosecutions Unit, which investigates and prosecutes offenses within the prison system. Merillat testified that he had been investigating such crimes **[*66]** for almost twenty years and that he had testified in court many times concerning (1) the prison classification system that would apply to convicted **capital** murderers who received life sentences; and (2) the opportunities for convicted **capital** murderers to be violent in prison. Merillat acknowledged that his knowledge of these subjects was mostly anecdotal, derived from his own investigations of prison crimes. He testified that the Special Prosecutions Unit is not part of the Texas Department of Criminal Justice ("TDCJ"), but that he spent a year working with internal affairs at TDCJ on use-of-force cases. Merillat testified that he would not be giving an expert opinion particular to appellant's case but instead would testify generally about opportunities to be violent in the prison system. Defense counsel questioned the need for expert testimony on this subject, asserting that it was "just common sense" that there were opportunities for violence in prison. Merillat responded that he had learned things through his job that the general public, as well as most prison officials and politicians, did not know.

Defense counsel repeatedly expressed concern that Merillat would testify about **[*67]** specific bad acts by individual prisoners in order to scare the jury. Counsel argued that he would have no way to verify the facts of these offenses if Merillat testified about them. Counsel also argued that Merillat was not qualified to testify about general classification and prison operations. The trial court indicated that Merillat would not be allowed to testify about particular incidents, but he would be allowed to answer general questions and testify about numbers or statistics. Counsel then questioned Merillat about his qualifications to testify concerning numbers and statistics. Merillat responded by referring to a list containing the names of convicted **capital** murderers and the offenses they had committed while they were in prison. He stated that he expected to use that list as proof of his knowledge of the opportunities for violence in prison. The only statistics he proposed to discuss were contained in a report prepared by TDCJ. Merillat acknowledged that anyone could testify about what the report said, as it was widely available and no special expertise was required to interpret it.

Toward the end of the hearing, counsel argued, "He's not an expert in the field. All he's **[*68]** here to do is scare them about some anecdotal information he has about particular cases he investigated in the past. That's just a job, not expertise." The trial court disagreed, stating again that Merillat would be able to answer general questions, but also noting that the court would be receptive to counsel's objections to testimony concerning specific incidents. The court did not grant counsel's written motion in limine concerning specific bad acts because the court had not had an opportunity to read through it. The record does not reflect that counsel re-urged his motion in limine before Merillat testified in the presence of the jury.

In the jury's presence, the prosecutor began to question Merillat about the prison classification system, and defense counsel asked for an opportunity to conduct additional voir dire. Counsel then questioned Merillat about his expertise on prison classification. Merillat testified that he had received the same classification training as TDCJ classification employees. Counsel objected again to Merillat's lack of formal training, pointing out that he was never employed by

TDCJ even though he spent a year working with TDCJ internal affairs. Counsel's **[*69]** objection was overruled.

Merillat then described the prison environment experienced by life-sentenced **capital** murderers classified as G-3 inmates: they could go to chow hall and the library with other inmates, and they could go to school, medical facilities, and visitation. They could not work outside the prison walls without direct armed supervision. Merillat acknowledged that TDCJ's classification board could impose additional restrictions based on its review of an inmate's criminal history and records of bad acts, and in very limited circumstances an inmate might start out in administrative segregation or with a classification that was more restrictive than G-3. Even with restrictions, however, a significant level of violence occurred within the prison system. Merillat testified that there were over 14,000 disciplinary convictions for assaults by inmates on other inmates, over 5,000 disciplinary reports of assaults by inmates on staff, and 156 murders in prison between 1984 and 2008. He also stated that inmates had escaped from prison. He described the restrictive environment of death row and testified that even on death row, it was possible to commit crimes. Merillat stated that **[*70]** an inmate could choose to be violent or choose to be peaceable, and he specified that he was not expressing any opinions about this particular case.

Merillat's testimony was generalized educator-expertise information designed to "assist" the jury under *Rule 702*. Therefore, the trial judge did not abuse his discretion in admitting it after determining that Merillat was qualified to testify as an expert regarding the prison classification system and opportunities for violence in prison. Point of error twenty-five is overruled.

G. Victim-Impact Evidence

In his twenty-sixth and twenty-seventh points of error, appellant asserts that the trial court erred in overruling his objections to State's Exhibits 115 and 116--the "progress notes" written by LaKenya and Garysha's therapist--which were admitted at the punishment phase. Appellant argues, "The proffered evidence is not relevant as it amounts to extraneous victim impact evidence."

The record shows that when the prosecutor offered Exhibits 115 and 116 into evidence, defense counsel objected generally that the information in them was not admissible and not relevant to any issue before the jury. He did not specifically object that the exhibits **[*71]** were extraneous victim impact evidence. The trial court instructed counsel for both parties to approach the bench. Following an off-the-record discussion, the court overruled the objection and admitted the exhibits. The prosecutor then called Garysha and LaKenya to testify about the impact the offense had on them. Appellant did not object to their testimony. [78]

78 To the extent that appellant may intend to complain about the girls' testimony at the punishment phase, this matter is not preserved for appellate review because he did not object. *See Tex. R. App. P. 33.1*. Moreover, appellant waived any claim of error concerning portions of the exhibits that were read into the record during the girls' testimony. *See Roberts v. State, 220 S.W.3d 521, 532 (Tex. Crim. App. 2007)* (attack on victim impact testimony in general, advanced before any testimony was heard, did not place the trial court on notice that appellant would find particular testimony objectionable); *Ladd, 3 S.W.3d at 572* (trial court was not required, in the face of a global objection, to sift through an exhibit and segregate the admissible portions from the inadmissible portions).

Appellant's specific complaint on appeal that **[*72]** Exhibits 115 and 116 were inadmissible extraneous victim impact evidence is not preserved by his general relevance objection at trial. [79] As appellant failed to preserve error, points of error twenty-six and twenty-seven are overruled.

79 *See Tex. R. App. P. 33.1*. We note that testimony concerning the impact of the murder of their two brothers upon LaKenya and Garysha is relevant. *See, e.g., Payne v. Tennessee, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*.

H. Sufficiency of Future Dangerousness Evidence

In his twenty-eighth point of error, appellant contends that the evidence of his future dangerousness was legally insufficient. He asserts that he had no prior violent criminal background and that the defense experts testified that he was a low risk for future dangerousness. Appellant further argues that none of the evidence presented at the punishment phase showed a probability that he would be a continuing threat to society if he were sentenced to life in prison.

When reviewing the future dangerousness special issue, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability that appellant **[*73]** would commit criminal acts of violence constituting a continuing threat to society. [80] The circumstances of the offense "can be among the most revealing evidence of future dangerousness and alone may be sufficient to support an affirmative answer to that special issue." [81]

80 *Wardrip v. State, 56 S.W.3d 588, 593 (Tex. Crim. App. 2001).*

81 *Id*. (quoting *Wilson v. State, 7 S.W.3d 136, 142 (Tex. Crim. App. 1999)*; *see also Martinez v. State, 924 S.W.2d 693, 696 (Tex. Crim. App. 1996)* (finding that a rational jury could perceive that the use of a knife to repeatedly stab a fallen victim showed a wanton and callous disregard for human life, sufficient to merit an affirmative answer to the future dangerousness issue).

Here, the record contains ample evidence of appellant's future dangerousness. The facts of the offense alone would have been sufficient. However, the State did not rely solely on the facts of the offense. At the punishment phase, the prosecutor introduced appellant's juvenile record, penitentiary packet, and disciplinary records. The jury learned that, as a juvenile, appellant had been "convicted" of criminal mischief, theft, unlawful carrying of weapons, and burglary. [82] As an **[*74]** adult, he had been convicted of aggravated robbery. While he was in prison for that offense, his disciplinary violations included failure to obey reasonable orders, masturbation in public, fighting, assaulting guards, and sodomy. An inmate who had been housed with appellant in prison testified that appellant beat him up and raped him on several occasions. Several officers testified about appellant's confrontational and violent behavior while he was in jail awaiting trial.

82 Although appellant, as a juvenile, would have been "adjudicated delinquent" rather than "convicted" of these offenses, in the presence of the jury the prosecutor referred to appellant's "certified juvenile conviction record." In addition, appellant's mother testified that appellant had been "convicted" of these offenses as a juvenile. Appellant's juvenile record, State's Exhibit 99, reflects that appellant was adjudicated delinquent of possessing prohibited weapons, unlawful carrying of a weapon, and burglary. Additionally, his juvenile probation report, State's Exhibit 102, reflects that appellant paid restitution in a criminal mischief case and a theft case. Two breaking and entering charges and one aggravated-assault **[*75]** charge were dismissed. Appellant was still serving probation for the burglary and weapons offenses when he was arrested for aggravated robbery.

Two former girlfriends testified that appellant physically assaulted them without warning. Garysha and LaKenya, as well as Chare's sister Nicole, testified about appellant's controlling and abusive behavior towards Chare and her children. Nicole and LaKenya had urged Chare to leave appellant. Nicole testified that, a few days after appellant killed Chare and the boys and fled to Austin, she was warned by appellant's daughter to stay away from her house because he had returned to Dallas to kill her.

On this record, a rational jury could find, beyond a reasonable doubt, that there was a probability that appellant would commit criminal acts of violence constituting a continuing threat to society. Thus, the evidence was legally sufficient to support the jury's answer to the future dangerousness special issue. Point of error twenty-eight is overruled.

I. Mitigation Special Issue

In appellant's twenty-ninth point of error, he asserts that due process requires this Court to review the sufficiency of mitigation evidence on appeal. Appellant acknowledges **[*76]** that this Court has held that a jury's negative answer to

the mitigation special issue in **capital** cases will not be reviewed for sufficiency of the evidence, and we have rejected the claim that this deprives a defendant of "meaningful appellate review." [83] He further acknowledges that we have rejected the claim that, because meaningful appellate review of the jury's mitigation determination is impossible, the mitigation special issue violates the *Eighth Amendment*. [84] We have likewise rejected the claim that it violates the *Fourteenth Amendment*. [85]

83 *Green v. State, 934 S.W.2d 92, 106 (Tex. Crim. App. 1996)*.
84 *Prystash v. State, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999)*.
85 *Green, 934 S.W.2d at 107*.

Notwithstanding precedent, in his thirtieth point of error, appellant asserts that the jury's answer to the mitigation special issue was so against the great weight and preponderance of the evidence as to be unjust. In support of this claim, he describes testimony from his mother and aunt "concerning [his] upbringing and mental illness," including his statements to them that Chare was poisoning him and that others were following him or trying to kill him.

The mitigation special issue "confers **[*77]** upon the jury the ability to dispense mercy, even after it has found a defendant eligible for the death penalty." [86] There is no evidence that must be considered to have mitigating value. [87] "Whether a particular piece of evidence is mitigating in the context of [the mitigation special] issue is a normative judgment that is not amenable to appellate review." [88] We decline to attempt such a review here. Points of error twenty-nine and thirty are overruled.

86 *Mosley, 983 S.W.2d at 264*.
87 *See, e.g., McGinn v. State, 961 S.W.2d 161, 169 (Tex. Crim. App. 1998)*.
88 *Id.; see also Eldridge v. State, 940 S.W.2d 646, 652-53 (Tex. Crim. App. 1996)*, *disavowed on other grounds in Mosley, 983 S.W.2d at 264 n.18* ("We cannot say that evidence is mitigating as a matter of law any more than we can say, in a non-**capital** case, that . . . the great weight and preponderance of the evidence establishes that the proper sentence would have been ten years, probated").

J. Constitutionality of Article 37.071

In his thirty-first point of error, appellant asserts that the trial court erred in "not concluding the punishment hearing and imposing a life sentence based on the trial court being made aware of the issues supporting **[*78]** the reversal of the recent death-penalty case of *Smith v. [Texas,] 543 U.S. 37, 125 S. Ct. 400, 160 L. Ed. 2d 303 (2004)*." Appellant argues that the current punishment scheme in Texas violates "the doctrines pronounced" in several Supreme Court cases [89] because the mitigation special issue is "nothing more than a nullification issue" to the future dangerousness special issue. Appellant asserts that the jury charges set forth in *Article 37.071* compare unfavorably with guidelines promulgated by the American Bar Association.

89 Appellant lists *Penry v. Lynaugh (Penry I), 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)*; *Penry v. Johnson (Penry II), 532 U.S. 782, 797, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001)*; *Tennard v. Dretke, 542 U.S. 274, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004)*; *Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*; *Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)*; and *Smith v. Texas, 543 U.S. 37, 125 S. Ct. 400, 160 L. Ed. 2d 303 (2004)*.

The Supreme Court cases cited by appellant concern jury instructions that were given prior to the 1991 amendment to *Article 37.071*. That amendment set forth the mitigation instruction that was given in appellant's case. [90] Other than his conclusory statement that the current mitigation issue is "nothing more than a nullification issue," appellant makes no attempt to explain how the reasoning of cases involving jury **[*79]** instructions from before the 1991 amendment operates to invalidate the jury instructions given in his case. [91] In addition, appellant does not allege that the jury instructions in his case prevented the jury from giving meaningful consideration and effect to any mitigating evidence. Finally, appellant offers no supporting legal authority or argument for his assertion that the trial court had a *sua sponte*

duty to take the punishment decision away from the jury. Thus, this claim is inadequately briefed. [92] Point of error thirty-one is overruled.

90 As amended in 1991, *Article 37.071* provided:

> The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:
>
> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Art. 37.071, § 2(e)(1) (1991). The current provision is the same, except that the **[*80]** instruction now specifies that the alternative sentence to death is a sentence of life imprisonment without parole. *Art. 37.071, § 2(e)(1)* (2009).

91 Appellant did not object at trial to the jury instructions. Nor did he call the trial court's attention to *Smith v. Texas* or explain how he believed the holding in that case might affect his case.

92 *TEX. R. App. P. 38.1*.

In his thirty-second point of error, appellant asserts that the trial court erred by failing to provide a rational process for the jury to decide between a life sentence and the death penalty. Appellant's entire argument is that the mitigation issue

> is made vaguely conditional on the [special issue] on future dangerousness, burdening the consideration of mitigating circumstances that are not related to future dangerousness with a vague presumption in favor of death if the mitigating circumstances are somehow not "sufficient" in comparison to something not stated in the special issues.

Appellant fails to specify any action that the trial court was required, but failed, to take. Nor does he specify any statutory or constitutional violation. This claim is inadequately briefed, and we decline to address it. [93] Point of error thirty-two **[*81]** is overruled.

93 *Id*.

In his thirty-third, thirty-fourth, and thirty-fifth points of error, appellant asserts that the trial court erred in failing to instruct the jury that it should answer "yes" to the mitigation special issue so long as 10 jurors agreed that one or more mitigating circumstances exist, separately or in conjunction, sufficient to warrant a life sentence. He complains that the jury should have been instructed that the mitigation issue should be answered affirmatively so long as 10 jurors agreed, even if they disagreed as to which mitigating circumstance or circumstances were sufficient to warrant a life sentence.

Article 37.071, section 2(f)(3), requires the trial court to instruct jurors that they need not agree on what particular evidence supports an affirmative answer to the mitigation special issue. In this case, the trial court instructed the jurors in accordance with this requirement. To the extent that appellant urges that the instruction required by *Article 37.071*, and given in his case, is unconstitutional because it does not comply with *Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988)*, we have rejected such claims in the past. [94] Points of error thirty-three, thirty-four, **[*82]** and thirty-five are overruled.

94 *See, e.g., Williams v. State, 301 S.W.3d 675, 694 (Tex. Crim. App. 2009)*; *see also Young v. State, 283 S.W.3d 854, 879 (Tex. Crim. App. 2009)* (finding that the failure to give this instruction, although statutory error, was not constitutional error that deprived appellant of a unanimous verdict or a fair trial).

In points of error thirty-six and thirty-seven, appellant asserts that the trial court erred by not informing the jury that a failure to agree unanimously on the mitigation special issue would have "the same dignity and respect" as a "yes" or "no" answer and would have the same legal effect as a "no" answer. He argues that the failure to give this charge violated *Article 36.14*, which gives effect to the "due course of law" provision of the Texas Constitution and the "due process" provision of the United States Constitution by requiring that the jury charge distinctly set forth the law applicable to the case. He asserts that the last sentence of *Article 37.071, section 2(a)(1)*, [95] seeks to suppress and conceal important information from the jurors because they are not informed that a life sentence, rather than a mistrial, will result from a failure **[*83]** to answer the special issues. Similarly, in his thirty-eighth and forty-third points of error, appellant asserts that the "12/10" rule in Texas **capital** jury charges is a misrepresentation of the law and constitutes cruel and unusual punishment as well as a violation of due process because jurors never learn that if the jury as a whole cannot agree on an answer to one of the special issues, a life sentence will result. This Court has repeatedly rejected similar claims. [96] We are not persuaded to revisit them here. Points of error thirty-six, thirty-seven, thirty-eight, and forty-three are overruled.

95 Appellant's brief cites to *Article 37.0711, § 3(3)(i)*, which is applicable to convictions for offenses committed before September 1, 1991. Because appellant's offense was committed in 2007, we presume that he means to cite to the last sentence of *Article 37.071, § 2(a)(1)*, which is the analogous provision applicable to convictions for offenses committed on or after September 1, 1991. Both provisions state that neither the court nor the parties may inform a juror or prospective juror of the effect of the jury's failure to agree on the special issues.

96 *See, e.g., Threadgill v. State, 146 S.W.3d 654, 673 (Tex. Crim. App. 2004)*; **[*84]** *Rayford v. State, 125 S.W.3d 521, 532 (Tex. Crim. App. 2003)*.

In appellant's thirty-ninth [97] point of error, he claims that the trial court erred in denying his motion to preclude the death penalty as a sentencing option. He argues that *Article 37.071* is unconstitutional because it fails to provide a method for the State to determine the deathworthiness of the defendant. Appellant complains that the method of determining which cases shall be prosecuted as **capital** offenses, and in which **capital** cases the death penalty will be sought, varies from county to county. He asserts that the failure of the State to set forth uniform and specific standards to determine against whom a death sentence will be sought violates the principles set forth in *Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000)*, as well as his rights to equal protection and due process as guaranteed by the *Fourteenth Amendment to the United States Constitution*, *Article 1, Sections 13* and *19, of the Texas Constitution*, and *Texas Code of Criminal Procedure Article 1.04*. [98] This Court has repeatedly rejected similar claims, and we are not persuaded to reconsider them here. [99] Point of error thirty-nine is overruled.

97 In his brief, appellant prefaces **[*85]** his argument concerning points of error thirty-nine through forty-seven with an acknowledgment that we have previously rejected these points. He invites us to review "any prior stand on any issue" and states his intention to preserve these points of error for federal review.

98 Appellant offers no separate argument concerning any state constitutional violations, and so we resolve this claim under the federal constitution only. *See Heitman, 815 S.W.2d at 690 n.23*.

99 *Neal v. State, 256 S.W.3d 264, 272 (Tex. Crim. App. 2008)*; *Allen v. State, 108 S.W.3d 281, 285-87 (Tex. Crim. App. 2003)*.

In his fortieth point of error, appellant claims that *Article 37.071* "is unconstitutional in violation of the cruel and unusual punishment prohibition because it allows the jury too much discretion to determine who should live and who should die and because it lacks the minimal standards and guidance necessary for the jury to avoid the arbitrary and capricious imposition of the death penalty." Appellant argues that, under the present Texas statute, the jury has unfettered discretion that invites and permits arbitrary application of the death penalty in violation of *Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)*. **[*86]** He complains that the mitigation instruction unconstitutionally allows the jury to impose a life sentence "if, in their sole discretion, they choose to do so." As such, he reasons, the Texas scheme does not insure a reasonably consistent application of the death penalty. Appellant also complains that the jury has unfettered discretion because the jury can decide what evidence, if any, is mitigating, and

can choose to completely disregard mitigating evidence. This Court has repeatedly rejected claims that the mitigation special issue gives the jury unfettered discretion and permits the arbitrary and capricious imposition of the death penalty, and we are not persuaded to revisit those decisions here. [100] Point of error forty is overruled.

100 *See Woods v. State, 152 S.W.3d 105, 121 & n.66 (Tex. Crim. App. 2004)*; *Moore v. State, 935 S.W.2d 124, 126-28 (Tex. Crim. App. 1996)*.

In his forty-first point of error, appellant claims that *Article 37.071* violates the *Eighth Amendment to the United States Constitution* as interpreted in *Penry II, 532 U.S. 782, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001)*, because the mitigation special issue sends "mixed signals" to the jurors, thereby rendering any verdict intolerable and unreliable. We **[*87]** have repeatedly rejected similar challenges, and we decline to review our prior decisions on this issue. [101] Point of error forty-one is overruled.

101 *See Woods, 152 S.W.3d at 121-22*; *Saldano v. State, 232 S.W.3d 77, 107-08 & n.30 (Tex. Crim. App. 2007)*.

In his forty-second point of error, appellant claims that the trial court erred in denying his motion to hold that *Article 37.071, subsections 2(e)* and *(f)*, violate *Article I, Sections 10* and *13, of the Texas Constitution*, which guarantee that any punishment for an offense will be in accordance with the law. He asserts that *subsections 2(e)* and *(f)*, which set forth the jury instructions for the mitigation special issue, are not in accordance with the law and are unconstitutional because they shift the burden of proof to the defendant and essentially reduce the State's burden of proof concerning punishment. We have previously rejected these claims, and we will not revisit them here. [102] Point of error forty-two is overruled.

102 *See Saldano, 232 S.W.3d at 107-08 &* n.30.

In his forty-fourth point of error, appellant claims that the Texas death penalty scheme violated his "rights against cruel and unusual punishment, [his right to] an impartial **[*88]** jury, and [his right] to due process" under the *Sixth*, *Eighth*, and *Fourteenth Amendments of the United States Constitution* because of vague and undefined terms in the jury instructions. Specifically, appellant argues that the terms "probability," "continuing threat to society," and "criminal acts of violence," should have been defined in the jury charge at punishment because these terms "are so vague and indefinite as to be violative of [a]ppellant's fundamental constitutional rights." We have repeatedly rejected these arguments, and we are not persuaded to reconsider them here. [103] Point of error forty-four is overruled.

103 *See Murphy v. State, 112 S.W.3d 592, 606 (Tex. Crim. App. 2003)*.

In his forty-fifth and forty-sixth points of error, appellant claims that the Texas death penalty scheme is contrary to the United States and Texas Constitutions because it is impossible to simultaneously restrict the jury's discretion to impose the death penalty while also allowing the jury unlimited discretion to consider all evidence mitigating against imposition of the death penalty. [104] Relying on Justice Blackmun's dissent in *Callins v. Collins, 510 U.S. 1141, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994)*, appellant declares that the **[*89]** death penalty scheme is unconstitutional because it fails to adhere to principled guidelines in weighing punishment evidence. [105] This Court has repeatedly rejected this claim, and we are not persuaded to reconsider it. [106] Points of error forty-five and forty-six are overruled.

104 Appellant makes no separate argument in support of his claim of a state constitutional violation, and so we resolve this claim under the federal constitution only. *See Heitman, 815 S.W.2d at 690 n.23*.

105 Citing *Penry I, 492 U.S. at 319*, he argues further that the "focus upon aggravating circumstances, to the exclusion of mitigating evidence, clearly violates the constitutional mandate of individualized sentencing." This argument is inapposite because nothing in the record indicates that mitigating evidence was excluded or that the jury was prevented from giving meaningful consideration and effect to any mitigating evidence.

106 *See Escamilla v. State, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004)*.

In his forty-seventh point of error, appellant claims that the mitigation special issue is unconstitutional because it fails to place the burden of proof on the State with regard to aggravating evidence, in violation of **[*90]** the *Eighth* and *Fourteenth Amendments to the United States Constitution*. He argues that the mitigation special issue is a conduit for aggravating as well as mitigating factors, and that by instructing jurors to determine whether there are "sufficient" mitigating circumstances, the mitigation issue in effect tells jurors to consider any aggravating factors that may outweigh the mitigating factors. He reasons that the language of the statute is unconstitutional because it implies that the defense has a burden to disprove aggravating circumstances.

By the time a jury considers the mitigation special issue, jurors cannot increase a defendant's maximum punishment because they have already found him guilty and made an affirmative finding on the future dangerousness special issue. [107] At that point, the jury has already determined that aggravating circumstances render the defendant eligible for the death penalty. [108] Therefore, a trial court does not err in declining to assign the burden on the mitigation issue to the State. [109] Point of error forty-seven is overruled.

107 *Blue v. State, 125 S.W.3d 491, 501 (Tex. Crim. App. 2003)*.
108 *Id*.
109 *Id.; see also Escamilla, 143 S.W.3d at 828*.

We affirm the **[*91]** judgment of the trial court.

Delivered: October 20, 2010

Tab E

- We would also like to see the police interrogation after the arrest.

- Can we have a copy of Plaintiff's + Defendant's exhibit list.

- Can we have Marilot's testimony?

FILED
2008 DEC 10 PM 2:45
GARY FITZSIMMONS
DISTRICT CLERK
DALLAS CO. TEXAS
DORIS GODBOLD DEPUTY

Heather Pardee
12/10/08

① The jury has a question regarding the substance of Mr. Marlot's testimony pertain to what restrictions are on Ja 63 business?

② [redacted] If sentenced to a life sentence without parole, what would he be classified as?

Heather Landau
12/10/08

FILED
2008 DEC 10 PM 7:23
KAREN MITCHAM
DISTRICT CLERK
DALLAS, TEXAS
DORIS GODBOLD
DEPUTY

BY MR. BEACH:

Q If this jury answers the two questions sometime this week in such a way that Robert Sparks is sentenced to life in prison without the possibility of patrol, is he gonna be thrown into some kind of 15 foot hole and isolated from the rest of humanity for the rest of his natural life?

A No, he's not.

Q Tell the members of the jury, Mr. Merrillat, anyone sentenced to 50 years on up, which obviously includes a capital murder life without parole, what is their automatic classification coming into the prison system ?

A They're automatically classified as what's called a G-3. In the classification system the numbers preceded by the letter G. Goes from G-1. G-1 being a good inmate --

QUESTIONS BY MR. BEACH:

Q Mr. Merrillat, individuals classified as G-3 inmates receive that classification which you told us capital murderers without parole, that's what they'd be coming in as , is that correct ?

A It's based upon the length of their sentence, yes, sir.

Q Are G-3 inmates restricted from going to the chow hall with other inmates ?

A No, sir, they're not.

Q Are they restricted from going to the library with other inmates?

A No, sir.

Q Are they restricted from going to school?

A No, they're not.

Q Medical facilities?

A They're not restricted.

Q They get to go to visitation?

A They can go to visitation.

(END OF EXCERPT)

BY MR. JOHNSON:

Q You said that anybody convicted and given a sentence over 50 years in the penitentiary would automatically qualifies or automatically be a G-3 inmate , is that correct?

A That's correct.

Q That's actually not totally correct, is it? The classification board of the Texas Department of Criminal Justice can look at the prior background, prior incarceration records , prior conduct records of individuals and can raise that classification if they choose to do so, can they not?

A As a matter of fact they will look at his prior history, whether he's been to the penitentiary before. Look at any prior convictions that brought him to the prison system. He's gonna go in as G-3. What, what -- I'm gonna answer. What they look at when they consider his prior past bad acts will be as G-3, if he needs to be housed in a different area of the prison system or have more restrictions put upon him. Doesn't mean he's gonna be a G-4, G-5 or ad seg.

Q Okay. Mr. Merrillat, if we can just try to limit this to question/answer, sir.

A Be glad to.

Q The G-3 classification you told the jury about and Mr. Beach inquired about, you're saying the G-3 is basically

unlimited except for armed supervision outside the prison , is that correct ?

A Not unlimited access to areas that convicts cannot generally go to. But he is free to come and go from his cell block without restraints, handcuffs or escort.

Q But as I just pointed out sir, whether or not you're classified, the minimum classification for a person is G-3 and can go all the way up to an automatic classication of ad seg right off the bat, couldn't it? That's yes or no, sir. Right or wrong?

A You're wrong .

Q I'm wrong ?

A Yes .

Q Couldn't be placed in ad seg?

A Very limited circumstances. But the broad way you say it is not correct .

Q He could be, couldn't he ?

A He could be .

Q Could be G-4, couldn't he?

A He could be .

Q Could be G-5.

A Could be .

Q So your testimony while ago what I called throwing a skunk over there, you're basically saying is we know what the minimum is, but we have no idea what it's actually gonna be for

Robert Sparks. That's what you're basically saying, isn't it ?

A No, you're wrong.

MR. JOHNSON: That's all, sir. I'll leave it there.

MR. BEACH: May he be excused?

(End of Excerpt)

(1) The jury had a conflict regarding the substance of Mr. Marlot's testimony regarding what classification the defendant would have in prison if he was sentenced to life without parole.

Heather Landrall
12/10/08

FILED
2008 DEC 10 PM 7:59
MARY FITZSIMMONS
DISTRICT CLERK
DONA ANA COUNTY, NM
DEPUTY

Tab F

REPORTER'S RECORD
VOLUME 39 OF 48 VOLUMES
TRIAL COURT CAUSE NO. F08-01020-VJ

STATE OF TEXAS	)	IN CRIMINAL DISTRICT
VS.	)	COURT NUMBER 3
ROBERT SPARKS	)	DALLAS COUNTY, TEXAS

****

JURY TRIAL

****

On the 8th day of December, 2008, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Robert W. Francis, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by machine shorthand.

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CHRONOLOGICAL INDEX
VOLUME 39

JURY TRIAL

ALPHABETICAL WITNESS INDEX

EXHIBIT INDEX

STATE'S NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
97	Stipulation	48	48	39
99	Terms of probation	49	49	39
100	Pen pack	49	49	39
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103	Doctor report	46	47	39
104	Jail calls (9 CDs)	171	171	39
105	Photo	177	178	39
106	Photo	192	192	39
107	Photo	192	192	39
108	Photo	208	208	39
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110	Photo	208	208	39
111	Photo	208	208	39
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DEFENDANT'S NO.	DESCRIPTION	OFFERED	ADMITTED	VOL.
12	CV of Compton	37	37	39
14	Disciplinary report	115	116	39

DECEMBER 8, 2008 PROCEEDINGS

(Open court, defendant present, jury not present)

(State's Exhibit No. 101 marked)

THE COURT: Let the record reflect we're outside the presence of the jury.

Both sides having rested on the issue of guilt, jury returning a verdict of guilty, before we proceed in the punishment phase of trial each side asked for a voir dire examination of experts under Rule 705 Texas Rules of Evidence.

Guess it doesn't matter which order we go in.

Mr. Beach?

MR. BEACH: Yes, A.P. Merillat, submit him for defense 705 examination. Offer State's Exhibit 101, copy of the witness' CV, for record purposes.

MR. JOHNSON: No objection.

THE COURT: State's Exhibit 101 is admitted for its stated purpose.

(State's Exhibit No. 101 admitted for record purposes)

THE COURT: If you will raise your right hand.

(Witness sworn)

THE COURT: If you'd give my court reporter your full name, and spell it for her, please.

THE WITNESS: A.P. Merillat, M-e-r-i-l-l-a-t.

THE COURT: Mr. Beach?

MR. BEACH: This is defense examination.

MR. JOHNSON: Sorry?

MR. BEACH: Your examination.

MR. JOHNSON: Oh.

A.P. MERILLAT,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. State your full name, please.

A. A.P. Merillat.

Q. How are you employed, sir?

A. I'm a criminal investigator with the special prosecution unit in Huntsville.

Q. As a special prosecutor, are you the criminal investigator for the special prosecutor's unit?

A. Yes, sir.

Q. And you're here today for what purpose?

A. Historically, I justify the punishment phase of capital cases about the likelihood or opportunities to be violent inside the penitentiary. Our office prosecutes

violent crimes and felonies that occur within the prison, and other crimes, too, primarily within the prison system. As such, for the past almost 20 years I've investigated those crimes and prepared them for grand jury and trials in district courts across the state and become extremely familiar with the level of violence, the opportunities to be violent among all classifications, all types of prison inmates. Specifically, convicted capital murderers serving life sentences or death sentences, their likelihood or opportunities -- likelihood's not a good word -- opportunities to be violent if they choose to be so.

Q. Everything you have done is through the investigation of particular criminal episodes that other individuals have been involved in; is that correct?

A. Yes, sir.

Q. So it's all anecdotal evidence and information in regards to what somebody else did, at some facility, that we're not gonna be privy to the details of; is that right?

A. Primarily. However, it's the level of violence I can talk about from personal knowledge. The jury can apply the facts to what they have heard in the previous portions of this trial. Whether or not it pertains to this man, I do not know.

Q. As a basis for your testimony today, I assume

you're going to be relying upon information you gathered in the past in regards to specific instances you have taken part in the investigation/prosecution of. Correct?

A. That's largely correct, yes.

Q. Can you tell me the particular names of the individuals in the cases you're gonna rely on?

A. I have a list of many names of convicted murderers and convicted capital murderers our office prosecuted. Specifically, the last two or three years, there's too many. We go over a thousand cases a year. We have been doing this 24 years. I can't know every name. I know names of recent cases we prosecuted.

Q. I'm gonna ask you which ones are you gonna rely upon as the basis of your proposed testimony in this courtroom.

A. I don't know what the questions are gonna be to me. If they're about what kind of acts of violence occur in the prison system in Texas, I can answer that question. If I'm asked whether or not convicted capital murderers serving life sentences are prevented from being dangerous inside the prison, I can answer that question.

Q. Sir, can you tell the court when it was you were employed by the Texas Department of Criminal Justice?

A. I'm not employed by them. I don't work for the prison system.

Q. Have you ever worked for a prison system?

A. No. I have been assigned there a year. So outside of my job. But our office is on a grant from the Governor's Office. We work independent of the prison system. I don't even have an office in the prison. Our --

Q. Mr. Merillat, let me ask the questions. I think the questions call for yes-or-no answers.

You're not employed by the prison unit?

A. That's correct.

Q. You've never been employed by the prison unit?

A. That's correct.

Q. You've never worked inside of a prison facility to -- and been trained in the functions of various personnel in the units?

A. That's incorrect.

Q. You have worked inside one and been trained?

A. Yes, sir.

Q. Tell me when and where you were trained.

A. I was detached -- that's what I tried to explain a minute ago. I was detached from my unit a year and assigned to internal affairs at that time inside the penitentiary and I worked the use-of-force review bureau, use-of-force cases, because there was so many and they had so few employees. I was assigned there temporarily. I

continued to work from my office during that year. I had to receive training in what was a use of force and constituted improper actions by guards and others. I reviewed those cases, referred them, if they needed, for prosecution or disciplinary proceedings against guards.

Q. Your role at that time -- so you're telling me for a year you were considered to be in some fashion employed by the criminal-justice system?

A. I can't answer that yes or no.

Q. Sir, I'm trying to find out -- if you're claiming to have had some type of a formal relationship with the criminal-justice system, I would like an opportunity to see your personnel file and the training records to show whatever training you did receive.

A. My personnel file is open to the public. It's in Huntsville at our office and been asked for before and freely given.

Q. Would you be able to, when we take a break, you can have that faxed to you?

A. I don't know if they can fax the whole thing or not. I wish you asked me this last week. I could have brought it.

Q. You understand the purpose of this hearing is to determine what your qualifications are to testify?

A. Yes.

Q. You understand your personnel file would be a particular aspect of your qualifications?
A. No, sir. The year I'm talking about is not part of my personnel file. My personnel file deals with what we do in my unit, and nothing to do with internal affairs.
Q. So the year you spent there is in somewhat relation to this, you're saying that's not gonna form the basis for your testimony?
A. Yes, but it's not in my personnel file. I thought I was clear about that.
Q. The amount of training you receive would be reflected in that, correct?
A. I don't think so.
Q. Because you weren't really trained. You're saying you were there kind of helping them out?
A. But I was instructed on what my job was, yes, sir. I call it training.
Q. Well, I call my wife a cook in cooking, but don't mean it's real good.
Who was it that did this training for you, sir?
A. The people employed by internal affairs. I don't know their names, ranks.
Q. No formal training whatsoever?
A. Not a classroom setting.

Q. Okay. So basically everything you did was anecdotal, also?
A. What?
Q. Anecdotal. Sitting, chewing the fat with people that work there and they're telling you how things are done, and you're gonna say that's the way things are supposed to be done?
A. No, sir, that trivializes what really happened. I was given pretty sincere instructions on my job and what the details of the job were. It wasn't chewing the fat, wasn't like you just suggested.
Q. Okay. These cases you're gonna talk about, everything that my understanding you're gonna try to testify to today is just in regards to what certain people have done in certain times in the past; is that correct?
A. That's correct.
Q. And I believe in that regard I assume you brought all the records of those cases so I can evaluate those for the credibility of anything you say may have been done or anything that may have been defensive in those instances?
A. I brought the list of names of convicted murderers and capital murderers I was talking about.
Q. Is it my understanding -- exactly tell me what it is your opinions are that you're gonna testify to today.
A. I have no opinion, I have no opinion. I will not express an opinion. I'm not here as a scientist, but I know what the prison system is like as far as the opportunities to be violent if a person chooses to be.

MR. JOHNSON: Okay. Judge, if he has no opinions, we have no further questions.

CROSS-EXAMINATION

BY MR. BEACH:
Q. Mr. Merillat, have you been qualified to testify as an expert in the district courts of this state before?
A. Yes, I have. In this county, as well.
Q. As a matter of fact, you testified in the State of Texas versus Wesley Lynn Ruiz, a capital-murder prosecution in June this year; is that correct?
A. Yes.
Q. And you have been qualified on many, many occasions to testify as an expert in the areas of opportunities to commit violent criminal acts within the penitentiary system?
A. Yes.
Q. You have been qualified to testify as to the classification system specifically in regards to a convicted capital murderer who's assessed a life sentence?
A. Yes, I have.
Q. And the opportunities for that convicted capital murderer serving a life sentence to commit criminal acts

of violence within the penitentiary system?
A. Right.
Q. And your CV speaks for itself. The judge can review it; is that correct?
A. Sorry?
Q. Your CV speaks for itself as far as your qualifications, education?
A. Yes, sir.
Q. You actually published a textbook entitled Future Dangerousness for the Texas District & County Attorneys Association; is that correct?
A. Yes, sir, I have written three editions of that book and also written numerous articles, lectured to college classes about prison-violence classification, such as that, and I have been interviewed by various news media about the same subject.
MR. BEACH: That's all I have, Judge.

REDIRECT EXAMINATION

BY MR. JOHNSON:
Q. Sir, what opinions are you gonna offer to the jury today? That's what I need to know.
A. I don't call them "opinions." I will not offer an opinion like "I believe he's gonna be violent." I've never done that and I will never do that. I don't know what he's gonna do.

Q. I thought you were the author of this textbook --
A. The textbook does not anywhere state a person will be a future danger.
Q. That textbook tries to classify, sir, various features and factors about a person's background that would try to help quantify whether or not there would be a --
A. No, sir, it does not. It doesn't talk about features and backgrounds of particular defendants facing death penalty. It talks about the opportunities -- key word, "opportunities" -- inside the penitentiary, if a person chooses to be violent. Whether or not he takes those opportunities, I don't know. I would be a fool to say so. My books talk about the opportunities and the failures within the prison system that make the opportunities available. Not only failures, but inherent situations that make it available to a person if they choose to be dangerous or not.
Q. Basically, all you can tell the jury is that if someone wants to be dangerous, they could if they want to; is that correct?
A. That's exactly right.
Q. That's common sense. Doesn't take training to know that, does it?
A. I am not qualified to answer that question. I

don't know if it takes training to answer that or not. I'll tell them what the opportunities are and let 'em decide whether or not he will take advantage of it.
Q. Basically, you're a prosecutor's investigator.
MR. BEACH: Judge, this is outside scope of the hearing.
MR. JOHNSON: Goes to qualifications.
THE COURT: Go ahead.
Q. (By MR. JOHNSON) Is that correct?
A. I am a prosecutor's investigator, yes, sir.
Q. And so you've investigated crimes on behalf of the prosecutors over the last 20 years?
A. Yes.
Q. And the testimony you're gonna offer today -- you didn't even have to do what you did to be able to come in and say, "If someone wants to be dangerous, they have an opportunity, they can be." Doesn't require training or experience at all, does it?
A. You're wrong there. What I have done in the penitentiary 20 years has given me insight into the levels of violence, the opportunities to be violent in the prison, that the general public does not know. I wish they did. Most of the prison officials or politicians don't know. So, yes, my job did give me this expertise.
Q. Do you intend to offer testimony on specific

cases?
A. If I'm asked and allowed to, yes.
MR. JOHNSON: Judge, we need a greater basis for what the state intends to offer. We don't know how to conduct a 705 hearing if we don't know what to inquire about. I need to see every bit of information. I need to see his personnel file, his training history, and every case file for every case he intends to mention by allusion or otherwise. I have seen his testimony in the past where he said, "A fella in this unit did this," and I want -- I want to -- to see that file to determine whether or not he's accurate in regards to the recitation of those events.
THE COURT: Mr. Beach, can you give me an idea what you intend to ask?
MR. BEACH: Judge, he's testified a hundred times, always to the exact same thing. That he's qualified based on training and experience. Opportunities to commit criminal acts of violence within the prison society, as you know, is part of question 1. We have to prove this defendant, in all probability, will commit future acts of violence in whatever society he's in. The jury -- it will be helpful to know he won't be thrown into a 12-foot hole and isolated from the rest of humanity. The witness can let 'em know where he's gonna be, how he's

gonna be classified, what opportunities he will have to commit criminal acts of violence, and that's all I'm gonna go into.
MR. JOHNSON: Judge, I submit the witness cannot do that. He's not been employed by the prison system. He's talking about anecdotal information in regards to people in prisons in the past. He's not trained in the classification process; he's never received formal training. Never been a guard, never worked in the classification board. They want him to get up there and testify about egregious behaviors on behalf of unknown individuals in the past.
We adamantly object to him saying this guy did this one time and this other guy did that, which is exactly what he's gonna do. I want to have a hearing and see the case files for those instances to make sure the jury's being given accurate information. I submit to the court I don't care if he's been qualified in the past. Today the issue is, does he have specialized training and does he have an opinion he's gonna offer in this courtroom based on the specialized training that's gonna make existence of the probability or of one of the issues before the jury more or less likely. I submit he does not.
THE COURT: It sounds as though the

testimony the state is proposing -- I don't know because I haven't heard the questions and answers yet -- are more along the lines of are there opportunities while a person's incarcerated, even on death row, to engage in acts of future dangerousness. I guess it goes beyond just basic mischief.

MR. JOHNSON: Judge, I don't mean to interrupt the court. I have copies of his prior testimony where he basically -- and I agree some judge somewhere just lets him throw out "this fella did this here and there." All well and good and scary, but it's not based on anything this witness has a specialized knowledge of.

Anybody that reads the newspaper can say "this person escaped one time and did somebody bad." Basically, he's an instrument of the state and trying to scare the jury. If he wants to do so, I feel like I should be allowed an opportunity to examine those particular files. I will be glad to tender to the court a prior testimony he's given in another case. I don't know -- since Mr. Beach isn't sponsoring any particular questions or opinions, I don't know what he's intending to do. I don't intend to object in front of the jury to every question unless forced to do so.

Reading of his prior testimony, prior capital-murder case, it's almost laughable what he's

allowed to say without factual background for it. I certainly object to that.

THE COURT: It would've been nice if somebody gave me that over the weekend, but it didn't happen.

MR. BEACH: Judge, he's had notice of this witness on my expert list six weeks now. He could've subpoenaed his personnel file. This is a last-minute attempt to delay things, Judge. That's why I gave notice six weeks ago. I'm not going into specific, you know, Capital Murderer Joe Blow slit somebody's throat. I'm talking about numbers, you know, of crimes committed by capital murderers, the opportunities to commit crimes in the penitentiary. The same context he's gonna be placed in if given a life sentence. Specific to him where he's gonna be, and based on his 20 years' experience, the opportunities he will have in that classification system to be violent versus, you know, some hot box getting food pushed through a tray. It's relevant.

MR. JOHNSON: He has no knowledge where Mr. Sparks would go, Judge.

MR. BEACH: He knows what his classification is gonna be and what that means.

MR. JOHNSON: Then he has a crystal ball. Because the people at TDC have no idea. I have personally

been to the prison system and I personally talked to the people at the classifications and they don't know. If Mr. Merillat has that information prior, then he must be a seer.

MR. BEACH: You cross him. You cross him, okay?

THE COURT: I'm gonna allow his testimony in regards to generalized questions and I don't see a problem with overall statistics or numbers.

I won't allow specific instances or cases.

And, Mr. Johnson, if something appears too specific or outside -- it's clear he does have expertise based on experience. Certainly somebody reading the newspaper every day can say crimes occur in prison. That's different from somebody working it or investigating cases on a regular basis. Certainly has expertise based on experience.

As far as his background, his experience and generalized questions, that's fine. I agree with Mr. Johnson in regards to specific instances or cases, Mr. Beach. Won't allow you to go into those.

MR. BEACH: Yes, sir.

THE COURT: In that regard, Mr. Merillat?

THE WITNESS: Yes, sir.

THE COURT: I have found over the course of

25 years that sometimes when defense counsels cross-examine a witness who's been working with the state or state's witness a long period of time, they on occasion find a way to squeeze extra information into an answer that somebody claims opens the door to something. Don't do that.

THE WITNESS: Yes, sir.

THE COURT: I'm sure you know what I'm talking about if you've testified before. I know the attorneys do. Even if they haven't taken a course on it, I know they're experts in it. Listen to Mr. Johnson's questions and answer those. I'm not overly concerned about the answers to Mr. Beach's questions. I assume y'all've talked to each other more in the past.

MR. JOHNSON: Judge, the court made a statement. I need to ask a couple more questions in particular. At this time we would file a particularized motion in limine to preclude testimony about violent acts by others. That goes to my objection I made a moment ago to Mr. Merillat started to throw up examples what somebody did in some other unit. We feel that's improper and that's the motion. I have a copy coming, being copied for Mr. Beach.

The court did state you have no problem with the defendant giving overall --

THE COURT: Witness.
MR. JOHNSON: Witness -- about overall statistics or numbers.
I have no knowledge that he has. Can I question him about that?
THE COURT: Sure.
Q. (By MR. JOHNSON) Are you intending to offer in your testimony some type of statistics or numbers that correlate to what you claim to be your expertise?
A. Uh, I have numbers. I have numbers; I have specifics; I have names.
As I said, I have a list of names of convicted capital murderers serving life that we prosecuted in the last three years.
If I'm asked the question on either -- by either side about convicted capital murderers able or not to be violent in the future, my answer's yes. If I'm asked, "How do you know," or, "What makes that true," or something like that, my answer is, "How about the names of the ones we prosecuted the last three years and the crimes they committed in the penitentiary?"
So what's happened in other trials, I can't answer for. What happens in this one, I'm bound by what the judge tells me to do or not to do. And I will abide by that. If I lie, I expect to be filed on for perjury.

it. That's this document.
Q. Is that -- are those names people you're gonna rely upon as the basis of your testimony in the courtroom today?
A. Well, they're -- only if somebody asks me the names, I can tell them; however it gives basis for my knowledge if I know if a convicted murderer can be violent again. Of course I know that because we prosecuted 200 of them here.
Q. Some of the individuals prosecuted were found not guilty, right, sir?
A. No, these were indicted and convicted. If they're not guilty, I assume because they're not guilty, I don't include those.
Q. You agree, sir, some individuals are found guilty when they're not, in fact, guilty?
A. No, I don't know.
MR. BEACH: Judge, that's outside the scope.
A. They were guilty of the offense we indicted them for. We're not gonna prosecute people who are innocent. We don't do that.
Q. (By MR. JOHNSON) Y'all don't?
A. No, sir.
Q. What statistic -- you mentioned you're intending to testify about statistics. What's the statistic you

Q. My understanding you're intending to offer a document that all these folks convicted in past have --
A. I have no idea of his strategy. He's not told me.
Q. Did you just get a document up there with an exhibit number on it?
A. Yes, sir.
Q. And have you seen it before?
A. Me?
Q. Yes.
A. I prepared it. Yes, it's mine.
Q. It's my understanding y'all are intending to offer that.
A. I don't know. I think it applies to what we're talking about right now.
Q. You held it up. I don't have great eyesight. Looks like a list of names.
A. Yes, sir, these are murder and capital-murder inmates convicted of murders and capital murders that are serving time for those crimes that received new charges by our office after they got to the penitentiary within the last three, four, five years, and 200-something names and tells you -- tells us what the new charges were after they got to the penitentiary. I prepared it in response to a defense subpoena in Collin County or I wouldn't have done

intend to testify about?
A. What's so funny about that?
Q. Mr. Merillat, we having --
A. We don't prosecute people who are innocent.
THE COURT: I understand your statement and the question is bordering on ridiculous. But since it's a capital-murder case, I'm gonna allow it.
Not just your question, Mr. Johnson. Not pointing at you. Just the way we've gone.
Q. (By MR. JOHNSON) What's the statistic you intend to testify about, sir?
A. If I'm asked about the numbers -- first, if I'm asked, "Do capital murderers serving life sentences or death sentences -- are they able to be violent once they go to the penitentiary," yes.
How do I know? I'll say, "Well, I, personally, worked cases where convicted capital murderers serving life or death sentences have stabbed guards, used drugs, escaped, held hostages, committed arson -- possessed cell phones, as we all heard about."
If you object, we'll see what the judge tells me.
Q. And the particulars of those comments would be anecdotal information you have in regards to particular cases you prosecuted?

A. If "anecdotal" is a proper term, yes, sir, you're right. I don't know if it's a proper term.
Q. Nothing you ever observed yourself?
A. Some I have. I have been standing on death row, man stabbed 40 times in the chest a few feet away from me. I received a bomb in the mail from a person in ad seg. Yes, some of the things I have personal knowledge of.
Q. Okay. And the rest of it, rest of those, are just anecdotal?
A. If that's the proper term. I'm sorry if I don't understand your term, but I don't know.
Q. Information you gathered through hearsay?
A. No, sir, no, sir.
Q. What statistics -- are you gonna offer a statistic in this case?
MR. BEACH: You have that report, the January to October report? Yeah.
A. The select statistics report that people in the courtrooms want to hear about, I have that with me. I will answer that if asked about it.
Q. (By MR. JOHNSON) Who compiled the report?
A. Sir?
Q. Who compiled the report?
A. Executive services of the prison system.
Q. Did you have any hand in the compilation or

making of the report?
A. No, sir.
Q. You have, you had nothing to do with the compilation or reporting of it?
A. No, I don't prepare the report at all.
Q. What expertise do you have to qualify you to come in and give -- give expert testimony in regards to a report prepared by Texas Department of Criminal Justice?
A. For one thing, one of the items the report talks about is offender death by homicides month by month and year by year. Offender deaths by homicides are prosecuted by our office. I know those. I don't submit that number to select statistics, but if the number comes out wrong, I point it out. If it's usually --
Go ahead.
Q. The answer is, you have no information in regards to that particular report other than you think you heard the numbers before. And I mean, anybody off the street can testify to that report.
A. It's available nationwide, yes, sir. Anybody can get ahold of it.
Q. You have no expertise in regards to the report which would offer your insight into the truth or veracity of the report itself; is that correct?
A. That's correct.

Q. So you can't sponsor it as being accurate.
THE COURT: Mr. Johnson, you're not suggesting if a doctor comes in and testifies that cancer kills a certain number of people, I need to personally get off the bench and talk to each of the people's relatives that have passed away and find out if they died of cancer?
MR. JOHNSON: No, sir. You're talking about a doctor to sponsor it. We're talking about a prosecutor's investigator to come in and start testifying about TDJC statistics that he's not privy to the information relied upon in the compilation. I don't -- I don't -- I disagree with this person qualified as an expert in anything, in regards to this case.
Be like if the state wants to call another homicide investigator to say, "Some people are mean. Tell us about other bad crimes you heard about in the past," they're not experts to testify in front of a jury in a capital-murder trial. That's all he is. They can dress it up, but basically what he's gonna do is offer cases and say things that he said a moment ago. "Some guy sent me a bomb." That's a real great statement, Judge. I got no way to know whether it's true or not. If I can see where the person's charged and see the evidence so I have an opportunity to cross-examine him-- you know, what's a bomb? Is it a bomb or matchstick?

THE COURT: That's what --
MR. JOHNSON: If he's gonna testify to that, I want to examine the background of the basis for the testimony.
MR. BEACH: Judge, we have that handled.
THE COURT: I already said he can't testify to specifics.
MR. JOHNSON: You're gonna allow the things about the numbers. There's 220 cases here. Basically saying, if you don't allow him to say the name, it's still number 1, the second name is number 2, I don't have an opportunity to examine those to determine if that's correct.
THE COURT: That's true. What I'm getting at -- if a doctor testifies about a medical study, I guarantee there's no attorney in this country that's gonna go back and interview everybody involved in the medical study.
MR. JOHNSON: I agree.
MR. BEACH: Just one question.
THE COURT: Mr. Beach.
RECROSS-EXAMINATION
BY MR. BEACH:
Q. Is that study relied upon by people like you, people like Larry Fitzgerald that testified for the

defense in these cases all over the state?
A. Absolutely. I never would've talked about statistics had the defense not introduced those across the -- I don't care about those. The defense brings them up and colors them towards the defendant in a way that's not always true and I have to come back in rebuttal and clear that up. I know what's true regarding those facts.
THE COURT: Go ahead, Mr. Johnson.
FURTHER REDIRECT EXAMINATION
BY MR. JOHNSON:
Q. You're telling us now, when the experts do the reports and the studies, it's up to the layman such as yourself to tell them they were wrong?
A. You know that's not what I said. When the defense hires experts to come to the capital cases across the state and talk about the report we're talking about now. I would never mention it if they didn't discolor it with things that are not always true. I didn't say about experts preparing it. Clerks prepare the reports, not experts.
(Pause in proceedings)
MR. BEACH: I understand the parameters.
THE WITNESS: I do, too, Judge.
MR. JOHNSON: Judge, I would like an offer to know what I'm subjected to. I believe -- and going

back to the court's comment a moment ago. When you're talking about a doctor, are you talking about someone who received training? They're qualified as an expert and they're qualified to look and study and review things done by other experts. This man has no expertise. I agree with the court. It's ridiculous to ask a doctor to go back and talk about medical studies. They're qualified; he's not.
I submit he's flat not qualified for the type of testimony they're gonna use him for. It's an attempt to put -- and I can guarantee he's gonna at some point start saying, "Well, we got a guy, death row, stabbed somebody." That goes back to who was it? What was the circumstances? We should have an opportunity to examine that before he goes into a particular instance. If he's allowed to say 220 instances, I would like to look at all of them to determine the factual basis behind it. He's not offering expert testimony; he's here to scare the jury, and we object to that.
THE COURT: I disagree with you. I don't think you have to go to a course to become an expert in something. Expertise can be obtained by a person by something other than a college or postgraduate course.
MR. JOHNSON: I agree on that specifically and absolutely.

This witness is not testifying to anything that makes him an expert in what he's trying to tell the jury. He's an investigator. All he does is handle prosecution investigation of crimes alleged to have been committed in the criminal system. His expertise only goes to one case at a time.
That's my objection. He's not an expert in the field. All he's here to do is scare them about some anecdotal information he has about particular cases he investigated in the past. That's just a job, not expertise.
THE COURT: I understand your positions. Court disagrees.
Mr. Beach, I don't know the questions, but I gave you directions. It appears this is probably a five-question witness, I don't know: Are there opportunities to commit crimes in the penitentiary?
MR. BEACH: Other than the predicate, you're right, about a seven-question witness.
THE COURT: Okay. I think I made it clear, you know, opportunities to commit crimes in prison. You know: Have those opportunity's been exploited by people in the past? Has prison reached the point where it's impossible to commit a crime again? Along those lines.
Beyond that, Mr. Johnson, I'm open to your

objection.
MR. JOHNSON: So the record's clear, I believe the court's made its feelings about that clear. So the court is granting my motion in limine in regards to prior specific bad acts by other individuals?
THE COURT: I can't say that 'cause I just got the motion. Hard to read it while you and Mr. Beach and the witness are yapping at the same time. "Yapping" being a colloquialism for speaking.
All right. Mr. Merillat, you may step down.
THE WITNESS: Thank you, sir.
THE COURT: All right.
MR. BEACH: Another hearing, Judge.
THE COURT: Mr. Beach, you have anything?
MR. BEACH: No, sir.
MR. JOHNSON: Call Dr. Kristi Compton.
THE COURT: You're still under oath.
DR. KRISTI COMPTON,
having been previously duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. JOHNSON:
Q. State your full name.
A. Kristi Compton.
Q. How are you employed?
A. I'm a psychologist in private practice in Dallas,

A. Those two, yes.
Q. Now, for purposes of clarity, you're aware and familiar with the fact that there was no question as to who it was wielding the shotgun on that night; is that correct?
A. I'm sorry?
Q. We know who was wielding the shotgun during the course of this offense, don't we?
A. I have no idea who was wielding that shotgun, sir.
Q. From what you saw about Investigator Mabry's report, you know that.
MR. BIRMINGHAM: Your Honor, I object, impeachment by a statement made by another person.
THE COURT: I don't view it as impeachment.
You're asking if he was able to read it and discern an answer to your question?
MR. JOHNSON: Yes, sir.
THE COURT: Were you able to discern an answer?
THE WITNESS: Not in my opinion, no, sir.
THE COURT: Okay.
Q. (By MR. JOHNSON) Sir, you reviewed other people's reports prior to your testimony prepared for the prosecutor of that case at that time; is that right?

A. Yes, sir.
Q. I just asked you to review the actual investigator's report that worked on this case at that time?
A. Okay.
Q. And now that you had an opportunity to review not only the report you made and not only the -- or somebody else made, now you had an opportunity to review the investigator reports. There's no question that Robert Sparks wasn't the one with the shotgun; is that true?
A. Not in my mind, no, sir.
Q. Why is that, sir?
A. You're asking me to go off what each defendant said in their own statements.
Q. The -- all the accomplices that testified stated which one had the shotgun, did they not?
A. In that report it says.
Q. You have any reason to disbelieve it?
A. You're asking me if I have knowledge, sir.
Q. Yes, sir.
A. I don't know which man held the shotgun and which one hit the man with [sic] the head or whether they even changed hands with that shotgun. I didn't see that.
Q. Okay. That information is contained in Detective Mabry's report, is it not?

A. It says that -- taken from statements of the other accomplices, that Mr. Sparks was not carrying the shotgun, yes, sir.
Q. Sir, that's not that difficult, is it? That's a fact, what the report says?
A. That's the fact of the report says, yes, sir.
Q. Whether or not Mr. Sparks even got out of the vehicle -- you know, you already testified he was the driver. Whether or not Mr. Silva says only three people got out. You're saying even though this is 20 years ago, that we're gonna go by what you saw instead of Mr. Silva?
A. It's my arrest report and my arrest. I'm not gonna put somebody in jail unless I saw what I saw.
Q. Fair enough. Thank you much.
MR. BIRMINGHAM: Pass the witness?
MR. JOHNSON: Nothing further.
MR. BIRMINGHAM: Nothing further, Judge.
THE COURT: You can step down.
MR. BIRMINGHAM: May he be excused?
MR. JOHNSON: No objection.
THE COURT: You're free to go. Thank you.
(Pause in proceedings)
MR. BEACH: A.P. Merillat, Your Honor.
THE COURT: Ladies and gentlemen, this witness was previously sworn.

Sir, if you'd have a seat on the witness stand, please.
Mr. Beach.

A.P. MERILLAT,

having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BEACH:
Q. Tell us your name, please.
A. A.P. Merillat.
Q. How are you currently employed, sir?
A. I'm a senior criminal investigator, special prosecution unit out of Huntsville.
Q. What is the special prosecution unit?
A. Our office for the past 24 years has primarily been given the authority to prosecute crimes that occur within the property of the Texas prison system, or crimes committed by employees of the prison system or parole or probation, and conspiracies within the prison system to commit crimes outside, in what we call the free world. We step in for local DAs across the state, and prosecute crimes so the local DA doesn't have to put it on their docket. We take care of it for them at no cost to the county.
Q. What is your professional employment history which qualifies you to be an investigator for the special

prosecution unit?
A. I've been a peace officer in Texas over 31 years, with Houston Police Department, Huntsville Police Department, and for almost the last 20 years I've been with the special prosecution unit and I have been employed as a detective with the police departments I worked with and now as an investigator for the past almost 20 years at my job now. And I prepare cases for prosecution, presenting to the grand jury, getting them ready for trial in district courts around the state. I testify as a fingerprint expert, bloodstain interpretation. So I've been involved in all kinds and all areas of investigations. I have written several books about criminal investigations. I wrote the curriculum for Texas A&M University for their criminal-investigation course.
Q. Have you ever testified in court as an expert witness in the area specifically of opportunities to commit violent crimes while in the penitentiary?
A. Yes, I have testified many times across the state.
Q. Have you been qualified and testified as an expert witness in the area of how the classifications system works in the Texas prison system?
A. Yes, sir.
Q. Have you ever been exposed to the idea,

Mr. Merillat, that suggests that all we have to do is throw a defendant in prison, give him a life sentence, and that will solve the problem of ever hurting anyone or being involved in criminal activity again?
A. Yes, I've heard that.
Q. Is that an accurate assumption?
A. That's not accurate.
Q. If this jury answers the two questions sometime this week in such a way that Robert Sparks is sentenced to life in prison without the possibility of parole, is he gonna be thrown into some kind of 15-foot hole and isolated from the rest of humanity for the rest of his natural life?
A. No, he's not.
Q. Tell the members of the jury, Mr. Merillat, anyone sentenced to 50 years on up, which obviously includes a capital-murder life without parole, what is their automatic classification coming into the prison system?
A. They're automatically classified as what's called a G-3. In the classification system, the number's preceded by the letter G. Goes from G-1, G-1 being a good inmate --
MR. JOHNSON: Judge, I object to the witness testifying in regards to classification process and ask to

take the witness on voir dire.
THE COURT: I sustain your objection. Let me see what Mr. Beach's next question will be. If it continues in the vein, you can voir dire the witness.
MR. BEACH: Sorry?
THE COURT: I want to know your next question and determine whether or not Mr. Johnson can have the opportunity to voir dire the witness.
MR. BEACH: I'm asking what a G-3 classification is.
MR. JOHNSON: He's going as far as testifying as to the classification process by Texas Department of Criminal Justice, Institutional Division.
He stated he's an investigator for the prosecutor's office. He doesn't work there, he doesn't have no ability to testify to the facts and are outside his area.
THE COURT: Sustain your objection because of the fact it went beyond the scope of the question. I'll allow you to voir dire the witness at this time.
MR. JOHNSON: You'll allow me to voir dire at this time?
THE COURT: Yeah.
VOIR DIRE EXAMINATION
BY MR. JOHNSON:

Q. Mr. Merillat, I believe I heard you testify you're a prosecutor for the special investigation unit. What county?
A. Statewide.
Q. You're not an employee of the Institutional Division of the Texas Department of Criminal Justice?
A. That's correct.
Q. You've never been an employee of the Institutional Division of the Texas Department of Criminal Justice, have you?
A. That's correct.
Q. Never trained by the Institutional Division of the Texas Department of Criminal Justice?
A. That's not correct.
Q. Okay. Let me ask you.
One point in your lifetime, you were assigned to a unit to -- and worked with people at the system, but weren't an employee of the system; is that correct?
A. Right. I was assigned to work there as a nonpaid employee by the prison system.
Q. Nonpaid employee?
A. By the prison system.
Q. You were getting paid by your prosecution job, weren't you?

A. Yes.
Q. That's what you are, in fact. You work for the prosecutors and help them get evidence to try to convict people of crimes, right?
A. Correct.
Q. Which is basically what you're doing here today.
A. I'm here to offer the facts. You guys make the choice that needs to be made. I'm not suggesting anything.
Q. You're telling the jury how a person's classified by the Institutional Division of the Texas Department of Criminal Justice and you don't work there. Have you ever received any formal training whatsoever in classification process at TC -- or Texas Criminal Department, Institutional Division?
A. Yes, sir. I have been given the same training in the area of classification that classification employees receive. Which they don't have schools for classification. There's a manual. You learn -- so to speak, on the job. You learn by doing the classification process. I have the classification manual today with me.
Q. You're saying you took the classification manual and read it and now you testify how the Texas Department of Criminal Justice classifies inmates?
A. I read it and also work with classification

managers and employees to learn what I was reading. In other words, I didn't read a book to learn the system; I talked to other people and interacted with them. Also I had to learn the classification system for my job in prosecuting crimes that occur within the system.
Q. Am I hearing the same thing? You don't work there, you never worked there, never received formal training, but because you read a book and talked to people that worked there, you consider yourself an expert in the field?
MR. BEACH: I object, asked and answered three times, whether he's heard it or not.
THE COURT: Sustained.
Q. (By MR. JOHNSON) Could you state to the jury any formal training, actual course, you have ever taken conducted by the Institutional Division, Criminal Defense -- or Department of Criminal Justice?
A. No, sir. There are no opportunities for me to have formal training from the prison system. My training comes from other areas.
Q. Certainly anybody that works in the system has many opportunities and undergo rigorous training to be employed there and undertake the things you learned to do on your own; is that correct?
A. That's not correct.

MR. JOHNSON: Judge, that's all by way of voir dire. I object to him. He's a prosecutor investigator. He doesn't work for the department, has no training, we object to him testifying.
THE COURT: Overruled.
CONTINUED DIRECT EXAMINATION
BY MR. BEACH:
Q. Mr. Merillat, you told us earlier you actually published textbooks in this area?
A. Yes, sir.
Q. The main one is entitled Future Dangerousness; is that right?
A. Yes, sir. That's the one that usually brings me in cases like this.
Q. In the book that you researched and published, is there a chapter in the area of how capital-murder life without parole inmates are classified?
A. That's correct.
MR. JOHNSON: Judge, I object. Can we approach?
THE COURT: Yes.
(Discussion at the bench, off the record)
THE COURT: Based on the conversation at the bench, Mr. Johnson, you'll be provided with what you're requesting over the lunch break.

Mr. Beach.
Q. (BY MR. BEACH) Mr. Merillat, individuals classified as G-3 inmates receive that classification which you told us capital murderers without parole, that's what they'd be coming in as; is that correct?
A. It's based upon the length of their sentence, yes, sir.
Q. Are G-3 inmates restricted from going to the chow hall with other inmates?
A. No, sir, they're not.
Q. Are they restricted from going to the library with other inmates?
A. No, sir.
Q. Are they restricted from going to school?
A. No, they're not.
Q. Medical facilities?
A. They're not restricted.
Q. They get to go to visitation?
A. They can go to visitation.
Q. There's some limitations on capital-murder life without parole in terms of working outside the walls; is that correct?
A. That's correct.
Q. What is that?
A. They cannot work outside the walls unsupervised.

They cannot work outside the walls without direct armed supervision, in other words.

Q. Notwithstanding the efforts by classification employees and so-called supervised structured environment in the Texas prison system, does a significant level of violence and violent acts occur in the prison system?

A. Yes, sir.

Q. And you -- that's why you still have a job after 20 years, because you investigate inmate crimes, violent crimes in the penitentiary.

A. We're funded by a grant from the Governor's Office. Every year we have to justify our existence to receive grant money.

Q. Are there statistical reports prepared each year documenting the numbers, the statistics, inmate crime in the prison system?

A. Yes, sir.

Q. And what is that document called?

A. The one the prison puts out -- excuse me -- is the select statistics report.

Of course, our office reports to the Governor's Office. It's an in-house form we send to the Governor's Office.

Q. In the calendar year 2000, were there over 14,000 disciplinary convictions for assaults by inmates on

inmates?

MR. JOHNSON: Judge, I object. Outside the scope of 705.

THE COURT: Overruled.

A. Yes, sir.

Q. (BY MR. BEACH) Over 5,000 disciplinary reports of assault by inmates on staff?

A. That's correct.

MR. JOHNSON: Same objection.

THE COURT: Overruled.

MR. BEACH: Wait for the judge before you answer.

THE WITNESS: Yes, sir.

Q. (BY MR. BEACH) Have there been 156 murders in the prison between 1984 and 2008?

MR. JOHNSON: Same objection.

THE COURT: Overruled.

A. Yes, sir.

Q. (BY MR. BEACH) If convicted, capital murderer receives a life sentence, is there any basis for concern relevant to future violence that arises from escape?

A. Yes, sir.

Q. Have inmates escaped from confinement within the Texas prison system?

MR. JOHNSON: Judge, I object, this is

outside the area the witness has even claimed the area of expertise. I believe this is anecdotal testimony.

THE COURT: Overruled.

Q. (BY MR. BEACH) You may answer.

A. Yes, sir, they have.

Q. Does the fact that an inmate has killed somebody as a convicted murderer or capital murderer, Mr. Merillat, automatically require that the person be housed in any type of high-security or segregated facility?

A. There's no requirement for that.

Q. Now we have heard what you're testifying as to, that's the opportunity for inmates to commit violent crimes within the prison system. You have any training in psychology or neuropathology?

A. No training at all, no.

Q. Are you testifying this defendant will absolutely be a future danger if given a life sentence?

A. I am not.

Q. Have you ever testified to such?

A. Never have.

Q. Are there opportunities, if you're an inmate in the prison system, whether a convicted capital murderer or car thief, are there opportunities to commit violence?

A. Many opportunities, yes.

Q. Are there also choices to be peaceful?

A. Exactly right, yes, sir.

Q. Based on your 20 years' experience investigating crimes within the prison system, in your opinion, is there adequate staffing, adequate ratio of guards to inmates in the prison system?

A. There's inadequate ratio. Too few guards working in the prison system.

MR. JOHNSON: Judge, this is outside of any --

THE COURT: Sustained.

MR. JOHNSON: Outside 705, and before we keep throwing out the softballs up here for him to lob back, we ask -- we --

THE COURT: Mr. Johnson, I sustained it. So the record's clear, I sustained your objection.

MR. JOHNSON: I object to further testimony is outside the scope of the 705 hearing and this is just one after the other, Judge.

THE COURT: I won't know the question until I've heard it.

MR. JOHNSON: That's the purpose of the 705.

THE COURT: Excuse me, Mr. Johnson. We had a hearing earlier today. Anything either side wanted to bring up, had the opportunity to.

Any other questions?

MR. BEACH: No, sir.

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Merillat, you testified you have no --

THE COURT: Just a second.

Let me see y'all.

(Discussion at the bench, off the record)

Q. (By MR. JOHNSON) Mr. Merillat, you testified a minute ago you have no training whatsoever, no experience whatsoever in the areas of psychology and mental health; is that correct?

A. That's correct.

Q. Why in the world would that preclude you from being an expert in that area?

A. Uh, not sure I understand.

Q. Well, you have the same training in those areas that you had in the way the Texas Department of Criminal Justice Institutional Division is run.

MR. BEACH: That's funny, Judge, but I object as argumentative.

THE COURT: Sustained.

Q. (By MR. JOHNSON) What you're here to basically do, Mr. Merillat, as you have in the past, come down and throw a skunk in the jury box and try to scare them about saying someone can be violent if they want to.

A. That's absolutely incorrect. Absolutely incorrect.

Q. I guess the substance of your testimony is that an opportunity to commit violence is present if the individual chooses to do so; is that right?

A. Exactly right.

Q. The same as the opportunity exists for the inmate to be peaceful if he chooses to do so?

A. I said that, yes.

Q. Why do we need anybody out here to testify to that, sir? Is that not true just like it is on a fella standing beside you on an elevator?

A. No, sir. You asked a question, I'll answer. The reason it's necessary for me to come do this is because you folks don't know what happens in the prison system, I don't believe. Because what we prosecute across the state in the area of violence inside the penitentiary is unknown to the general public. We find it out when we pick juries every time we have a trial.

Q. How many times have you --

A. I could finish my answer.

Q. I'm asking the questions. I'd appreciate you answer the one I asked. How many times you picked a jury?

A. I participated in hundreds of times. I'm not a lawyer. I'm not allowed to talk in a courtroom unless I'm sitting right here.

Q. That's right. You're not a lawyer. You don't pick juries. You don't know what jurors know or don't know except for what you think you know.

A. I'm not a lawyer. I'm a very inconsequential person. I'm just a cop; you're right.

Q. Basically, if we want a whole bunch of cops to say prison's scary, we can do that; you agree?

A. You could find some like in my office familiar with the situation, but you couldn't pull any cop off the street. They wouldn't know.

Q. What special training have you had to be an investigator over there at the special prosecution unit?

A. Up to this point today, over 1800 hours of training, probably 2,000.

In the area of criminal investigation, everything from arson investigation to serial crimes.

I had specialized training in bloodstain-pattern interpretation. I've testified as an expert in that field several times. I've had training in the area in fingerprints. I testified across the state and in the state of Florida identifying unknown people with known fingerprints. I wrote the curriculum for Texas A&M University criminal-investigation course.

Q. I don't mean to interrupt. I was -- I think the

question is what training did you have when you were hired 20 years ago. I didn't ask you to toot your horn about what you have done.

MR. BEACH: Judge, I object to this.

THE COURT: Sustained. Mr. Johnson, you know how to ask the questions appropriately.

MR. BEACH: He's insulting the witness.

MR. JOHNSON: But the answer, Judge --

THE COURT: Mr. Johnson, when I'm speaking, I have one rule in court.

MR. JOHNSON: Sorry, Judge.

THE COURT: You've been a lawyer a long time. You know how to ask the questions. I'm gonna expect you to do that.

MR. JOHNSON: Thank you.

Q. (By MR. JOHNSON) Mr. Merillat, all the things you testified to, do those pertain to your training before you got hired as a special prosecutor unit or is that the stuff you have been doing 20 years now?

A. Some apply because of my job required that I have some training before I got hired as an investigator.

Q. But 95 percent of what you told the jury you have done has all been done after you got hired; is that correct?

A. That's correct.

Q. Did you understand my question, what experience did you have before you got hired, or did you not understand the question?
A. I didn't understand the question.
Q. You said that anybody convicted and given a sentence over 50 years in the penitentiary would automatically qualify or automatically be a G-3 inmate; is that correct?
A. That's correct.
Q. That's actually not totally correct, is it? The classification board of Texas Department of Criminal Justice can look at the prior background, prior incarceration records, prior conduct records of individuals and can raise that classification if they choose to do so, can they not?
A. As a matter of fact, they will look at his prior history, whether he's been to the penitentiary before. Look at any prior convictions that brought him to the prison system. He's gonna go in as G-3. What, what -- I'm gonna answer. What they look at when they consider his prior past bad acts will be as G-3, if he needs to be housed in a different area of the prison system or have more restrictions put upon him. Doesn't mean he's gonna be a G-4, G-5 or ad seg.
Q. Okay. Mr. Merillat, if we can just try to limit

this to question/answer, sir.
A. Be glad to.
Q. The G-3 classification you told the jury about and Mr. Beach inquired about, you're saying the G-3 is basically unlimited except for armed supervision outside the prison; is that correct?
A. Not unlimited access to areas that convicts cannot generally go to. But he is free to come and go from his cell block without restraints, handcuffs or escort.
Q. But as I just pointed out, sir, whether or not you're classified, the minimum classification for a person is G-3 and can go all the way up to an automatic classification of ad seg right off the bat, couldn't it? That's yes or no, sir. Right or wrong?
A. You're wrong.
Q. I'm wrong?
A. Yes.
Q. Couldn't be placed in ad seg?
A. Very limited circumstances. But the broad way you say it is not correct.
Q. He could be, couldn't he?
A. He could be.
Q. Could be G-4, couldn't he?
A. He could be.

Q. Could be G-5.
A. Could be.
Q. So your testimony while ago what I called throwing a skunk over there, you're basically saying is we know what the minimum is, but we have no idea what it's actually gonna be for Robert Sparks. That's what you're basically saying, isn't it?
A. No, you're wrong.
MR. JOHNSON: That's all, sir. I'll leave it there.
MR. BEACH: May he be excused?
THE COURT: Thank you, sir. You can step down.
MR. JOHNSON: I have possible further questions after the lunch hour.
THE COURT: If you would, wait for us back there.
Folks, we'll take a lunch break at this point. Be back at 1:30 for me.
(Lunch recess)
(Open court, defendant present, jury not present)
THE COURT: Andy, you want to go ahead and get your witness?
MR. BEACH: Yes, sir.

(Pause in proceedings)
(Open court, defendant present, jury present)
THE COURT: Y'all may be seated.
Mr. Merillat, you're still under oath.
Mr. Beach.
MR. BEACH: I passed, Judge. Sorry.
THE COURT: I thought you had additional questions.
MR. JOHNSON: I passed.
MR. BEACH: Sorry. Did you pass?
THE COURT: Whoever wants to.
MR. BEACH: Sleepy. You want to flip for it?

REDIRECT EXAMINATION

BY MR. BEACH:
Q. Mr. Merillat, what is the most restrictive environment within the Texas prison system?
A. Death row.
Q. And explain what you mean by that.
A. Death row is in the -- what they call the 12 building at the Polunsky Unit in Polk County at Livingston, Texas.
MR. JOHNSON: Judge, I object unless we have a 705 hearing with regard to opinions he may have. This

was outside the scope of the 705 and ask to voir dire the witness and conduct 705 on this line of questioning.

THE COURT: I thought your question was a location of a physical place?

MR. BEACH: Correct.

MR. JOHNSON: What his opinion is.

MR. BEACH: We proffered him in terms of his opinion as to the opportunities to commit violence within the prison system. This is specifically within the proffer of the 705 hearing, whether it's death row or general population. That's our proffer.

MR. JOHNSON: That's the purpose of the 705, to see his opinions so we have a chance to --

(Pause in proceedings)

MR. JOHNSON: Withdraw my objection, Judge.

THE COURT: Okay.

MR. JOHNSON: I'll withdraw my objection to that question.

THE COURT: As I recall your question, where is the location of the particular unit?

MR. BEACH: Yes, sir.

A. It's in 12 building at the Polunsky Unit in Livingston, Texas. It's the ad seg, or administrative segregation, building on the unit. The cells -- the inmates are single-celled. Locked in their cells 23 hours

a day. They can only come out with handcuffs on, escorted by a guard. That's to go to the shower or to go to a single-man rec yard. They can't congregate with other inmates. They eat in their cells. It's administrative segregation.

Q. (BY MR. BEACH) In spite of the highest levels of security that you can find in the prison system, are there still opportunities to commit acts of violence on death row?

A. Yes, sir.

Q. And you, as a special prosecution unit investigator, investigated and prosecuted crimes committed on death row?

A. We do prosecute crimes that occur on death row. Most of the cases we hold in abeyance pending the outcome of appellate process.

MR. BEACH: That's all.

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Merillat, you told the jury you're a published author?

A. What?

Q. Published author about the subjects you're testifying about; is that correct?

A. I told them I was a what?

Q. Published author.

A. Oh, published author, yes, sir.

Q. You recall that?

A. Yes, sir.

Q. And I assume when you're a published author, the book -- was it Random House or Putnam?

A. No, sir.

Q. Could you tell the jury who published your book?

A. Yes, sir, Texas District & County Attorneys Association, through a company in Fort Worth that I don't recall the name of.

Q. Basically, a book you told the jury you authored is nothing more than a handbook for prosecutors of how to come into a courtroom and how to get information -- or prosecutor's side of information about the prison system to a potential jury; is that correct?

A. No, sir, totally incorrect.

Q. Is this your book?

A. Yes, sir.

Q. Do you recall in the book you talk about if you need to -- that your testimony is good for rebutting what the defense witnesses may say?

A. That's exactly right. That's a very good information to use in rebutting defense experts. That's not the only purpose of the book.

Q. It's written for the district attorneys, correct?

A. No, sir, it's not.

Q. Is it not full of trial strategies and tactics to rebut information a defense brings to a jury about someone?

A. There's areas useful to prosecutors in rebutting defense theories, yes.

Q. In the book you talk about shortsighted judges who limit your testimony; is that true?

A. That's true.

MR. BEACH: We stipulate that's not happening in this case, Judge.

THE WITNESS: That's right.

Q. (By MR. JOHNSON) When I ask the question, I don't ask it to be comical. You wrote that, right?

A. Right. Why don't you read the whole paragraph.

THE COURT: Mr. Merillat. Just listen closely to his question, please, just answer the question.

Q. (By MR. JOHNSON) Part of the paragraph I'll read, okay? Then I'll ask you a question.

"If you have a judge who refuses to consider the validity and worthiness of a man's knowledge about violence in the prison system when that's what he's done for a living for the past 15 years or more, such a witness could be excluded or severely limited in what he testifies

to."
A. Exactly, yes, sir.
Q. If you testified earlier you have been doing this 20 years, I assume you wrote this five years ago.
A. Probably so.
Q. Yeah. So you recognize in here when you have a shortsighted judge who doesn't appreciate the validity and worthiness of your vast knowledge, that you may not be able to testify; is that correct?
A. That applies to me or people in my office. I'm not the only one that does this.
Q. The next chapter you talk -- if you're not allowed to testify and the state needs to put on an expert about these areas, that it would be a good idea to bring in someone familiar with the cell blocks?
A. Yes, sir, that's right.
Q. Do we recognize a lack of knowledge in this particular area, sir?
A. Recognize?
Q. Well, basically your book says if you find the judge that's not gonna snap up on your qualification, then you need to go down and get someone from the prison itself? Is that what you're telling us?
A. I appreciate your take on my book. That's your take on my book.

THE COURT: Mr. Merillat, just answer his question, please.
THE WITNESS: Yes, sir.
Q. (By MR. JOHNSON) Okay. Let me skip my take. Use your words: "If you need to rebut the prison board expert, bring in someone familiar with the cell blocks"?
A. That's true.
Q. Those are your words, not my take?
A. That's true.
MR. JOHNSON: That's all I have.
FURTHER REDIRECT EXAMINATION
BY MR. BEACH:
Q. That's why the title of your book is Rebutting the Warden?
A. No, sir. The title is Future Danger, question mark.
MR. BEACH: That's all.
FURTHER RECROSS-EXAMINATION
BY MR. JOHNSON:
Q. What books have you written for the legal field in general that aren't directed at the district attorneys and how to prosecute cases? What was the name of that book?
A. Actually, since you brought it up, I have written a novel, nothing to do with law enforcement.

Q. I'll go ahead and let you get a plug in. What's the name of it?
A. Thank you. Teachers' Pets and Other Wildlife. Available through Amazon and Barnes & Noble, you name it. So that is a book that has nothing to do with what you just said.
Q. Did you self-publish that or did the District Attorneys --
A. No, the District Attorneys did not. It's a company Author House out of Indiana.
Q. Good luck with your book, sir.
MR. JOHNSON: That's all I have.
MR. BEACH: Nothing further.
THE COURT: May this witness be excused?
MR. JOHNSON: Yes, sir.
THE COURT: You're free to go. Thank you, sir.
Folks, I have to send you to the jury room a moment.
(Recess)
(Open court, defendant present, jury not present)
THE COURT: Mr. Maloney, in a minute I'm gonna swear you.
Listen closely to what the attorneys are

asking you and answer those questions only, okay?
MR. MALONEY: (Moving head up and down)
THE COURT: All right.
(Pause in proceedings)
(Open court, defendant present, jury present)
THE COURT: Y'all may be seated.
Sir, would you raise your right hand.
(Witness sworn)
THE COURT: Would you give my court reporter your first and last name. Spell that, please, for the court reporter.
THE WITNESS: Charles Maloney, C-h-a-r-l-e-s, M-a-l-o-n-e-y.
THE COURT: Mr. Beach.
CHARLES MALONEY,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. BEACH:
Q. State your full name, please.
A. Charles Maloney.
Q. Charles, were you born and raised in Dallas?
A. Yes, sir.
Q. You're how old right now?
A. 35.

Tab G

STATE OF TEXAS

COUNTY OF SAN JACINTO

AFFIDAVIT OF FRANK AUBUCHON

Before me, the undersigned authority, on this day did personally appear, Frank AuBuchon, known to me to be the person signing this affidavit, and who did upon his oath state the following:

1. My name is Frank AuBuchon. I am a retired classification Administrator with the Texas Department of Criminal Justice (TDCJ). During my 26+ year career with TDCJ, I worked as a Correctional Officer, Lieutenant of Correctional Officers, Classification Case Manager, Chief of Unit Classification, Countroom Coordinator, Administrator for Unit Classification and Administrator for Classification Operations. Since retiring in 2007, I have testified in many death penalty trials as an expert witness on prison and classification issues. *See* Exhibit A- Frank AuBuchon May 2013 C.V.

2. I was asked by current counsel for Robert Sparks to review and evaluate the testimony of A.P. Merillat from Mr. Spark's 2008 Trial in Dallas County.

3. 39 Ct. R. at 70: Q: "Tell the members of the jury, Mr. Merillat, anyone sentenced to 50 years or up, which obviously includes a capital murder life without parole, what is their automatic classification coming into the prison system?" A: "They're automatically classified as what's called a G3." This is inaccurate in several ways. First, an offender on day one in the prison system does not yet have a determined custody level unless he is death sentenced, or if he is sentenced to life without parole, in which case he is classified as, at best, G3 or, ultimately, at the more restrictive G4 or G5 levels if required. *See* Exhibit B - TDCJ Unit Classification Procedure 2.00 and Attachment A. All non-death sentenced offenders are processed through the Reception and Diagnostic Process as described in the TDCJ Classification Plan. *See* Exhibit C TDCJ 2003 Classification Plan pp. 35-

55. This process, for a non-death sentenced offender takes 30 days to complete. *See* Exhibit D TDCJ Classification Plan page 17-18 at 18 II.A; Exhibit C Page 53 at I.A. Only then can the appropriate custody level be determined.

4. 39 Ct. R. at 73: Q: "You're telling the jury how a person's classified by the Institutional Division of the Texas Department of Criminal Justice and you don't work there. Have you ever received any formal training whatsoever in classification process at TC – or Texas Criminal Department, Institutional Division? " A: "Yes, sir. I have been given the same training in the area of classification that classification employees receive. Which they don't have schools for classification. There's a manual. You learn – so to speak, on the job. You learn by doing the classification process. I have the classification manual with me." This answer is also incorrect. From 1992 until my retirement in 2007 I was involved in the process of training both Classification Case managers and Chief's of Unit Classification. TDCJ did then and still does today have a formal training process for newly promoted classification staff in addition to annual training seminars for Classification Chiefs. Since Mr. Merillat was NEVER an employee of TDCJ involved in the classification processes he would have never had the opportunity for any formal training.
5. 39 Ct. R. at 74: Q: "Certainly anybody that works in the system has many opportunities and undergo rigorous training to be employed there and undertake the things you learn to do on your own; is that correct?" A: "That's not correct." Again, Mr. Merillat is incorrect in his response. All unit based classification staff is required to attend and successfully complete the TDCJ Pre-Service Training Academy, Annual In-Service Training, and New Case Manager Training. In addition there is annual training for Classification Chiefs.
6. 39 Ct. R. at 85: Q: "You said that anybody convicted and given a sentence over 50 years in the penitentiary would automatically be a G-3 inmate; is that correct? " A: "That's correct." In fact that is not correct. The TDCJ Classification Plan describes the classification characteristics of G3 custody. An offender must fit those characteristics to be assigned to G3 custody. Those characteristics include having no pattern of recent in-prison assaultive behavior or other disciplinary convictions resulting in major penalties in the preceding six months and otherwise having "No requirement for a more restrictive custody." Moreover, any inmate with a sufficiently bad disciplinary record or other negative characteristics, with a poor disciplinary record, could be assigned to more restrictive custody, at the G4 or G5 levels. *See* Exhibit E TDCJ Classification Plan at p. 73-86.

Had the witness reviewed the prison and jail disciplinary records of the defendant he would have seen that the defendant had an extensive history of in-custody disruptive and violent acts. This history would be taken into account when determining an initial custody level for Sparks upon his admission to TDCJ. *See* Exhibit B - TDCJ Unit Classification Procedure 2.00 and Attachment A.

7. 39 Ct. R. at 86: Q: " But as I just pointed out, sir, whether or not you're classified, the minimum classification for a person is G-3 and can go all the way up to an automatic classification of ad seg right off the bat, couldn't it? That's yes or no sir. Right or wrong?" A: "You're wrong". In fact that is not correct. The TDCJ Classification Plan describes the classification characteristics of G3 custody. An offender must fit those characteristics to be assigned to G3 custody. Those characteristics include having no pattern of recent in-prison assaultive behavior or other disciplinary convictions resulting in major penalties in the preceding six months and otherwise having "No requirement for a more restrictive custody." Moreover, any inmate with a sufficiently bad disciplinary record or other negative characteristics, with a poor disciplinary record, could be assigned to more restrictive custody, at the G4 or G5 levels. *See* Exhibit E TDCJ Classification Plan at p. 73-86. Had the witness reviewed the prison and jail disciplinary records of the defendant he would have seen that the defendant had an extensive history of in-custody disruptive and violent acts. This history would be taken into account when determining an initial custody level for Sparks upon his admission to TDCJ. *See* Exhibit B - TDCJ Unit Classification Procedure 2.00 and Attachment A.
8. 39 Ct. R. at 87 Q: "So your testimony while ago what I called throwing a skunk over there, you're basically saying is we know what the minimum is, but we have no idea what it's actually gonna be for Robert Sparks. That's what you're basically saying, isn't it?" A: "No, you're wrong." As illustrated above in the responses in #6 and #7 the attorney is in fact correct and the witness is incorrect. G3 custody is the least restrictive custody that Sparks would be eligible for but he could easily be assigned to a more restrictive custody based on his prior institutional history. *See* Exhibit B - TDCJ Unit Classification Procedure 2.00 and Attachment A.
9. During deliberations, the jury had two questions pertaining to Mr. Merillat's testimony. 1: "The jury has a conflict regarding the substance of Mr. Merillat's testimony pertaining to what restrictions are on a G3 prisoner? " 2: "If sentenced to a life sentence without parole, what would he be classified as?" In response, the jury was provided with two excerpts of testimony given by Mr. Merillat. As outlined in my point's #3-#8 above

the testimony given by the witness was both misleading and incorrect. Therefore the jury based their decision on incorrect information. Cl. R. at 489-495.

10. Because TDCJ is a world of its own, with its own rules and terminology, and because of the State's common practice, in death penalty cases, of utilizing Special Prosecution Unit employees to talk about classification of inmates and the opportunities for violence that exist in prison, defense attorneys have for many years recognized the need for specialized assistance when dealing with questions of classification and other issues that may be relevant to sentencing. Consequently, former TDCJ employees such as myself have found themselves in demand to assist on cases such as Mr. Sparks'. Unfortunately, the defense chose not to present any rebuttal in this trial.

11. At the time of Mr. Spark's trial, I personally would have been available and willing to consult with his defense attorneys and to assist in preparing the case, and in helping to identify points for cross-examination at a *Daubert/Kelly* hearing or other hearing intended to exclude prosecution evidence about TDCJ. I could also have testified before the jury. For example, I could have explained that the best indicator of how an incarcerated individual may behave is based on their age and institutional adjustment record. I am also aware that there are other former TDCJ employees who acted as consultants and expert witnesses in this field who may well also have been available.

Further affiant sayeth not.

Sworn to and signed by the affiant on this the 3rd day of June 2013.

Frank AuBuchon

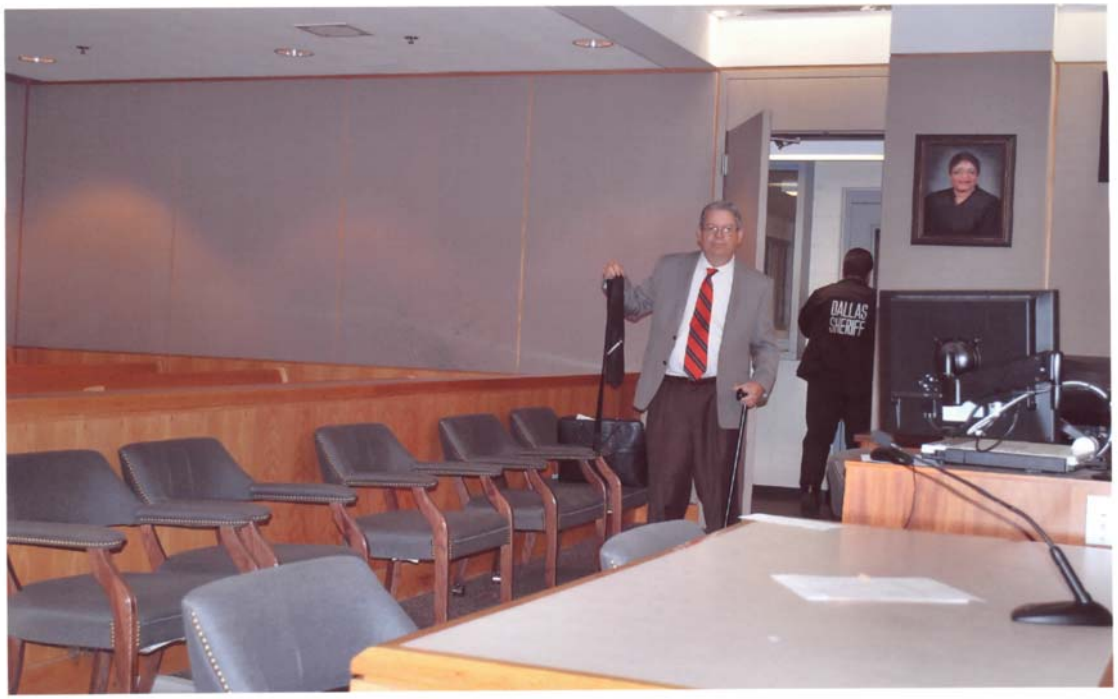
Sworn to and subscribed before me on this the 3rd day of June 2013.

Notary Public in and for the State of

RACHAEL RIDLEY GLASS
Notary Public, State of Texas
My Commission Expires
May 13, 2015

My Commission expires May 13, 2015

Tab H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