No. 19-________

IN THE SUPREME COURT OF THE UNITED STATES

TERENCE TREMAINE ANDRUS,

Petitioner,

v.

TEXAS,

Respondent.

**APPLICATION TO THE HONORABLE SAMUEL A. ALITO, JR.
FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS**

Under 28 U.S.C. § 2101(c) and this Court's Rule 13.5, Applicant Terence Tremaine Andrus hereby moves for an extension of time of 59 days, up to and including July 12, 2019, for the filing of a petition for writ of certiorari. In support of this request, he offers the following:

1. This Court has jurisdiction to grant this application under 28 U.S.C. § 1257(a).

2. Mr. Andrus seeks review of a decision of the Texas Court of Criminal Appeals, dated February 13, 2019 reversing the habeas fact-finding court's recommendation of relief in a capital case. *See* Appendix A.

3. Absent an extension, Mr. Andrus's petition for writ of certiorari would be due on May 14, 2019. This application is being filed more than 10 days before that date.

4. Mr. Andrus was convicted of capital murder and sentenced to death in Fort Bend County, Texas in 2012. Texas's highest court for criminal cases, the Court of Criminal Appeals (CCA), affirmed his conviction and sentence over three years later. A motion for rehearing was filed; and the CCA eventually withdraw its initial opinion and issued a substitute opinion, while also denying the motion for rehearing. *See Terence Tremaine Andrus v. State*, No. AP-76,936 (Tex. Crim. App. March 23, 2016) (not designated for publication). No one sought a writ of certiorari on Mr. Andrus's behalf at that time.

5. Mr. Andrus then sought post-conviction relief under Article 11.071 of the Texas Code of Criminal Procedure. The state district court, which served as the habeas fact-finder, held an evidentiary hearing on December 12, 13, 14, and 15, 2016, and on March 20, 21, and 29, 2017. The parties then presented closing arguments and proposed findings of fact and conclusions of law on July 21, 2017.

6. On September 8, 2017, the habeas fact-finding court issued Findings of Fact and Conclusions of Law, recommending that Mr. Andrus be granted relief in the form of a new punishment-phase trial, under *Wiggins v. Smith*, 539 U.S. 510 (2003) and its progeny. *See* Appendix B. The case was then submitted to the CCA as Article 11.071 of the Texas Code of Criminal Procedure requires.

7. On February 13, 2019, the CCA rejected the habeas fact-finding court's recommendation of relief and denied relief as to all other claims as well. *See* Appendix A.

8. A petition for writ of certiorari is essential in this case because Mr. Andrus is under a death sentence and his post-conviction case presents substantial, important, and recurring questions of federal constitutional law.

9. The CCA's unsigned opinion in this case states that the habeas applicant had failed to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), rejecting, *inter alia*, his allegation under *Wiggins v. Smith*, 539 U.S. 510 (2003), that trial counsel had failed to conduct a reasonable investigation and failed to present available mitigation. In "declin[ing] to adopt any of the trial court's findings of fact and conclusions of law, or its recommendation to grant relief" on the *Wiggins* claim, the CCA did not provide a rationale or mention any of the voluminous documentary or testimonial evidence put before the habeas court. Instead, most of the CCA's opinion is devoted to recounting the details of the underlying crime and the punishment-phase evidence put on by the State at trial. *See* Appendix A.

10. This case presents important and recurring questions about the need to apply national standards consistently in all death-penalty jurisdictions. For instance, this case presents the important question of whether a shackling claim under *Deck v. Missouri*, 544 U.S. 622 (2005), raised for the first time in a capital habeas proceeding and based on evidence only discovered through post-conviction interviews with jurors, can be properly deemed "procedurally barred" based on the conclusion that it could

have been raised on direct appeal—even though the State's capital procedures do not allow for the development or presentation of extra-record evidence on direct appeal. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (finding that Texas's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise certain claims on direct appeal).

11. This case also presents the important and recurring question of how a *Wiggins* claim, based on mitigating evidence adduced only during the post-conviction investigation, should be assessed in light of the State's case in aggravation at trial—where the trial counsel, accused of providing ineffective assistance, admitted under oath during the post-conviction proceeding that: he did not investigate any aspect of the State's case in aggravation pre-trial or seek to rebut it during trial and in fact conceded to the jury in closing argument that the jury would likely find that the State had proven that his client would be a "future danger." *See* Appendix B.

12. Undersigned counsel respectfully seeks this extension of time because of the importance of the issues in this case and counsel's obligations in other cases. Undersigned counsel is a solo practitioner appointed on March 19, 2019 to pursue a petition for writ of certiorari on Mr. Andrus's behalf. Between this date and the current deadline for filing a petition for writ of certiorari, Ms. Sween has substantial existing obligations in other capital cases. These obligations include primary responsibility for a trial-level hearing in which numerous constitutional challenges to Texas's capital-sentencing scheme will be presented on a client's behalf. Ms. Sween

also has primary responsibility for preparing for four complex post-conviction evidentiary hearings on behalf of death-sentenced individuals.

13. An extension of time will not prejudice Respondent.

Because good cause exists, Applicant respectfully requests that an extension of time, up to and including July 12, 2019, be granted within which Applicant may file a petition for writ of certiorari.

Respectfully submitted,

/s/ Gretchen Sims Sween

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March 29, 2019

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,438-01

EX PARTE TERENCE TRAMAINE ANDRUS

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 09-DCR-051034 IN THE 240TH DISTRICT COURT FORT BEND COUNTY

***Per curiam*. RICHARDSON, J., filed a concurring opinion in which KELLER, P.J., and HERVEY and SLAUGHTER, JJ., joined.**

ORDER

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

In November 2012, a jury convicted applicant of capital murder for intentionally or knowingly causing the deaths of Avelino Diaz and Kim-Phuong Vu Bui by shooting them with a firearm during the same criminal transaction. *See* TEX. PENAL CODE § 19.03(a). The trial evidence generally showed that, on October 15, 2008, a then-unidentified African American man shot Avelino Diaz to death while trying to "carjack" Diaz in a

Kroger's front parking lot in Fort Bend County. While fleeing, Diaz's assailant shot at the two occupants of a car which was entering the Kroger's side lot. The man killed the passenger (Kim-Phuong Vu Bui) and wounded the driver (Kim's husband, Steve Bui).

After investigation, Texas law enforcement officers identified applicant as a suspect. These officers subsequently learned that applicant had been arrested in New Orleans on an unrelated charge. The officers returned applicant to Texas after he waived extradition.

Applicant initially denied any involvement in the Kroger shootings. However, applicant ultimately confessed to the officers that he had shot the complainants. In his written statement, applicant asserted he was high on a mix of "embalming fluid" mixed with marijuana (a street name for marijuana or tobacco cigarettes dipped in phencyclidene (PCP)), cocaine, and beer when the offense occurred.

Applicant also essentially contended that he had acted in self-defense. Applicant admitted that he had been trying to take Diaz's car. However, applicant asserted that he tried to abandon the attempt after he saw that the car was a stick-shift, which he could not drive. But then Diaz got out of the car, trying to pull a pistol out of a holster. While fleeing the scene of Diaz's shooting, applicant asserted, the Buis tried to run applicant over with their car. However, applicant's account of the shootings contradicted the State's physical and testimonial evidence.

The jury found applicant guilty of capital murder as alleged in the indictment. *See*

TEX. PENAL CODE § 19.03(a)(7)(A). At the punishment phase, the State presented evidence of applicant's adjudicated and unadjudicated prior offenses. These included juvenile adjudications for felony possession of a controlled substance in a drug-free zone and criminal solicitation to commit felony aggravated robbery (involving a firearm). They also included evidence that Applicant had committed an aggravated robbery less than a month before the capital offense. During that offense, applicant kicked, beat, and threatened his victim with a knife. The State also showed the jury photographs of applicant's numerous gang-related tattoos. In addition, when applicant testified at the punishment phase, he admitted that he had been a member of the "59 Bounty Hunter Bloods" street gang.

Besides the evidence of his criminal history, the State presented evidence that applicant was confined by the former Texas Youth Commission (TYC) as a result of his criminal-solicitation juvenile adjudication. However, due to his behavior problems, which included aggressive or assaultive behavior towards other youths and staff, and his general failure to progress in TYC's rehabilitation program, applicant was transferred to Texas's adult prison system to complete his sentence. The State additionally presented evidence of applicant's significantly more disruptive, violent, and threatening behavior at the Harris County and Fort Bend County jails while awaiting trial in this case.

As we summarized previously in our opinion on direct appeal, the defense presented a punishment case which emphasized evidence of: applicant's socioeconomic

history; his long-standing drug abuse; the effect of drug abuse on adolescent brain development; and applicant's remorse. *See Andrus v. State*, No. AP-76,936, slip op. at 11–12 (Tex. Crim. App. Mar. 23, 2016) (op. on reh'g) (not designated for publication).

Applicant also testified in his own defense. Applicant asserted that: he had been exposed to drugs as early as 6 years of age, because his mother sold them; he rarely had adult supervision at home, and he started using drugs regularly when he was 15. *See id.* at 12. Applicant acknowledged that he does not like confined spaces and or being told what to do, and that he had previously acted out when feeling agitated. *See id.* at 12–13. However, Applicant stated that he had recently given his life to God, and he asserted that he no longer acted out. *See id.* Applicant additionally testified that he could help other inmates to avoid making the same mistakes that he had made. *See id.* at 13.

The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Id.* at 2.

In his application, applicant presents seven challenges to the validity of his conviction and sentence. The trial court held an evidentiary hearing. The trial court thereafter entered findings of fact and conclusions of law and recommended that we grant relief as to Claim 1 of applicant's allegations. However, the trial court recommended that we deny relief as to applicant's remaining claims.

We have reviewed the record regarding applicant's allegations. In Claim 2,

applicant alleges that his "due process rights were infringed when the jury was informed [that applicant] was wearing physical restraints during the punishment phase of his trial." In Claim 5, applicant alleges that his "death sentence was arbitrarily and capriciously assigned based on the jury's answer to the unconstitutionally vague [future dangerousness special issue]." Both Claim 2 and Claim 5 are procedurally barred, as they could have been raised on direct appeal. *See Ex parte Chavez*, No. WR-68,051-03, slip op. at 14 (Tex. Crim. App. October 3, 2018); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004). We accordingly deny relief on both Claim 2 and Claim 5 without reaching the merits of either allegation.

In Claims 1, 3, 4, 6, and 7, applicant alleges that trial counsel were constitutionally ineffective for: failing to conduct a reasonable investigation and presentation of available mitigating evidence (Claim 1); failing to preserve potential *Batson*[1] error (Claim 3); conceding the future dangerousness special issue (Claim 4); failing to properly object to allegedly inadmissible victim-impact evidence at the guilt-innocence phase of trial (Claim 6); and failing to preserve the record for direct appeal (Claim 7). However, applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

the proceedings would have been different, but for counsel's deficient performance.[2] *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688). Therefore, we deny relief on the merits of Claims 1, 3, 4, 6, and 7.

Furthermore, we decline to adopt any of the trial court's findings of fact and conclusions of law, or its recommendation to grant relief regarding Claim 1. Based on our own review of the record, we deny relief on all of applicant's habeas claims.

IT IS SO ORDERED THIS THE 13TH DAY OF FEBRUARY, 2019.

Do Not Publish

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[2] We note that, throughout its findings, the trial court misstates the *Strickland* prejudice standard by omitting the standard's "reasonable probability" language.

APPENDIX B

No. 09-DCR-051034-HC1

EX PARTE	§	IN THE 240TH JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
TERENCE ANDRUS	§	FORT BEND COUNTY

FINDINGS OF FACT & CONCLUSIONS OF LAW

On March 4, 2015, Applicant filed an Application for Writ of Habeas Corpus. This Court held a hearing on Applicant's application and pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court hereby enters the following Findings of Fact & Conclusions of Law:

Procedural History

(1) On February 2, 2009, Applicant was indicted for the offense of Capital Murder alleged to have been committed on October 15, 2008. *See* TEX. PENAL CODE § 19.03(a)(7)(A).

(2) Applicant pleaded not guilty to the charges alleged in the indictment and on October 1, 2012, Applicant's jury trial began in the 240th Judicial District Court of Fort Bend County, Texas.[1]

(3) On November 6, 2012, Applicant was convicted of Capital Murder as alleged in the indictment. Pursuant to the Jury's answers to the special issues submitted at the punishment phase of trial, Applicant was sentenced to death on November 14, 2012. *See* TEX. CODE CRIM. PRO. Art. 37.071 §§ 2(b), 2(e).

(4) On March 23, 2016, The Texas Court of Criminal Appeals affirmed Applicant's conviction and sentence. *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

[1] The trial was presided over by the Honorable Thomas R. Culver, III, now deceased. The undersigned was assigned to preside over the Habeas Corpus Proceedings by the Hon. Olen Underwood, Presiding Judge of the Second Administrative Judicial Region.

Applicant's Confession and Statements to Law Enforcement

(5) At trial, the jury was presented with Applicant's written confession and statements to law enforcement.[2] Applicant's trial counsel filed a motion to suppress that confession and Applicant's statements to law enforcement. The trial court denied Applicant's motion and entered findings of fact and conclusions of law with respect to the voluntariness of Applicant's statements.

(6) The Texas Court of Criminal Appeals, which will ultimately decide the present case, held that Applicant's confession and his statements to law enforcement were voluntary and were not the product of a violation of his state or federal constitutional or statutory rights; and therefore, the trial court did not err in denying Appellant's motion to suppress. *Andrus v. State,* No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

(7) During one conversation with law enforcement, after he was properly *Mirandized,*[3] Applicant described killing the first victim in this case by saying, "Boom, I shot him." Applicant continued:

> I shot him. He was about to pull a pistol out on me. It was life or death with him. If I'd have turned around and started running, I would have been dead --which I am now, don't get me wrong, but -so, I ran towards -out going towards, back towards my house, and people, I guess they heard the gun shots. So, as I came in front of their car, they sped up and tried to hit me with their car. They tried to run me over. So, I started shooting through their windshield, and then I just took out running. And you know that's the honest to God truth.

See HCEH RR10: State's Exhibit HC19.[4]

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[2] In addition to his statements and written confession, after returning to Fort Bend County, Applicant helped the police locate his gun, a .380 automatic, as well as a shovel Applicant used to conceal the gun. Three live rounds were still in the gun's eight-round magazine with one round in the chamber. Investigators recovered four spent bullets from the crime scene that matched the rounds recovered from the gun used to kill the victims in this case. *Andrus v. State,* No. 76,936 (Tex. Crim. App., delivered March 23, 2016).

[3] *Miranda v. Arizona,* 384 U.S. 436 (1966).

[4] The Reporter's Record of the Habeas Corpus Evidentiary Hearing will be referred to as "HCEH."

(8) The Texas Court of Criminal Appeals held further that the evidence in this case is legally sufficient to support Applicant's conviction because "aside from the confessions, the evidence included eyewitness testimony, video surveillance, and Andrus's flight after committing the crime." *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

Applicant's Claims

Each of Applicant's claims will be addressed in the order in which it was presented in Applicant's Petition for Writ of Habeas Corpus filed March 4, 2016. As a preliminary matter, this Court recognizes that to prevail upon a post-conviction petition for a writ of habeas corpus, an Applicant bears the burden of proving, by a preponderance of the evidence, facts that entitle him to relief. *Ex parte Morrow*, 952 S.W.2d 530, 534-35 (Tex. Crim. App. 1997).

(9)Applicant's first claim is as follows:

"TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO CONDUCT A REASONABLE INVESTIGATION AND IN THEIR PRESENTATION OF AVAILABLE MITIGATING EVIDENCE."

(a) In *Wiggins v. Smith*, 539 U.S. 510 (2003), the United States Supreme Court held that the failure to present mitigating evidence in a death penalty case is unreasonable where the record reflects that trial counsel did not conduct a thorough investigation into the defendant's background and cited the ABA Standards for Criminal Justice. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(b) The Supreme Court emphasized in *Wiggins* that the question is not whether counsel should have presented a mitigation case. Rather, the focus is on whether the investigation supporting trial counsel's decision not to introduce mitigating evidence was itself reasonable. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(c) Specifically, in *Wiggins*, trial counsel's assistance was found to be ineffective where they failed to investigate and present mitigating evidence regarding the defendant's abusive childhood. *Wiggins v. Smith*, 539 U.S. 510, 517 (2003).

(d) At the hearing on Applicant's Petition for Habeas Corpus relief, James Sidney Crowley testified that he was appointed to represent Applicant in this case on

February 17, 2009. HCEH RR2: 172.

(e) Crowley testified that the first time he visited Applicant in jail was on October 4, 2009 and only visited him a total of six times prior to trial. HCEH RR2: 183, 185.

(f) Crowley agreed that between February 17, 2009, and October 4, 2009, he did not visit Applicant in jail to admonish him that his behavior while incarcerated could be used against him at the punishment of his capital murder trial. HCEH RR2: 186.

(g) Crowley agreed further that he was not aware that during February 17, 2009, and October 4, 2009, Applicant attempted suicide, smeared blood on the walls of the jail, and engaged in altercations with jail personnel. HCEC RR2: 188-89. Crowley stated that he did not believe he needed to investigate the foregoing issues and did not have a mitigation specialist who could have investigated those issues. HCEH RR2: 189.

(h) Crowley admitted that he did not investigate why Applicant was confined to a padded cell for sixty-two days in the Fort Bend County Jail or why he was administered the medications Thorazine and Seroquel. HCEH RR3: 78.

(i) Crowley acknowledged that the first time he had Applicant evaluated by a mental health professional, Dr. Jerome Brown, was "in 2012 sometime." HCEH RR2: 191.

(j) Crowley testified that Amy Martin, a mitigation specialist, was appointed in 2010 after second chair counsel, Jerome Godinich, recommended her. HCEC RR2: 197. However, Crowley never asked Martin to prepare a mitigation packet. HCEH RR2: 198.

(k) In fact, Crowley asked during the hearing on Applicant's Petition for Writ of Habeas Corpus, "What do you mean by a mitigation packet?" and indicated his understanding that a mitigation packet was "something that you give the district attorney's office." HCEH RR2: 199.

(l) Crowley testified that at the time Martin and Godinich withdrew from this case in January of 2012, no experts had been retained despite the fact that trial was set to begin on October 1, 2012. HCEH RR2: 212.

(m) Crowley agreed that as of January of 2012, he had only put in five hours of work on Applicant's case and that no one was attempting to define mitigation themes or determine how to advocate for a life sentence on behalf of Applicant. HCEH RR2: 212.

(n) Crowley agreed further that between January of 2012 and June of 2012, he had no second chair counsel and no mitigation expert in this case. HCEH RR3: 37-38.

(o) Crowley testified that he did not conduct any independent investigation into any of the extraneous offenses alleged by the State during the punishment phase of trial and did not test the veracity of any of the extraneous offense evidence offered by the State, despite Applicant's repeated assertion that he did not commit at least one of the extraneous offenses. HCEH RR3: 64-66.

(p) Crowley acknowledged that he received information from Martin that Applicant was diagnosed with a serious mental illness when he was ten or eleven years old, but did not retain an expert to investigate that mental illness. HCEH RR3: 71.

(q) Crowley learned that Applicant received medication for mental health issues as a child but did not consult a mental health or medical expert to investigate why Applicant received the medication or its affects. HCEH RR3: 73.

(r) Crowley stated that although records from the Texas Youth Commission indicated Applicant had problems at home, Crowley did not investigate what those problems were. HCEH RR3: 73-74.

(s) Crowley testified that he did not investigate anything traumatic in Applicant's background except to speak to Applicant and his mother. HCEH RR3: 88. However, Crowley did not speak with Applicant's mother until she was subpoenaed to come to Court. HCEH RR3: 88.

(t) Crowley testified that he did not conduct any independent investigation into Applicant's mother's version of Applicant's childhood even after Applicant informed Crowley his mother did not testify truthfully at trial. HCEH RR3: 95.

(u) Crowley testified that he did not have any extensive conversations with Appellant's father, Mike Davis, before he testified and in fact, it was the State who brought Davis to the courthouse to testify. HCEH RR3: 98.

(v) Crowley called James Martins, a Fort Bend County Jailer, to testify during the punishment phase of trial, but met with him for the first time during a break in the middle of trial. HCEH RR3: 99. Martins then testified that Applicant may suffer from Antisocial Personality Disorder which, Crowley agreed, was not mitigating. HCEH RR3: 102-03.

(w) Crowley agreed that he retained psychiatrist and pharmacologist Dr. John Roache in late August of 2012,[5] two months prior to the commencement of voir dire in this case. HCEH RR3: 103.

(x) Crowley agreed further that Dr. Roache was not given a mitigation report, memos of interviews with family members or any information from a mitigation specialist, though he regularly relies on that information to render an opinion. HCEH RR3: 103-04.

(y) Crowley acknowledged that Dr. Roache only met with Applicant once, just days before voire dire began, and Crowley took no steps to prepare Applicant for that meeting. HCEH RR3: 105.

(z) When asked if Dr. Roache did a psychological evaluation of Applicant, Crowley responded, "No." HCEH RR3: 110. Crowley responded further that although Dr. Roache was the lone expert that testified at trial, Crowley did not retain him to perform a psychological evaluation. HCEH RR3: 110.

(aa) Crowley testified that he did not investigate Applicant's neighborhood or his childhood experiences. HCEH RR3: 116.

(bb) Crowley testified that he did not investigate any of the facts of the underlying offense that resulted in Applicant's incarceration at the Texas Youth Commission. HCEH RR3: 119-20.

(cc) Crowley testified that despite the widely-known scandal concerning the Texas Youth Commission, which occurred prior to the trial of this case, Crowley did not consult an expert regarding the Texas Youth Commission. HCEH RR3: 122-23.

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[5] The record reflects "August 2002, late August." HCEH RR3: 103). This appears to be either a typo by the Court Reporter or an accidental misstatement by Applicant's attorney. The context is clear that the time period referred to was late August of 2012.

(dd) Crowley testified that he did not interview Applicant's brother, Torad Andrus; his sister, Tafarrah Andrus; his sister, NormaRaye Andrus; his stepmother, Rosalind Cummings; his stepbrother, Jamontrell Seals; his mother's live-in boyfriend, Sean Gilbow; or family friend Stephanie Garner. HCEH RR3: 135-36.

(ee) Crowley testified that he received a report from Dr. Brown, dated October 12, 2012, but claimed he did not receive that report until after trial was completed because Dr. Brown sent the report by email to an old email address. HCEH RR3: 255, 257.

(ff) Crowley agreed that Dr. Brown's report indicated that Applicant was referred for psychiatric evaluation in 2009 while in the Harris County Jail and received psychiatric treatment. HCEH RR3: 258.

(gg) Crowley agreed further that Dr. Brown's report indicated that Applicant had been prescribed psychoactive, antipsychotic, psychotropic and antidepressant medications. HCEH RR3: 258, 260.

(hh) Crowley agreed further that Dr. Brown's report indicated that Applicant had suffered auditory hallucinations since the age of fourteen years, suffers from severe mental illness and had been diagnosed with schizophrenia. HCEH RR3: 261-64.

(ii) Crowley testified that he is not a mitigation specialist and after Martin left the case, no one he spoke to about Applicant's case was a mitigation specialist. HCEH RR3: 253. Crowley testified further that he had used mitigation specialists in the past. HCEH RR3: 254.

(jj) Crowley stated that he expected to be compensated for his time testifying at the habeas corpus evidentiary hearing. HCEH RR3: 254.

(kk) The Court finds portions of Crowley's testimony credible and portions of Crowley's testimony not credible.

(ll) Diana Olvera testified that she was appointed as second chair trial counsel on June 7, 2012, four months before trial was set to begin. HCEH RR4: 12-13.

(mm) Olvera clarified that she was not a mitigation specialist and that there was no one in that role when she joined the defense team in this case or any time after. HCEH RR4: 15. However, in her affidavit, Olvera stated that she was in charge of presenting mitigating evidence at trial. HCEH RR11: State's Exhibit 2.

(nn) Olvera testified that she spoke to Cynthia Andrus, Applicant's mother, on a few occasions and decided to call her as a witness at trial, but only interviewed her in person on the day she testified. HCEH RR4: 16-17.

(oo) Olvera agreed that she had not met with any of Applicant's family members in person before this case went to trial. HCEH RR4: 25-26.

(pp) Olvera testified that she did not investigate the facts of the underlying facts of the present case and did not discuss the facts of the case with Applicant. HCEH RR4: 23-24.

(qq) Olvera testified that she contacted the Texas Defender Service prior to trial to get guidance about a potential expert on the Texas Youth Commission and its internal problems, and was given the name of John Niland who referred her to the appropriate expert. HCEH RR4: 30. However, Olvera never contacted the expert. HCEH RR4: 31.

(rr) Olvera explained that Crowley was in charge of contacting and retaining experts. HCEH RR4: 33. Olvera testified that it was not reasonable for Crowley to wait to communicate with potential experts just before voir dire began in October of 2012, especially considering he was appointed in February of 2009. HCEH RR4: 34-35.

(ss) Olvera testified that she did not investigate the extraneous offense evidence presented by the State at the punishment phase of trial. HCEH RR4: 37.

(tt) Olvera testified that Crowley was responsible for the strategic decisions in the case, including the decision to proceed without a mitigation specialist. HCEH RR4: 39.

(uu) The Court finds Olvera's testimony credible.

(vv) Fred Felcman, the Fort Bend County First Assistant District Attorney who prosecuted this case, testified that in another capital murder case, Crowley

admitted to misleading the trial court. HCEH RR5: 21-22.

(ww) Felcman testified that no one from the defense team ever approached him with an offer that Applicant would plead guilty to the offense of capital murder in exchange for a sentence of life without parole. HCEH RR5: 25.

(xx) The Court finds Felcman's testimony credible.

(yy) Will Harrell, Southern Regional Policy Counsel for the American Civil Liberties Union, testified that he was appointed by Governor Rick Perry to serve as the first Chief Independent Ombudsman over the Texas Youth Commission. HCEH RR5: 112.

(zz) Harrell reviewed Applicant's Texas Youth Commission Records and determined that Applicant was unfairly held accountable for failing to succeed in a behaviorial program that has since been discredited and "scrapped" by the State. HCEH RR5: 121. The result was that Applicant was sent to the Texas Department of Criminal Justice when he should not have been. HCEH RR5: 121-22.

(aaa) Harrell detailed the scandal which caused the Texas Youth Commission to be reformed by legislation. He explained that Applicant was incarcerated prior to the legislative reform and was incarcerated at the Texas Youth Commission while the events that were uncovered by the scandal were occurring. HCEH RR5: 140-60.

(bbb) Harrell explained that Applicant was not properly diagnosed while at the Texas Youth Commission because of undertrained staff. HCEH RR5: 158.

(ccc) Harrell detailed Applicant's time of incarceration at the Texas Youth Commission including the dangerousness of the facility he was placed in, the lack of appropriate mental health care, the fact that he was unduly placed in isolation for weeks at a time, and the fact that his prescribed medication was not appropriate or adequately distributed. HCEH RR5: 161-63, 179-81.

(ddd) Harrell testified that Applicant's time at the Texas Youth Commission damaged and traumatized him and that he got no meaningful assistance from the program. HCEH RR5: 246.

(eee) Harrell testified that he was not contacted by Applicant's trial counsel, but would have been available to testify at trial in 2012 had he been contacted. HCEH RR5: 192.

(fff) The Court finds Harrell's testimony credible.

(ggg) Sean Gilbow testified that he met Applicant when they were both living in the Third Ward because his brother, Seneca Booker, was Applicant's mother's boyfriend. HCEH RR6: 24, 29. Gilbow characterized the Third Ward as "[d]rug infested," with prostitution, shootings, crime and violence. HCEH RR6: 24-26.

(hhh) Gilbow testified that he learned how to obtain and sell drugs from Applicant's mother, Cynthia Andrus, when he was nineteen years old. HCEH RR6: 26-27, 35-36. Applicant was ten years old at this time. HCEH RR6: 37.

(iii) Gilbow testified that several other adults used and sold drugs around Applicant when he was a child. HCEH RR5: 39-40.

(jjj) Gilbow explained that when Applicant's mother was not at home, she would leave Applicant in charge of his many siblings, including his special needs brother. HCEH 6: 41-42. Specifically, Applicant cooked, cleaned, made sure his siblings did their homework and made sure they went to school. HCEH RR6: 42.

(kkk) Gilbow testified that Applicant and his family later moved to Mission Bend, but the same problems existed there as in the Third Ward. HCEH RR6: 46-47. In addition, Applicant and his siblings were exposed to gang activity. HCEH RR6: 47.

(lll) When Applicant was released from prison, he went to live with Gilbow; Gilbow's wife, Phyllis Garner; and Garner's daughter. HCEH RR6: 49.

(mmm) Gilbow testified that Applicant was respectful, cooked meals, and "cleaned up" when he lived with Gilbow. HCEH RR5: 49.

(nnn) Gilbow visited Applicant prior to the trial in this case, but was never contacted by Applicant's trial counsel. HCEH RR5: 50. Gilbow testified that he would have talked to trial counsel had they contacted him and would have

testified at trial if asked. HCEH RR5: 50-51.

(ooo) The Court finds Gilbow's testimony credible.

(ppp) Phyllis Garner testified that she is a field staff supervisor for Girling Community Care and that she and Gilbow have lived together for fourteen years. HCEH RR6: 75-76.

(qqq) Garner testified that she met Applicant when he was sixteen years old through Gilbow because Gilbow's brother, Seneca Booker, was Applicant's mother's boyfriend. HCEH RR6: 79-80.

(rrr) At the time Garner met Applicant, he and his family were living in Public Assistance Housing in Mission Bend, an area that was infested with drugs and gangs. HCEH RR6: 83.

(sss) Garner testified that Applicant's mother, Cynthia Andrus, supported herself and her children by selling drugs and prostitution. HCEH RR6: 85-86. Cynthia also used drugs in front of her children. HCEH RR6: 88-89

(ttt) Garner explained that Applicant took care of his brothers and sisters by getting them dressed and ready for school, making sure they got to bed on time, and watching out for his brother, Torad, who had special needs. HCEH RR6: 889.

(uuu) Garner explained further that on their days off, she and Gilbow would take Applicant to the movies or to get a haircut, and then Garner would cook Applicant his favorite meal, breakfast, for dinner. HCEH RR6: 90. During those visits, Applicant was "laughing, talking, smiling and just being a kid" because he did not have the responsibilities he had at home. HCEH RR6: 91.

(vvv) Garner testified that Applicant came to live with her and Gilbow when he was released from prison. HCEH RR6: 95. Applicant abided by the rules of the house and did his assigned chores. HCEH RR6: 96.

(www) Garner testified that no one from Applicant's trial team ever contacted her but she would have spoken to them if they had and she would have testified at trial if asked. HCEH RR6: 100.

(xxx) The Court finds Garner's testimony credible.

(yyy) Dr. Scott Hammel, a clinical psychologist testified that he was formerly employed at the Texas Youth Commission. HCEH RR6: 127. Dr. Hammel interviewed Applicant on three occasions, spoke to his family members and reviewed relevant records. HCEH RR6: 130.

(zzz) Dr. Hammel testified that his evaluation revealed that Applicant suffered physiological changes to his brain as a result of trauma in his childhood. HCEH RR6: 168. Specifically, Dr. Hammel testified that Applicant was exposed to violence, death, severe emotional neglect, substance abuse, domestic violence and distrust. HCEH RR6: 168-69.

(aaaa) According to Dr. Hammel, the trauma Applicant suffered stunted his emotional development. HCEH RR6: 181.

(bbbb) Dr. Hammel detailed Applicant's social history including his relationship to his relatives, the circumstances of his neighborhood, the incarceration of family members, and the violence and drug use in Applicant's family. HCEH RR6: 169-215.

(cccc) Dr. Hammel explained that his evaluation revealed that Applicant was exposed to trauma in such a way that he exhibits post-traumatic-stress-disorder symptoms and suffers from mood disorder. HCEH RR7: 52.

(dddd) The Court finds Dr. Hammel's testimony credible.

(eeee) Dr. Roache submitted an affidavit, which the Court finds credible, in which he explains:

"Based on my prior experiences consulting and testifying in capital cases, I was struck by the extent to which Mr. Crowley appeared unfamiliar or naive with issues relating to brain development, drug addiction, and other such mitigation issues relative to other capital attorneys I have worked with. During my testimony, Mr. Crowley seemed to struggle to provide direction while I was on the stand. Also, following a rather rough cross-examination by the prosecutor, who made mocking comments about my testimony, Mr. Crowley seemed to be at a loss to ask follow up questions to address the prosecution's damaging statements. Another part of my involvement in the Andrus case that stuck out to me was that Mr. Crowley asked me to speak to the prosecution prior to my testimony. Mr. Crowley told me that the prosecutor wanted to know the factual basis of my intended testimony. I found this to be an unusual request based on

my prior capital case experience. During the phone call, I was very uncomfortable with the extent to which the prosecutor wanted to go broadly into the subject of my testimony. Our conversation was certainly not limited merely to my own qualifications to testify." HCEH RR13: Applicant's Exhibit 6.

(ffff) Dr. Brown submitted an affidavit, which the Court finds credible, in which he explains he was contacted by Crowley in September of 2012 to perform a psychological evaluation of Applicant. Dr. Brown was provided only collateral information upon which to perform his evaluation. Dr. Brown visited Applicant on September 20, 2012, and submitted a report to Crowley on October 12, 2012. Dr. Brown was never asked to testify although he was available to do so. HCER RR13: Applicant's Exhibit 2.

(gggg) Dr. Michael Lindsey, a clinical psychologist, submitted an affidavit, which the Court finds credible, in which he explains that he performed a psychological evaluation on Applicant and considered Applicant's criminal history records, education records, medical records, jail records and affidavits from Applicant's family and friends. Dr. Lindsey also met with Applicant over the course of two days, February 12-13, 2015 at the Texas Department of Criminal Justice. Dr. Lindsey offered his opinion that Applicant suffered from inadequate childhood development which produced "strongly mitigating circumstances," in Applicant's case including "overall deprivation of a nurturing childhood, his parental abuse and neglect, witnessing violence and trauma, the lack of adequate supervision and guidance. Inadequate stimulation for his brain for learning. and multiple factors leading to substance abuse and misconduct, his cognitive and psychological development is unquestionably compromised and is unquestionably compromised and less that of an adult." Dr. Lindsey states he was available to testify at Applicant's trial but was not contacted by Applicant's trial counsel. HCEH RR13: Applicant's Exhibit 5.

(hhhh) Jerome Godinich submitted an affidavit, which the Court finds credible, in which he explains that he was appointed as second chair in this case but withdrew in 2012 because the case was not ready to be tried. HCEH RR13: Applicant's Exhibit 27. Specifically, he had a "lack of confidence" in Crowley's "willingness to handle the case in the manner it needed to be." HCEH RR13: Applicant's Exhibit 27.

(iiii) Amy Martin submitted an affidavit, which the Court finds credible, in which she explains she was appointed as a mitigation specialist on July 19, 2010 but

was told by Crowley that no mitigation packet was needed because he was awaiting the State's confirmation that they would accept an offer of life without parole. HCEH RR13: Applicant's Exhibit 28.

(jjjj) Martin informed Crowley he needed a juvenile development expert, a prison classification expert, a Texas Youth Commission Expert, and a medical professional. HCEH RR13: Applicant's Exhibit 28.

(kkkk) Martin also informed Crowley that he needed to interview Applicant's family, friends and teachers. HCEH RR13: Applicant's Exhibit 28.

(llll) Martin ultimately withdrew from the case because in her opinion, it was not ready to be tried. HCEH RR13: Applicant's Exhibit 28.

(mmmm) Torad Davis, Cynthia Booker, Latoya Cooper, Sade Scroggins, Jamontrell Seals, Kailyn Williams, and NormaRaye Williams, all submitted affidavits, each of which, the Court finds credible. HCEH RR13: Applicant's Exhibits 9-18. The affidavits provide mitigating information which could have been presented at the punishment phase of Applicant's trial. HCEH RR13: Applicant's Exhibits 9-18.

(nnnn) The Court finds and concludes that in the present case, there was ample mitigating evidence which could have, and should have, been presented at the punishment phase of Applicant's trial. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(oooo) The Court finds and concludes that relevant, available, and persuasive mitigating evidence was not presented at Applicant's trial because his lead trial counsel failed to conduct a thorough investigation into Applicant's background. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(pppp) The Court finds and concludes that lead trial counsel's decision not to introduce mitigating evidence was unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(qqqq) The Court finds and concludes that just as in *Wiggins*, Applicant's lead trial counsel was ineffective in failing to investigate and present mitigating evidence regarding the defendant's abusive and neglectful childhood. *Wiggins v. Smith*, 539 U.S. 510, 517 (2003).

(rrrr) The Court finds and concludes that Applicant's lead trial counsel was ineffective in failing to investigate and present all other mitigating evidence, including, but not limited to: mental health history, his incarceration at the Texas Youth Commission, the scandal at the Texas Youth Commission, educational history, the circumstances of Applicant's child development, Applicant's family history, and the diagnosis of serious mental illness, which was available at trial, as detailed above. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(ssss) The Court finds and concludes that Applicant's lead trial counsel was ineffective in failing to retain the necessary experts to investigate and present all available mitigating evidence at the punishment phase of Applicant's trial. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(tttt) The Court finds and concludes that Applicant is entitled to Habeas Corpus Relief with respect to his first claim. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(10) Applicant's second claim is as follows:

"ANDRUS'S DUE PROCESS RIGHTS WERE INFRINGED WHEN THE JURY WAS INFORMED ANDRUS WAS WEARING PHYSICAL RESTRAINTS DURING THE PUNISHMENT PHASE OF TRIAL."

(a) In *Deck v. Missouri*, the United States Supreme Court held that while shackling of a defendant during trial is inherently prejudicial because it infringes upon the presumption of innocence, due process is only implicated when the jury can see the restraints. *Deck v. Missouri*, 544 U.S. 622, 628 (2005); *Bell v. State*, 415 S.W.3d 278, 281-82 (Tex. Crim. App. 2013). The *Deck* Court was clear that it is not the mere shackling alone, but rather the jury's perception of the shackles, that undermines a defendant's presumption of innocence. *Bell*, 415 S.W.3d at 281-82. If it is determined beyond a reasonable doubt that shackling the defendant did not contribute to the conviction or punishment, relief is not justified. *Id.* at 284.

(b) In the present case, virtually all of the jurors and alternates filed affidavits with respect to Applicant's second claim.

(c) All but one juror either did not remember when they realized Applicant was constrained or remembered that it was during the punishment phase when

they were apprized that Applicant was wearing restraints. *See* HCEH RR10: State's Exhibits 3-12; RR13: Applicant's Exhibits 19, 24.

(d) Applicant concedes the bailiff did not inform the jury that Applicant was restrained until after he had been found guilty and before the punishment phase. Applicant's writ at 80.

(e) All of the jurors that submitted affidavits averred that the fact that Applicant was shackled had no effect on their verdict. *See* HCEH RR10: State's Exhibits 3-12; RR13: Applicant's Exhibits 19, 24.

(f) As such, Applicant is not entitled to relief on his second claim for habeas corpus relief. *Deck*, 544 U.S. at 628; *Bell*, 415 S.W.3d at 284.

(11) Applicant's third claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE POTENTIAL *BATSON* ERROR."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) The Texas Code of Criminal Procedure prohibits the use of peremptory challenges to exclude prospective jurors on the basis of race. TEX. CODE CRIM. PRO. Art. 35.261. Additionally, striking a prospective juror on the basis of race violates the equal protection guarantees of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79 (1986).

(c) Crowley testified that he did not make a *Batson*[6] challenge because he did not feel a prima facie case for striking minority jurors had been made. HCEH RR3: 187.

(d) Olvera testified, and included in her affidavit, her opinion that during the jury selection process, she never got the impression the State was purposely striking jurors based on race, so the defense did not lodge any *Batson* challenges. HCEH RR4: 125.

[6] *Batson v. Kentucky*, 476 U.S. 79 (1986).

(e) Felcman testified that "not one" of the peremptory strikes against a minority venire member was racially motivated. HCEH RR5: 49.

(f) Using his notes and the answers to Juror Questionnaires, Felcman then offered race neutral reasons for the minority jurors he used peremptory strikes on. HCEH RR5: 51-78.

(g) Based on this record, Applicant is unable to show his attorney's performance was deficient or that but for counsel's allegedly deficient performance, the outcome of his trial would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984).

(12) Applicant's fourth claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR CONCEDING THE FIRST SPECIAL ISSUE."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) The complained-of argument is as follows:

> Let's go the Question 1. It's that "future danger"' question. Remember, we talked about it. Is there's a probability --do you find from the evidence beyond a reasonable doubt that there's a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? You've heard all kinds of evidence, based upon that, to help you - - aid you in answering this question. You know, I told you all along, the guilt or innocence argument –I'm not going to try to snow the jury. You've heard evidence, even from some of our own witnesses, that Mr. Andrus was probably a violent kind of guy. Okay? That's kind of a double-edged sword to put on evidence. Hopefully, you know, our case, you have to take the good with the bad. You've heard all of this evidence, basically what happened in the jail and TYC. There is probably a good probability that you're going to answer this question yes.

(c) At the hearing on Applicant's Petition for Writ of Habeas Corpus, Crowley testified that his statement was not, in fact, a concession, but rather a strategy in focusing on mitigation. HCEC RR3: 83.

(d) The Court finds and concludes that Crowley's statement was the product of trial strategy to focus on mitigation and gain credibility with the jury. While not the desired strategy of all, it is still, a plausible strategy. Therefore, Applicant is unable to show his counsel's performance was deficient. Further, Applicant is unable to show the outcome of the punishment phase of his trial would have been different had Crowley not made the complained-of statement.[7] *See Strickland v. Washington*, 466 U.S. 668 (1984).

(13)Applicant's fifth claim is as follows:

"ANDRUS'S DEATH SENTENCE WAS ARBITRARILY AND CAPRICIOUSLY ASSIGNED BASED ON THE JURY'S ANSWER TO THE UNCONSTITUTIONALLY VAGUE FIRST SPECIAL ISSUE."

(a) The United States Supreme Court and the Texas Court of Criminal Appeals have previously considered challenges to the constitutionality of Texas Code of Criminal Procedure Article 37.071, Section 2(b)(1) and have denied those challenges. *See Jurek v. Texas*, 428 U.S. 262 (1976; *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003); *Robinson v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994).

(b) The United States Supreme Court and the Texas Court of Criminal Appeals have ruled contrary to Applicant's position and thus, he is not entitled to habeas corpus relief with respect to his fifth claim. *See Jurek v. Texas*, 428 U.S. 262 (1976; *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003); *Robinson v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994).

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[7] As discussed above, the Court does find and conclude that Applicant is entitled to relief, and specifically, a new punishment trial, because his counsel was ineffective in failing to investigate and present mitigating evidence at the punishment phase of trial. Therefore, the resolution of this claim is rendered moot assuming the Court of Criminal Appeals accepts this Court's recommendation.

(14)Applicant's sixth claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY OBJECT TO INADMISSIBLE VICTIM IMPACT EVIDENCE AT THE GUILT/INNOCENCE PHASE OF TRIAL."

(c) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(d) Applicant signed a written confession, made several statements to law enforcement explaining how he killed the victims in this case, and led law enforcement to the gun he used to kill the victims. In addition, there was videotape and eyewitness evidence which inculpated Applicant.

(e) Based on the overwhelming evidence of Applicant's guilt, he is unable to show that any alleged deficient performance on the part of his trial counsel affected the jury's verdict at the guilt or innocence phase of trial or that but for counsel's allegedly deficient performance, the outcome of the guilt or innocence phase of his trial would have been different. Accordingly, Applicant is not entitled to relief with respect to his sixth claim for habeas corpus relief. *See Strickland v. Washington*, 466 U.S. 668 (1984).

(15)Applicant's seventh claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE RECORD FOR APPEAL."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) Applicant's claim is essentially that a number of bench conferences and off-the-record discussions were not recorded by the Court Reporter and that as a result, he was prejudiced. However, Applicant does not set forth what the bench conferences or off-the-record discussions consisted of and does not demonstrate how he was prejudiced by their omission from the Reporter's

Record of his trial.

(f) Because Applicant is unable to show the importance of any bench conferences or off-the-record discussions, or how they impacted his trial, he is unable to show the outcome of his trial would have been different had they been included in the record. As such, Applicant is not entitled to relief on his seventh claim for habeas corpus relief. *See Strickland v. Washington*, 466 U.S. 668 (1984).

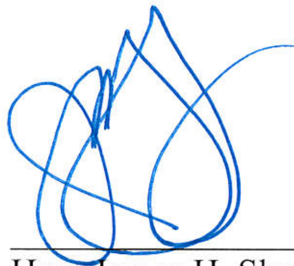
RECOMMENDATION

This Court recommends that Applicant be granted habeas corpus relief with respect to the first claim set forth in his writ application. Specifically, the Court recommends that Applicant be granted a new punishment trial because his lead trial counsel was ineffective in failing to investigate and present mitigating evidence. This Court recommends that Applicant's remaining claims be denied.

The District Clerk shall immediately transmit to the Court of Criminal Appeals these findings and conclusions as provided by law.

The Clerk shall send a copy of this order to Applicant and the State of Texas.

Signed on this 8 day of September, 2017.



Hon. James H. Shoemake
Sitting by Assignment
240th Judicial District Court
Fort Bend County, Texas