No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS LYNN KIRK
Petitioner

vs.

THE STATE OF TEXAS
Respondent

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

APPENDIX

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1/8/2020

KIRK, DOUGLAS LYNN Tr. Ct. No. C-297-W011409-1266320-A WR-89,870-01

This is to advise that the Court has denied without written order on the findings of the trial court after hearing the application for writ of habeas corpus and on the Court's independent review of the record.

Deana Williamson, Clerk

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* DELIVERED VIA E-MAIL *

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TARRANT COUNTY
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WRIT NO. D297-W011409-00

EX PARTE	**§**	**IN THE 297TH**
	§	
	§	**DISTRICT COURT OF**
	§	
DOUGLAS LYNN KIRK	**§**	**TARRANT COUNTY, TX**

FOURTH AMENDED MEMORANDUM IN SUPPORT OF APPLICATION FOR A WRIT OF HABEAS CORPUS

TO THE HONORABLE PRESIDING JUDGE:

At Douglas Kirk's trial, he freely admitted shooting and killing Alphonso Beza and Pedro Diaz. But Kirk explained that he did so in self-defense and in defense of his property. RR5: 196-98; *see* Tex. Pen. Code §§ 9.32 & 9.42.

Despite Kirk's wholesale reliance on his belief that deadly force was immediately necessary to defend himself and his property, (1) Kirk's trial attorney did not introduce evidence of Beza's and Diaz's prior violent acts—and both men had long criminal records—to show their intent, motive, or state of mind. *See Torres v. State*, 117 S.W.3d 891, 894–95 (Tex. Crim. App. 2003). (2) Kirk's trial attorney also did not introduce evidence of Beza's and Diaz's character traits for violence to demonstrate that they were in fact the first aggressors. *See, e.g., Ex parte Miller*, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009). And (3) Kirk's

trial attorney failed to introduce evidence of Beza's and Diaz's character traits for property crimes to demonstrate that they were in fact stealing Kirk's property. What's more, (4) Kirk's trial attorney failed to investigate and present evidence that Beza and Diaz had indeed stolen Kirk's metal detector, corroborating Kirk's account of the night. And (5) Kirk's trial attorney then failed to object to the State's closing-argument comparison of Kirk to Hitler. The State, too, was not without fault—(6) it failed to disclose that Beza had stabbed a man named Cirilio Cruz-Guillen and had been involved in the murder of a man named Leonard Carl Grimm.

Accordingly, comes now Douglas Lynn Kirk, Applicant, and files this amended memorandum in support of his amended application for a writ of habeas corpus under article 11.07 of the Code of Criminal Procedure. His conviction illegally confines and restrains him of his liberty because his trial attorney did not provide the effective assistance the United States and Texas Constitutions guarantee. *See* U.S. Const. amend. VI & XIV; Tex. Const. art. I, § 10. Kirk respectfully requests that he be released from confinement, that his conviction be set aside, and that the case be set for re-trial.

1. History of the case

In April of 2010, Kirk moved from one Fort Worth home to another. RR4: 158. As he and a friend unloaded his things at the new home, Alphonso Beza, who lived next door, approached and volunteered to help. RR4: 178, 239. Kirk accepted Beza's offer, and Beza then invited Pedro Diaz to further assist. RR4: 184.

After completing the task, the men proceeded to get extremely intoxicated (Beza and Diaz had been drinking even before joining Kirk). RR3: 76; RR5: 37, 63-64. Eventually, Kirk announced that it was time to call it a night, but, according to Kirk's trial testimony, Beza and Diaz—both covered in prison tattoos—refused to leave and then physically threatened Kirk and tried to steal from him. RR5: 175, 178-87. Kirk ran into a bedroom closet and found his rifle. RR5: 191. He heard the men coming down the hallway toward him, shouting expletives, and he feared for his life. RR5: 194. Believing that the men had armed themselves with loaded guns from other rooms in the house, Kirk fired three or four warning shots into the closet ceiling. RR5: 194-95. He then moved across the bedroom and got down on one knee. RR5: 195. Seeing Beza and Diaz facing him in the hallway leading to the front bedroom,

Kirk shot at both men, killing them. RR5: 196-98. Kirk further testified that he shot the men to keep them from robbing him. RR5: 196-97.

Kirk did not call the police. Instead, he fled from the scene, and after Beza's and Diaz's bodies were discovered, Kirk was arrested and charged in a three-count indictment with capital murder (murdering both men), murder (murdering Beza), and murder (murdering Diaz). Exhibit 1; *see* Tex. Pen. Code § 19.02 & 19.03. After his first trial ended in a hung jury, a second was held in February 2012. Pursuant to Kirk's testimony, the jury was instructed to find Kirk not guilty if it believed that he killed Beza and Diaz in defense of himself or his property. Exhibit 2; *see* Tex. Pen. Code §§ 9.32 & 9.42. But Kirk's trial attorney having failed to present evidence of Beza's and Diaz's characters for violence and property crimes to show that they were in fact the first aggressors and stealing, respectively, the jury found Kirk guilty as to the count alleging Diaz's murder. This Court granted a mistrial on the remaining counts. Exhibit 3. The jury assessed punishment at 47 years' imprisonment. Exhibit 3.

On appeal to the Second Court of Appeals in Fort Worth, Kirk argued (1) that the evidence was insufficient to sustain the verdict because the State failed to disprove that he acted in self-defense and in defense of property, (2) that this Court erred by overruling his objections to the State's introduction of photographs of his previous home, and (3) that this Court erred by giving the jury a modified *Allen* charge after four days of deliberation. *Kirk v. State*, 421 S.W.3d 772 (Tex. App.—Fort Worth 2014, pet. ref'd). With one justice dissenting as to the *Allen*-charge ground, the court affirmed this Court's judgment. *Id.*

Kirk then filed a petition for discretionary review in the Court of Criminal Appeals, urging that the court of appeals ignored the plain language of article 36.16 of the Code of Criminal Procedure in approving of this Court's *Allen* charge. *Kirk v. State*, PD-0200-14 (Tex. Crim. App. 2014). The Court refused the petition on June 18, 2014. *Id.* This application now follows.

2. ***Ground One*: Kirk's trial attorney performed deficiently in failing to introduce evidence of the victims' prior violent acts to show their intent, motive, or state of mind.**

3. ***Ground Two*: Kirk's trial attorney performed deficiently in failing to introduce evidence of the victims' character for violence to demonstrate that the victims were in fact the first aggressors.**

4. *Ground Three*:[1] Kirk's trial attorney performed deficiently in failing to introduce evidence of the victims' character for property crimes to support that the victims were in fact stealing from Kirk.

a. *Strickland v. Washington* and the standard for effective assistance

A criminal defendant has a Sixth Amendment right to effective assistance of counsel at every critical stage of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). To determine whether to grant relief for ineffective assistance of counsel, courts apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires claimants to establish two components by but a preponderance of evidence: (1) deficient performance of counsel, and (2) but for counsel's error(s), there was a "reasonable probability" of a different outcome at trial. *Id.* at 687.

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id*. at 688. The Supreme Court has declined to articulate

[1] Because these grounds are so closely intertwined, Kirk sets them out together to avoid repetition.

specific guidelines for appropriate attorney conduct, instead emphasizing that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* Essentially, counsel is obliged to fulfill "certain basic duties," including "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.*

As to the second *Strickland* requirement, counsel's errors must be considered cumulatively. *Ex Parte Aguilar*, No. AP-75,526, 2007 WL 3208751, *3 (Tex. Crim. App. 2007); *Ex Parte Welborn*, 785 S.W.2d 391, 396 (Tex. Crim. App. 1990). And a "reasonable probability" of a different outcome is but a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 692-94. "[*Strickland*] specifically rejected the proposition that the [applicant] had to prove it more likely than not that the outcome would have been altered." *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002). Instead, a reviewing court's adjudication of an ineffective-assistance claim should ultimately focus on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

b. A defendant may—but Kirk's attorney didn't— introduce evidence of victims' prior violent acts to show their intent, motive, or state of mind and offer reputation and opinion testimony of the victims' characters to demonstrate that the victims were in fact the first aggressors and stealing.

When a defendant is charged with an assaultive offense, he may offer evidence of the victims' character trait for violence to demonstrate that the victims were the first aggressor, regardless of whether the defendant was aware of the victims' violent character, so long as a witness testifies about the victims' character for violence only through reputation and opinion testimony. *Miller*, 330 S.W.3d at 618–22 (citing Tex. R. Evid. 405(a)). In *Miller,* for example, the Court of Criminal Appeals approved of a defendant's attorney's introduction of evidence of the victim's character for aggression through four witnesses who testified as to the victim's violence, especially when drinking. *Id.* at 619.

A defendant may also introduce evidence under Rule 404(b) of a "victim's prior specific acts of violence when offered for a non-character purpose—such as his specific intent, motive for an attack on the defendant, or hostility—in the particular case." *Id.* at 620; see Tex. R. Evid.

404(b)(2). "As long as the proffered violent acts explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only, prior specific acts of violence may be admitted even though those acts were not directed against the defendant." *Torres v State*, 71 S.W.3d 758, 762 (Tex. Crim. App. 2002). "The proper predicate for the specific violent prior act by the deceased is some act of aggression that *tends* to raise the issue of self-defense"—like refusing to leave, physically threatening Kirk, and coming down the hallway shouting expletives (RR5: 194)—"which the violent act may then help clarify." *Torres v. State*, 117 S.W.3d 891, 895 (Tex. Crim. App. 2003) (emphasis in the original). The Court of Criminal Appeals has "not required that the specific, violent acts be directed against the defendant to be admissible." *Torres*, 71 S.W.3d at 761. "In fact," the Court has "found error in excluding such acts where they were directed towards third parties. *Id.* at 761-62 (citing *Jenkins v. State*, 625 S.W.2d 324, 325–27 (Tex. Crim. App. [Panel Op.] 1981) (testimony concerning the deceased's conviction for attempted murder of a third party was admissible to show the deceased was the first aggressor); *Lewis v. State*, 463 S.W.2d 186, 187-88 (Tex. Crim. App. 1971) (evidence that the

deceased often carried a knife and got in barroom brawls, along with a threat against the defendant, was admissible)). "For purposes of proving that the deceased was the first aggressor, the key is that the proffered evidence explains the deceased's conduct." *Id.* at 762. "As long as the proffered violent acts explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only, prior specific acts of violence may be admitted even though those acts were not directed against the defendant." *Id.*

Alphonso Beza and Pedro Diaz had long and, at least in the case of Beza, violent criminal histories. Beza was convicted twice for aggravated assault, twice for burglary, and once for robbery. Exhibit 4. In Guadalupe County, Texas (the Seguin area), Beza stabbed a man named Cirilio Cruz-Guillen and had been involved in the murder of a man named Leonard Carl Grimm. *See* Exhibit filed June 24, 2019 (police reports), and Exhibit 6. Diaz, for his part, was convicted twice for burglary and once for trespassing. Exhibit 5. And both men were members of the violent Mexican Mafia street gang. *See* Exhibit filed July 3, 2019 (parole records showing gang membership), and Exhibit 6. Beza's

and Diaz's violent criminal records and pasts could have been introduced at Kirk's trial, then. Surely *somebody* could have testified as to specific acts of violence and offered reputation and opinion testimony of their character for violence—their own victims, or witnesses to their crimes, or prison officials, immediately come to mind. And indeed, somebody could have: Jaime De La Garza, a former Seguin Police Officer. As set forth in the attached affidavits, De La Garza knew both men well and believed that Beza had stabbed Cruz-Guillen and Grimm, and De La Garza could have attested to the fact that both men "had bad reputations for violence and their reputations in the community were that they were violent persons." Exhibits 6 and 7. Similarly, De La Garza could have offered reputation and opinion testimony of Beza's and Diaz's character for property crimes to demonstrate that they were in fact stealing from Kirk: both men "were known burglars [and] thieves" and "had reputations for being thieves and burglars." Exhibits 6 & 7. That, too, would have been admissible—nothing in *Miller* (or *Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999), the case on which it principally relies) states that only a victim's character for violence is admissible under the Rules of Evidence. To the contrary, Rule 404 states

only that "In a criminal case… a defendant may offer evidence of a victim's pertinent trait…." Tex. R. Evid. 404(a)(3)(A).

Kirk's jury didn't hear anything about Beza's and Diaz's prior specific acts of violence or characters for violence or property crimes, though. The only evidence that even remotely touched on the subject was that the men were on parole and had prison tattoos. RR4: 241-42; RR5: 175.

c. Kirk's counsel's failure to introduce evidence of the victims' specific acts of violence and characters fell below an objective standard of reasonableness.

As to *Strickland*'s first prong, Kirk urges this Court that his attorney's failure to present evidence of the victims' prior specific acts of violence or characters for violence and property crimes amounted to deficient performance. At the June 25 hearing on Kirk's third amended habeas application, counsel testified unequivocally that he would have introduced all of this evidence if he had known about it. But counsel testified that his investigator didn't uncover any of it.

Counsel's file reflects, however, that he was well aware of Beza's and Diaz's criminal histories in Guadalupe County. Exhibit filed July 11, 2019 (McWithey affidavit). Counsel just didn't pursue it further.

And counsel's file further reveals that he failed to request Beza's and Diaz's parole records, which would have quickly led him to the evidence that Beza had stabbed Cruz-Guillen and Grimm, and that both men were members of the Mexican Mafia. *See* Exhibits filed July 11, 2019 (McWithey affidavit), and July 3, 2019 (parole records showing gang membership), and Exhibit 6. Indeed, as detailed in the affidavits filed July 8 by undersigned counsel and by private investigator Stuart R. Gary, it was Beza's and Diaz's parole records—making clear that they had criminal histories in Guadalupe County, that they were members of violent street gangs, and that Beza was suspected of stabbing Cruz-Guillen—that prompted undersigned counsel to send Gary to the county and to issue open records requests to the authorities there; it didn't then take long to learn more of Beza's stabbing of Cruz-Guillen and involvement in Grimm's murder. *See* Exhibits filed July 8, 2019 (undersigned counsel and Stuart Gary affidavits).

Counsel's failure to introduce evidence of the victims' specific acts of violence and characters was not strategic. It was a result of an incomplete investigation. Kirk thus urges this Court that counsel's failure amounted to deficient performance. *See Wiggins v. Smith*, 539 U.S. 510,

534 (2003) (trial counsel constitutionally ineffective when "incomplete investigation was the result of inattention, not reasoned strategic judgment").

5. *Ground Four*: Kirk's trial attorney performed deficiently in failing to investigate and present evidence that Beza and Diaz had indeed stolen Kirk's metal detector, corroborating Kirk's account of the night.

At trial, Kirk testified that the confrontation began when, after announcing it was time to call it a night, he realized that some of his things—among them, a "nice metal detector"—had been moved while he was outside. *Kirk*, 421 S.W.3d at 780; RR5: 183. Kirk thought that Diaz and Beza were attempting to steal from him and that the "metal detector was already set over the fence," and he told the men that he was going to call the police if anything was missing. *Id.*; RR5: 255. It was this that prompted Diaz and Beza to threaten Kirk, "acting like they were wanting some kind of altercation" and warning, "[w]e can make you sorry if you fuck with us." *Id.*

Detective Sarah Waters confirmed that a metal detector was not found in Kirk's house. RR4: 50. And, before being cut off, Kirk tried to testify that "we do know it was stolen and linked to Johnny Beza by the

serial number…." RR5: 270. But Kirk's counsel failed to present evidence that, in fact, a "Johnny Diaz" (not Beza) pawned Kirk's metal detector not long after the shootings. In the State's closing argument, the prosecutors then urged that Kirk's "story of self defense is made up"—"[i]t's a fabrication, and it is in fact a lie." RR6: 64-65. "[W]hat happened in this case was [Kirk] is intoxicated and he is on methamphetamine," "he's having delusions, and he's seeing ghosts, and he's seeing demons, and he fires off rounds in the closet while he's hiding from the ghosts and the demons." RR6: 46-48. Beza and Diaz, the State argued, "were standing outside talking, smiling, laughing. Nobody was chasing him back in the house." RR6: 46-48. "[W]hen [Beza] and [Diaz] stroll back there with their flip-flops on and the can of beer in their hand, he jumps out and murders both of them." RR6: 46-48. The State further urged that "the truth" was that if Kirk "really and truly was afraid of the Beza and Diaz scam… he never would have acted the way he did." RR6: 64-65. "If you feel like people are stealing from you, you don't turn around and put your back to them and walk out of the house. RR6: 64-65.

In fact, Kirk's story wasn't made up. He did have a metal detector, and it was pawned by Johnny Diaz. Exhibit 8. And counsel knew about

it—he had obtained a subpoena for the pawn shop. Exhibit 9. But counsel failed to present evidence of as much.

No reasonable trial strategy could justify trial counsel's failure. Indeed, "[t]here can be no strategic or tactical benefit in withholding exculpatory evidence from a jury which is deciding whether the attorney's client is guilty or innocent." *Ex parte Alaniz*, 583 S.W.2d 380, 384 (Tex. Crim. App. 1979). The only possible explanation Kirk can imagine is that counsel thought, pursuant to the State's first amended *Brady* notice, that the metal detector wasn't stolen until *after* the shootings. Exhibit 8. But, again, Detective Sarah Waters confirmed that responding officers did not find any metal detector in Kirk's house. RR4: 50. And no metal detector appears in the crime scene photos. State's Trial Exhibits 16-128, 198-227. The metal detector couldn't have been taken after the shootings, then—it was taken by Beza and Diaz, just as Kirk said. Here, again then, Kirk urges that his counsel's performance was deficient. *See Andrews*, 159 S.W.3d at 102 ("…when no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law….").

6. *Ground Five*: Kirk's trial attorney performed deficiently in failing to object to the State's closing argument comparing Kirk to Adolf Hitler and Joseph Stalin.

Just about the last thing the jury heard before considering Kirk's guilt was the State's rebuttal closing argument putting Kirk in the company of Hitler and Stalin:

> The underlying subtext of this entire defense has been, "Oh, the Defendant is a good guy, professional. [Beza and Diaz] are just thugs. Who cares about their lives?" If you are a student of history, you know that the worst crimes of the last century were committed by people who thought they had the right to decide who should live and die. Hitler, Stalin. They all thought they had the right to decide who was more important than the next guy, who was worthy of life and who was not.
>
> lt would be the most brutal error you could possibly make to make a decision based on that kind of prejudice. The State is not asking you to do that. We're not asking you to make a decision on emotion. We're asking you to make a decision based on logic and common sense and facts and evidence. And it is important to remember that it is the State of Texas who is asking you to do that.

RR6: 72-73. Kirk's trial counsel did not object.

Counsel should have. There are four general areas of proper jury argument: (1) pleas for law enforcement, (2) summations of the evidence, (3) reasonable deductions from the evidence, and (4) responses to arguments from opposing counsel. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000). Arguments referencing matters that are not in

evidence and may not be inferred from the evidence, on the other hand, are usually "designed to arouse the passion and prejudices of the jury and as such are highly inappropriate." *Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990).

The Amarillo Court of Appeals has twice held that a closing argument comparing a defendant to notorious murders is reversible error. In *Brown v. State*, the prosecutor compared the appellant to Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy, arguing that, although the appellant claimed to be mentally ill or legally insane, so did they. 978 S.W.2d 708, 713–14 (Tex. App.—Amarillo 1998, pet. ref'd). In finding reversible error, the court explained:

> Comparing an accused or his acts to those of a notorious criminal is, according to the Texas Court of Criminal Appeals, an improper and erroneous interjection of facts not in the record. [citations omitted]. Here, the State's comments are tantamount to comparing appellant and his defense to Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy and the defenses they raised. Each of the three individuals to which he was compared was or is a notorious serial murderer whose despicable acts remain fresh in the collective mind of the public. And, in arguing as it did, the State not only invoked the memory of the horrific crimes they committed but also effectively asked the jurors to punish appellant like they were punished, that is, by the assessment of imprisonment.

978 S.W.2d at 714.

Then in *Mills v. State*, the State's argument was again "tantamount" to comparing the appellant and his defense to Gacy and Dahmer and the defenses they raised (in an update, the State also included 9/11 hijacker Mohamed Atta). 07-08-0348-CR, 2009 WL 3320249, at *2–3 (Tex. App.—Amarillo Oct. 14, 2009), opinion supplemented on overruling of reh'g, 07-08-00348-CR, 2009 WL 4016418 (Tex. App.—Amarillo Nov. 20, 2009, no pet.). Because, again, "the State's argument relied on facts not in evidence and was highly improper," the court reversed the appellant's conviction even though there was "ample evidence to support the jury's verdict of guilt." *Id.*

Here, like there, the State's argument was highly improper. Heinous though Gacy may be, Hitler was responsible for the deaths of some 17 million people; his name is shorthand for incomprehensible evil. And yet counsel failed to object to the State's comparison of Kirk to Hitler. Here, again, counsel could have had no reasonable strategy in doing so. Here, again, Kirk thus urges that his counsel's performance was deficient. *See Andrews*, 159 S.W.3d at 102 ("…when no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance

falls below an objective standard of reasonableness as a matter of law….").

7. *Cumulative Prejudice*: Had counsel introduced evidence of the victims' prior violent acts, the victims' violent characters, and evidence that corroborated Kirk's account, and had counsel objected to the State's closing argument comparing Kirk to Adolf Hitler and Joseph Stalin, it's reasonably likely the jury would have found Kirk not guilty.

As set out above, as to the second *Strickland* requirement, counsel's errors must be considered cumulatively. *Aguilar*, 2007 WL 3208751 at *3; *Ex Parte Welborn*, 785 S.W.2d 391, 396 (Tex. Crim. App. 1990). And a reviewing court's adjudication of an ineffective-assistance claim should ultimately focus on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

Here, counsel's errors taken together so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *See id.* at 686, 688; *Sessums*, 129 S.W.3d at 248 ("[T]here is a reasonable probability that, but for counsel's error in failing to object to extensive, inadmissible, and critical testimony, the result of the proceeding would have been different."). As to counsel's failures to present evidence of Beza's and Diaz's prior violent

acts and reputations, the Fifth Circuit's opinion in *Smith v. Dretke* is instructive. There, the court remarked that "[c]learly, not having testimony strengthening a belief that [the victim] was the first aggressor or that [the defendant] reasonably feared for his life prejudiced [the defendant] in this case." *Smith*, 417 F.3d at 443–44. The court reasoned that, though the defendant testified that he acted in self-defense, without corroboration in the form of evidence that the victim had a character for violence, the defendant's "entire line of defense was easily discounted and disparaged by the prosecuting attorney." *Id.* In sum, the court held that counsel's "[f]ailure to present the readily available testimony bearing on both the violence of [the victim] and [the defendant's] reasonable apprehension of danger seriously undermines our faith in the outcome of the state court proceeding." *Id.*

Similarly, in *Gonzales v. State*, Texas's First Court of Appeals held harmful the trial court's refusal "to admit both opinion testimony of [the victim's] bad reputation and evidence of three violent acts by [the victim], all of which supported appellant's claim of self-defense by showing that [the victim] was the first aggressor." 838 S.W.2d 848, 856 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). The court explained that,

"[g]iven the importance in [the] trial of deciding whether [the victim] was the first aggressor, the exclusion of the evidence was harmful." *Id.* at 864 (citing *United States v. Greschner*, 647 F.2d 740, 743 (7th Cir. 1981) ("The excluded evidence related specifically to the defendant's self-defense theory. The trial court's improper exclusion of the character and motive evidence was seriously prejudicial to that theory. Therefore, the improper evidentiary rulings require reversal of the defendant's assault conviction and a new trial.")).

Kirk's case is strongly alike *Smith* and *Gonzales*. And like in *Smith*, specifically, because Kirk's testimony was not corroborated with evidence of the victims' characters for violence and property crimes, the prosecutor in closing was able to wave off Kirk's testimony—first as "lying" to "fit the castle doctrine," and then as a "story of self-defense made up," "a fabrication" and "in fact a lie." RR6: 48, 63-64. Counsel's failure to introduce evidence that Beza and Diaz in fact stole Kirk's metal detector—corroborating Kirk's testimony—then compounded the harm, further emboldening the State to wave off the defense as wholly fabricated. The State's closing-argument comparison of Kirk and Hitler was then the final touch. Remember too that this was about as close of a

case imaginable—Kirk's conviction came only in a second trial after the first ended in a hung jury. And the jury found Kirk guilty of murdering only Diaz, and only after this Court submitted an *Allen* charge.

In light of this, Kirk respectfully urges this Court that there is a "reasonable probability" that the result of the proceeding would have been different (1 & 2) had his trial attorney demonstrated that Beza and Diaz were in fact the first aggressors by introducing evidence of their specific prior acts of violence and character traits for violence and (3) in fact stealing Kirk's property by introducing evidence of their character traits for property crimes; (4) had Kirk's trial attorney investigated and presented evidence that Beza and Diaz had indeed stolen Kirk's metal detector, corroborating Kirk's account of the night; and (5) had counsel objected to the State's closing-argument comparison of Kirk and Hitler. *See Strickland*, 466 U.S. at 694. The prosecution's case against Kirk was not overwhelming. And "where the record evidence in support of a guilty verdict is thin, as it is here, there is more likely to be prejudice." *Gersten*, 426 F.3d at 614; *see also Strickland*, 466 U.S. at 696 ("a verdict . . . only weakly supported by the record is more likely to

have been affected by errors than one with overwhelming record support"); *see also Gersten v. Senkowski*, 426 F.3d 588, 614 (2nd Cir. 2005) ("Where the record evidence in support of a guilty verdict is thin, as it is here, there is more likely to be prejudice."). That's just what happened here. Had Kirk's counsel introduced evidence of the victims' prior violent acts, the victims' prior characters for violence and property crimes, and evidence that corroborated Kirk's account, and had counsel objected to the State's inflammatory closing argument, it's reasonably likely the obviously torn jury would not have found Kirk guilty beyond a reasonable doubt.

In sum, counsel's errors were not isolated incidents; they pervaded and prejudiced the entire defense. *See supra*; *cf. McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992) ("isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective...."). Kirk urges this Court that, under these circumstances, there is a reasonable probability that, but for counsel's repeated deficient performance, the jury would have found him not guilty. Accordingly, Kirk urges this Court that his counsel's deficient performance was prejudicial.

8. ***Ground Six*: In failing to disclose that Beza stabbed Cirilio Cruz-Guillen and had been involved in the murder of Leonard Carl Grimm in Guadalupe County, the State violated Kirk's right to due process.**

The State, too, bore blame for the jury's ignorance of Beza's and Diaz's violent pasts. In *Brady v. Maryland*, the United States Supreme Court "[held] that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Thus, *Brady* is violated when three requirements are satisfied: (1) the State suppressed evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). "Incorporated into the third prong, materiality, is a requirement that [the] defendant must be prejudiced by the state's failure to disclose the favorable evidence." *Id*.

"Favorable evidence is any evidence that, if disclosed and used effectively, may make a difference between conviction and acquittal and includes both exculpatory and impeachment evidence." *Id*. at 408 (citing *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992) and

United States v. Bagley, 473 U.S. 667, 676 (1985)). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Ex parte Adams*, 768 S.W.2d 281, 291 (Tex. Crim. App. 1989) (adopting *Bagley* standard of materiality). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. "Materiality is determined by examining the alleged error in the context of the entire record and overall strength of the state's case." *Harm*, 183 S.W.3d at 409.

Crucially here, "the *Brady* Rule… encompasses evidence unknown to the prosecution but known to law-enforcement officials and others working on their behalf." *Ex parte Lalonde*, 570 S.W.3d 716, 724–25 (Tex. Crim. App. 2019) (citing *Ex parte Reed*, 271 S.W.3d 698, 726 (Tex. Crim. App. 2008)). Indeed, "[i]t is well accepted that a prosecutor's lack of knowledge does not render information unknown for *Brady* purposes." *United States v. Perdomo*, 929 F.2d 967 (3d Cir.1991). And the Fifth Circuit—"[speaking] the most often on this issue"— "has declined to excuse non-disclosure" even "in instances where the prosecution has not sought out information readily available to it." *Id.* (citing *United*

States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980)). In *Auten*, for example "the appellant argued that his motion for a new trial should have been granted because the prosecution failed to disclose that one of its key witnesses had been convicted more than once." *Id.* In response, "[t]he prosecution argued that it did not withhold or suppress evidence because the information was unknown to it." *Id.* But because "[t]he prosecutor had chosen not to run an NCIC [National Crime Information Center] check on the witness because of the shortness of time," "[t]he court held that the prosecutor's lack of knowledge was not an excuse for a *Brady* violation." *Id.* "In the interests of inherent fairness," the prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it. *Auten*, 632 F.2d at 481 (quoting *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975)). To do otherwise would be "inviting and placing a premium on conduct unworthy of representatives of the United States Government." *Auten*, at 481.

In short, prosecutors have an obligation to provide all information that is readily available to them. *Perdomo*, 929 F.2d at 970. And that Beza stabbed Cirilio Cruz-Guillen and had been involved in the murder of Leonard Carl Grimm in Guadalupe County was readily available to

the State here. Again, as detailed in the affidavits filed on July 8 by undersigned counsel and by private investigator Stuart R. Gary, Beza's and Diaz's parole files made clear that they had criminal histories in Guadalupe County. Undersigned counsel then sent Gary to the county and issued open records requests, and it didn't take long to learn of Beza's stabbing of Cruz-Guillen and involvement in Grimm's murder. *See* Exhibits filed July 8, 2019 (undersigned counsel and Stuart Gary affidavits). Certainly, Kirk's prosecutors had access to the same parole records, and were equally capable of contacting law enforcement in Guadalupe County—indeed, it almost certainly would have been easier for the State. It's not just that trial counsel was ineffective, then, in failing to introduce evidence of Beza's and Diaz's prior violent acts and characters for violence—in failing to disclose that Beza stabbed Cruz-Guillen and was involved in Grimm's murder, the State violated Kirk's right to due process.

9. Conclusion

Though the critical issues at Kirk's trial were whether, in shooting Beza and Diaz, Kirk believed that deadly force was immediately necessary to defend himself and his property, Kirk's trial attorney did not

demonstrate that Beza and Diaz—both of whom had long criminal records—were (1 & 2) in fact the first aggressors by introducing evidence of specific prior acts of violence and their character traits for violence and (3) in fact stealing Kirk's property by introducing evidence of their character traits for property crimes. What's more, (4) Kirk's trial attorney failed to investigate and present evidence that Beza and Diaz had indeed stolen Kirk's metal detector, corroborating Kirk's account of the night. And (5) Kirk's trial attorney then failed to object to the State's closing-argument comparison of Kirk to Hitler. The State, too, was not without fault—(6) it failed to disclose that Beza had stabbed a man named Cirilio Cruz-Guillen and had been involved in the murder of a man named Leonard Carl Grimm in Guadalupe County. Accordingly, on all six grounds, Kirk respectfully requests this Court recommend the Court of Criminal Appeals set aside his conviction.

Respectfully submitted,

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Certificate of Service

I, the undersigned, certify that a true and correct copy of the foregoing document was electronically served to the Tarrant County District Attorney's Office on July 16, 2019.

/s/ Gary Udashen
Gary Udashen

Certificate of Compliance

Pursuant to Tex. R. App. P. 73.1, I, the undersigned, certify that this memorandum complies with:

1. the type-volume limitation of Tex. R. App. P. 73.1(d), because this memorandum contains 6,026 words; and

2. the typeface requirements of Tex. R. App. P. 73.1(e), because this memorandum has been prepared in 14-point Century Schoolbook, a conventional typeface.

/s/ Gary Udashen
Gary Udashen

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NO. C-297-W011409-1266320-A

EX PARTE	**§**	**IN THE 297th JUDICIAL**
	§	
	§	**DISTRICT COURT OF**
	§	
DOUGLAS LYNN KIRK	**§**	**TARRANT COUNTY, TX**

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

The State proposes the following Memorandum, Findings of Fact and Conclusions of Law regarding the issues raised in the present application for Writ of Habeas Corpus.

MEMORANDUM

The applicant, DOUGLAS LYNN KIRK ("Applicant"), alleges his incarceration is illegal because (1) he received ineffective assistance of trial counsel (Grounds One, Two, Three, Four, and Five) and (2) the State failed to disclose favorable material in violation of *Brady v. Maryland* (Ground Six). *See* Application, p. 6-17. Specifically, Applicant alleges that trial counsel was ineffective for the following reasons:

a. Counsel failed to introduce evidence of the victims' prior specific acts of violence to show their intent, motive, or state of mind (Ground One),
b. Counsel failed to introduce evidence of the victim's character traits for violence to demonstrate that the victims were the first aggressor (Ground Two),
c. Counsel failed to introduce evidence of the victim's character traits for property crimes to demonstrate that that the victims were, in fact, stealing from Applicant (Ground Three),

d. Counsel failed to investigate and present evidence that Applicant's metal detector had been stolen by the victims, before he killed them, and then was pawned by Johnny Diaz, corroborating Applicant's account of the night, and
e. Counsel failed to object to the State's closing argument comparing Applicant to Adolf Hitler and Joseph Stalin.

See Application, p. 6-14.

In response to an Order from this Court, Applicant's trial counsel, Mr. Warren St. John, filed an affidavit addressing Applicant's claims. Then, on June 25, 2019, a hearing[1] was held before the Honorable Charles P. Reynolds. Based on Applicant's contentions and the evidence presented in the Writ Transcript, this Court should consider the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

General Facts

1. On February 16, 2012, Applicant was convicted by a jury of the first-degree felony offense of murder. *See* Judgment, No. 1266320R.

2. The jury then assessed punishment at forty-seven years' confinement in the Texas Department of Criminal Justice – Institutional Division. *See* Judgment.

3. The trial court's judgment was affirmed on direct appeal. *See Kirk v. State*, 421 S.W.3d 772 (Tex. App. – Fort Worth 2014, pet. ref'd).

[1] The record from the writ hearing will be cited to as [WRR Pg. #], [WR A.Ex. #], [WR S.Ex. #], etc.

Ineffective Assistance of Trial Counsel (Grounds One, Two, Three, Four, and Five)

4. Applicant waited nearly five years to file this application for writ of habeas corpus. *Compare* Application, p. 1; *with Kirk v. State*, 421 S.W.3d 772 (Tex. App. – Fort Worth 2014, pet. ref'd).

5. Mr. Warren St. John represented Applicant during the trial proceedings. *See* Judgment.

6. Applicant's original trial ended in a hung jury. *See* Criminal Docket Sheet, No. 1197805D, Vol. I, p. 2 [CR 9]; Nunc Pro Tunc, No. 1197805D [CR 190].

7. Applicant was re-tried for capital murder. *See* Indictment, No. 1266320R [CR 2]; Court's Charge, No. 1266320R, p. 3 [CR 237].

8. The jury was given the option of convicting Applicant of two murders. *See* Court's Charge, p. 3-4 [CR 237-38].

9. Applicant was ultimately convicted of one lesser-included offense of murder. *See* Judgment; Discharge of Jury After Receiving Charge of Court, No. 1266320 (capital murder) [CR 290]; Discharge of Jury After Receiving Charge of Court, No. 1266320 (murder) [CR 291].

10. The Second Court of Appeals summarized the evidence as follows:

> Isabel Diaz testified that Beza, her fiancée, and Diaz, her brother, had been drinking beer and playing with her kids and nephew in front of her house on the evening of April 24, 2010. She testified that Beza and Diaz went next door to [Applicant]'s house around 11:00 p.m. to help [Applicant] move in and that Beza had appeared happy and indicated that there was free beer. When Isabel awoke the following morning to find that Beza and Diaz had not returned home, she became concerned, walked outside, and saw [Applicant] and another man walking towards [Applicant]'s house. She asked [Applicant] if he knew where Beza and Diaz were. [Applicant] told her that he did not know where they were, so she went back inside her house and called the police.

When first responders arrived and found a semiautomatic rifle in the bushes underneath a broken window at [Applicant]'s residence, they searched the house and found Beza's and Diaz's bodies in the hallway. A detailed search of the bedrooms and closets revealed boxes of ammunition and numerous loaded weapons, including rifles, shotguns, pistols, and hunting bows. Ballistics tests later confirmed that the semiautomatic rifle found in the bushes outside of [Applicant]'s house fired the rounds that killed Beza and Diaz. The police also found empty beer cans and bottles of liquor scattered around the kitchen and on the living room floor.

The police also searched the Clover Lane house and discovered a variety of unusual objects including, among other things, a plastic manikin torso and head suspended by a noose around its neck, several pieces of animal skulls, jawbones, antlers, and a faux human skeleton with a chain locked to its ankle and a vice grip next to its knee. Photographs of these items were admitted and published to the jury over [Applicant]'s objection.

[Applicant]'s friend, Benavides, testified that he helped [Applicant] move from the Clover Lane house to the Raton Drive house on the night of April 24. He testified that he had taken a final load of items back to the Raton house around 10:30 p.m. after stopping at a gas station to pick up two eighteen-packs of beer. Upon arriving at the Raton Drive house, Benavides spoke with Beza, who identified himself as the next door neighbor and offered to help them unload [Applicant]'s belongings. Benavides testified that after [Applicant] had told Beza he could help them unpack, Beza called Diaz and his nephew over to help as well. Benavides further testified that once the unloading was finished, the group sat on the front porch and began drinking beer. He stated that everyone was friendly and laughing and that they eventually moved inside and continued drinking.

Benavides testified that he lit a joint and offered to share it with the rest of the group, but they all declined. Diaz told Benavides that he could not smoke pot because he was on parole. Benavides testified that he left the house around 1:00 a.m. and that he thought [Applicant] had walked with him outside to his truck, but he could not remember for sure. He stated that the mood inside the house was light and that nobody was arguing or upset when he decided to leave. Benavides further testified that around noon the next day, [Applicant] called him and asked what had happened the night before.

Dennis Joiner, who lived across the street from the Raton Drive house, testified that he had seen a white man and a Hispanic man laughing and conversing in front of [Applicant]'s house when he came home from work on April 25 at 1:00 a.m. As Joiner exited his car and walked towards his house, he watched the men move back into [Applicant]'s home and claimed that the two seemed cordial. He said that at one point, the white man stood in the doorway and seemed to summon the Hispanic man into the house. Joiner said the Hispanic man was smiling, walked into the house, and stood in the doorway conversing with someone inside. Joiner could not hear the conversation but said that it did not appear that the men were arguing. After the Hispanic man closed the door, Joiner went into his house. Joiner said that he heard four popping sounds around 1:35 a.m. or 1:45 a.m. and that he thought it was his sister-in-law's dog that lives in his house. He said that the four sounds could have occurred later.

[Applicant]'s friend, Jana Thompson, who lived next door to the Raton Drive house, testified that she had helped [Applicant] place newspaper on the Raton Drive house's backdoor windows between 7:30 and 9:30 p.m. on April 24 before she went home to sleep. She further testified that [Applicant] had appeared at her door around 5:00 the next morning, said he was scared, and appeared to be in shock. She stated that she had told [Applicant] that everything

was going to be fine and that he kept repeating that he was scared before he turned around and walked away.

[Applicant]'s friend Cody White, who lived next door to the Clover Lane house, testified that [Applicant] came to his house on April 25 and asked for a ride to the Raton house. White said that [Applicant] was disheveled and was acting "crazy" and that [Applicant] told him that he had walked the four miles from the Raton Drive house to the Clover Lane house the night before. When White asked why he had walked the long distance, [Applicant] said that he was being chased by the police, criminals, ghosts, or demons. White drove [Applicant] to the Raton Drive house, and when they saw Beza's and Diaz's bodies inside, [Applicant] said, "I can't believe I did it."

White testified that he had immediately left the Raton Drive house when he saw Diaz's and Beza's bodies and that he had called [Applicant] at 12:30 p.m.—soon after he left-to ask him what had happened the night before. [Applicant] told White that he did not know what had happened, and when White asked about the bodies on the floor, [Applicant] told him that he had fired his assault rifle at two people. White testified that when he told [Applicant] he was going to call the police, [Applicant] responded, "Don't call the police. I will take care of it."

Medical examiner Marc Krouse testified that a toxicology report showed that Beza and Diaz were highly intoxicated at the time of the shootings. Krouse stated that Diaz was so intoxicated—close to five times the accepted level for driving—that he might have considered intoxication the cause of death absent other evidence and that Diaz's extreme intoxication would have impaired his gross motor functions. The trial court also admitted into evidence photographs showing a beer can near Beza's hand at the crime scene.

Krouse's forensic examination showed that Beza was shot three times in the back and once in the side of the head

> behind the ear. Krouse testified that all of Beza's wounds except one to his left arm had a distinct downward trajectory that meant he was either "on his way to the floor or on the floor when he was shot."

Kirk v. State, 421 S.W.3d 772, 778–80 (Tex. App.—Fort Worth 2014, pet. ref'd).

11. Counsel presented the following evidence:

> [Applicant] testified that Thompson had met him and Benavides at the Raton Drive house around 7:30 p.m. and had helped him tape newspapers over the glass of the back door because he had been "alerted to the fact that the house had had a number of ... recent break-ins." After Thompson went home around 9:30 p.m., he and Benavides made a final trip to the Clover Lane house to gather more of his belongings. When they arrived back at the Raton house around 11:00 p.m., Beza was next door and asked if they needed help unloading. [Applicant] testified that Beza and Diaz helped them move his box spring and mattress inside the house and that afterwards the group began drinking. [Applicant] stated that he had noticed what appeared to be prison tattoos on both Beza and Diaz, and when he asked Diaz how he got the tattoos, Diaz told him "something about a long prison term."
>
> [Applicant] testified that after walking Benavides to his car at around 1:00 a.m., he thought that Diaz and Beza were attempting to steal from him because some items in the house had been moved while [Applicant] was outside. He said that he had asked the men to leave and the group went to the front yard. He stated that he had told the men that he was going to call the police if anything was missing and that the men threatened him and prevented him from closing the door when he attempted to return inside. [Applicant] testified that the two men began "acting like they were wanting some kind of altercation" and that they had told him, "We can make you sorry if you fuck with us." He further testified that he had asked the men to leave

a second time and that they continued to threaten him and refused to leave.

[Applicant] testified that he ran into the front bedroom closet, found his rifle, and heard the men coming down the hallway toward him. They began shouting expletives, and he feared for his life. Believing that the men had armed themselves with loaded guns from other rooms in the house, he fired three or four warning shots into the closet ceiling. After firing the warning shots, [Applicant] moved across the bedroom and got down on one knee. He saw Beza and Diaz facing him in the hallway leading to the front bedroom, so he shot at both men.

[Applicant] testified that after the shooting, he exited the house by breaking through the bedroom window, ran next door to Thompson's house, and began knocking on her door and ringing the doorbell. When Thompson refused to let him in, [Applicant] made his way on foot back to the Clover Lane house and knocked on White's door.

[Applicant] admitted during cross-examination that he had told White not to call the police and that he would "take care" of the situation. [Applicant] also testified that after he had seen the bodies, he had left the house and had called his work colleague Robert Nickerson.

Nickerson testified that [Applicant] had called him several times around 1:00 p.m. on April 25, 2010, but that he missed the calls and called [Applicant] back around 2:30 p.m. Nickerson testified that [Applicant] seemed confused about what had happened on the night of the shootings. Nickerson said that [Applicant] had told him he thought he had shot two people who had helped him move into his new house. Nickerson also testified that he had asked [Applicant] whether he had been robbed and that [Applicant] had said, "I do not remember." [Applicant] testified that after speaking with Nickerson, he had contacted an attorney and then had turned himself in to the police.

Kirk v. State, 421 S.W.3d 772, 780 (Tex. App.—Fort Worth 2014, pet. ref'd).

12. When Mr. St. John was appointed, Applicant was confused, disoriented, overwhelmed, and did not remember much about the night he shot the victims. [WRR 15-16; WR S.Ex. 4, p. 2]

13. Mr. St. John spent "hours and hours of time" working with Applicant to remember what occurred the night he shot the victims. [WRR 16; WR S.Ex. 1, p. 2-3]

14. Mr. St. John recalled that Applicant struggled to remember a lot of things until Mr. St. John and he went through it many, many times. [WRR 16]

15. Mr. St. John interviewed witnesses and investigated the crime scene. [WR S.Ex. 1, p. 2]

16. Mr. St. John conducted at least 323.5 hours of investigation in this case, including trial preparation and reviewing the trial transcript from the first trial for the second trial. [WR S.Ex. 1; WR S.Ex. 2; WR S.Ex. 3]

17. Mr. St. John was appointed a medical expert. [WR S.Ex. 1, p. 2]

18. Mr. St. John was appointed an investigator, Mr. Doug Lambertsen. [WR S.Ex. 1, p. 2; WR S.Ex. 4; WR S.Ex. 5]

19. Mr. Lambertsen conducted at least 207 hours of investigation in this case, including trial support. [WR S.Ex. 4; WR S.EX. 5]

20. Mr. Lambertsen interviewed the State's witnesses and independently tracked down, and interviewed, several possible witnesses. [WR S.Ex. 4; WR S.Ex. 5]

21. Applicant presents evidence that an officer with Guadalupe County Juvenile Services in Seguin, Texas, could have testified that he believed Victim Beza stabbed someone in 1985. [WR A.Ex. 2, p. 1]

22. Victim Beza was not convicted for a 1985 stabbing. [WR A.Ex. 2, p. 1]

23. Applicant presents evidence that an officer with Guadalupe County Juvenile Services in Seguin, Texas, could have testified that he believed Victim Beza stabbed someone to death in 1989. [WR A.Ex. 2, p. 2]

24. Victim Beza was not convicted for a 1989 stabbing death. [WR A.Ex. 2, p. 2]

25. There is no evidence, or allegation, that Victim Beza was in possession of a knife when Applicant killed him.

26. There was evidence at trial that the victims told Applicant that they had been in prison and were on parole. [5 RR 175]

27. There is no evidence that Applicant was aware that the victims had reputations for violence or thievery when he killed them.

28. Applicant presents evidence that an officer with Guadalupe County Juvenile Services in Seguin, Texas, could have testified that he believed Victim Beza and Victim Diaz had reputations for violence and that their reputations in the Seguin community were that they were violent persons. [WR A.Ex. 3, p. 1]

29. Applicant presents evidence that an officer with Guadalupe County Juvenile Services in Seguin, Texas, could have testified that he believed Victim Beza and Victim Diaz had reputations for being burglars and thieves, and drug dealers in the Seguin community. [WR A.Ex. 2, p. 1; WR A.Ex. 3, p. 1]

30. Mr. St. John subpoenaed the victims' pen packets from the Texas Department of Criminal Justice. [WRR 14; WR S.Ex. 4, pg. 9]

31. Mr. St. John received the victims' pen packets from the Texas Department of Criminal Justice. [WRR 14]

32. Mr. St. John had access to the victims' DPS criminal history and TCIC/NCIC records through the Tarrant County open-file policy. [WRR 13-14]

33. Mr. Lambertsen attempted to get the parole records from the board of pardons and paroles in Austin but he was unable to get them. [WRR 21, 32, 34]

34. Neither Mr. St. John nor Mr. Lambertsen sent an open records request for the victims' parole records. [WRR 32]

35. Mr. St. John instructed Mr. Lambertsen and Mr. Gunn to uncover everything they could about the victims, including finding out what they could from Seguin. [WRR 16-17]

36. Mr. St. John wanted to uncover the victims' history to formulate the defense that the victims were the first aggressors. [WRR 17]

37. Mr. St. John is confident that Mr. Lambertsen did a very thorough background check of the victims. [WRR 20]

38. Mr. Lambertsen canvassed the neighborhood near the crime scene to find out what he could about the victims. [WRR 31, 62]

39. Mr. Lambertsen attempted to find out anything he could from where the victims grew up. [WRR 31]

40. Mr. Lambertsen contacted people in Seguin regarding the victims' background and history. [WRR 19, 22]

41. Mr. St. John recalled that Mr. Lambertsen contacted Mr. Lambertsen's law enforcement contacts in Seguin but found out no information. [WRR 19, 22]

42. Mr. St. John does not recall whether Mr. Lambertsen contacted the Guadalupe County Sheriff's Department or the Seguin Police Department. [WRR 22]

43. Mr. Lambertsen was unable to get any information from law enforcement in Seguin regarding the victims' criminal histories and background. [WRR 22, 23]

44. Mr. Lambertsen never advised Mr. St. John that he spoke Mr. De La Garza. [WRR 23]

45. Mr. St. John's defense team thoroughly investigated this case.

46. Mr. St. John's investigation was the result of reasonable trial strategy.

47. Over the State's objection, Mr. St. John successfully was able to put in evidence before the jury that the victims were both on parole. [4 RR 227-30]

48. Mr. St. John was able to repeatedly remind the jury, through testimony and argument, that the victims were "thugs," "parolees," on "parole," had been to "prison," were "inmates," and had prison tattoos. [4 RR 242; 5 RR 174, 175, 321-22; 6 RR 50, 54, 59]

49. Mr. St. John tracked down information regarding Applicant's metal detector being pawned after the murders. [WRR 37]

50. Mr. St. John did not present evidence that the metal detector had been pawned because he concluded, based on the crime scene photographs, that the metal detector was still in the house after the victims were murdered. [WRR 38; S.Ex. 36-38, 46-48]

51. Mr. St. John concluded that the pawn tickets would not corroborate Applicant's account of the night because the victims had not removed the metal detector from the house. [WRR 38, 39-40, 46-48]

52. Mr. St. John's decision to not present evidence that Applicant's metal detector was later stolen and pawned after the murders, because the victims did not steal it, was the result of reasonable trial strategy.

53. During closing argument, defense counsel repeatedly referred to Applicant's professional job, his work history, and the fact that the victims were lowly, parolee thugs. [6 RR 50-61]

54. During the State's closing argument, it made the following argument, in part,

> But the Defense has invited you repeatedly in this case, and Counsel just did it in his final argument again, calling [the victims] thugs. *He has invited you to make a decision based on your deciding who gets to live and who gets to die, whose life is worth more, whose life is more important.*
>
> The underlying subtext of this entire defense has been, "Oh, the Defendant is a good guy, professional. These people are just thugs. Who cares about their lives? *If you are a student of history, you know that the worst crimes of the last century were committed by people who thought they had the right to decide who should live and die. Hitler, Stalin. They all thought they*

> *had the right to decide who was more important than the next guy, who was worthy of life and who was not.*
>
> *It would be the most brutal error you could possibly make to make a decision based on that kind of prejudice.* The State is not asking you to do that. We're not asking you to make a decision on emotion. We're asking you to make a decision based on logic and common sense and facts and evidence. And it is important to remember that it is the State of Texas who is asking you to do that.
>
> Because if the facts and evidence are on your side, then you are in the right, and decisions should be made with cool heads based on those facts and not based on some spurious idea that some people have more right to walk this earth than others.

[6 RR 72-73] (emphasis added)

55. Taken as a whole, the State was arguing that the *jury* not be like Hitler and Stalin and make its decision based on whose life the *jury* believed was more important. [6 RR 72-73]

56. Taken as a whole, the State was not comparing Applicant to Hitler or Stalin during its closing argument. [6 RR 72-73]

57. The State's argument that the jury not be like Hitler or Stalin was a plea was law enforcement. [6 RR 72-73]

58. The State's argument that the jury not be like Hitler or Stalin was an answer to argument of opposing counsel. [6 RR 72-73]

59. Mr. St. John did not object to the State's references to Hitler and Stalin during its closing arguments because, he concluded, there was no legal reason to make the objection. [WRR 41-42]

60. Mr. St. John's decision to not object to the use of the words "Hitler" and "Stalin" during the State's closing argument was the result of reasonable trial strategy.

61. Mr. St. John's affidavit is credible and supported by the record.

63. Mr. St. John's testimony at trial was credible and supported by the record.

64. Counsel's actions were the result of reasonable trial strategy.

65. The Second Court of Appeals held the evidence was legally sufficient to support the jury's rejection of Applicant's self-defense claim because

- Although [Applicant] testified that he thought Diaz and Beza were threatening him and stealing from him, testimony from White and Nickerson indicated that [Applicant] was not sure what had happened within twelve hours of the shooting and even after seeing the bodies. As the sole judge of credibility, the jury was free to disregard [Applicant]'s testimony. *See* Tex. Code Crim. Proc. Ann. art. 38.04; *Wise* [*v. State*], 364 S.W.3d [900,] 903 [(Tex. Crim. App. 2012)].

- [Applicant] left the scene immediately after the shooting; did not ask Thompson for help or to call the police when he went to her house several hours after the alleged time of the shooting; and after confirming that he had shot Diaz and Beza, he told White not to call the police, fled the scene again, and did not contact the authorities to report the shooting until the evening of April 25, 2010. Flight is circumstantial evidence from which a jury may infer guilt. *See Devoe v. State,* 354 S.W.3d 457, 470 (Tex. Crim. App. 2011).

- [T]he record reflects that both Diaz and Beza were extremely intoxicated. The jury could have reasonably determined that due to the men's intoxicated state, [Applicant]'s belief that they were going to hurt and rob him was unreasonable. The evidence also indicated that Beza was likely carrying a beer when he was shot, which weighs against [Applicant]'s testimony that the men were approaching him in a threatening manner.

- [T]he jury was entitled to conclude that [Applicant]'s belief that deadly force was immediately necessary was unreasonable, given that Beza was shot in the back several times and the forensic evidence showed that the shots were fired at a downward trajectory. *See Saxton* [*v. State*], 804 S.W.2d [910,] 913 [(Tex. Crim. App. 1991)] (holding that there was sufficient physical

evidence to contradict an appellant's claim that the shooting was an accident).

- Because Diaz had earlier in the evening expressed his reluctance to engage in criminal activity out of concern for his parole status, the jury could have reasonably rejected [Applicant]'s contention that Diaz later attempted to assault and rob him. *See Sorrells* [*v. State*], 343 S.W.3d [152,] 155 [(Tex. Crim. App. 2011)].

Kirk v. State, 421 S.W.3d 772, 781 (Tex. App.—Fort Worth 2014, pet. ref'd).

66. In light of all the evidence, no reasonable likelihood exists that the outcome of the proceeding would have been different but for the alleged misconduct.

Brady (Ground Six)

67. Applicant alleges that the "prosecutors had access to the same parole records, and were equally capable of contacting law enforcement in Guadalupe County – indeed, it almost certainly would have been easier for the State" to obtain the records. *See* Application, p. 14b-15b.

68. Applicant presents no evidence, or allegation, that any member of law enforcement connected to the investigation and/or prosecution of this case was in possession of the victims' parole records. *See* Application; Memorandum.

69. Applicant presents no evidence, or allegation, that the State was in possession of the victims' parole records. *See* Application; Memorandum.

70. Applicant presents no evidence, or allegation, that the any member of law enforcement connected to the investigation and/or prosecution of this case was in possession of any information regarding the victims' actions in Guadalupe County. *See* Application; Memorandum.

71. Applicant presents no evidence, or allegation, that the State was in possession of any information regarding the victims' actions in Guadalupe County. *See* Application; Memorandum.

CONCLUSIONS OF LAW

General Writ Law

1. "We have repeatedly held that the burden of proof in a habeas application is on the applicant to prove his factual allegations by a preponderance of the evidence." *Ex parte Brown*, 158 S.W.3d 449, 461 (Tex. Crim. App. 2005).

2. Relief may be denied if the applicant states only conclusions, and not specific facts. *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000). "Sworn pleadings provide an inadequate basis upon which to grant relief in habeas actions." *Ex parte Garcia*, 353 S.W.3d 785, 789 (Tex. Crim. App. 2011) (11.072 proceeding).

Ineffective Assistance of Trial Counsel (Grounds One, Two, Three, Four, and Five)

3. An applicant's delay in seeking habeas corpus relief may prejudice the credibility of the claim. *Ex parte Young*, 479 S.W.2d 45, 46 (Tex. Crim. App. 1972).

4. The two-prong test enunciated in *Strickland v. Washington* applies to ineffective assistance of counsel claims in non-capital cases. *Hernandez v. State*, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999). To prevail on his claim of ineffective assistance of counsel, the applicant must show counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability the results of the proceedings would have been different in the absence of counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984).

5. The Court of Criminal Appeals "must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that he made all significant decisions in the exercise of reasonable professional judgment." *State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008) (citing *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992)).

6. "The proper standard of review for claims of ineffective assistance of counsel is whether, considering the totality of the representation, counsel's performance was ineffective." *Ex parte LaHood*, 401 S.W.3d 45, 49 (Tex. Crim. App. 2013) (citation omitted).

7. "Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *see Kimmelman v. Morrison,* 477 U.S. 365, 383, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) ("To establish a claim of ineffective assistance of counsel, a *habeas* petitioner must 'overcome [a] strong presumption of attorney competence.'" (citation omitted)).

8. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record and "'the record must affirmatively demonstrate' the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

9. An applicant is not entitled to perfect or error-free counsel. Isolated instances of errors of omission or commission do not render counsel's performance ineffective; ineffective assistance of counsel cannot be established by isolating one portion of trial counsel's performance for examination. *McFarland v. State,* 845 S.W.2d 824 (Tex. Crim. App.1992), *cert. den'd,* 508 U.S. 963, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993).

10. "Deficient performance means that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Ex parte Napper*, 322 S.W. 3d 202, 246 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 687).

11. "[The] court will not second guess through hindsight the strategy of counsel at trial nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness." *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979).

12. "[E]ach case must be judged on its own unique facts." *Davis v. State*, 278 S.W.3d 346, 353 (Tex. Crim. App. 2009).

13. "Under *Strickland,* the defendant must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

14. The extent of counsel's investigation into the victims' personal and criminal histories was reasonable.

15. Counsel's overall investigation was the result of reasonable trial strategy.

16. Counsel is not required to advance every argument; however, if he "fails to raise a claim that has indisputable merit under well-settled law," and the issue would have affected the outcome of the proceeding, counsel is ineffective for failing to raise it. *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (discussing ineffective assistance of counsel on appeal).

17. A defendant, who is personally unaware of the victim's character for violence, cannot present evidence of specific prior acts of violence by the victim under Rule 404(a)(2) of the Texas Rules of Evidence. *Ex parte Miller*, 330 S.W.3d 610, 618-619 (Tex. Crim. App. 2009).

18. Because Applicant only knew that the victims had been to prison, but had no idea why or that they had any reputation or character for violence, specific prior acts of violence by them would have been inadmissible. *See Ex parte Miller*, 330 S.W.3d 610, 618-619 (Tex. Crim. App. 2009).

19. A defendant may offer evidence of victim's character for violence to demonstrate that the victim was the first aggressor but "*only* through reputation and opinion testimony under Rule 405(a)." *Ex parte Miller*, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009) (emphasis in original).

20. Because counsel's investigation into the victims' personal and criminal histories was reasonable, Applicant has failed to prove that counsel's inability to discover evidence that the victims had reputations in Guadalupe County for being violent thieves constituted deficient representation.

21. Counsel's decision to not present additional evidence that Applicant's metal detector had been stolen and pawned, because there was evidence that it had not been stolen until *after* Applicant was arrested, was the result of reasonable trial strategy.

22. "[T]o successfully assert that trial counsel's failure to object amounted to ineffective assistance, the [defendant] must show that the trial judge would have committed error in overruling such an objection." *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *see Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

23. To be proper, jury argument must fall under one of the following areas (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement. *See Todd v. State*, 598 S.W.2d 286 (Tex. Crim. App. 1980); *Dunbar v. State*, 551 S.W.2d 382 (Tex. Crim. App. 1977); *Alejandro v. State*, 493 S.W.2d 230 (Tex. Crim. App. 1973).

24. The State's closing argument was proper because it was an answer to argument of opposing counsel and a plea for law enforcement.

25. Trial counsel's decision to not object to the State's closing argument because there was no legal basis for the objection was the result of reasonable trial strategy.

26. Based on the facts of this case, including the fact that Applicant remembered very little about committing the offense at the time counsel was appointed, Applicant has failed to prove that trial counsel's representation fell below an objective standard of reasonableness.

27. A party fails to carry his burden to prove ineffective assistance of counsel where the probability of a different result absent the alleged deficient conduct "sufficient to undermine confidence in the outcome" is not established. *See Ex parte Saenz*, 491 S.W.3d 819, 826 (Tex. Crim. App. 2016) (citation omitted).

28. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed*." *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984) (emphasis added).

29. Based on the facts of the case, Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel presented more evidence regarding Diaz's criminal history.

30. Based on the facts of the case, and the fact that Applicant was not convicted for any offense as to Victim Beza, Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel presented more evidence regarding Beza's criminal history.

31. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel presented evidence that the metal detector had been stolen from Applicant's home after Applicant's arrest and pawned.

32. Applicant has failed to show that a reasonable likelihood exists that the outcome of the proceeding would have been different had counsel objected to the State's closing argument.

33. Based on the facts of this case, including the facts that Applicant remembered very little about committing the offense at the time counsel was appointed and Applicant was only convicted of the lesser-included offense of murder, Applicant has failed to show that there is a reasonable probability that the outcome of the proceeding would have been different but for the alleged misconduct.

34. Applicant has failed to prove that he received ineffective assistance of trial counsel.

35. This Court recommends that Applicant's first ground for relief be **DENIED**.

36. This Court recommends that Applicant's second ground for relief be **DENIED**.

37. This Court recommends that Applicant's third ground for relief be **DENIED**.

38. This Court recommends that Applicant's fourth ground for relief be **DENIED**.

39. This Court recommends that Applicant's fifth ground for relief be **DENIED**.

Brady (Ground Six)

40. A prosecutor has an affirmative duty to disclose favorable evidence that is material either to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963); *McFarland v. State*, 928 S.W.2d 482, 511 (Tex. Crim. App. 1996).

41. "Under its present incarnation, to succeed in showing a *Brady* violation, an individual must show that (1) the evidence is favorable to the accused because it is exculpatory or impeaching; (2) the evidence was suppressed by the government or persons acting on the government's behalf, either inadvertently or willfully; and (3) the suppression of the evidence resulted in prejudice (i.e., materiality). Evidence is material to guilt or punishment 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' 'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *Ex parte Reed*, 271 S.W.3d 698, 726–27 (Tex. Crim. App. 2008).

42. It is well-settled that the government may be charged with the knowledge of its investigating agents. *See Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

43. For the purposes of the disclosure duty, "'the State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement *connected to the investigation and prosecution of the case*." *Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) (citations omitted) (emphasis added).

44. Applicant has failed to prove that the Texas Department of Criminal Justice – Parole Division was connected to the investigation and prosecution of this case.

45. Applicant has failed to prove that law enforcement in Guadalupe County was connected to the investigation and prosecution of this case.

46. Applicant has failed to prove that the State had the victim's parole records.

47. Applicant has failed to prove that the State contacted law enforcement in Guadalupe County.

48. Applicant has failed to prove that the State had evidence that victim Beza was alleged to have stabbed Cirillio Cruz-Guillen in Guadalupe County.

49. Applicant has failed to prove that the State had evidence that victim Beza was the suspect in the murder of Leonard Carl Grimm in Guadalupe County.

50. "*Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist." *Hafdahl v. State,* 805 S.W.2d 396, 399 (Tex.Crim.App.1990) (citing *Thompson v. State,* 612 S.W.2d 925, 928 (Tex.Crim.App.1981)).

51. The State is not required to seek out exculpatory evidence independently on appellant's behalf, or furnish appellant with exculpatory or mitigating evidence that is fully accessible to appellant from other sources. *Jackson v. State,* 552 S.W.2d 798, 804 (Tex. Crim. App. 1976).

52. Applicant has failed to prove that the State had a duty to seek out exculpatory evidence from the Texas Department of Criminal Justice – Parole Division on Applicant's behalf.

53. Applicant has failed to prove that the State had a duty to seek out exculpatory evidence from law enforcement in Guadalupe County on Applicant's behalf.

54. Applicant has failed to prove that the State failed to disclose favorable evidence.

55. Applicant has failed to demonstrate that he was denied due process.

56. This Court recommends that Applicant's sixth ground for relief be **DENIED**.

WHEREFORE, the State prays that this Court adopt these Proposed Findings of Fact and Conclusions of Law and recommend that Applicant's grounds for relief be **DENIED**.

Respectfully submitted,

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Criminal District Attorney
Tarrant County

JOSEPH W. SPENCE
Chief, Post-Conviction

/s/Andréa Jacobs
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CERTIFICATE OF SERVICE

A true copy of the above has been e-served to Applicant, Mr. Douglas Lynn Kirk, by and through his attorney of record, Mr. Gary Udashen, at gau@udashenanton.com, 2311 Cedar Springs Road, Suite 250, Dallas, Texas 75201 on the 8th day of October, 2019.

/s/Andréa Jacobs
ANDRÉA JACOBS

CERTIFICATE OF COMPLIANCE

The total number of words in this State's Proposed Findings of Fact and Conclusions of Law is **7017** words as determined by the word count feature of Microsoft Office Word 2016.

/s/ Andréa Jacobs_____
ANDRÉA JACOBS

NO. C-297-W011409-1266320-A

EX PARTE	§	IN THE 297th JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
DOUGLAS LYNN KIRK	§	TARRANT COUNTY, TX

FINDINGS AND ORDER

The Court adopts the State's Proposed Memorandum, Findings of Fact and Conclusions of Law as its own and recommends that the relief DOUGLAS LYNN KIRK ("Applicant") requests be **DENIED**.

The Court further orders and directs the Clerk of this Court to furnish a copy of the Court's findings to Applicant, Mr. Douglas Lynn Kirk, by and through his attorney of record, Mr. Gary Udashen, at gau@udashenanton.com, 2311 Cedar Springs Road, Suite 250, Dallas, Texas 75201 (or to Applicant's most recent address), and to the post-conviction section of the Criminal District Attorney's Office.

SIGNED AND ENTERED this 14th day of November, 2019.

JUDGE PRESIDING

CHARLES P. REYNOLDS
TARRANT COUNTY
CRIMINAL MAGISTRATE

FILED
THOMAS A. WILDER, DIST. CLERK
TARRANT COUNTY, TEXAS

NOV 14 2019

TIME 12:24

BY [illegible] DEPUTY