63,481
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 8/17/2019 8:51 AM
Accepted 8/19/2019 9:04 AM
DEANA WILLIAMSON
CLERK

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN TEXAS

TCCA Writ No. 63,481-01
213th District Court, Tarrant County, TX No. C-213-007275-0885306-D

	§	
Ex parte Billy Jack Crutsinger	§	CAPITAL CASE
Applicant	§	Execution Date: 9-4-2019
	§	

SUGGESTION THAT THE COURT RECONSIDER,
ON ITS OWN MOTION,
THE INITIAL APPLICATION
FOR POST-CONVICTION WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Richard Alley was not competent at the time of his appointment and for the duration of the case, to represent Mr. Crutsinger. [A summary of the facts and arguments, is available by reading the Table of Contents outline].

Mr. Crutsinger is mindful that this Court has repeatedly held that the Texas Legislature had not intended ineffective assistance of habeas counsel claims to be an exception to the bar on subsequent applications. " *Ex parte Graves*, 70 S.W.3d 103, 113 (Tex. Crim. App. 2002). However, this Court did stress that "the Legislature has consistently shown a great interest in the appropriate appointment of competent counsel in these very serious cases." *Graves* at 115.

The phrase "competent counsel," found in Art. 11.071, also appears in the State Bar of Texas (SBOT) Rules of Professional Conduct. These rules state they are "rules of reason" and "the Comments ... provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules." Preamble: Scope 10.

The Texas Supreme Court has looked to rules of conduct "to inform" the substantive law when a client is injured by his former lawyer and seeks a remedy. *See e.g., Gillespie v. Hernden*, 516 S.W.3d 541, 546 (Tex. App. – San Antonio, 2016) *citing Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 158 n.2 (Tex. 2004) ("The Disciplinary Rules are not binding as to substantive law regarding attorneys,

although they inform that law.").

Like the Texas Supreme Court, this Court too should look to the professional conduct rules (SBOT Prof. Conduct Rules, and Comments) to guide and inform its decision on what it means for state capital habeas counsel (in this case, Richard Alley) to be competent to represent an indigent death-row inmate (Mr. Crutsinger), as governed by Art. 11.071 – and *not* to be viewed a "gateway" device to resurrect a procedurally defaulted claim.

To that end, Mr. Crutsinger asks this Court to revisit *Graves* informed by the State Bar Rules of Professional Conduct, and for all the reasons discussed in this Suggestion, reopen the initial state habeas proceeding and allow Mr. Crutsinger to proceed anew because the Crutsinger case was a matter beyond Alley's competence.

STATEMENT OF FACTS

1. Prior to his 2003 appointment to represent Crutsinger in state habeas, Alley's disciplinary record documented Alley's lack of professionalism and unethical behavior in the state and federal courts

On November 2, 2000, U.S. Magistrate Judge Bleil entered a seventeen page (17) page Findings, Conclusions, and Recommendations (FFCL) Regarding Disciplinary Hearing For Attorney Travis Richard Alley. The FFCL were entered after an evidentiary hearing in *Lagrone v. Thaler* (hereinafter "Lagrone") in the U.S. District Court, Northern District of Texas, Fort Worth Division (USDC Case No. 4:7cv521). Mr. Alley appeared and was represented by counsel. Alley had been capital habeas counsel for Edward Lagrone. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL .

U.S. District Judge Kendall accepted the FFCL, although he modified the recommendations for discipline. Exhibit 1B: Lagrone 2002-01-22 Order at 1, USDC Kendall, J.

Alley took an appeal to U.S. Chief Judge Fish. Exhibit 1C: Lagrone 2002-09-04 Memorandum Order at p. 6, USDC Fish, C.J.

Judge Fish agreed with Alley on Alley's objection to Section 3. Failure to Conduct Litigation Properly in which the magistrate judge found Alley failed to make

timely and proper objections in three cases, *Roberts*, *Haney* and *Gholson*. Judge Fish ruled that Alley had explained his conduct in those three cases and "to the extent that discipline against Alley rested on this ground, it should be set aside."

However, the Order of Appeal of Discipline upheld the findings, quoted *infra*, from the Section 4. Lack of Professionalism and Unethical Behavior. Exhibit 1C: Lagrone 2002-09-04 Memorandum Order at p. 6, USDC Fish, C.J.

A. The pertinent FFCL in *Lagrone* of Alley's lack of professionalism and unethical behavior by the U.S. Magistrate Judge were:

4. Lack of Professionalism and Unethical Behavior[1]

- "[Alley's work] is frequently 'sloppy' ... and [he] remains culpable for poor representation, ... of his clients."
- "Testimony from Judge David Ferris confirms that Alley's reputation for sloppiness is not confined to the federal court system and has even achieved a level of abusiveness towards [state] courts and opposing counsel."
- "Compounding doubts about Alley's professionalism is his intentional deception or lack of regard for the accuracy of the information he furnishes to the courts."
- "And his false statements to the federal appellate court and state

[1] Because Judge Fish sustained Alley's objections to the federal magistrate judge's Sec. 3 findings that he "fail[ed] to preserve issues and errors on behalf of his clients," Order at 6, the quoted findings from Section 4, omit it even though it had been included in the Sec. 4 Lack of Professionalism findings.

> trial court plus his cryptic description of these incidents in response to a direct inquiry of the federal district court reflect unprofessional and unethical tendencies."

FFCL at 11-12. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL.

The deception to which the federal FFCL refer includes two (2) public reprimands of Alley by the State Bar of Texas. The first public remand was a March 6, 1985 Judgment of Reprimand that concluded that Alley committed professional misconduct in violation of the disciplinary rules. Exhibit 1E: Lagrone 1985-03-06 SBOT Public Reprimand.

The facts recited in the 1985 Reprimand, Exhibit 1E, concerned two (2) criminal defendants in two (2) unrelated cases before two different courts:

> 5. Travis Richard Alley knew ***the statement*** [he] made ***[to the United States Court of Appeals for the Fifth Circuit*** on August 6, 1984] in the Motion for Stay of Execution [on behalf of a capital client] ***was not true at the time it was made***." ....
>
> 10. Travis Richard Alley knew that **the motion** [for change of venue for Carlton Dale Knowles] was defective and that it ***was false evidence at the time he presented it to the Criminal District Court No. 1***, Tarrant County, Texas on March 22, 1984.

The second Judgment of Public Reprimand was entered on October 27, 1992 finding that Alley "failed to safeguard the property of a client and further failed to keep complete records of such property." Exhibit 1D: Lagrone 1992-10-27 Public Reprimand.

B. The federal FFCL in *Lagrone* also found Alley's work product was cut-and-paste, and it's worth "quickly approache[d] zero" because despite notice from the federal court of how to protect the client's claims, Alley failed to do so

The federal FFCL that Alley's work product was "of minimal assistance to the court" and its worth "quickly approache[d] zero" were affirmed on appeal. The work product was worthless because the statute of limitations had run. In the appointment order, the federal court put Alley on notice that an equitable tolling defense could protect the client's claims, but Alley failed to raise it at all.

Even though Judge Kendall declined to order a fine or repayment of attorney fees, his order stated that they were "probability justified." Exhibit 1B: Lagrone 2002-01-22 Order at 2, USDC Kendall, J.

The findings recited:

- "The [federal habeas] petition [for Edward Lewis Lagrone, a capital defendant] overall is poorly done and of minimal assistance to the court."
- "Approximately half of [the federal habeas petition] appears to have been pulled nearly verbatim and indiscriminately from the state court papers and other briefs and documents Alley has prepared or collected in the course of his legal practice."
- "Moreover, the worth of the petition quickly approaches zero if, as it appears, the petition is time-barred under the AEDPA."
- "In appointing counsel for Lagrone, the court expressly cautioned that the petition should be timely filed and referred counsel to case law providing for equitable tolling."

- "The court cannot endorse Alley's failure to seek equitable tolling of the statute of limitations when Alley was cognizable of the fact that it may be his client's only chance to have his claims heard."

FFCL at 12, 13. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL.

Ultimately, in his September 4, 2002 Order on Appeal of Discipline, Chief Judge Fish accepted District Judge Kendall's order to reprimand Alley, remove Alley permanently from representation of Mr. Lagrone, a capital defendant, and not fine or require Alley to repay attorney fees, but modified Judge Kendall's order, reinstating the U.S. Magistrate's recommendation to suspend Alley from the bar of the district for one year. Exhibit 1C: Lagrone 2002-09-04 Memorandum Order at p. 6, USDC Fish, C.J.

2. In the years preceding the 2003 *Crutsinger* appointment, Alley had been appointed to represent five (5) state capital habeas clients

In the years preceding his 2003 appointment to represent Crutsinger, Alley had been appointed to represent five (5) state capital habeas clients in Texas. The five writs, more fully discussed, *infra*, are:

2000-Aug 30	Carpenter, David (Dallas)
2001-Mar 15	Williams, Bruce (Dallas)
2002-Jul 16	Reese, Lamont (Tarrant)
2004-Jun 16	Scheanette, Dale (Tarrant)
2004-Oct 20	Kerr, Cary (Tarrant)
2005-Mar 17	Crutsinger, Billy Jack (Tarrant)

A. <u>Overview</u>: The 2000-2005 state FFCL on each of the five (5) state capital writs, and the *Crutsinger* writ, demonstrate Alley's experience and ability in state capital habeas was consistent with the federal disciplinary findings in 2000

Each of the writs (*Carpenter, Williams, Reese, Scheanette, Kerr* and *Crutsinger*) pled the same or substantially similar non-cognizable claims. It appears Alley did a cut-and-paste of one claim from an earlier capital writ into the next capital writ as the Table of Claims demonstrates. (Appendix 1). Alley also did a cut-and-paste of claims from the particular client's capital direct appeal brief into the capital writ for that client, pouring all five (5) direct appeal claims in the *Crutsinger* direct appeal brief into the *Crutsinger* Writ. Table of Claims, infra, and (Appendix 1).

CRUTSINGER: TABLE of CLAIMS COMPARISONS
The Point of Error (POE)/Issue in prior Applications or Direct Appeal Briefs (DA)
reproduced by Alley *verbatim* into, or were substantially similar to, those in the *Crutsinger* Writ

Crustinger (BJC) 3-17-05 Writ	18 POEs raised in Crutsinger Writ	*Kerr* (CDK) 10-20-04 Writ	*Scheanette* (DES) 06-16-04 Writ	*Reece* (LR) 7-16-2002 Writ	*Williams* (BW) 03-20-2001 Writ	*Carpenter* (DLC) 8-30-2000
POE 1	TCCP 37.071, §2(B)(1) unconst'l - State burden only "probable" on future danger instead of beyond rble dbt	10	1	10	10	9
POE 2 & 10	TX DP Scheme unconst'l: (2) Failure to define "operant term" (probability) spec issue "distinguish from chance," at p. 37 (10) Jury not given definition of probability; "distinguish from chance," at p. 82	11	2	11	10 & 14	10
POE 11	TX DP Scheme unconst'l - no requirement of "what amount of probability" State must prove future dangerousness issue	26	11 & 12	-	-	-
POE 3 in BJC DA Brief 3	TX DP Scheme unconst'l - 12/10 Rule juror vote	12	3	12	24	34
POE 4	TCCA refused to conduct sufficiency review of evidence of mitgn spec issue under any std Art. 37.01, sec (2)(e)	19	4	9	8	15
POE 5 in BJC DA Brief 5	Same as POE 4, but raises failure to review on direct appeal	19	5	-	-	-
POE 6	TX DP Scheme unconst'l - impossibility of restricting juror discretion to impose death, but unlimited discretion to consider all mitgn evidence	13	6	13 & from LR's DA Brief	25	35 &36

CRUTSINGER: TABLE of CLAIMS COMPARISONS
The Point of Error (POE)/Issue in prior Applications or Direct Appeal Briefs (DA)
reproduced by Alley *verbatim* into, or were substantially similar to, those in the *Crutsinger* Writ

POE 7	TX DP Scheme unconst'l - failure of notice in indictment on future dangerousness	-	-	-	-	-
POE 8	TX DP Scheme unconst'l - no BOP on State to prove mitgn spec issue s/b answered no	-	-	-	-	-
POE 9	TX DP Scheme unconst'l - dp imposed with "relaxed evid stds"	-	-	-	-	-
POE 12	TX DP Scheme unconst'l - no BOP on State of whtr evid is insufficient mitgn spec issue	-	-	-	-	-
POE 13	TX DP Scheme unconst'l - Likelihood of executing innocent persons	-	24	-	-	-
POE 14 in BJK's DA Brief 1	Wealth disparity among counties results in arbitrariness in seeking death	27	13	-	-	-
POE 15 (IAC)	IAC Boilerplate IAC Law: p. 124	15 Expert presentation challenge: Dr. Cunningham; & raised in CDK's DA 2 Boilerplate IAC Law: p.67-73	15 Expert presentation challenge: Dr. Kessner & raised in DA 3, 4 Boilerplate IAC Law: pp, 76-84	15 Boilerplate Case Law: pp. 111-117	31 Boilerplate IAC Law: pp. 151 - 161	13 & 14 Boilerplate IAC Law: pp. 92-121
POE 16 in BJC's DA 2	judge excused potential juor Enlow, not shown to be absolutely disqualified	-	-	-	-	-
POE 17 in BJC's DA Brief 4	admission of confession	-	-	-	-	-
POE 18	cumulative error	36	29	19	33	40 & 41

Alley was on notice that the claims, as he pled them, were not cognizable, and that he needed to support the claims with compelling new evidence or non-frivolous argument to extend, modify, or reverse existing law or to establish new law. The FFCL of the Tarrant County and Dallas County District Courts not only cited to established case law from this Court that denied each claim, but also provided a parenthetical explanation of why the claim was denied. *See* Statement of Facts, 2.E. ("Beginning in 2001, the FFCL put Alley on notice that the writ claims he pled were not cognizable and explained why ....). *See also* Analysis (Appendix 2).

Some of the content in the pleadings were either intentionally deceptive or showed a lack of regard for the accuracy of the information he furnished to the state courts. *See* Statement of Facts, 2.B. ("The FFCL from the 2000 Carpenter Writ & the 2004 Scheanette Writ ....).

In sum, Alley's experience and ability in the 2000-2005 state habeas litigation is consistent with the U.S. Magistrate Judge's Disciplinary findings in 2000 in *Lagrone*. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL at 11-12.

B. The FFCL from the 2000 *Carpenter* Writ & the 2004 *Scheanette* Writ showed the writ-allegations were obviously false by just looking at the trial record

In the 2000 *Carpenter* Writ, the writ alleged an IAC Claim against appellate counsel (POE 19):

- in "[s]aid motion for new trial [appellate counsel] did not allege [trial] counsel was incompetent or ineffective;"
- "said motion ... was not verified....;"
- He "fail[ed] to timely present the motion...."

Exhibit 2C: Carpenter 2000-08-30 Writ at 136-138.

In contrast, the *Carpenter* FFCL found:

301. The Court finds the motion ... was timely filed.

302. The Court recognizes that the appellate rules do not require verification of a motion for new trial; .... and

304. Contrary to Applicant's assertion, however, the Court finds that its handwritten order expressly overruling the motion demonstrates that counsel did present the motion to this court.

Exhibit 2D: Carpenter 2001–04-05 Adopted State Proposed FFCL at 56-58.

Four years later in the June 16, 2004 *Scheanette* Writ, Alley pled that trial counsel was ineffective for failing "to oppose by pretrial motion or objection the charges made against" applicant. In contrast, FFCL #6 found, among other things, that:

6. Applicant's ***counsel filed over 80 pretrial motions***, requests for relief, designations of experts, or objections to the State's motions"

(Emphasis supplied) Exhibit 6E: Scheanette 2005-08-29 District Court FFCL Order, FFLC #6 at 118.

Alley's experience and ability in the 2000-2005 state habeas litigation is consistent with the U.S. Magistrate Judge's Disciplinary findings in 2000 in *Lagrone*. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL at 11 ("Compounding doubts about Alley's professionalism is his intentional deception or lack of regard for the accuracy of the information he furnishes to the courts").

C. Alley did a cut-and-paste of record-bound, IAC boilerplate claims from one writ into the next

It appears Alley had a collection of judicial opinions – many of which were *not* Texas case law, and *not* binding precedent – that held specific conduct was deficient in a particular way (*e.g.,* failed to file pre-trial motions; to develop a meaningful relationship with client; to be sufficiently familiar with the facts and law). Alley quoted from the opinion, sometimes alleging in very general terms counsel was ineffective in that way, or at other times relying on the trial record, despite the obligation of an applicant to prove the claim by a preponderance of the evidence. *See infra* Statement of Facts 2. D..("The quote from Judge Benavides ....); *see* also *Ex*

parte Graves, 70 S.W.3d 103, 108-109 (Tex. Crim. App. 2002) ("claimants have had to allege and prove, by preponderance of the evidence, the violation of a specific constitutional provision").

Examples include:

"*Ex parte Felton*, 815 S.W.2d 733 (Tex. Crim. App. 1991) counsel was ineffective in that trial counsel was not sufficiently familiar with the law and facts ...." cited in

Crutsinger Writ at 128
Kerr Writ at 70
Scheanette Writ at 81
Reese Writ at 114
Williams Writ (not cited)
Carpenter Writ at 110

"In *Ware v. State*, 875 S.W.2d 432 (Tex. App. Waco 1994) counsel's failure to elicit facts beneficial to his client ....” cited in

Crutsinger Writ at 127
Kerr Writ at 68
Scheanette Writ at 82
Reese Writ at 112
Williams Writ at 154
Carpenter Writ at 109

"The errors complained of herein are not harmless .... *Offor v. Scott*, 72 F.3d 30 (5th Cir. 1995)" cited in

Crutsinger Writ at 129
Kerr Writ at 70
Scheanette Writ at 84
Reese Writ at 123
Williams Writ at 161
Carpenter Writ at 111

"In *Hall v. Washington*, __ F,3d ___, 1997 WL 42967 (7th Cir. Feb. 4, 1997) ... the federal court concludes ... counsel failed to present

readily available mitigating evidence...", cited in

Crutsinger Writ at 129
Kerr Writ at 70
Scheanette Writ at 79
Reese Writ at 114
Williams Writ at 158
Carpenter Writ at 107

"In *Driscoll v. Delo*, 71 F3d 701, 708 (8th Cir. Cir. 1995), ... counsel was ineffective ... [for] failing to prepare to challenge ... evidence..." cited in

Crutsinger Writ at 130
Kerr Writ at 71
Scheanette Writ at 80
Reese Writ at 116
Williams Writ at 156-57
Carpenter Writ at 111

"In *Harris by and through Ramseyer v. Woods*, 64 F.3d 1432 (9th Cir. 1995), ... the writ due to cumulative deficiencies of trial counsel ...." cited in

Crutsinger Writ at 130-31
Kerr Writ at 72
Scheanette Writ at 83
Reese Writ at 122
Williams Writ at 156
Carpenter Writ at 111

"In *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993),... counsel was ineffective for failure to investigate an alibi defense...." cited in

Crutsinger Writ at 131
Kerr Writ at 72
Scheanette Writ at 80
Reese Writ at 117
Williams Writ at 159
Carpenter Writ at 112

"In *Groseclose v. Bell*, 895 F. Supp. 935 (M.D. Tenn. 1995), ... counsel was ineffective ... [for] failure to form a meaningful relationship with client....." cited in

Crutsinger Writ at 131
Kerr Writ at 72
Scheanette Writ at 84
Reese Writ at 123
Williams Writ at 160
Carpenter Writ at 112

"In *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996), ... counsel was ineffective for failing to object to prosecutor's closing argument...." cited in

Crutsinger Writ at 132
Kerr Writ (not cited)
Scheanette Writ at 84
Reese Writ (not cited)
Williams Writ at 160
Carpenter Writ at 112

Alley pled this boilerplate (*e.g.,* failure to file pre-trial motions) even in cases where the face of record made the falsity of the allegation obvious. *See supra* Statement of Facts 2. B ("The FFCL from the 2000 Carpenter Writ & the 2004 Scheanette Writ ....).

Alley's experience and ability in the 2000-2005 state habeas litigation is consistent with the U.S. Magistrate Judge's Disciplinary findings in 2000 in Lagrone. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL at 12 ("Approximately half of [the federal habeas petition] appears to have been pulled nearly verbatim and indiscriminately from the state court papers and other briefs and documents Alley has

prepared or collected in the course of his legal practice.").

D. The quote from Judge Benavides in each of the five (5) capital writs, and the *Crutsinger* writ, prove Alley knew unsupported IAC claims could permanently foreclose a petitioner's right to relief. The FFCL in each of the writs are replete with findings that Alley failed to present material, other than what the Court had already considered

Each writ reflects that Alley knew that IAC claims had to be supported by adequate, extra-record evidence. At the beginning of each and every IAC boilerplate claim in each of the state writs, including that of Crutsinger's, Alley quoted from the dissent of Judge Benavides in *Craig v. State*, 825 S.W.2d 128, 130 (Benavides, J., dissent) (Tex. Crim. App.,1992). This quotation appears in:

Crutsinger Writ at 124
Kerr Writ at 67
Scheanette Writ at 76
Reese Writ at 111
Williams Writ at 151
Carpenter Writ at 92

Judge Benavides wrote that the absence of "testimony from appellant's trial counsel; .... testimony of other witnesses and factors existing at the time of the asserted unprofessional conduct .... deprives both the appellant and the State the opportunity to develop adequately their positions and could permanently foreclose appellant's right to relief to which he could otherwise be entitled." *Craig*, 825 S.W.2d at 130.

Representative samples from the FFCL that find Alley failed to support the IAC claims with extra-record evidence, include:

> 2000 Carpenter Writ – Brevity of consultation with the client: The FFCL found that "Applicant presents no evidence in the record, or accompanying his writ application, of how many times counsel consulted with him before and during the trial or how much time counsel spent with him when they did meet." The FFCL also found that "Applicant does not state how much more consulting was necessary." FFCL # 103, 105 at 23. Exhibit 2D: Carpenter 2001–04-05 Adopted State Proposed FFCL.
>
> 2001 Williams Writ – No meaningful investigation: The FFCL found "applicant offers no evidence of any facts his attorneys failed to uncover due to their alleged deficient investigation and preparation." FFCL #181 at 59. Exhibit 7C: Williams 2001-08-22 Adopted State Proposed FFCL & 2001-09-12 Dist Ct Order.
>
> 2002 Reese Writ – Mental Retardation. Alley failed to qualify the expert, whose report he attached to the Writ, Dr. Church, or support her conclusions with objective evidence. The court found there was no evidence Dr. Church was licensed in Texas, FFCL#56 at 623; no documentation in support of the claim of Dr. Church as to Applicant's IQ score of 73, FFCL#16-17 at 619; and no documentation in support of the claim Applicant had been diagnosed in childhood with fetal alcohol syndrome and seizure disorder. FFCL#59 at 623. Exhibit 5C: Reese 2003-03-04 State Proposed FFCL. Worse, Alley failed altogether to implement the recommendation of Dr, Church for a "comprehensive medical evaluation," despite having attached it to the Writ. See Exhibit 5B: Reese 2002-07-16 Writ Reese Writ, Dr. Church Evaluation at 154.
>
> 2004 Scheanette Writ – IAC claims. The FFCL found "Applicant has failed to plead or prove: what additional pre-trial investigation trial counsel should have conducted but did not." FFCL#10 at 118; "any specific instance in which counsel did not demonstrate a thorough and complete knowledge of he facts and law applicable to the case;"

FFCL#19 at 120; "any instance in which trial counsel 'failed to impeach [a] state 's main witness with available information,' ... identify any such 'main witness' ..." "identify what 'available information' could have been used to impeach this unidentified witness," FFCL#22 at 121; "any specific 'beneficial' evidence that was 'available' to trial counsel that counsel did not assert ...; FFCL#23 at 121. Exhibit 6E: Scheanette 2005-08-29 District Court FFCL Order.

2004 Kerr Writ: IAC Claims. "Applicant does not direct the court to any applicable change in the law regarding effective assistance of counsel which the Court of Criminal Appeals has decided to apply retroactively;" FFCL#12 at 352; "The applicant does not provide the court any material, outside the record already considered by the Court of Criminal Appeals...." FFCL#13 at 352. Exhibit 4C: Kerr 2005-05-09 Adopted FFCL with 2005-06-03 Order.

E. Alley also pled a wide-variety of other record-bound claims (factual and legal insufficiency, challenges for cause, to the admission of the evidence, to jury instructions, to rulings on parole law, cumulative error, and to a plethora of challenges to the Texas death penalty scheme and the special issues). At least as early as 2001, the FFCL put Ally on notice the claims were not cognizable, cited established precedent and explained why. Alley took no corrective action

Alley pled a wide variety of claims – factual and legal insufficiency, challenges to the admission of trial evidence, challenges for cause, challenges to rulings on parole law, jury instruction challenges, cumulative error, challenges to the special issues and burdens of proof thereon, and challenges to the Texas death penalty scheme – all record-bound claims that belong im a direct appeal brief, not a state habeas writ.

With each FFCL released in the five writs (Williams, Carpenter, Reese,

Scheanette, and Kerr), the FFCL put Alley on continuing-notice that the claims he raised in the writs – direct appeal claims copied from the direct appeal brief, or claims that could have been raised in direct appeal, were not cognizable. All the FFCL cited to established case law and in a parenthetical explained why the claim was denied. Alley took no corrective action. He just continued to cut-and-paste.

1. The 2001 Carpenter FFCL, *infra*, cited to long established precedent holding the particular claim was not cognizable, and stated why

The 2001 Carpenter FFCL found and concluded:

> Claims 3-6, 8 (sufficiency of evidence and special issues). The FFCL#18 found the proper avenue to raise sufficiency claims was on direct appeal, but Applicant did not. The FFCL#19 concluded the claims were procedurally barred and cannot be relitigated through habeas corpus, *citing Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998). Further, FFCL#23 found sufficiency of the evidence claims cannot be collaterally attacked, and none are cognizable in habeas, citing *Ex parte McLain*, 869 S.W.2d 349, 351 (Tex. Crim. App. 1994). The FFCL#25-27 concluded the law prohibits sufficiency review of the special issues, citing *McGinn v. State*, 961 S.W.2d 161, 166 (Tex. Crim. App. 1998). FFCL at 7-9.
>
> Claims 9 & 10 (State's burden to prove future dangerousness; and definition of operant terms). The FFCL#41-43 found the claims were not objected to at trial and not raised on direct appeal. The FFCL#44 concluded the claims were procedurally barred and cannot be litigated through habeas, *citing Ramos*, 977 S.W.2d at 617. FFCL at 12.
>
> Claim 17 (Admission of Opinion testimony). The FFCL#254-256 found the claim could have been raised on direct appeal but was not. The FFCL#257-258 concluded the claim was procedurally barred and

cannot be litigated through habeas, *citing Ramos*, 977 S.W.2d at 617. FFCL at 49-50.

Claim 18 (Admission of drawings). The FFCL#272-273 found the claim could have been raised on direct appeal but was not. The FFCL#275-278 concluded the claim was procedurally barred and cannot be litigated through habeas, *citing Ramos*, 977 S.W.2d at 617. FFCL at 52-53.

Claim 20 (Admissibility of letters). The FFCL#314 found the claim could have been raised on direct appeal but was not. The FFCL#315-316 concluded the claim was procedurally barred and cannot be litigated through habeas, *citing Ramos*, 977 S.W.2d at 617. FFCL at 59.

Claim 21 (lack of burglary charge instruction). The FFCL#345-347 found the claim was not objected to at trial and not raised on direct appeal. The FFCL#350 concluded the claim was procedurally barred and cannot be litigated through habeas, *citing Ramos*, 977 S.W.2d at 617. FFCL at 64-65.

Claims 25-32 (challenges for cause). The FFCL#487 found the claims could have been raised on direct appeal but were not. The FFCL#489, 493 concluded the claims were procedurally barred and cannot be litigated through habeas, *citing Ramos*, 977 S.W.2d 617. FFCL at 89.

Claim 39 (Tainted identification). The FFCL#674 found the claims could have been raised on direct appeal but were not. The FFCL#676, 677 concluded the claims were procedurally barred and cannot be litigated through habeas, *citing Ramos*, 977 S.W.2d at 617. FFCL at 129-130.

Exhibit 2D: Carpenter 2001–04-05 Adopted State Proposed FFCL

2. The 2001 Williams FFCL, infra, cited to long established precedent holding the particular claim was not cognizable, and stated why

The 2001 Williams FFCL found and concluded:

Claim 1 (sufficiency of the evidence to prove guilt). The FFCL#6 found the sufficiency claim was not cognizable because sufficiency challenges cannot be raised in a collateral attack, *citing Ex parte McLain*, 869 S.W.2d 349, 351 (Tex. Crim. App. 1994). FFCL#6 also ruled the claim was not cognizable because it could have been raised on direct appeal, *citing Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998). FFCL at 5.

Claims 3, 4, 5, 6, 7 (sufficiency of the evidence & special issues) The FFCL#17 found the legal and factual sufficiency of the evidence claims as to the special issues cannot be raised in a collateral attack, *citing Ex parte McLain*, 869 S.W.2d 349, 351 (Tex. Crim. App. 1994), and concluded in FFCL#21the claims are not recognized in law and should not be addressed, *citing McGinn v. State*, 961 S.W.2d 161, 166 (Tex. Crim. App. 1998), and *Green v. State*, 934 S.W.2d 92, 106-107 (Tex. Crim. App. 1996). FFCL at 8-10.

Claims 8-9 (constitutional bar to review sufficiency & mitigation special issue). The FFCL#48 found the claim could have been raised on direct appeal, but was not. The FFCL#48 concluded the claim was procedurally barred and cannot be litigated in habeas, citing Ramos, 977 S.W.2d 617. FFCL . FFCL at 18.

Claim 10 (State's burden to prove future dangerousness). The FFCL#53 found the claim was not objected to at trial. The FFCL#53 concluded the claim was procedurally barred in habeas, *citing Ex parte Dietzman*, 851 S.W.2d 304, 305 (Tex. Crim. App. 1993). FFCL at 19-20.

Claims 11 & 14 (failure to define terms is future dangerousness issue). The FFCL#59 found the claim could have been raised on direct appeal, but was not. The FFCL#59 concluded the claims were

procedurally barred and cannot be litigated in habeas, citing Ramos, 977 S.W.2d 617. FFCL at 21.

Claims 15-17 – (rulings on parole law). The FFCL#86 ruled claims raised on direct appeal cannot ne re-litigated in habeas. FFCL#86 aslo found the record was inadequate to review the claims *citing Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998), and *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). FFCL at 28-29.

Claims 19-22 (challenges for cause). The FFCL#108 found the claims could have been raised on direct appeal, but were not. The FFCL#108 concluded the claims were procedurally barred and cannot be litigated in habeas, *citing Ramos*, 977 S.W.2d 617. FFCL at 36.

Claim 26 (selection of appointed counsel). The FFCL#144 found the claim was not objected to at trial and absent a trial objection, the Applicant forfeits the complaint on habeas, citing Dietzman, 851 S.W.2d at 305. FFCL at 48.

Claim 27 (Admission of evidence seized in home). The FFCL#152 found the claim could have been raised on direct appeal, but was not. The FFCL#152 concluded the claim was procedurally barred and cannot be litigated in habeas, *citing Ramos*, 977 S.W.2d 617. FFCL at 50.

Claim 28 (Admissibility of confession). The FFCL#159 found the claim could have been raised on direct appeal, but was not. The FFCL#159 concluded the claim was procedurally barred because habeas review is not a substitute for direct appeal, citing Ex parte Ramos, 977 S.W.2d 617. FFCL at 52.

Claim 29 (Admissibility of Identification testimony). The FFCL#167 found the claim could have been raised on direct appeal, but was not. The FFCL#167 concluded the claim was procedurally barred because habeas review is not a substitute for direct appeal, *citing Ex parte Ramos*, 977 S.W.2d 617. FFCL at 54.

Claim 34 (cumulative error). The FFCL#222 found that the cumulative error claim failed to demonstrate a constitutional error, and further failed to show how any of the errors combined to create a due process violation. FFCL at 70.

Exhibit 7C: Williams 2001-08-22 Adopted State Proposed FFCL & 2001-09-12 Dist Ct Order (end of the FFCL).

3. The 2003 Reese FFCL, infra, cited to long established precedent holding the particular claim was not cognizable, and stated why

On direct appeal issues raised in the writ, the 2001 Reese FFCL ruled:

Claim 4, Applicant contended that the evidence was not sufficient to support the jury's finding on the future dangerousness special issue. FFCL at 567. The FFCL#1-3 found that the issue had been raised and decided in the direct appeal, and that the applicant did not direct the court to any applicable change in the law. The FFCL#4 concluded sufficiency challenges were not cognizable in a collateral attack. FFCL at 567, 570.

Claim 5, Applicant contended that the evidence was not sufficient to support the jury's negative finding on the mitigation special issue. FFCL at 572. The FFCL#1 found that the issue had been raised and decided in the direct appeal. The FFCL#1-4 concluded habeas corpus cannot be used to re-litigate matters addressed on direct appeal. sufficiency challenges were not cognizable in a collateral attack. FFCL at 572.-573.

Claim 6, Applicant contended that the Texas death penalty scheme violated his protection against cruel and unusual punishment because it gave the jury too much discretion in answering the mitigation special issue. FFCL at 575. The FFCL#3 found that the issue had been raised and decided in the direct appeal. FFCL at 575. The FFCL#1-3. concluded habeas corpus cannot be used to re-litigate matters addressed

on direct appeal. FFCL at 576.

Claim 7, Applicant contended that the Texas death penalty scheme violated his protection against cruel and unusual punishment because it sends mixed signals to the jury. FFCL at 578. The FFCL#3 found that the issue had been raised and decided in the direct appeal, FFCL at 578. The FFCL#1-3- concluded habeas corpus cannot be used to re-litigate matters addressed on direct appeal. FFCL at 579.

Claim 8, Applicant contended that the mitigation special issue's non-assignment of a burden of proof on the State violates his due process rights. FFCL at 581. The FFCL#3 found that the issue had been raised and decided in the direct appeal, FFCL at 581. The FFCL#1-3 concluded habeas corpus cannot be used to re-litigate matters addressed on direct appeal. FFCL at 582.

Claim 13, Applicant contended that the Texas death penalty scheme is unconstitutional because it restricts the jury's discretion to impose the death penalty while allowing them unlimited discretion in considering mitigating evidence. FFCL at 595. The FFCL#3 found that the issue was raised on direct appeal. The FFCL#1-3 concluded habeas corpus may not be used to relitigate matters raised on direct appeal. FFCL at 595-596.

On issues that could have been raised on direct appeal but were not, the 2001 Reese FFCL ruled:

Claims 1, 2, 3 (wrongful admission of extraneous conduct evidence in the penalty phase), were issues that could have been raised, on direct appeal. FFCL at 563, 566. The FFCL found Applicant did not challenge Thomas' personal knowledge or custodial capacity as a caseworker with the Louisiana Office of Community Services, who testified about Reese's violent behavior while he was a minor in the custody of the State of Louisiana from January 1990 to 1996. FFCL at 563. The FFCL concluded that claims of wrongfully admitted evidence were not cognizable in habeas. FFCL at 564.

Claim 9, Applicant contended that the mitigation special issue's immunity from a sufficiency review by the TCCA violates his due process and equal protection rights. FFCL at 586. The FFCL found that such a review is not constitutionally required, relying on established precedent from the CCA, *citing McFarland v. State*, 928 S.W.2d 482, 519 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542, 557 (Tex. Crim. App. 1995) The FFCL concluded applicant presented no new compelling argument or authority to reverse precedent,. FFCL at 587.

Claim 10, Applicant contended that the probability language in the future dangerous special issue unconstitutionally diminishes the State's burden to prove that special issue beyond a reasonable doubt. FFCL at 588. The FFCL concluded Apprendi was not applicable. FFCL at 589.

Claim 11, Applicant contended that the lack of a definition of probability violated his due process rights. FFCL at 591. The FFCL concluded that Applicant provided no new compelling argument or authority to reverse precedent that no definition was required. FFCL at 592,

Claim 12, Applicant contended that the requirement of ten for the jury to negatively answer the special issue violates his protection against cruel and unusual punishment. FFCL at 593. The FFCL concluded that the requirement does not coerce or mislead the jurors, and does not conflict with *Mills v. Maryland*, *citing Prystash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App.,1999). FFCL at 594.

Claim 14, Applicant contended that his trial counsel were unqualified and not appointed pursuant to the statutory requirements . FFCL at 598. The FFCL found that Applicant did not raise this claim on direct appeal. The FFCL concluded habeas should not be used to raise issue that could have been raised on direct appeal. FFCL at 598, 600.

Claim 19 was a cumulative error argument. The FFCL concluded that the claim was without merit because Applicant had not suffered any

constitutional error. FFCL at 631.

Supp Claims 1, 2, 3 - A supplemental Writ Application was filed. All three claims were denied because they were not raised on direct appeal and the supplemental writ was not timely filed. (Supplemental claims 1 & 2 that the indictment did not allege law of the parties; claim 3 - the indictment did not allege the special issues in the indictment). FFCL at 632-635.

Exhibit 5C: Reese 2003-03-04 Adopted State Proposed FFCL.

F. Alley abused the state courts and opposing counsel by filing 873 pages of pleadings, containing 158 non-cognizable claims. Even if the claims were not cognizable, the courts and opposing counsel were required to act on them

Alley abused the state courts and opposing counsel by filing 873 pages of pleadings, containing 158 non-cognizable claims. Even if the claims were not cognizable, the courts and opposing counsel were required to act on them.

- There were forty-one (41) claims in the *Carpenter* Writ, and two hundred thirty-two (232) pages.
- There were thirty-three (33) claims in the *Williams* Writ, and one hundred sixty-five (165) pages.
- There were nineteen (19) claims in the *Reese* Writ, and one hundred sixty-one (161) pages.
- There were twenty-nine (29) claims in the *Scheanette* Writ, and one hundred fifty-seven (157) pages,
- There were thirty-six (36) claims in the *Kerr* Writ, and one hundred fifty-eight (158) pages.

Alley's experience and ability in the 2000-2005 state habeas litigation is consistent with the U.S. Magistrate Judge's Disciplinary findings in 2000 in Lagrone. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL at 11 ("Testimony from Judge David Ferris confirms that Alley's reputation for sloppiness is not confined to the federal court system and has even achieved a level of abusiveness directed towards the [state] courts and opposing counsel.").

3. The March 17, 2005 *Crutsinger* Writ

A. The *Crutsinger* Writ contained eighteen (18) claims. While the Writ was pending, the TCCA removed Alley from the list of qualified article 11.071 counsel

On March 17, 2005, Mr. Alley filed a state habeas application ("Writ"), *Ex parte Crutsinger*, No. C-213-007275-0885306-A, in the 213th Judicial District Court, Tarrant County, TX. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order. It was one-hundred forty (140) pages and raised eighteen (18) claims. The claims were erroneously labeled, "Points of Error," (POE") – nomenclature used in a direct appeal brief, and not a writ application, which uses the phrase "Ground for Relief." *Compare* TX R. APP. PROC. 38.1(f) (contents of direct appeal briefs are to "state concisely ... points presented for review") *with* TX CODE CRIM. PROC. 11.071§ "Investigation of Grounds;" §4(e) "... grounds for relief."

The state post-conviction record shows that the district attorney filed a motion for court-ordered attorney affidavits, that was granted. Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record at 1413.

The State filed a Reply to the Writ ("Answer"). Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record at 11427.

On October 20, 2005 the State filed proposed Findings of Fact and Conclusions of Law (FFCL), relying on trial counsel's joint affidavit. Exhibit 3A: Crutsinger Vol

7 Master Index Clerk Record at 1534.

After filing the Crutsinger Writ, Alley did not seek a hearing or any other process to challenge or rebut the assertions contained in the joint trial-counsel affidavit. Alley did not seek funding for any post-petition fact development as required by Art. 11.071 § 3(a). Alley did not file a reply to the State's Answer. Alley even failed to file proposed findings of fact and conclusions of law, despite being ordered to do so by the trial court. Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record at 1533.

On November 7, 2005, the District Court entered an order that adopted the FFCL and recommended relief be denied. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

Between November 16, 2006, and December 18, 2006, while the Writ was pending, the TCCA removed Alley from the list of qualified counsel approved for state capital post-conviction representation. Exhibit 3E: Crutsinger TCCA Appvd Appmt Lists Nov Dec 2006.

This Court did not replace Alley as Mr. Crutsinger's attorney. Alley did not seek to withdraw or have other counsel appointed to represent Crutsinger.

On November 7, 2007, the Texas Court of Criminal Appeals "adopt[ed] the trial judge's findings and conclusions. Based upon the trial court's findings and

conclusions and our own review, the relief sought is denied." Exhibit 3C: Crutsinger 2007-11-07 TCCA Order.

B. The Table of Claims and Analysis show that of the eighteen (18) claims, five (5) were copied from the direct appeal brief, and nine (9) track claims in the *Scheanette* Writ, even down to the identical numbering of the claims

Alley copied all five (5) of the claims in the direct appeal brief into the *Crutsinger* Writ. *Crutsinger v, State*, No AP 74,769. *See* Table of Claims and Analysis (Appendix 1 & 2).

Several other POEs in the Crutsinger Writ, appear to have been reproduced from the *Scheanette* writ – which appears to be the foundation document, even down to the identical numbering of the claims. *Compare* Table of POEs in the 2005 *Crutsinger* Writ *with* the POEs in the June 16, 2004 *Scheanette* Writ, *infra*.

CRUTSINGER: TABLE of CLAIMS COMPARE SCHEANETTE & BJC
The Point of Error in Scheanette Writ or Crutsinger Direct Appeal Briefs (DA) reproduced *verbatim* or were substantially similar to those in the *Crutsinger* Writ

Crustinger (BJC) 3-17-05 Writ POE's	18 POEs in Crutsinger Writ	*Scheanette* (DES) 06-16-04 Writ POE's
POE 1	TCCP 37.071, §2(B)(1) unconst'l - State burden only "probable" on future danger instead of beyond rble dbt	1
POE 2 & 10	TX DP Scheme unconst'l - (2) Failure to define "operant term" (probability) spec issue "distinguish from chance," at p. 37 (10) Jury not given definition of probability; "distinguish from chance," at p. 82	2
POE 11	TX DP Scheme unconst'l - no requirement of "what amount of probability" State must prove future dangerousness issue	11& 12
POE 3 in BJC DA Brief 3	TX DP Scheme unconst'l - 12/10 Rule juror vote	3
POE 4	TCCA refused to conduct sufficiency review of evidence of mitgn spec issue under any std Art. 37.01, sec (2)(e)	4
POE 5 in BJC DA Brief 5	Same as POE 4, but raises failure to review on direct appeal	5
POE 6	TX DP Scheme unconst'l - impossibility of restricting juror discretion to impose death, but unlimited discretion to consider all mitgn evidence	6
POE 7	TX DP Scheme unconst'l - failure of notice in indictment on future dangerousness	-
POE 8	TX DP Scheme unconst'l - no BOP on State to prove mitgn spec issue s/b answered no	-
POE 9	TX DP Scheme unconst'l - dp imposed with "relaxed evid stds"	-
POE 12	TX DP Scheme unconst'l - no BOP on State of whtr evid is insufficient mitgn spec issue	-
POE 13	TX DP Scheme unconst'l - Likelihood of executing innocent persons	24
POE 14 in BJK's DA Brief 1	Wealth disparity among counties results in arbitrariness in seeking death (from BJC direct appeal brief, issue 1)	13

CRUTSINGER: TABLE of CLAIMS COMPARE SCHEANETTE & BJC
The Point of Error in Scheanette Writ or Crutsinger Direct Appeal Briefs (DA) reproduced *verbatim* or were substantially similar to those in the *Crutsinger* Writ

Crustinger (BJC) **3-17-05 Writ**	**18 POEs raised in Crutsinger Writ**	***Scheanette*** **(DES) 06-16-04 Writ**
POE 15 (IAC)	IAC - Boilerplate IAC Law: p. 124	15 (IAC) Expert presentation challenge: Dr. Kessner & raised in DA 3, 4 Boilerplate IAC Law: pp, 76-84
POE 16 in BJC's DA 2	judge excused potential juor Enlow, not shown to be absolutely disqualified (from BJC direct appeal brief, issue 2)	-
POE 17 in BJC's DA Brief 4	admission of confession (from BJC direct appeal brief, issue 4)	-
POE 18	cumulative error	29

The *Scheanette* Writ claims were themselves lifted from preceding writs that Alley had filed in earlier Writs, *infra*. *See also* Table of Claims. For example:

> "The same standard has been quoted with approval by this court and by other Texas appellate courts..." *citing Lowry v. State*, 692 S.W.2d 86 (Tex. Crim. App. 1985); *Crocker v. State*, 573 S.W.2d 190 (Tex. Crim. App. 1978) reproduced in
>
> ***Crutsinger Writ (POEs 1 & 2)*** at 34, 36
> Kerr Writ (POEs 10 & 11) at 45, 47
> Scheanette Writ (POEs 1 & 2) at 23, 25
> Reese Writ (Issue 10 & 11) at 74
> Williams Writ (Issue 10 & 14) at 82
> Carpenter Writ (Issue 9 & 10) at 73
>
> "The Petitioner submits that a heightened sense of reliability ...." *citing Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982) reproduced in
>
> ***Crutsinger Writ (POEs 1 & 2)*** at 40-41
> Kerr Writ (POEs 10 & 11) at 51
> Scheanette Writ (POEs 1 & 2) at 29
> Reese Writ (Issue 10 & 11) at 78
> Williams Writ (Issue 10 & 14) at 82
> Carpenter Writ (Issue 9 & 10) at 80
>
> *Mills v. Maryland*, 486 U.S. 367 (1988) and the "'Majority Rules' Harm Analysis," reproduced in
>
> ***Crutsinger Writ (POEs 3)*** at 42
> Kerr Writ (POEs 12) at 56
> Scheanette Writ (POEs 3) at 30-31
> Reese Writ (Issue 12) at 89
> Wiiliams Writ (Issue 24) at 113
> Carpenter Writ (Issue 34) at 208
>
> "12/10 rule is a built-in 'dynamite charge'" *citing Lowenfield v. Phelps*, 484 U.S. 231 (1988) and reproduced in
>
> ***Crutsinger Writ (POEs 3)*** at 43
> Kerr Writ (POEs 12) at 57

Scheanette Writ (POEs 3) at 32
Reese Writ (Issue 12) at 90
Williams Writ (Issue 24) at 114
Carpenter Writ (Issue 34) at 209

"The Mills Principle: and the "Mills Principle as Applied in Texas" *citing Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989), reproduced in

Crutsinger Writ (POEs 3) at 45
Kerr Writ (POEs 12) at 57-58
Scheanette Writ (POEs 3) at 32-33
Reese Writ (Issue 12) at 91
Williams Writ (Issue 24) at 115-116
Carpenter Writ (Issue 34) at 209-210

"Despite the past belief of the Courts that no workable tests exists ..." *citing Sawyer v. Whitley*, 505 U.S. 333 (1992); *Johnson v. Texas*, 509 U.S. 350 (1993), reproduced in

Crutsinger Writ (POEs 4 & 5) at 47
Kerr Writ (POEs 19 & 20) at 93
Scheanette Writ (POEs 4 & 5) at 35
Reese Writ (Issue 9) at 69
Williams Writ (Issue 8) at 73
Carpenter Writ (Issue 15) at 124

"When a State affords the right of appellate and collateral attack ...." *citing Case v. State of Neb.*, 381 U.S. 336 (1965); *Long v. Iowa*, 385 U.S. 192 (1966) reproduced in

Crutsinger Writ (POEs 4 & 5) at 47-48
Kerr Writ (POEs 19 & 20) at 94
Scheanette Writ (POEs 4 & 5) at 36
Reese Writ (Issue 9) at 70
Williams Writ (Issue 8) at 74
Carpenter Writ (Issue 15) at 125

"At the very least, a proportionality review ....." *citing Pulley v.*

Harris, 465 U.S. 37 (1984); *Solem v. Helm*, 463 U.S. 277 (1983), reproduced in

Crutsinger Writ (POEs 4 & 5) at 50
Kerr Writ (POEs 19 & 20) at 96
Scheanette Writ (POEs 4 & 5) at 38
Reese Writ (Issue 9) at 72
Williams Writ (Issue 8) at 78
Carpenter Writ (Issue 15) at 129

"Justice Blackmun of the United Supreme Court recently concluded..." *citing Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J. dissenting), reproduced in in

Crutsinger Writ (POEs 6) at 51-58
Kerr Writ (POEs 13 & 14) at 60-64
Scheanette Writ (POEs 6) at 39-45
Reese Writ (Issue 13) at 92-97
Williams Writ (Issue 25) at 117
Carpenter Writ (Issue 35 & 36) at 212

C. Alley knew the non-IAC claims were not cognizable

The FFCL and district court orders in the preceding writs for *Carpenter*; *Williams*, *Reese* were released before Alley filed the *Crutsinger* Writ on March 17, 2005. These FFCL put Alley on notice that the wide-ranging, non-IAC claims he pled were not cognizable in habeas.

The FFCL also placed Alley on notice that he would have to present "compelling new argument or authority that would require the reversal of these prior decisions." But Alley did not.

A few examples are below, *see also* Table of Claims (Appendix 1) and Analysis (Appendix 2):

Compare

2005-10-20 FFCL **Crutsinger POE 1** – TX DP Scheme unconst'l, "probability language in future dangerousness special issue." The *Crutsinger* FFCL ruled:

> "1. The inclusions of the term 'probability' in the future dangerousness special issue does not impermissibly soften the required burden of proof in criminal cases *See Lagrone v State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997)... *Robertson v State*, 888 S.W. 2d 473, 481 (Tex. Crim. App. 1994); ... *Kemp v State*, 846 S.W. 2d 289, 308-09 (Tex. Crim. App. 1994);" FFCL at 1536
>
> 3. The Applicant presents no new compelling argument or authority that would require the reversal of these prior decisions." FFCL at 1537

with

2005-05-09 FFCL Kerr POE 10 – same language at 342-342

2003-03-04 FFCL Reese POE 10 – same language at 588-589

Compare

2005-10-20 FFCL **Crutsinger POE 2** – TX DP Scheme unconst'l, "definition of operant terms." The *Crutsinger* FFCL ruled:

"2. Defining the term "probability" is not constitutionally required because the jury is presumed to understand it without instruction. *See Ladd v State*, 3 S.W.3d 547, 572-73 (Tex. Crim. App. 1993)... *Williams v State*, 937 S.W. 2d 479, 489 (Tex. Crim. App. 1996); *Kemp v State*, 846 S.W. 2d 289, 308-09 (Tex. Crim. App. 1994);" FFCL at 1538-1539 ....

5. The Applicant does not present any compelling argument or authority that would require the reversal of these prior decisions...." FFCL at 1539

with

2005-05-09 FFCL Kerr POE 11 – same language at 344-345

2003-03-04 FFCL Reese POE 11 – same language at 591-592

Compare

2005-10-20 FFCL **Crutsinger POE 4** – Special issues, "due process - lack of sufficiency review of special issues." The *Crutsinger* FFCL ruled:

"1. A sufficiency review of a negative answer to the mitigation special issue is not constitutionally required. *See Griffith v. State*, 983 S.W.2d 282, 289 (Tex. Crim. App. 1998); *McFarland v State*, 928 S.W. 2d 482, 499 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542, 557 (Tex. Crim. App. 1995)." FFCL at 1543.

2. The Applicant presents no new compelling argument or authority that would require the reversal of these prior decisions." FFCL at 1544.

with

2005-05-09 FFCL Kerr POE 19 – same language at 364-365

2003-03-04 FFCL Reese POE 9 – same language at 586-587

2001-08-22 FFCL Williams POE 8 – *citing McFarland and Lawton*, FFCL at 316-317

Compare

2005-10-20 FFCL **Crutsinger POE 6** – TX DP Scheme unconst'l - impossibility of restricting juror discretion to impose death, but unlimited discretion to consider

all mitgn evidence)." The *Crutsinger* FFCL ruled:

"3. The court of Criminal Appeals has repeatedly rejected adopting Justice Blackman's dissenting opinion in *Callins v. Collins*, 510 U.S. 1141, 1158-59 (1996) ... arguing that the Texas death penalty procedure is unconstitutional. *See Hughes v. State*, 24 S.W.3d 833 (Tex. Crim. App. 2000); *Ladd v. State*, 3 S.W. 3d at 574; and *Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App. 1996).

4. ***The applicant presents no new compelling argument or authority that would require reversal of these prior decisions***."

with

2005-05-09 FFCL Kerr POE 13 – same language at 350

2003-03-04 FFCL Reese POE 13 – same language at 596-597

2001-08-22 FFCL Williams POE 25 – "... the Court of Criminal Appeals has repeated rejected this same contention. *Cannaday v. State*, 11 S.W.3d 205, 214 (Tex. Crim. App. 2000)."

and with

2001 Carpenter Claims 35 & 36 – The FFCL found the claims had been raised as Direct Appeal POEs 12 & 13, and concluded they were procedurally barred and cannot be relitigated through habeas corpus, citing Ramos, 977 S.W.2d at 617. FFCL at 106-107.

Compare

Crutsinger Writ POEs 3, 5, 14, 16, 17 – were cut-and pasted from the direct appeal brief, **and Crutsinger Writ POEs 7 to 13** – were wide ranging challenges to the constitutionality of the Texas death penalty scheme and the special issues, not raised in the direct appeal brief.

with

2001 FFCL in Carpenter, Williams and Reese, which cited Texas law for the proposition that claims raised on direct appeal, or could have been raised on direct appeal are not cognizable in habeas. *See e.g.*, 2001 Carpenter FFCL *citing Ramos*, 977 S.W.2d at 617. FFCL at 106-107.

D. *Crutsinger*'s IAC Claim (POE 15)

1. The IAC boilerplate claim (POE 15) appears to be a cut-and-paste claim from *Scheanette*

Point of Error Fifteen (15) purports to raise a claim that Mr. Crutsinger was deprived of effective assistance of counsel (IAC Claim). It appears to be substantially similar or *verbatim* from the *Scheanette* Writ POE 15.

The IAC boilerplate claim alleged trial counsel:

a. "failed to conduct any investigation, independent or otherwise into the facts of this case;" Writ at 125;

b. failed "to oppose by pre-trial motion or objection the charges made against the Applicant;" Writ at 126;

c. "made only the briefest attempts to communicate with the Applicant," Writ at 126; and

d. "attempted to coerce the Applicant to plead guilty both prior to and during the Applicant's trial;" Writ at 126;

e. "The counsel below did not have a firm command of the law and the facts necessary to effectively defend the accused;" Writ at 126; and

f. "failed to elicit facts beneficial to his client." Writ at 127.

Writ at 125-126. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

Scheanette's POE 15 IAC claim alleged, among others, that trial counsel:

a. "failed to conduct any pretrial investigation into the facts of the

case or”

b. "to oppose by pretrial motion or objection the charges made against" applicant, Writ Application at 78-79;

c. "demonstrated an unfamiliarity with the law and the facts which prejudiced the presentation of Applicant's case," Writ Application at 81;

d. failed to elicit beneficial facts or take actions beneficial to his client, Writ Application at 82;

Exhibit 6B: Scheanette 2004-06-16 Writ

Alley did not provide extra-record evidentiary support for the POE 15 IAC claims to show either (1) that trial counsel's investigation was unreasonable; or (2) what evidence could have been discovered through reasonable investigation. *See e.g.* FFCL at 1566. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order (“25. The applicant presents no evidence that Mr. Ray and Mr. Moore attempted to coerce him into pleading guilty. 26. The applicant did not plead guilty and received a full trial on the merits of this prosecution.”).

An email from Mark Kratovil, Assistant District Attorney, Civil Division, who handles open records requests for the Tarrant County Auditor's Office confirmed that the Auditor's Office could locate only two requests for payments in the Crutsinger case, both from Mr. Alley. The Auditor's Office was unable to find pay requests for investigators or experts. The two payment records from Alley appear to be for his

efforts only. There are no pages itemizing date, time and tasks attached to the pay requests. *See* Emails Kratovil from/to Brandt. Exhibit 3F: Crutsinger Alley Pay Sheets Open Records Email.

2. The Clerk's Record and Reporter's Record of the trial proceedings prove the obvious falsity of the IAC boilerplate claims in the *Crutsinger* Writ. Indeed, Alley even copied into the *Crutsinger* Writ, the substance of the pre-trial motion that Alley alleged trial counsel failed to file, and attached trial counsel's evidence

The Crutsinger Clerk's Record reveals the frivolous nature of the five (5) conclusory trial-counsel-did-absolutely-nothing allegations. For example, the FFCL cited to the Clerk's Record ("C.R.") in rejecting the claim that trial counsel failed "to oppose by pre-trial motion or objection the charges made against the Applicant." Writ at 126. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

The FFCL found:

> 12. Mr. Ray and Mr. Moore filed several motions to suppress the applicant's confession and the DNA evidence, and participated in a suppression hearing on these issues. *See* Counsel's affidavit, page 2; ***C.R. II:119–22, VII: 1197-1202***; R.R. VII: passim. ....
>
> 14. Mr. Ray and Mr. Moore researched and filed a motion regarding the disproportionate application of the death penalty. See Counsel's affidavit, page 2; ***C.R. III-IV***: passim. ....
>
> 17. Mr. Ray and Mr. Moore filed numerous other motions in this case, including:
>
> • motions for notice of extraneous offenses. (***C.R. I:21-25***)

- motions for discovery. (***C.R. I:26-30***)

- motions for the appointment of an investigator, a mental health expert, a DNA expert, and a mitigation expert. (***C.R. I:35, 48-50, 61-64, 65-67***)

- motions regarding jury instructions and challenges to the capital punishment statute. (***C.R. I:72-76, 78-81, II:138-40, 141-44, 162-64, VII:1204-35***).

(Emphasis supplied) FFCL at 1565-1566. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

Moreover, Alley even copied claims from the *Crutsinger* direct appeal brief written by trial counsel, which argued the substance of the several pre-trial motions, such as the disproportionate application of the death penalty based on the wealth of the county. Alley appended to Crutsinger's Writ, trial counsel's open records requests concerning the application of the death penalty in the various counties, and governmental response in support of the motion. *Compare* Direct Appeal POE 1 *with* Writ POE 14 and accompanying Appendix.

The FFCL similarly disposed of the allegations of trial counsel's "failure to conduct ***any*** investigation" in preparation of the guilt/innocence and punishment phases.

The FFCL found:

7. Upon appointment in this case, Mr. Ray and Mr. Moore interviewed the applicant and his family.

8. Mr. Ray and Mr. Moore traveled to Galveston and interviewed witnesses surrounding the applicant's capture and arrest.
9. Mr. Ray and Mr. Moore viewed the crime scene and the motel where the applicant stayed at the time of the murders.

....

21. Mr. Ray and Mr. Moore investigated the applicant's family background for mitigation evidence.
22. ***Counsel and their investigators interviewed family members and presented the testimony of those who would be helpful***.
23. Mr. Ray and Mr. Moore presented evidence of the applicant's three deceased children and his broken relationships and marriages.

(Emphasis supplied) FFCL at 1565-1566.

Family member testimony was readily available to Alley if he had read the punishment transcripts of the trial record.

E. After the March 17, 2005 Writ

1. After filing the March 17, 2005 Writ, Alley took no further action in state court – made no request for an evidentiary hearing, and filed no Response to the State's Answer, and no Proposed FFCL

After filing the Crutsinger Writ, Alley did not seek a hearing or any other process to challenge or rebut the assertions contained in the joint trial-counsel affidavit, did not seek funding for any post-petition fact development as required by Art. 11.071 § 3(a), did not file a reply to the State's Answer. Indeed, Alley failed to file proposed findings of fact and conclusions of law as ordered by the trial court. Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record.

2. On March 31, 2005, the judge authorized payment to Alley of $6,000 for 44.3 hours of work, which appears limited to the preparation of the Writ and nothing more

The pay sheets from the Tarrant County Auditor's Office reflect that after Alley filed the *Crutsinger* Writ on March 17, 2005, Alley submitted a pay request for 44.3 hours of work, signed by the judge on March 31, 2005. The approved payment was for $6,000 to Alley. Exhibit 3F: Crutsinger Alley Pay Sheets Open Records Email.

3. On February 1, 2008, the state judge authorized payment of $2,440 to Alley for 24.4 hours of work. It appears to be for a motion to withdraw and affidavit that Alley filed in federal court

There is a second pay request from Alley, signed by the state judge on February 1, 2008. It authorized payment to Alley of an additional $2,440 for 24.4 hours of work. There is no detailed breakdown of the time and tasks. Exhibit 3F: Crutsinger Alley Pay Sheets Open Records Email.

However, the second pay request is close in time to two filings by Alley in federal court, *Crutsinger v. Stephens*, Case No. 4:07cv703. One filing was a Motion to Withdraw and the second, an Affidavit [Doc 1, dated 11/19/2007 – Motion to Withdraw, and Doc. 5, dated 11/30/2007 – Affidavit).

On January 15, 2008, the federal court granted Alley's request to withdraw, and appointed undersigned counsel, who has represented Mr. Crutsinger continuously since her appointment by the federal court. (Doc 7).

F. Between November 16, 2006, and December 18, 2006, while the *Crutsinger* Writ remained pending in state court, the TCCA removed Alley from the list of qualified counsel approved for state capital post-conviction representation

Somewhere between November 16, 2006, and December 18, 2006, while the state habeas application was pending in state court, Alley was removed from the list of qualified counsel approved for state capital post-conviction representation by this

Court. Exhibit 3E: Crutsinger TCCA Appvd Appmt Lists Nov Dec 2006.

This Court did not replace Alley as Crutsinger's attorney. Alley did not seek to withdraw and have new counsel appointed. This Court simply adopted the trial court's findings and denied relief to Crutsinger on the basis of representation—or lack thereof—afforded by Alley, the very attorney it had stricken from the list of qualified habeas counsel months earlier. *See Ex Parte Crutsinger*, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007).

ISSUES FOR RECONSIDERATION

1. Whether Alley was "competent counsel" "at the time of his appointment," and throughout the "continuity of representation" of Mr. Crutsinger in state capital habeas to pursue one full and fair opportunity to present all cognizable claims in a single, comprehensive post-conviction writ of habeas corpus, as was Mr. Crutsinger's state statutory right, and federal procedural due process right.

2. Even if Alley was competent counsel, whether his acts as Crutsinger's agent for purposes of a habeas corpus proceeding were so meaningless as to constitute abandonment and deprived Crutsinger of his state statutory right, and federal procedural due process right, to one full and fair opportunity to present all cognizable claims in an initial post-conviction writ of habeas corpus.

ARGUMENT

I. The *Crutsinger* case was a matter beyond Alley's competence

A. "The Court should revisit the holdings of *Graves*" to explore the concept of what it means for state capital habeas counsel to be "competent," as informed by the Professional Conduct Rules – and ***not*** viewed as a "gateway" device to resurrect a procedurally defaulted claim

Graves held: "In enacting article 11.071 in 1995, the Legislature explicitly ensured that all indigent death row inmates would be appointed competent and compensated counsel for pursuing .... one full and fair opportunity to present all [cognizable] claims in a single, comprehensive post-conviction writ of habeas corpus, except for those rare exceptions outlined in section 5 of 11.071." *Ex parte Graves*, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002).

For more than a decade, arguments presented to this Court about "competence," focused on an injured client's remedy through the constitutional IAC "gateway" device ... to resurrect a procedurally defaulted claim. " *Graves* at 113. This Court disagreed, and continues to disagree, that competent counsel's performance must be constitutionally effective. *Graves* held that the Texas Legislature had *not* intended ineffective assistance of habeas counsel claims to be an exception to the bar on subsequent applications. *Id.* at 113. This Court has remained unrelenting that "competent counsel" does not concern the final product of

representation.

However, *Graves* agreed, and this Court continues to agree, that although "the federal and Texas constitutions may not recognize a claim of ineffective assistance of counsel on a writ of habeas corpus, the 1995 Habeas Corpus Reform Act creates a statutory right to "competent" counsel in habeas proceedings." *Graves*. at 113. *Graves* recognized that "the Legislature has consistently shown a great interest in the appropriate appointment of competent counsel in these very serious cases." *Graves* at 115.

The phrase "competent counsel" found in Art. 11.071 appears in the State Bar of Texas (SBOT) Rules of Professional Conduct. *See* SBOT Rule of Prof. Conduct Terminology, TEX. PROF. CONDUCT R. 1.01, and Comments to Prof. Conduct R. 1.01. The Scope of the Professional Conduct Rules recite the rules are "rules of reason" and "the Comments ... provide guidance for interpreting the rules and for practicing in compliance with the spirit of the rules." Preamble: Scope 10.

The Texas Supreme Court has looked to rules of conduct "to inform" the substantive law when a client has been injured by his former lawyer and seeks a remedy. *See e.g.*, *Gillespie v. Hernden*, 516 S.W.3d 541, 546 (Tex. App. – San Antonio, 2016) *citing Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 158 n.2 (Tex. 2004) ("The Disciplinary Rules are not binding as to substantive law regarding

attorneys, although they inform that law."). *See also Gillespie*, 516 S.W.3d at 546 ("The Texas Supreme Court considered the client protections incorporated in [Tex. Disciplinary R. Prof'l Conduct] Rule 1.15 to determine that a provision in a contingent fee contract was unconscionable as a matter of law"), *citing Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 563 (Tex. 2006).

Like the Texas Supreme Court, this Court too should look to the professional rules – SBOT Prof. Conduct Rules, and Comments – to guide and inform its decision on the duration and scope of what it means for counsel to be competent in state capital habeas and fashion an appropriate remedy.

To that end, Mr. Crutsinger asks this Court to revisit *Graves* and its progeny informed by the State Bar Rules of Professional Conduct, for all the reasons discussed below. Thereafter, Mr Crutsinger asks this Court to reopen the initial state habeas proceeding and allow Mr. Crutsinger to proceed anew because as this Suggestion demonstrates, the *Crutsinger* case was a matter beyond Alley's competence.

1. The DURATION of competence, as *Graves* held, is "at the time of appointment" AND throughout the "continuity of representation" as counsel carries out each of responsibilities in Art. 11.071 – informed by SBOT Prof. Conduct Rule 1.01

Graves held:

> The reference to 'competent counsel' in [Art. 11.071 (a) and (c)] concerns habeas counsel's ***qualifications, experience, and abilities at the time of his appointment .... AND [for the duration of the] continuity of representation*** rather than the final product of representation.

Graves, 70 S.W.3d at 114, *citing Ex parte Mines*, 26 S.W.3d 910, 912 (Tex. Crim. App. 2000) (emphasis supplied).

Contrary to dicta in subsequent cases, that mistakenly conflate competence and effective assistance, competence is ***not*** limited to the initial appointment. *See e.g., Ex parte Buck*, 418 S.W.3d 98, 106 (Tex. Crim. App. 2013) (Alcala J., dissenting, in which Price and Johnson, JJ., joined) ("... , the Court concluded that the right to "competent" counsel extends only to the initial appointment and does not guarantee that counsel will render effective assistance."); *Ex parte Alvarez*, 468 S.W.3d 543, 545 (Tex. Crim. App. 2015) (Yeary, J., concurring in which Johnson and Newell, JJ., joined) ("*Graves* held that the statute plainly refers to the qualifications of the appointed attorney at the time of the appointment – that the statutory guarantee of "competent counsel" only "concerns habeas counsel's qualifications, experience, and abilities at the time of his appointment.").

That is *not* what Graves held. Even the dissent of Judge Price in *Graves* makes obvious the *Graves*' holding is not so constrained:

> "***The majority claims that the reference to competent counsel*** in article 11.071, section 5(a) & (c) concerns counsel's qualifications, experience and abilities ***at the time of appointment AND during the continuity of the representation***.

(Emphasis supplied) *Graves*, 70 S.W.3d at 120 (Price, J., dissenting).

The duration of competence in *Graves* tracks TEX. R. PROF. CONDUCT Rule 1.01. The rule (and the parallel construction of competence in *Graves*) provides:

> (a) A lawyer shall not ***accept [Graves' "at time of appointment"]*** or ***continue employment [Graves' "continuity of representation"]*** in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, ...

(emphasis supplied) TEX. R. PROF. CONDUCT 1.01.

The attributes possessed by competent counsel in *Graves*, track Comment 1 to TEX. R. PROF. CONDUCT 1.01:

> 1. ....***"Competence" is*** defined in Terminology as ***possession of the legal knowledge, skill, and training [Graves' qualifications, experience, and abilities"] reasonably necessary for the representation***.

(Emphasis supplied) Comment 1, TEX. R. PROF. CONDUCT 1.01.

Thus, at the get-go the language of Art. 11.071(a), as well as its construction in *Graves*, *see infra,* moves beyond the static inquiry of whether at the time of appointment, competent counsel is merely "a human being with a law license and a

pulse." *Graves*, 70 S.W.3d at 118 (Price, J., dissenting).

Both Art. 11.071 and *Graves* mandate that counsel be competent throughout the duration of the initial writ proceeding. *Graves* made this obvious when it held:

> "All of these provisions [of Art. 11.071] concern the initial appointment of counsel and continuity of representation."

Graves, 70 S.W.3d at 114.

Thus, the competency, as mandated by Art. 11.071, obligates counsel to be competent:

- at the inception of representation, Art. 11.71 §2 (a),
- as counsel competently carries out each statutorily-enumerated responsibility owed the client after initial appointment (*e.g.*, Art. 11.71 §§ 2(e), 3(a), 4(a)), and
- at the time of, and while concluding, the representation in state court, by competently initiating timely federal-court, habeas litigation, Art. 11.071 §2 (e).

As Judge Yeary wrote, the statute "would seem to [and does] contemplate an on-going enterprise." *See Ex parte Alvarez*, 468 S.W.3d 543, 548 (Tex. Crim. App. 2015) (Yeary, J., concurring).

2. The SCOPE of competence – as informed by PROF. CONDUCT R. 1.01 and comments – asks if state habeas counsel has the qualifications, experience and abilities, *as applied*, to "present all [*cognizable*] claims in a single, comprehensive post-conviction writ"

Graves held that "[t]he reference to "competent counsel" ... concerns habeas counsel's qualifications, experience, and abilities...." *Graves*, 70 S.W.3d at 114, *citing Mines*, 26 S.W.3d at 912.

Mines, on which *Graves* relied, takes it as a given that counsel's experience and ability will be competently applied to the provisions of Art. 11.071. *See Ex parte Mines*, 26 S.W.3d 910, 912 (Tex. Crim. App. 2000) ("In this context [of Art. 11.071 §3 (a)], 'competent' refers to an attorney's qualifications and abilities. The article further requires [this same competent] counsel to investigate expeditiously the factual and legal grounds for an application."). So if competent counsel is investigating, then she is necessarily ably (that is, skillfully; competently) conducting the investigation.

Art. 11.071 responsibilities owed the client are informed by TEX. R. PROF. CONDUCT 1.01, Comment 1:

> 1. A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. ***"Competence" is defined in Terminology as possession of the legal knowledge, skill, and training*** reasonably necessary for the representation. ***Competent representation contemplates appropriate application*** by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and

analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.

Cognizable Claims

Graves held that the Legislature has explicitly set the limits of the rights of a convicted death row inmate to seek collateral review of possible violations of his constitutional rights at trial to "one full and fair opportunity to present *all such claims* in a single, comprehensive post-conviction writ of habeas corpus, except for those rare exceptions outlined in section 5 of 11.071." *Graves* at 117.

"All such claims" means "cognizable claims," that is, claims that ask this Court to "review jurisdictional defects, or denials of fundamental or constitutional rights." *Ex parte McLain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994), *citing Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App.1989).

For state capital habeas counsel to be competent "to present all such [cognizable] claims in a single, comprehensive post-conviction writ of habeas corpus," counsel must necessarily have applied her knowledge and skill in conducting the investigation, Art. 11.071 § 3(a), and with it fruits, engage in a reasonably thorough study and analysis of the law and facts in order to present the factual and legal grounds in an application for a writ of habeas corpus. Cmt. 1 TEX. R. PROF. CONDUCT 1.01.

Absent "appropriate application," it is impossible to competently satisfy the mandate of Art. § 3(a):

> On appointment, investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, *the factual and legal grounds for the filing of an application* for a writ of habeas corpus.

B. Alley's performance between 1999 to 2003 in five (5) capital cases prove that AT THE TIME OF HIS OCTOBER 2003 APPOINTMENT to represent Mr. Crutsinger, the *Crutsinger* case was a matter beyond Alley's competence

1. Qualifications: Alley had been licensed to practice law in Texas on 05/14/1982. Alley had been on the list for Approved Attorneys for 11.071 Appointments, but removed by this Court from the list, while the *Crutsinger* case was pending

To determine if habeas counsel is competent at the time of appointment to a state capital case, *Graves* looks to habeas counsel's qualifications, experience, and abilities. *Graves*, 70 S.W.3d at 114, *citing Ex parte Mines*, 26 S.W.3d 910, 912 (Tex. Crim. App. 2000). Alley's qualifications included a license to practice law in Texas, issued on 05/14/1982. The State Bar website reports Alley is deceased. Exhibit 3G: Crutsinger Alley SBOT profile (deceased).

Alley also had been on the Approved Attorneys List for 11.071 Appointments. It is not known why during the pendency of the Crutsinger Writ, Alley was removed from the list with effective-date 12-18-2006. Exhibit 3E: Crutsinger TCCA Appvd Appmt Lists Nov Dec 2006.

This Court did not replace Alley as Crutsinger's attorney. Alley did not seek to withdraw and have new counsel appointed. This Court simply adopted the trial court's findings and denied relief to Crutsinger on the basis of representation—or lack thereof—afforded by Alley, the very attorney it had stricken from the list of qualified

habeas counsel months earlier. *See Ex Parte Crutsinger*, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007).

Nonetheless, even if Alley had the qualifications, competency is more than just a license and a listing on an approved list of qualified counsel. In this regard, Comment 2 to Rule 1.01 is instructive in assessing if an attorney is competent.

> In determining whether a matter is beyond a lawyer's competence, ***relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter***, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. ***The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment*** than matters of lesser consequences.

State capital habeas is complex litigation. At stake is the life of the client. *See Speer v. Stephens*, 781 F.3d 784, 786 (5th Cir. 2015) (characterizing capital cases as "the complex and difficult law of the death penalty"). As more fully discussed below, the *Crutsinger* case was a matter beyond Alley's competence.

2. Unethical Behavior: At the time of the 2003 *Crutsinger* appointment, the FFCL in *Carpenter* and *Scheanette* prove Alley's unethical tendencies toward "intentional deception or lack of regard for the accuracy of the information he furnishes to the courts," persisted

On November 2, 2000, the federal court found Alley to be "intentional[ly] decepti[ve] or [having a] lack of regard for the accuracy of the information he

furnishes to the courts." and making “false statements to the federal appellate court and state trial court ... [which] reflect unprofessional and unethical tendencies." Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL. *See supra* (Statement of Facts, 1.A ... The pertinent FFCL in Lagrone of Alley's lack of professionalism and unethical behavior by the U.S. Magistrate Judge were...).

The unethical behaviors continued in the ensuing years. In the 2000 Carpenter Writ, (POE 19), Alley alleged that appellate counsel failed to file a timely and verified Motion for New Trial. The FFCL made short shrift of the allegation writing that the court’s own “handwritten order expressly overrul[ed] the motion [and] demonstrates that counsel did present the motion to this court;” that “the motion ... was timely filed;” and “that the appellate rules do not require verification of a motion for new trial.” FFCL at 56, 57. Exhibit 2D: Carpenter 2001–04-05 Adopted State Proposed FFCL.

In the 2004 Scheanette Writ, Alley pled the same conclusory IAC boilerplate claim (e.g., failure to file pre-trial motions), notwithstanding the face of the record makes the falsity of the allegation obvious. Specifically, Alley alleged trial counsel failed "to oppose by pretrial motion or objection the charges made against" applicant. In contrast, the FFCL found, among other things, that "Applicant's counsel filed over 80 pretrial motions, requests for relief, designations of experts, or objections to the

State's motions." FFCL at 118. Exhibit 6E: Scheanette 2005-08-29 District Court FFCL Order.

3. Lack of Legal Experience & Ability: By the time of the 2003 Crutsinger appointment, Alley's prior experience and ability as a state capital habeas lawyer was limited to that of a word processor, cut-and-pasting claims from one capital writ into the next

On November 2, 2000, the federal court found that Alley's work product was "of minimal assistance to the court," and that the federal petition he filed on behalf of a capital client "appears to have been pulled nearly verbatim and indiscriminately from the state court papers and other briefs and documents Alley has prepared or collected in the course of his legal practice." FFCL at 11-12. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL *See supra* (Statement of Facts, 1.B. The federal FFCL in Lagrone also found Alley's work product ....).

The writs Alley filed on behalf of the five (5) capital clients who Alley represented in state habeas prior to his appointment in Crutsinger, reflect that Alley excelled as a word processor, reproducing nearly verbatim text from a claim in an earlier capital writ and direct appeal brief, into the next capital writ, and the next, and the next, and the next.

The Table of Claims (Appendix 2) shows that the same or substantially similar claims in the August 8, 2000 Carpenter Writ appear in the March 15, 2001Williams

writ and then in the July 16, 2002 Reese Writ, and then in the June 16, 2004 Scheanette Writ, then in the October 20, 2004 Kerr Writ, and ultimately in the October 17, 2005 Crutsinger Writ – albeit with some variation that had no meaningful significance. *See also* Analysis (Appendix 2).

In 2011, two Texas Court of Criminal Appeals' judges wrote about Mr. Alley's representation in *Kerr*, stating that Alley "raised only record-based or non-cognizable claims on his [client's] behalf, and appears to have conducted no investigation into the constitutional effectiveness of the applicant's trial attorneys with respect to developing a case for mitigation." *Ex parte Kerr*, 358 S.W.2d 248, 249 (Tex. Crim. App. 2011) (Price and Johnson, JJ. dissenting).

Alley's reputation was so notorious that of the *Kerr* Writ, one writer observed:

> Alley's 2005 writ for Cary Kerr ... was larded with 29 pages copied directly from Kerr's direct appeal, even though the Texas Court of Criminal Appeals cannot consider such claims in a writ. ....
>
> Another 64 pages of Kerr's writ were taken from writs Alley had filed on behalf of other death-row inmates, making almost no reference to Kerr or his trial.
>
> In total, the copied issues accounted for 75 percent of the writ's arguments. .... Other Alley writs show similarities to the Kerr writ.

Exhibit 4E: Kerr, Lindell, Austin-American Statesman (10-30-2006).

4. <u>Lack of Preparation, Study, and Application of the Law and Facts to the Claims Presented</u>: The FFCL in each preceding writ provided the cite to the case that rejected the claim, and stated why in parentheses. Alley took no corrective action, and persisted in reproducing these same claims into the next writ

The claims in the five capital writs had been denied by this Court repeatedly, as a matter of settled law. *See* Analysis (Appendix 2). *See supra (*Statement of Facts, 2. E. "Beginning in 2001, the FFCL put Alley on notice that the writ claims he pled were not cognizable....").

Alley did not need to step foot in a law library to learn this. The FFCL in the writs cited volume and page of the legal authority that had previously denied the claims – even inserting the holding of the case in a parenthetical following the case cite to explain why the claim had been denied. The FFCL prove that Alley lacked the legal experience and ability, as applied, to:

- "investigate expeditiously"
- and with the fruits of that investigation, engage in a reasonably thorough study and analysis of the law and facts;
- to determine what constitutes a cognizable claim in state habeas, and
- thereafter present all such claims in a single, comprehensive post-conviction writ of habeas corpus,

Art, 11.071 § 3(a); Comment 1 to TEX. R. PROF. CONDUCT 1.01.

Alley took no corrective action. Unable to learn from his prior experience,

Alley reproduced these same claims into the next writ, including *Crutsinger*.

5. <u>Lack of professionalism</u>: By the time of the 2003 Crutsinger appointment, Alley's lack of professionalism was entrenched. Between 2000 and 2004, Alley abused the courts and counsel by filing 873 pages of pleadings with 158 non-cognizable claims, all of which opposing counsel and the courts had to act on

On November 2, 2000, the federal court characterized Alley's work as "frequently sloppy," and "abusive[] towards the [state] courts and opposing counsel." FFCL at 11-12. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL . *See supra* (Statement of Facts, 1.A ... The pertinent FFCL in Lagrone of Alley's lack of professionalism and unethical behavior by the U.S. Magistrate Judge were...).

The lack of professionalism continued in the ensuing years. Despite notice the claims in the preceding writ were not cognizable in habeas, Alley filed 873 pages of pleadings with 158 non-cognizable claims.

Case	Total Pages	Number of Claims
2000 Carpenter Writ	232	41
2001 Williams Writ	165	33
2002 Reese Writ	161	19
2004 Scheanette Writ	157	29
2004 Kerr Writ	158	36
TOTAL	873	158

And even though the claims were not cognizable, opposing counsel and the courts still had to act on the filings. Opposing counsel was required to respond in the State's Answer and file proposed FFCL. Likewise, the district courts and the TCCA had to rule on hundreds of pages of these worthless claims.

6. <u>The Remedy</u>: At the time of Alley's appointment to Crutsinger's case, capital habeas was an area of law beyond Alley's competence. Mr. Crustsinger, an indigent death row inmate, was deprived of his Art. 11.071 statutory right and federal constitutional due process rights. Thus, this Court should reopen the initial state habeas proceeding, appoint new state habeas counsel, and allow Mr. Crutsinger to proceed anew.

Graves held the right to competent counsel is a statutory right. "In enacting article 11.071 in 1995, the Legislature explicitly ensured that all indigent death row inmates would be appointed competent and compensated counsel for pursuing .... one full and fair opportunity to present all such claims in a single, comprehensive post-conviction writ of habeas corpus, except for those rare exceptions outlined in section 5 of 11.071." *Graves* at 117.

As all of the aforementioned prove, the Crutsinger case was a matter beyond Alley's competence at the time of his appointment, which Alley was required to decline, but he did not. *See* Comment 5 Tex. Prof. Rules of Conduct, Rule 1.01.("5. A lawyer offered employment or employed in a matter beyond the lawyer's

competence generally must decline or withdraw from the employment ....).

As a result, Mr. Crutsinger, an indigent inmate, was denied his statutory right, and federal constitutional due process right, to one full and fair opportunity to present his claims in a single, comprehensive post-conviction writ of habeas corpus. Graves at 117; U.S. Const. amend. XIV; *Burns v. Ohio*, 360 U.S. 252 (1959). As Judge Price wrote: "In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court explained that: "[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." Id. at 257, 79 S.Ct. 1164." *Graves* at 123 (Price., J. dissenting).

Thus, this Court on its own suggestion should reopen the initial state habeas proceeding, appoint new state habeas counsel, and allow Mr. Crutsinger to proceed anew.

C. FOR THE DURATION OF THE REPRESENTATION, each responsibility owed Crutsinger pursuant to Art. 11.071, was beyond Alley's competence

Because the provisions of Art. 11.071 are all embraced either within initial appointment of counsel or for the duration of the continuing representation, then counsel must necessarily be competent in fulfilling these responsibilities. *Graves*, 70 S.W.3d at 114.

Among the responsibilities owed Mr. Crutsinger by Alley pursuant to the 11.071 provisions were:

> Sec. 2. (a) be competent to accept the appointment, or under Cmt 5, Tex. R. Prof. Conduct Rule 1.01, "decline or withdraw from the employment or, with the prior informed consent of the client, associate a lawyer who is competent in the matter;"
>
> Sec. 3. (a) investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus;
>
> Sec. 4. (a) present all cognizable claims in a timely filed application for a writ of habeas corpus;
>
> Sec. 8. (b) timely file proposed findings of fact and conclusions of law for the court to consider; and
>
> Sec. 2. (e) If the court of criminal appeals denies an applicant relief, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599.

1. Sec. 2. (a) ("competent to accept the appointment"): In 2002, the federal court had removed Alley from a federal capital habeas case "for poor representation," among other things. Yet, Alley did not decline the 2003 *Crutsinger* state capital habeas appointment

Art. 11.071 Sec. 2.(a) requires counsel be competent to accept the appointment. If he is not, TEX. R. PROF. CONDUCT 1.01, Comment 5, states that counsel "decline or withdraw from the employment or, with the prior informed consent of the client, associate a lawyer who is competent in the matter."

Mr. Crutsinger incorporates by reference Argument I. B. ("Although Alley had been appointed between 1999 to 2003 to five (5) capital cases ....). More important than the fact of Alley's incompetence, is his knowledge that he was incompetent to handle capital habeas cases.

At a minimum, the 2000 FFCL in *Lagrone* – which he appealed and lost – gave him pause to question his competency. Not only did the federal court put him on notice that he provided "poor representation," in 2002 the federal court out-and-out removed him as capital habeas counsel for Edward Lewis Lagrone. FFCL at 11-12. Exhibit 1A: Lagrone 2000-11-02 Mag J. FFCL.

Yet, Alley was unable to learn and apply his experience. He accepted the *Crutsinger* appointment, with no record evidence that Alley made any attempt to associate a lawyer who was competent in state capital habeas.

2. Sec. 3. (a) ("investigate expeditiously, the factual and legal grounds"): Alley knew he was obligated to investigate. Alley lacked the experience and ability to provide the court with extra-record evidence, and to engage in a "reasonably thorough study and analysis of the law and facts" in order to present an application with cognizable claims

Art. 11.071 Sec. 3(a) requires counsel on appointment, to investigate expeditiously, the factual and legal grounds for the filing of an application for a writ of habeas corpus, both before and after the appellate record is filed in the court of criminal appeals. *See also Ex parte Reynoso*, 257 S.W.3d 715, 720 n.4 (Tex. Crim. App. 2008) (statute imposes a duty on Article 11.071 counsel to "diligently pursue the investigation").

Without a meaningful and expeditious investigation, counsel cannot prove, by preponderance of the evidence, the violation of a specific constitutional provision. *See Graves*, 70 S.W.3d at 108-109 ("Even under the most expansive understanding of the writ's post-conviction availability, however, claimants have had to allege ***and prove, by preponderance of the evidence***, the violation of a specific constitutional provision").

a. Alley knew he was required to investigate

Alley knew the writ claims required adequate evidentiary support. He quoted from the dissent of Judge Benavides at the beginning of each and every IAC

boilerplate claim. *See Craig v. State*, 825 S.W.2d 128, 130 (Benavides, J., dissent) (Tex. Crim. App.,1992). Judge Benavides wrote that IAC claims should be decided in habeas because "records on direct appeal, contain no testimony from appellant's trial counsel; .... testimony of other witnesses and factors existing at the time of the asserted unprofessional conduct," and that the absence of extra-record development, "could permanently foreclose appellant's right to relief to which he could otherwise be entitled." *Craig v. State*, 825 S.W.2d 128, 130 (Tex. Crim. App. 1992). Alley cited this quotation in:

> Crutsinger Writ at 124
> Kerr Writ at 67
> Scheanette Writ at 76
> Reese Writ at 111
> Williams Writ at 151
> Carpenter Writ at 92

See also Salinas v. State, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) ("[a] reviewing court will rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective assistance claim because '[i]n the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions'") (*quoting Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001)).

In addition, the FFCL from preceding writs put him on notice that if Alley chose to raise claims that existing law had denied, Alley would need to "direct the court to applicable changes in the law regarding effective assistance of counsel." FFCL at 352.

Exhibit 4C: Kerr 2005-05-09 Adopted FFCL with 2005-06-03 Order.

b. Alley did not have the ability to investigate the facts and law in *Crutsinger*'s case

Despite having been appointed as counsel in state capital habeas for five (5) indigent death row inmates prior to the *Crutsinger* appointment, Alley lacked the experience and ability to investigate, as required by Art. 11.071 § 3(a).

In *Crutsinger*, there is no extra-record evidence that Alley conducted any meaningful investigation to show either (1) that trial counsel's investigation was unreasonable; or (2) what evidence could have been discovered through reasonable investigation. The Crutsinger FFCL at 1566 ruled:

> "25. The applicant presents no evidence that Mr. Ray and Mr. Moore attempted to coerce him into pleading guilty.
>
> 26. The applicant did not plead guilty and received a full trial on the merits of this prosecution."

Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

An email from Mark Kratovil, Assistant District Attorney, Civil Division, who handles open records requests for the Tarrant County Auditor's Office confirmed that the Auditor's Office could locate only two requests for payments in the Crutsinger case, both from Mr. Alley. The Auditor's Office was unable to find pay requests for investigators or experts. The two payment records from Alley appear to be for his

efforts only. There are no pages itemizing date, time and tasks attached to the pay requests. *See* Exhibit 3F: Crutsinger Alley Pay Sheets Open Records Email.

3. Sec. 4. (a) (present all cognizable claims"): Alley knew he was obligated to present all *cognizable* claims. Yet, at the time Alley undertook the Art. 11.071 § 4 (a) responsibility, Alley lacked even the most basic ability to study the trial record and make accurate FACT representations of its content to the state court

Sec. 4. (a) requires counsel to present all cognizable claims in a timely filed application for a writ of habeas corpus. Before counsel can present cognizable claims, he must engage with "reasonable thoroughness in the study and analysis of the law and facts," in order to know the factual and legal grounds for the filing of an application. Art. 11.071 § 3 (a); TEX. R. PROF. CONDUCT Rule 1.01, Comment *1.See, e.g., Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006) ("[c]laims that have already been raised and rejected are not cognizable" on habeas corpus). Claims which were not raised on direct appeal, but which could have been, are also not cognizable. *See, e.g., Ex parte Webb*, 270 S.W.3d 108, 111 (Tex. Crim. App. 2008) (claim that could have been, but was not, raised on direct appeal was "not cognizable on habeas").

a. Alley lack the ability to study the law to determine what would be a cognizable claim

Alley lack the ability to study the law and determine what would be a cognizable claim. *See* Analysis (Appendix 2). *See also supra* ("Statement of Facts

2.E. Alley also pled a wide-variety of other record-bound claims ....”). The 2001 Carpenter FFCL, the 2001 Williams FFCL, and the 2003 Reese FFCL, cited to long-established precedent holding the claims raised in the Crutsinger Writ were *not* cognizable, and stated why. The record proves Alley lacked the competence (ability) to learn from his prior experience, and take corrective action. The end-result was that the Crutsinger Writ raised no cognizable claims.

b. Alley lacked the most basic of abilities: the ability to plead accurate factual representations contained in the trial record

Alley lacked even the most basic of abilities: to accurately plead the facts. The Clerk's Record reveals the frivolous nature of the five (5) conclusory trial-counsel-did-absolutely-nothing allegations.

For example, the FFCL cited to the Clerk's Record ("C.R.") in rejecting the IAC claim that trial counsel failed "to oppose by pre-trial motion or objection the charges made against the Applicant." Writ at 126. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

The FFCL found (and identified the motion and its record-location):

> 12. Mr. Ray and Mr. Moore **filed several motions** to suppress the applicant's confession and the DNA evidence, and participated in a suppression hearing on these issues. See Counsel's affidavit, page 2; **C.R. II:119–22, VII: 1197-1202; R.R. VII**: passim. ....

14. Mr. Ray and Mr. Moore researched and **filed a motion** regarding the disproportionate application of the death penalty. See Counsel's affidavit, page 2; **C.R. III-IV**: passim. ....

17. Mr. Ray and Mr. Moore **filed numerous other motions** in this case, including:
    - motions for notice of extraneous offenses. (**C.R. I:21-25**)
    - motions for discovery. (**C.R. I:26-30**)
    - motions for the appointment of an investigator, a mental health expert, a DNA expert, and a mitigation expert. (**C.R. I:35, 48-50, 61-64, 65-67**)
    - motions regarding jury instructions and challenges to the capital punishment statute. (**C.R. I:72-76, 78-81, II:138-40, 141-44, 162-64, VII:1204-35**).

(Emphasis supplied) FFCL at 1565-1566. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

Alley's audacity in pleading trial counsel's failure to file pre-trial motions, is even more stunning because he copied the content of one of them (argued in the direct appeal brief) into Claim 14 of the Crutsinger Writ. Then Alley appended to Crutsinger's Writ, trial counsel's exhibits in support of the motion. *Compare* Direct Appeal POE 1 with Writ POE 14 and accompanying Appendix.

Likewise, the trial transcripts contradict Alley's pleading ("failure to conduct ***any*** investigation"). The FFCL found:

7. Upon appointment in this case, Mr. Ray and Mr. Moore interviewed the applicant and his family.
8. Mr. Ray and Mr. Moore traveled to Galveston and interviewed witnesses surrounding the applicant's capture and arrest.

9. Mr. Ray and Mr. Moore viewed the crime scene and the motel where the applicant stayed at the time of the murders.

....

21. Mr. Ray and Mr. Moore investigated the applicant's family background for mitigation evidence.
22. ***Counsel and their investigators interviewed family members and presented the testimony of those who would be helpful***.
23. Mr. Ray and Mr. Moore presented evidence of the applicant's three deceased children and his broken relationships and marriages.

FFCL at 1565-1566. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

If Alley had read the punishment phase transcripts, he would have known family members testified.

4. <u>Sec. 8.(b) ("timely file proposed findings of fact and conclusions of law for the court to consider")</u>: At the time Alley undertook the Art. 11.071 § 4 (a) responsibility, Alley did not have the ability to follow the law. He failed to file proposed FFCL as required by Art. 11 § 8(e) and the court's order

Alley did not have the ability to follow the law. Sec. 8.(b) obligates counsel to timely file proposed findings of fact and conclusions of law for the court to consider. The district judge's order also ordered they be filed. Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record. There is no record of any proposed findings having been prepared and filed by Alley.

5. <u>Sec. 2. (e) ("move for the appointment of counsel in federal habeas")</u>: Alley did file a timely motion for appointment of other counsel in federal court

Sec. 2. (e) provides that if the Court of Criminal Appeals denies an applicant relief, state habeas counsel must move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. Alley did file a timely motion in federal court. On January 15, 2008, Alley was permitted to withdraw, and undersigned counsel was appointed to represent Mr. Crutsinger. (Doc 7). Exhibit 3D: Crutsinger Federal Court Docket Sheet.

6. <u>The Remedy</u>: For the duration of the appointment, capital habeas was an area of law beyond Alley's competence. Mr. Crustsinger, an indigent death row inmate, was deprived of his Art. 11.071 statutory right and federal constitutional due process rights. Thus, this Court should reopen the initial state habeas proceeding, appoint new state habeas counsel, and allow Mr. Crutsinger to proceed anew

Graves held the right to competent counsel is a statutory right. "In enacting article 11.071 in 1995, the Legislature explicitly ensured that all indigent death row inmates would be appointed competent and compensated counsel for pursuing .... one full and fair opportunity to present all such claims in a single, comprehensive post-conviction writ of habeas corpus, except for those rare exceptions outlined in section 5 of 11.071." *Graves* at 116, 117.

In sum, the Crutsinger case was beyond Alley's competence for the duration of

representation. Alley was required to withdraw during the representation because he was not competence to carry out the responsibilities owed the client pursuant to Art. 11.071, but he did not. *See* Comment 5 TEX. R. PROF. CONDUCT 1.01 ("5. A lawyer ... employed in a matter beyond the lawyer's competence generally must decline or withdraw from the employment ....).

As a result, Mr. Crutsinger, an indigent inmate, was denied his statutory right, and federal constitutional due process right, to one full and fair opportunity to present his claims in a single, comprehensive post-conviction writ of habeas corpus. *Graves* at 117; U.S. Const. amend. XIV; *Burns v. Ohio*, 360 U.S. 252 (1959). As Judge Price wrote: "In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court explained that: "[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." Id. at 257, 79 S.Ct. 1164." *Graves* at 123 (Price., J. dissenting).

Thus, this Court on its own suggestion should reopen the initial state habeas proceeding, appoint new state habeas counsel, and allow Mr. Crutsinger to proceed anew.

II. Even if Alley was competent at the time of appointment and for the duration of the representation, his actions as an agent of Crutsinger were so meaningless as to constitute abandonment. Crutsinger was deprived of his federal procedural due process right, and state statutory right, to one full and fair opportunity to present all such claims in an initial post-conviction writ of habeas corpus proceeding.

The Statement of Facts is incorporated by reference herein. The facts prove that even if this Court rules that Alley was competent, he was not acting as Crutsinger's agent. His acts and omissions as an agent of Crutsinger were so meaningless as to constitute abandonment.

A. Art. 11.071 § 2(a) – Alley lacked the qualifications to represent Mr. Crutsinger

Notwithstanding that he held a license to practice law in the State of Texas, Alley was removed by this Court while the Crutsinger case was pending from the list of attorneys approved for Art. 11.071 representation. Exhibit 3E: Crutsinger TCCA Appvd Appmt Lists Nov Dec 2006.

This Court did not replace Alley as Crutsinger's attorney. Alley did not seek to withdraw and have new counsel appointed. This Court simply adopted the trial court's findings and denied relief to Crutsinger on the basis of representation—or lack thereof—afforded by Alley, the very attorney it had stricken from the list of qualified habeas counsel months earlier. *See Ex Parte Crutsinger*, 2007 WL 3277524 (Tex. Crim. App. Nov. 7, 2007).

B. Art. 11.071 § 3(a) – Alley failed to conduct any meaningful extra-record investigation

Art. 11.071 § 3a obligates counsel to investigate. *Ex parte Reynoso*, 257 S.W.3d 715, 720 n.4 (Tex. Crim. App. 2008) (statute imposes a duty on Article 11.071 counsel to "diligently pursue the investigation"). There is no extra-record evidence that Alley conducted any meaningful investigation to show either (1) that trial counsel's investigation was unreasonable; or (2) what evidence could have been discovered through reasonable investigation. See Crutsinger FFCL at 1566. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

The Tarrant County Auditor's Office reported they were unable to locate any pay requests for investigators or experts. The two payment records from Alley appear to be for his efforts only. See Exhibit 3F: Crutsinger Alley Pay Sheets Open Records Email.

C. Art. 11.071 § 4(a) – Lack the ability to present cognizable claims.

Alley lack the ability to study the law to determine what would be a cognizable claim. *See* Analysis (Appendix 2). See also supra ("Statement of Facts 2.E. Alley also pled a wide-variety of other record-bound claims ...."). The 2001 Carpenter FFCL, the 2001 Williams FFCL, and the 2003 Reese FFCL, cited to long-established precedent holding the claims raised in the Crutsinger Writ were not cognizable, and

stated why. The record proves Alley lacked the competence (ability) to learn from his prior experience, and take corrective action. The end-result was that the Crutsinger Writ raised no cognizable claims.

Alley lacked even the most basic of abilities: to accurately plead the facts. The Clerk's Record reveals the frivolous nature of the five (5) conclusory trial-counsel-did-absolutely-nothing allegations. FFCL at 1565-1566. Exhibit 3B: Crutsinger 2003 Appmt, 2005 Writ, 2005 FFCL, 2005 Ct Order.

Further, Alley's prior experience and ability as a state capital habeas lawyer was limited to that of a word processor, cut-and-pasting claims from one capital writ into the next writ, and ultimately into the Crutsinger writ. *See* Table of Claims (Appendix 1); Analysis (Appendix 2). Alley knew long before he filed the Crutsinger Writ, that the claims he cut-and-pasted into it were not cognizable. The FFCL in *Carpenter*, *Williams*, and *Reese* provided the case cite and explanation of why the claim had been denied. Yet, Alley presented the same or substantially similar claims in Crutsinger,

D. Art. 11.071 § 8(b) – Alley was not able to follow the law

Art. 11.071 § 4 (a) required Ally to "timely file proposed findings of fact and conclusions of law for the court to consider." The district judge's order also ordered they be filed. Exhibit 3A: Crutsinger Vol 7 Master Index Clerk Record. There is no record of any proposed findings having been prepared and filed by Alley.

The acts of Alley, as an agent of Crutsinger, were so meaningless as to constitute abandonment. Crutsinger was deprived of his federal procedural due process right, and state statutory right, to one full and fair opportunity to present all such claims in an initial post-conviction writ of habeas corpus proceeding. Mr. Crutsinger, an indigent inmate, was denied his statutory and federal constitutional due process right, to one full and fair opportunity to present his claims in a single, comprehensive post-conviction writ of habeas corpus. *Ex parte Graves*, 70 S.W.3d at 117; U.S. Const. amend. XIV. As Judge Price wrote: "In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court explained that: "[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." Id. at 257, 79 S.Ct. 1164." *Ex parte Graves*, 70 S.W.3d at 123 (Price., J. dissenting).

Thus, this Court on its own suggestion should reopen the initial state habeas proceeding, appoint new state habeas counsel, and allow Mr. Crutsinger to proceed anew.

CERTIFICATE OF SERVICE

This certifies that on August 17, 2019, I electronically filed the foregoing document with the clerk of court using the electronic case filing system of the court. The electronic case filing system sent a notice of electronic filing to the attorneys of record for the State of Texas, Steven W. Conder, Assistant Criminal District Attorney, sconder@tarrantcountytx.gov, 401 W. Belknap, Fort Worth, TX 76196-0201, who have consented in writing to accept this notice as service of this document by electronic means to:

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APPENDICES

Appendix 1	Table of Claims Comparisons
Appendix 2	Analysis of the State Writs and FFCL in Carpenter, Williams, Reese, Scheanette, Kerr, and Crutsinger

EXHIBITS

(Dates are written as year, month, day (e.g., 2003-10-09 is October 9, 2003)

Exhibit 1A:	Lagrone 2000-11-02 Mag J. FFCL
Exhibit 1B:	Lagrone 2002-01-22 Order USDC Kendall, J
Exhibit 1C:	Lagrone 2002-09-04 Order, USDC Fish, C.J.
Exhibit 1D:	Lagrone 1992-10-27 SBOT Public Reprimand
Exhibit 1E:	Lagrone 1985-03-06 SBOT Public Reprimand
Exhibit 2A:	Carpenter 1999-10-13 Appointment Order
Exhibit 2B:	Carpenter 1999-10-22 CCA Appmt Approved
Exhibit 2C:	Carpenter 2000-08-30 Writ
Exhibit 2D:	Carpenter 2001–04-05 State Proposed FFCL
Exhibit 2E:	Carpenter 2001-04-06 Substitute Motion & Order
Exhibit 2F:	Carpenter 2001-05-01 Dist Ct Order
Exhibit 3A:	Crutsinger Vol 7 Master Index Clerk Record
Exhibit 3B:	Crutsinger ‘03 Appmt, ‘05 Writ, FFCL, Ct Order
Exhibit 3C:	Crutsinger 2007-11-07 TCCA Order
Exhibit 3D:	Crutsinger Federal Court Docket Sheet
Exhibit 3E:	Crutsinger TCCA Appvd Appmt Lists
Exhibit 3F:	Crutsinger Alley Pay Sheets Open Records Email
Exhibit 3G:	Crutsinger Alley SBOT profile (deceased)

Exhibit 4A: Kerr 2003-04-22 Appointment Order
Exhibit 4B: Kerr 2004-10-20 Writ
Exhibit 4C: Kerr 2005-05-09 FFCL, 2005-06-03 Order
Exhibit 4D: Kerr 2005-08-31 TCCA Order
Exhibit 4E: Kerr, Lindell, Austin-American Statesman (10-30-2006)

Exhibit 5A: Reese 2000-12-12 Appointment Order.
Exhibit 5B: Reese 2002-07-16 Writ
Exhibit 5C: Reese 2003-03-04 Adopted State Proposed FFCL
Exhibit 5D: Reese 2003-03-17 Dist Ct Order

Exhibit 6A: Scheanette 2003-05-06 Appointment Order
Exhibit 6B: Scheanette 2004-06-16 Writ
Exhibit 6C: Scheanette 2004-09-23 District Court FFCL Order
Exhibit 6D: Scheanette 2005-04-13 TCCA Order
Exhibit 6E: Scheanette 2005-08-29 District Court FFCL Order
Exhibit 6F: Scheanette 2005-11-09 TCCA Order

Exhibit 7A: Williams 1999-11-12 Appointment Order .
Exhibit 7B: Williams 2001-03-15 Writ
Exhibit 7C: Williams 2001-08-22 Adopted State Proposed FFCL & 2001-09-12 Dist Ct Order (end of the FFCL)